



UNHCR

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

**LEGAL AND PROTECTION POLICY
RESEARCH SERIES**

**Alternatives to Detention of
Asylum Seekers and Refugees**

Ophelia Field

with the assistance of

Alice Edwards

External Consultants

DIVISION OF INTERNATIONAL PROTECTION SERVICES

**POLAS/2006/03
April 2006**

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This paper was prepared on behalf of UNHCR by Ophelia Field with the assistance of Alice Edwards, both of whom are external consultants.

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Ophelia Field
April 2006

EXECUTIVE SUMMARY

In 2002, UNHCR's Agenda for Protection urged 'States more concertedly to explore alternative approaches to the detention of asylum seekers and refugees ...'¹ in response to the increasing use of detention of asylum seekers and/or refugees by host governments. This study is a contribution towards that objective. This study undertook research into the practices regarding the use of *alternatives* to detention for asylum seekers and/or refugees of thirty-four States. The information presented herein is valid up to 31 March 2004 and takes no account of changes in law or practice between that date and the date of publication. This study has two main parts. First, it presents a concise overview of the legal standards under international law applicable to both detention as well as alternatives to detention that may give rise to some restrictions on the freedom of movement of asylum seekers and/or refugees. Second, and forming the main part of this study, it presents a range of alternatives to detention used by many receiving countries and attempts to evaluate those measures, specifically in relation to rates of absconding.

This study found that there is a significant difference in the level of effectiveness of a particular alternative depending on whether it is applied in a primarily 'destination', as opposed to a primarily 'transit', State. The statistical data available suggests that restrictive alternatives involving close supervision or monitoring, for the purpose of ensuring compliance with asylum procedures, are seldom if ever required in destination States where most asylum seekers wish to remain. In such States, the rate at which asylum seekers abscond, prior to a final rejection of their claim and/or the real prospect of removal from the territory, seems to be low. Projects established to provide alternatives to detention throughout the duration of refugee status determination procedures in such countries are therefore all highly effective, but this appears to be due less to their design than by happenstance, that is, asylum seekers who reach their 'destination' country are unlikely to abscond because they have a vested interest in remaining in the territory and in complying with the asylum procedure. With this context in mind, there is a real risk of certain alternatives, such as electronic tagging, being misapplied to asylum seekers who would not and should not otherwise be detained, thereby becoming an unnecessary restriction on their freedom of movement and other rights.

In some countries with well-articulated national legislation in which consideration of alternatives is required prior to the issuing of any detention order, official information was unavailable with regard to the implementation of the relevant articles. Available figures and anecdotal evidence from asylum lawyers in those countries suggest, however, that alternative measures were rarely if ever applied to their clients. Although detention of asylum seekers prior to a decision on a claim is, to date, a relatively exceptional measure in those contexts, the non-implementation of the available alternative measures is of concern. In transit States, where the rate of absconding is usually higher, this study found several examples of reception policies and programmes which successfully reduced this rate, without recourse to detention. In some southern European countries, for example, the partial or recently introduced provision of State accommodation and support to asylum seekers is making a marked reduction in the rate at which such persons abscond and move on irregularly to other countries.

Even in primarily destination States, certain factors were found to further reduce the low rate at which asylum seekers there abscond. The provision of competent legal advice and concerned case management, for example – which serve as non-intrusive forms of monitoring and which ensure that asylum seekers fully comprehend the consequences of non-compliance – were found to raise rates of appearance and compliance. Similarly, legal support, guardianship and specialised group

¹ UNHCR Agenda for Protection, June 2002, A/AC.96/965/Add.1, p.8.

homes run by nongovernmental agencies were found to successfully reduce the rate at which separated asylum-seeking children disappeared from several European countries. Early, detailed interviewing of such children at the border, to fully establish the nature of their situation, was also found to be an effective alternative to placing ‘protective’ restrictions upon their freedom of movement after admission.

The effectiveness of alternatives used to ensure the availability for removal or compliance with removal proceedings of persons found not to be in need of international protection is less certain, though there were several successful examples to be cited even here. Several countries report successful results from projects for counselling persons not in need of international protection about consenting to mandatory return, and both Australian and British nongovernmental organisations report high rates of success in monitoring sample groups of people released while awaiting removal. Return-oriented centres established in some European States for persons who refuse to cooperate with their forced return (or for asylum seekers with manifestly unfounded claims or, in one case, for separated children), have not so far produced similar evidence of success. For persons found not to be in need of international protection who cannot be returned to their home country, reporting requirements are successfully used in a number of States as an alternative to the inhumane and unlawful prospect of indefinite detention.

This study further found that, where comparative costs of detention vis-à-vis alternatives to detention are available, alternatives are universally more cost-effective than detention. Finally, this study advocates for further empirical research, transparency and public education at the national and international level in relation to all these issues.

ABBREVIATIONS

1951 Convention	<i>Convention relating to the Status of Refugees 1951</i>
1967 Protocol	<i>Protocol relating to the Status of Refugees 1967</i>
CAT	Committee against Torture
CRC	<i>Convention on the Rights of the Child 1989</i>
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms 1950</i>
ExCom	Executive Committee of the High Commissioner's Programme
HRC	Human Rights Committee
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
NGO	nongovernmental organisation
UNHCR	United Nations High Commissioner for Refugees

I. INTRODUCTION

A. Context

1. The 1999 UNHCR Guidelines on detention of asylum seekers ('UNHCR Guidelines on Detention')² reaffirmed the general principle that asylum seekers should not be detained.³ In exceptional cases where such detention may be necessary, Guideline 3 recommends that it should only be resorted to 'after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.' Human rights bodies have similarly emphasised that detention of asylum seekers should only occur as a measure of last resort, after other non-custodial alternatives have proven or been deemed insufficient in relation to the individual.⁴

2. Contrary to this guidance, for many States detention continues to be the preferred means of ensuring that asylum seekers remain available for the determination of their claims and for removal should their claims be rejected. Reception policies involving a strong element of detention are also used, sometimes explicitly, to deter future arrivals, without adequately differentiating between unauthorised migrants and those persons who are seeking asylum in a place that will afford them effective protection. Arbitrary detention, both of asylum seekers and refugees, also continues to occur in numerous host countries.⁵

3. In June 2002, UNHCR's Agenda for Protection urged 'States more concertedly to explore alternative approaches to the detention of asylum seekers and refugees...'⁶ This study offers information and analysis on existing alternatives to detention as a contribution towards that goal.

² UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999 (henceforth, 'UNHCR Guidelines on Detention'). Based on UNHCR Executive Committee (ExCom) Conclusion No. 44 (XXXVII) – 1986 on the detention of refugees and asylum seekers (henceforth "ExCom Conclusion No. 44 (1986)).

³ 'Asylum seeker' here refers to any person whose claim to asylum is being considered either individually or on a group basis under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, regional instrument, or other national law. The term should in theory include all persons who are awaiting final adjudication of their appeals. This being said, national laws, statistics or practices will sometimes categorise such persons prematurely as 'rejected' or 'failed' cases. Asylum seekers whose claims to international protection have been rejected ('failed asylum seekers') are included within the parameters of this study in part due to this 'grey area', and in part because the issue of ensuring availability for removal impacts upon the treatment of asylum seekers who are still awaiting decisions. Where asylum seekers have been 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, following due consideration of their claims in a fair procedure, or wherever such persons are mentioned in a normative context, they are referred to as 'persons found not to be in need of international protection' (in the terminology of UNHCR ExCom Conclusion No. 96 (LIV) – 2003 on the Return of Persons Found not to be in Need of International Protection (henceforth "ExCom Conclusion No. 96 (2003)). This study also looks at the treatment of refugees recognised on either an individual or *prima facie* basis where they may experience unnecessary or arbitrary detention or alternative restrictions upon their freedom of movement, alongside asylum seekers

⁴ See, for example, Resolution of the UN Sub-Commission on Promotion and Protection of Human Rights regarding detention of asylum seekers, 2000/21; The UN Working Group on Arbitrary Detention recommendation that 'alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.' E/CN.4/1999/63/Add.3. See also Article 37(b) of the Convention on the Rights of the Child (CRC).

⁵ See Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice, Standing Committee of the Executive Committee of the High Commissioner's Programme, 15th Meeting, 4 June 1999, EC/49/SC/CRP.13.

⁶ UNHCR Agenda for Protection, above footnote 1, at p.8.

B. Scope, structure and purpose

4. This study aims to evaluate practical arrangements that minimise or avoid the need to deprive asylum seekers of their liberty while at the same time appropriately addressing concerns of States, including, in particular, that of reducing the incidence of asylum seekers who abscond and ensuring their compliance with asylum procedures.⁷ It further aims to identify best practices. For the purposes of this paper, therefore, the term ‘alternatives to detention’ should be understood as shorthand for alternative means of increasing the appearance and compliance of individual asylum seekers with asylum procedures and of meeting other legitimate concerns which States have attempted to address, or may otherwise attempt to address, through recourse to detention. Such measures may or may not involve some degree of restriction on the freedom of movement of asylum seekers. The choice of terminology is in no way intended to imply that detention is the norm from which other measures should be seen as deviations.

5. This study is divided into five main parts. Part I provides an overview of the purpose, context and scope of the study. Part II synthesises applicable legal standards under international and regional law relevant to detention and to other restrictions on freedom of movement, as well as a brief overview of criminal justice standards. Part III, which forms the main part of this study, reviews and analyses various alternative measures to detention. It identifies a range of alternatives to detention that are commonly used and evaluates their effectiveness against the main reasons why detention or alternative measures are resorted to by States, such as to prevent absconding, to perform identity and security checks, or to protect public health. A separate section deals with alternatives aimed at failed asylum seekers pending their removal. Examples of alternative measures are drawn from different States and are examined in the context of these purposes. Part III is to be read in conjunction with the appendices which contain thirty-four separate country sections describing in more detail the alternative measures used in various countries. The information contained in these appendices is valid up to March 2004. These sections are for information only and no attempt has been made to comprehensively assess the effectiveness or the legality of particular alternative practices, although some comments are made in this regard at the conclusion of each country annex. Finally, Part IV offers some concluding remarks to the study as a whole and recommendations for further investigation/research.

6. The present study does not specifically address measures defined as ‘detention’ or ‘detention-like situations’ by the UNHCR Guidelines, that is, ‘confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed and where the only opportunity to leave this limited area is to leave the territory.’⁸ The UNHCR definition encompasses most forms of detention recognised as such by international human rights law. This is of particular relevance with regard to ‘transit’ or ‘waiting zones’ in international ports⁹ but is also relevant to situations where natural geography may be used by a government to severely curtail asylum seekers’ or refugees’ freedom of movement.¹⁰ Similarly, the paper does not examine alternative *forms of* detention, such as 24-hour home detention or transfers to locations where conditions may be better but where regimes of

⁷ The terms ‘risk of absconding’ and ‘flight risk’ are used interchangeably in this study. They are both general headings to describe the risk of an asylum seeker deliberately abandoning a claim and disappearing, either to make an unauthorised onward movement to another State or to remain, illegally and/or without documents, in the State where they claimed asylum.

⁸ UNHCR Guidelines on Detention, above footnote 2, Guideline no.1.

⁹ See, e.g., *Amuur v France*, ECtHR, 25 June 1996 (1996) I.I.H.R.L. 39 (25 June 1998).

¹⁰ See, e.g., *Guzzardi v Italy*, ECtHR, (1981) 61 I.L.R. 227; also (1981) E.H.R.R. 333.

24-hour supervision and escort are still enforced. In several instances, schemes that are sometimes presented as ‘alternatives’ are briefly examined to show why they are not deserving of the name.

7. Although the study does not address measures defined as detention, it nevertheless sets out the legal criteria under which it would be unlawful for a host State to detain an asylum seeker and/or a refugee. It is also beyond the scope of this study to assess policies aimed at reducing periods spent in detention, such as policies promoting prompt removal of persons found not to be in need of international protection, except to note that the orderly return of such persons is an objective of many detention policies as well as of certain alternative measures.¹¹ Tighter border control is another policy alternative to internal controls on the free movement of asylum seekers, but will not be dealt with in this study.

8. The question of how re-detention, and/or the threat of re-detention, may be used in conjunction with various alternative measures is, to some extent, considered. Many of the national schemes for maximising the use of alternative measures include either a brief period of initial detention if the asylum seeker enters the territory without proof of identity, or a period of re-detention after final rejection of a claim or immediately prior to removal. To examine the effectiveness of such models is not to detract from the general principle that asylum seekers should not be detained. Rather, it recognises that a particular individual may need to be detained, on exceptional grounds, at one point in time, but may not need to be detained at another.

9. Certain national reception arrangements, or proposals for reception arrangements, may fairly be regarded, in their entirety, as ‘alternatives to detention’.¹² In the present study, reception conditions are evaluated only in so far as they contribute, intentionally or incidentally, to achieving the same stated objectives as detention: that is, most commonly, ensuring the appearance or easy location of asylum seekers throughout the refugee status determination process, or ensuring compliance with a removal order when issued, or maintaining public order. Therefore, for example, the question of whether residents can cook for themselves in an accommodation centre is not mentioned, while their freedom to come and go is reviewed in detail. On the other hand, where the quality of environment and services were indicated to be important factors in the success of an ‘alternative’ accommodation or programme, in terms of creating an incentive for the appearance and compliance of those under its care, then these services are described. The issue of adequate legal advice and representation is mentioned both with reference to the effectiveness of remedies by which a detention order may be challenged and with reference to the design of programmes aiming to ensure compliance with determination procedures.¹³

¹¹ See, ExCom Conclusion No. 96 (2003), above footnote 3.

¹² What may constitute an ‘alternative to detention’ in one context may be simply a reception arrangement elsewhere – for example, the establishment of an open, collective accommodation centre for asylum seekers. The question is one of sequence for a specific asylum seeker (Was he or she detained and then released because the centre or shelter was willing to offer itself as a fixed address or surety?) and a question of history for each country (Is the introduction of increased restrictions on the free movement of asylum seekers – such as those which may go hand in hand with accommodation in collective centres, for example – a step aimed at reducing the percentage of those in detention or is it about increased State supervision of those who were previously permitted to reside in the community without restrictions?).

¹³ The term ‘legal aid’ denotes State-funded legal advice and/or representation provided free of charge to whole groups of asylum seekers (for example, detainees) or to those with very limited resources. Where other legal advice or representation is mentioned, whether paid for by the asylum seeker or provided on a *pro bono* basis, this shall be stated.

C. Methodology

10. The author did not visit all the countries surveyed, but based her findings upon existing international surveys, other written sources (both published and confidential), interviews (by telephone and email) and comments on the study's draft text provided by experts and practitioners working in the selected countries. Several governmental departments were contacted to supply statistics, to confirm certain facts, or to supply additional information regarding national reception policies and practices. Their views with regard to alternatives to detention were not directly solicited.

11. In the country sections contained in the appendices, specific sources are cited wherever possible, including nongovernmental agencies interviewed. In contrast, sources are not cited directly in the main text of the study; all references to State practice are drawn from the appendices unless otherwise indicated. Some sections are more detailed and fully annotated than others, reflecting differing levels of information provided to the author.

12. This study does not presume to judge the legality of State practice, although in some cases questions are raised where programmes, policies and measures appear, on the face of the evidence, to involve unnecessary, unreasonable or disproportionate restrictions on the rights and freedoms of asylum seekers or refugees. In many cases, though the overall policy or legislation may conform to international standards, the degree to which alternatives were considered prior to the issuance of an individual detention order may be impossible to evaluate without more transparent decision-making and without further independent research at either national or local level.

II. APPLICABLE LEGAL STANDARDS

13. This part of the study provides an overview of the applicable legal standards relevant to detention, that is, any measure that amounts to deprivation of liberty, as well as to lesser forms of restrictions on movement. While this study principally concerns restrictions on movement that fall short of deprivation of liberty, that is, alternatives to detention, one is only able to distinguish between the two adequately by understanding the law relating to both. Sometimes what is called an alternative *to* detention may in fact be an alternative form *of* detention. This study wishes to underline that international law forms a continuum whereby the same rigorous testing applies as much to other forms of restrictions on freedom of movement as to detention. The following section is organised by legal areas, ending with a summary. Its main emphasis is on international law, although, where applicable and/or instructive, reference is also made to regional instruments and jurisprudence.

A. International refugee law

14. Unlike international human rights law which applies to all human beings, except where explicitly stated otherwise (see below under B.), international refugee law, notably the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, endorses a sliding scale of treatment (sometimes referred to as 'gradations' of treatment) which depends on one's legal status.¹⁴ Goodwin-Gill distinguishes four general categories on which rights may be determined,

¹⁴ See, UNHCR, 'Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems', Global Consultations on International Protection, 3rd Meeting, UN Doc. EC/GC/01/17, 4 September 2001, para. 3.

namely ‘simple presence’, ‘lawful presence’, ‘lawful residence’, and ‘habitual residence’.¹⁵ UNHCR would appear to agree with this analysis, stating that ‘the gradations of treatment allowed by the Convention ... serve as a useful yardstick in the context of defining reception standards for asylum seekers. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum seekers ...’¹⁶ Most other rights are contingent upon status as a refugee or some other legal status. The question of what amounts to ‘lawful residence’ versus ‘lawful presence’ is unsettled (see, below, under B.).¹⁷ In principle, the term “lawfully in” could imply admission in accordance with the applicable immigration law for a temporary purpose, and should, therefore, apply to asylum-seekers who have been admitted into the asylum procedure.

1. Detention

15. Although there is no explicit provision in the 1951 Convention that prohibits arbitrary detention, article 31(1) provides that States ‘shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’ Article 31(1) of the 1951 Convention has also been taken to mean that the act of entering a country for the purposes of seeking asylum should not be considered an unlawful act. Article 31 of the 1951 Convention applies to asylum seekers. While ‘penalty’ has been most commonly associated with criminal penalties, it has been argued that it has a wider application.¹⁸ In this way, it is arguable that detaining asylum seekers or otherwise restricting their freedom of movement without appropriate justification, could amount to a penalty within the meaning of article 31. This remains unsettled.¹⁹ In any case, as will be seen below, international and regional human rights standards pertaining to the prohibition of arbitrary detention, are also applicable to asylum seekers and refugees.

16. Moreover, detention of an asylum seeker must be necessary in the individual case. The Executive Committee of the High Commissioner’s Programme (henceforth ExCom) has elaborated four grounds upon which detention, when prescribed by law, could be necessary in an individual case. These are: to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel

¹⁵ G. Goodwin-Gill, *The Refugee in International Law* (2nd ed., Oxford University Press, 1996, reprinted 1998), pp. 305-307.

¹⁶ UNHCR, ‘Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems’, above footnote 14, at p.1, referring to ExCom Conclusion No. 82 (XLVIII) - 1997 on Safeguarding Asylum.

¹⁷ See, e.g., J.C. Hathaway, *The Rights of Refugees under International Law*, Ch.3.1.2, who argues that it cannot be reasonably concluded that refugees who submit to a refugee status determination procedure are not ‘lawfully present’; cf. A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (A.W. Sijthoff-Leyden, 1972), p.374, who argues that ‘lawful stay’ is equivalent to ‘lawful presence’ of three months or longer; cf. G. Goodwin-Gill, *The Refugee in International Law*, above footnote 15, at p.309, who argues that refugees lawfully staying ‘must show something more than mere lawful presence’, such as ‘permanent, indefinite or unrestricted or other residence status, recognition as a refugee, issue of a travel document, [or] grant of re-entry visa.’

¹⁸ See, e.g., R. Cholewinski, ‘Enforced Destitution of Asylum Seekers in the United Kingdom’ (1998) 10 *IJRL* 3; G. Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection’, in Feller, Türk & Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), 185; A. Edwards, ‘Tampering with Asylum: The Case of Australia’ (2003) 15(3) *IJRL* 192.

¹⁹ See, for fuller discussion, G. Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection’, above footnote 18.

and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.²⁰

2. *Other restrictions on freedom of movement*

17. Article 31(2) explicitly acknowledges that States retain the power to limit the freedom of movement of refugees, subject to particular restrictions. It provides that '[t]he Contracting State shall not apply to the movements of such refugees [that is, those referred to in article 31(1), including asylum seekers] 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.' Although article 31(2) of the 1951 Convention does not identify in what circumstances restrictions on movement would be necessary, this provision must be read in light of article 12(3) of the ICCPR, which sets out the conditions in which the host State may limit the freedom of movement of those lawfully in the country. These are discussed below at B.2.

18. The other relevant provision in the 1951 Convention to this study is article 26, which provides that '[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within the territory subject to any regulations applicable to aliens generally in the same circumstances.' Many States have made specific reservations to this article. Some States reserve the right to designate places of residence, either generally or on grounds of national security, public order (*ordre public*), or the public interest.²¹ In line with the gradations of treatment framework underlying the 1951 Convention, it is clear that this provision applies to recognised refugees, but it may also apply to asylum seekers who are lawfully within the territory – that is, those who have applied for asylum regardless of whether they entered the territory with or without authorisation. In sum, for those persons lawfully in the territory, restrictions on their choice of residence are not permitted.

B. International human rights law

1. Detention

19. ExCom has on many occasions recommended that any reception arrangements put in place by States parties respect human dignity and applicable international human rights standards.²² This section shall provide an overview of what these standards entail.

20. Rights under the International Covenant on Civil and Political Rights²³ (henceforth 'ICCPR') apply not only to citizens, but equally to asylum seekers and refugees,²⁴ unless expressly provided otherwise.²⁵ The Human Rights Committee (henceforth 'HRC') has held that '... the general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens.' It further stated that 'In general, the rights set forth in the Covenant apply to

²⁰ ExCom Conclusion No. 44 (1986), above footnote 2. See also UNHCR Guidelines on Detention, above footnote 2, Guideline 3.

²¹ Angola, Botswana, Burundi, Greece, Honduras, Iran, Malawi, Mozambique, The Netherlands, Papua New Guinea, Rwanda, Spain, Sudan, Zambia and Zimbabwe. See, G. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', above footnote 18, at p.221.

²² ExCom Conclusion No. 93 (LIII) - 2002 on reception of asylum-seekers in the context of individual asylum systems, para. (b)(i).

²³ GA res. 2200A (XXI), 16 Dec. 1966; entry into force 23 March 1976.

²⁴ See, in particular, art. 1(3), UN Charter; arts. 1 and 2, UDHR; art. 2(1), ICCPR.

²⁵ E.g., the right to participate in public life and to vote is reserved for citizens only, see, art. 25 of the ICCPR.

everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.’²⁶ The Human Rights Committee has more recently clarified that ‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party.’²⁷ Most regional human rights instruments also apply to all persons on the territories of States parties, rather than only to citizens.²⁸

21. Article 9 of the ICCPR is the key provision in international law guaranteeing the right not to be arbitrarily detained. The relevant sub-articles of article 9 are as follows:

- a) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.
- b) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his [or her] arrest and shall be promptly informed of any charges against him [or her].
- c) Anyone who is deprived of his [or her] liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his [or her] detention and order his [or her] release if the detention is not lawful.
- d) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

22. Article 9 of the ICCPR protects individuals against arbitrary deprivation of liberty, whereas article 12 applies to restrictions on movement short of deprivation of liberty. Severe restrictions on movement may be considered a deprivation of liberty.²⁹ The European Court of Human Rights stated that the distinction between restrictions upon freedom of movement and arbitrary detention is ‘merely one of degree or intensity, and not one of nature or substance.’³⁰

23. Article 9(1) of the ICCPR is not an absolute protection against detention, but rather it is a substantive guarantee against detention that is arbitrary or unlawful. According to the Human Rights Committee, it ‘is applicable to all deprivations of liberty, whether in criminal cases or in

²⁶ See, Human Rights Committee, General Comment No. 15 on ‘The Position of Aliens under the Covenant’, CCPR/C/21/Rev.1, 11 April 1986, paras. 2 and 1 respectively.

²⁷ See, Human Rights Committee, General Comment No. 31 on ‘Article 2: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant’, 21 April 2004 (adopted at 2187th meeting on 29 March 2004), CCPR/C/21/Rev.1/Add.13.

²⁸ See, e.g., *Loizidou v Turkey*, Judgment (Merits and just satisfaction), ECHR Applic. No. 000153118/89, 18 Dec. 1996, in which the Court stated at para. 52, ‘The obligation to secure ... the rights and freedoms set out in the Convention, derives from the fact of ... control [of territory].’ That is, the application of human rights law is territory-based, not nationality-based.

²⁹ See, e.g., *Celepli v Sweden*, HRC Case No. 456/1991, and *Karker v France*, HRC Case No. 833/1998.

³⁰ *Guzzardi v Italy*, above footnote 10, at para. 93. In this case, the applicant, a suspect in illegal mafia activities, was ordered to live for sixteen months on a remote island off the coast of Sardinia. He was restricted to a hamlet in an area of the island of some 2.5 sq kms that was occupied solely by persons subject to such orders, although the applicant’s wife and child were allowed to live with him. He was able to move freely in the area and there was no perimeter fence, although he could not move beyond the area. He was also required to report twice daily and was subject to a curfew. The Court held that the applicant’s conditions fell within article 5. In *Ashingdane v UK*, Case No. A 93 (1985), the European Court found that the compulsory confinement of a mentally ill patient in a mental hospital under a detention order invoked article 5 protections, even though he was in an ‘open’ (i.e. unlocked) ward and was permitted to leave the hospital unaccompanied during the day and over the weekend (para. 42). Some parallels can be drawn from the facts of these cases and the practices of States in relation to asylum seekers. For more information on the distinctions between arbitrary detention and restrictions on freedom of movement, see D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995), p. 98.

other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.’³¹ Sub-articles 9(4) (the right to court review of detention) and (5) (the right to compensation)³², as well as parts of (2) (right to be given reasons for deprivation of liberty), also apply beyond criminal cases.³³

24. In accordance with article 4 of the ICCPR, a State party may take measures derogating from its obligations under article 9 in time of public emergency. However, it may do so only to the extent ‘strictly required by the exigencies of the situation’ and ‘provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’³⁴ Any restrictions must be limited to the needs of the situation and cease as soon as the state of emergency no longer exists. Moreover, any derogation must not interfere with other non-derogable rights in the Covenant, such as the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR. In addition, the State party must inform other States parties to the ICCPR immediately of any such derogation.³⁵ In practice, detaining refugees and/or asylum seekers is rarely declared to be for reasons of public emergency (as opposed to reasons of public order³⁶).

25. Whether detention is arbitrary is dependent on a number of factors.

26. First, any detention must be in accordance with and authorised by law. Any deprivation of liberty that is not in conformity with national law would be unlawful and therefore in breach of article 9(1). Moreover, legislation which permits the use of detention must be in keeping with international human rights standards.³⁷

27. Second, any detention must not be arbitrary. Even though the detention may be in accordance with the national law, it may nonetheless be arbitrary. The HRC has clarified what it means by arbitrariness in a number of cases, as follows:

“‘[A]rbitrariness’ is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but

³¹ See, HRC General Comment No. 8 (1982) on Article 9 (Right to liberty and security of the person) HRI/GEN/1/Rev.7.

³² Article 9(5) of the ICCPR is to be read in conjunction with article 2(3) on the provision of an effective remedy.

³³ HRC General Comment No. 8, above footnote 31, states that reasons must be given in cases of preventative detention and only parts of sub-article (2) are limited to criminal cases. Therefore, an asylum seeker has a right to be informed of the reason/s for the deprivation of liberty in the context of administrative detention. See, also, Principle 8 of the Working Group on Arbitrary Detention Deliberation No. 5, stating that an asylum seeker must be informed of the grounds for the custodial measure being taken; UN Body of Principles, Principle 10. Similarly, the Council of Europe Handbook No. 5, ‘A guide to the implementation of Article 5 of the ECHR’, states ‘Article 5(2) refers to a person who is “arrested” and to the existence of a “charge”. The wording should not lead to the conclusion that the need to give reasons only arises in the context of criminal proceedings. It is well established that reasons must be given in any situation where someone has been deprived of his or her liberty.’ (p. 46).

³⁴ Article 4(1), ICCPR; see also HRC General Comment No. 29 (2001) on Article 4: Derogations during a state of emergency, 31 August 2001 (adopted at 1950th meeting on 24 July 2001), CCPR/C/21/Rev.1/Add.11.

³⁵ Article 4(3), ICCPR.

³⁶ See, e.g., country sections on Kenya, Uganda, and Zambia.

³⁷ See, e.g., HRC Concluding Observations on Trinidad and Tobago (2000), CCPR/CO/70/TTO, at para. 16 in which the Committee stated that a vague formulation of the circumstances in which arrest may be issued was ‘too generous an opportunity to the police to exercise this power’ and that they recommended that the State party ‘confine its legislation so as to bring it into conformity with article 9.1 of the Covenant.’

reasonable in all the circumstances. Further, remand in custody must be *necessary in all the circumstances*, for example, to prevent flight, interference with evidence or the recurrence of crime.³⁸ (emphasis added)

28. Whether a deprivation of liberty is considered to be reasonable and necessary will also depend on the proportionality of the measure with its intended objective.³⁹

29. Third, any period of detention must be open to periodic review. Even though an initial period of detention may not be arbitrary (e.g. if it was necessary to carry out identity, security or health checks), subsequent periods may breach article 9(1) of the ICCPR, that is, prolonged detention may be arbitrary.⁴⁰ Therefore an ongoing and periodic assessment is required in order to ensure that the initial reasons justifying detention continue to exist.⁴¹ The mandatory and non-reviewable detention of asylum seekers and/or refugees without an individual assessment of their need for detention would be arbitrary.⁴²

30. Fourth, and related to the above, an asylum seeker and/or refugee must have a right to challenge his or her detention in a court. Anything less than a court review is not satisfactory.⁴³ Even where a decision to detain an individual is taken by an administrative body or authority, article 9(4) of the ICCPR obliges the State party concerned to make available to the person detained the right of recourse to a court of law.⁴⁴ Moreover, review by the court must be effective. It cannot be circumscribed by law to particular forms of review. Merely formal review is not sufficient. Most importantly, the court must be empowered to order release.⁴⁵ The absence of effective court review renders detention arbitrary.

31. The criteria set out in article 9 fully apply to the detention of refugees and asylum seekers. In *A v Australia*,⁴⁶ the HRC confirmed that it is not *per se* arbitrary to detain individuals seeking asylum under article 9(1). Nor did the Committee find support for any rule of customary international law that would render all such detention arbitrary.⁴⁷ Likelihood of absconding and lack of cooperation were specifically cited as reasons that may justify detention in an individual case.⁴⁸ The HRC went on to state that ‘without such factors detention may be considered arbitrary, even if entry was illegal.’⁴⁹

32. The HRC elaborated upon when detention is arbitrary in regard to a person who had applied for refugee status in *C v Australia*.⁵⁰ In this decision, the HRC found that the State party had ‘not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends...’ The Committee referred to the imposition of reporting requirements, sureties or other conditions which would take account of the particular circumstances

³⁸ *Van Alphen v The Netherlands*, HRC Case No. 305/1988, para. 5.8.

³⁹ *A v Australia*, HRC Case No. 560/1993, para. 9.2. See also M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Strasbourg, 1993 (henceforth: ‘Nowak, 1993’) pp.172-173.

⁴⁰ See, e.g., *Spakmo v Norway*, HRC Case No. 631/1995, para. 6.3; HRC Concluding Observations on Japan (1998) CCPR/C/79/Add.102, para. 19 and Switzerland (1996) CCPR/C/79/Add.70.

⁴¹ *A v Australia*, above footnote 39, at para. 9.4.

⁴² *A v Australia*, above footnote 39; *C v Australia*, HRC Case No. 900/1999.

⁴³ See, e.g., *Torres v Finland*, HRC Case No. 291/1988; *Vuolanne v Finland*, HRC Case No. 265/1987. See, also, *Amuur v France*, above footnote 9.

⁴⁴ *Vuolanne v Finland*, HRC Case No. 265/1987, para. 9.6.

⁴⁵ *A v Australia*, above footnote 39, at para. 9.5; *C v Australia*, above footnote 42, at para. 8.3.

⁴⁶ *A v Australia*, above footnote 39.

⁴⁷ *A v Australia*, above footnote 39, at para. 9.3.

⁴⁸ *A v Australia*, above footnote 39, at para. 9.4.

⁴⁹ *A v Australia*, above footnote 39, at para. 9.4.

⁵⁰ *C v Australia*, above footnote 42.

of the individual concerned.⁵¹ Therefore, in order to establish that detention is necessary and reasonable in all the circumstances, consideration must be given to ‘less invasive means of achieving the same ends.’⁵² The standards elaborated by the HRC have informed UNHCR’s position that asylum-seekers should not be detained, and that only in exceptional cases would it be necessary to resort to detention in an individual case.⁵³

2. Other restrictions on freedom of movement

33. Article 12(1) of the ICCPR obliges States parties to ensure that ‘everyone lawfully within the territory of the State shall, within that territory, have the right to liberty of movement and freedom of residence.’⁵⁴ In this regard, it is more restrictive than the article 9 protection against arbitrary detention which applies to all persons, regardless of their status. Thus, in order to understand the extent of the protection afforded by article 12 of the ICCPR, it is necessary to examine first who is to be considered ‘lawfully’ within the territory of a State party.

34. The question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law. A State may impose restrictions on the entry of an alien to its territory, provided they are in compliance with the State’s international obligations.⁵⁵ The HRC has held that an alien who entered a State illegally, but whose status has been regularised, must be considered to be lawfully within the territory for the purposes of article 12.⁵⁶ Thus, recognised refugees are lawfully within the territory for the purposes of article 12 and therefore enjoy its benefits. As noted above in section A, an individual who registers to apply for asylum and is admitted to a procedure ought to be considered ‘lawfully’ within the territory. While the HRC has stated that a State may impose conditions on the entry of an alien, for example, in relation to movement, residence or employment,⁵⁷ these conditions must be justified by reference to article 12(3): ‘... once aliens are allowed to enter the territory of a state party they are entitled to the rights set out in the Covenant.’⁵⁸

35. A relevant HRC communication that supports the above analysis is *Celepli v Sweden* in which a Turkish citizen of Kurdish origin was granted permission to stay in Sweden but not refugee status. He was subsequently subjected to a deportation order on the grounds of suspicion of involvement in terrorist activities. The expulsion order was not however enforced as it was believed that he (and his fellow suspects) could be exposed to political persecution in Turkey in the event of return. Instead, the Swedish authorities prescribed limitations and conditions concerning their place of residence. The HRC found that the person concerned, having been allowed to stay in Sweden, albeit subject to conditions, was considered to be lawfully in the territory of Sweden for the purposes of article 12. Sweden justified its restrictions on the ground of national security under article 12(3), which was accepted by the Committee.⁵⁹

36. However, article 12(1) is not an unfettered right to freedom of movement as it may be subject to particular restrictions. Any restriction must be provided by law, necessary to protect national

⁵¹ *C v Australia*, above footnote 42, at para. 8.2.

⁵² *C v Australia*, above footnote 42, at para. 8.2.

⁵³ UNHCR Guidelines on Detention, above footnote 2, Guidelines 2 and 3.

⁵⁴ Note that under Article 13 of the Universal Declaration of Human Rights, everyone has the right to freedom of movement and residence with the borders of each State.

⁵⁵ HRC General Comment No. 27 on Article 12: Freedom of Movement, 2 November 1999 (adopted at 1783rd meeting on 18 October 1999), CCPR/C/21/Rev.1/Add.9, para. 4.

⁵⁶ See, e.g., *Celepli v Sweden*, above footnote 29, at para. 9.2.

⁵⁷ HRC General Comment No. 15, above footnote 26, at para. 6.

⁵⁸ HRC General Comment No. 15, above footnote 26, at para. 6.

⁵⁹ *Celepli v Sweden*, above footnote 29, at para. 9.2.

security, public order (*ordre public*), public health or morals or the rights and freedoms of others (see paragraphs below), and must be consistent with other rights recognised in the Covenant.⁶⁰ Any restriction must not ‘nullify the principle of liberty of movement.’⁶¹ Persons are entitled to move from place to place and to establish themselves in a place of their choice, irrespective of any particular purpose or reason for wanting to move or stay in a particular place.⁶² Any restrictions on the movement of persons must be justified by the State party⁶³ and must not continue beyond the point in which the justification no longer exists. Thus, periodic assessments are also required.⁶⁴

a. Grounds for restrictions

37. Of the reasons given by States for imposing restrictions on the free movement of asylum seekers, verification of identity, and the protection of national security, public order, or public health are the most common.

38. Recourse to initial, temporary periods of detention in order to verify the identity of asylum seekers, particularly those who arrive without, or with false, documentation, is accepted by UNHCR as satisfying the ‘exceptional’ ground criterion in their guidelines.⁶⁵ Some State practice indicates that other restrictions on movement (e.g. daily reporting requirements, release on bail or surety to citizens) may be effective while awaiting verification of identity, or where identity cannot be readily found but the person is not considered a risk to society. Detention is not necessary in every case, as some examples in this study show, and must be assessed on an individual basis.

39. As UNHCR reminded the international community in the aftermath of the events of 11 September, 2001, both detention and other restrictions on the movement of asylum seekers may only be applied on national security grounds ‘if necessary in circumstances prescribed by law and subject to due process safeguards’.⁶⁶ Unduly prolonged detention or other restrictions may violate international law.

40. ‘Public order’ may be defined as the sum of rules that ensure the peaceful and effective functioning of society.⁶⁷ ‘*Ordre public*’ is the equivalent French concept, but it is not an exact translation, seemingly broader in scope than the concept of ‘public order’. It does not appear, however, that this ‘extra depth’ implied within the notion of *ordre public* has had any effect on the outcome of cases submitted to the HRC under the Optional Protocol to the ICCPR.⁶⁸ Criminal legislation in most jurisdictions contains ‘public order’ offences, which typically include public drunkenness, driving while intoxicated, disorderly conduct, disturbing the peace, rioting, vagrancy,

⁶⁰ Art. 12(3), ICCPR.

⁶¹ HRC General Comment No. 27 on freedom of movement, above footnote 55, at para. 2.

⁶² HRC General Comment No. 27 on freedom of movement, above footnote 55, at para. 5.

⁶³ See, *Ackla v Togo*, HRC Case No. 505/1992, para. 10.

⁶⁴ C. Beyani, *Human Rights Standards and the Movement of People within States*, (Oxford University Press, 2000), p. 116. In situations of mass influx, ‘case by case review of confinement may indeed be unrealistic, and there *may* also exist good reasons – racial, cultural, religious, economic – why alternatives to detention cannot be used in any particular context; but the conditional nature of these statements should not be overlooked.’

⁶⁵ Verification of identity, protection of national security and public order are listed in ExCom Conclusion No. 44 (1986), above footnote 2, and the UNHCR Guidelines on Detention, above footnote 2, as the exceptional grounds upon which detention may be necessary in an individual case.

⁶⁶ ‘Addressing Security Concerns without Undermining Refugee Protection’, UNHCR Department of International Protection, November 2001, Section D, para. 10.

⁶⁷ ‘Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1985) 7 *HRQ* 3.

⁶⁸ See, S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2nd ed., 2004), p. 530.

nuisance, liquor law violations, disrupting a lawful protest without legal authority, etc. In most cases, these crimes are not punishable by incarceration, although the police may have some discretion to detain individuals in various states of vagrancy or intoxication for a limited time subject to charge and arrest. They are oftentimes referred to as consensual crimes or victimless crimes.⁶⁹ In relation to asylum law, widespread State practice indicates that the most common reason for restricting freedom of movement is associated with preventing absconding or ensuring appearance at asylum procedures. ‘Likelihood of absconding’ and ‘lack of cooperation’ have been cited as factors that may justify detention in an individual case by the UN Human Rights Committee.⁷⁰ Notwithstanding, these measures must still only be applied on an individual basis, after a full assessment of their likelihood of absconding, and coupled with the right to seek judicial review. In particular, any measure must not arbitrarily deprive an individual of their liberty, nor must they unduly restrict their right to freedom of movement.

41. On a broader scale, mass influxes of refugees have had a particularly destabilising impact on public order in many countries, particularly in Africa, Latin America and Asia. Depending on the situation, such movements may also have an impact on national security. The same safeguards relating to detention and restrictions on free movement apply in situations of mass influx.⁷¹ Some States have managed to avoid the use of closed camps,⁷² which amount to *de facto* detention, and to make such confinement as temporary as possible. In 2002, the UNHCR Executive Committee reaffirmed principles for maintaining the civilian and humanitarian character of refugee camps,⁷³ including the necessity of early ‘identification, separation and internment’ of combatants, thereby allowing the remainder of the refugee population not only to live in peace and safety but also allowing them to be accommodated without severe restrictions upon their freedom of movement, in the confidence that they are civilians who pose no threat to national security. It was recognised that civilian family members of combatants should not be interned alongside combatants, and that child soldiers are deserving of ‘special protection and assistance’. Case by case assessments of the level of ‘openness’ in various camps, and then of whether the use of a closed camp may amount to detention or even arbitrary detention in a specific context and over a prolonged period, is, however, beyond the scope of the present paper.

42. It is rare for the protection of public health to be invoked as the sole grounds for detaining or otherwise restricting the movement of asylum seekers or refugees, although some countries conduct medical tests during an initial ‘quarantine’ period in a restricted area of an otherwise open reception centre (as in the Czech Republic, Belgium, Denmark and Hungary⁷⁴) or in detention. This is usually the same period in which identity and security checks are conducted. Confinement in a health

⁶⁹ See, P. McWilliams, ‘Patterns and Trends in Public Order Crime: Ain’t nobody’s business but your own’, at <http://faculty.ncwc.edu/toconnor/201/201lect17.htm>, accessed April 2005; L. Siegel, *Criminology: Theories, Patterns & Typologies* (Wadsworth/Thomson Learning, Belmont, California, 2004).

⁷⁰ *A v Australia*, above footnote 39, at para. 9.4.

⁷¹ ExCom Conclusion No. 65 (XLII) - 1991 at para. (c), which called on ‘States to intensify efforts to protect the rights of refugees ... to avoid unnecessary and severe curtailment of their freedom of movement.’ Any restrictions in mass influx must be necessary in the interests of public order and public health: see, ExCom Conclusion No. 22 (XXXII) – 1981 on the Protection of Asylum Seekers in Situations of Large-Scale Influx, section II.B, para. 2(a).

⁷² For example, the Ugandan policy of more open settlement areas as opposed to closed camps, or the open refugee camps in the *zones d’accueil* of Côte d’Ivoire, as described in UNHCR Global Report 2002.

⁷³ ExCom Conclusion No. 94 (LIII) – 2002 on the civilian and humanitarian character of asylum.

⁷⁴ In Hungary, UNHCR has recommended that the amount of medical screening be reduced to correspond more closely to levels in other European host countries, and thereby to reduce the length of time that asylum seekers spend in such quarantine detention after arrival.

facility is subject to the same legal requirements as other forms of detention under international law.⁷⁵

43. Since 1990, UNHCR policy has been to oppose mandatory HIV testing/screening of asylum seekers and refugees, and also to oppose any restrictions based on a person's HIV status or potential status. This includes any restriction on freedom of movement.⁷⁶ Expert UN agencies stated in 1997: 'There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status.' Furthermore, public health interests are best served by 'integrating people with HIV/AIDS within communities'.⁷⁷

44. UNHCR does, however, countenance the screening and isolation of individuals with serious communicable diseases such as active tuberculosis, which may be transmitted via casual contacts and close proximity over a certain period – for example, in a communal reception centre for asylum seekers.⁷⁸ Beyond the initial screening, if an asylum seeker with a highly infectious disease does need to be confined for a certain period of treatment, every effort should be made to transfer the individual to a hospital or private location where the conditions of such quarantine may be as comfortable and conducive to their care as possible.

b. General legal requirements

45. Any restrictive measure must conform to the principle of proportionality; it must be appropriate to achieve their protective function; and it must be the least intrusive instrument amongst those which might achieve the desired result.⁷⁹ Restrictions must not only serve one of the permissible purposes; they must be necessary to protect them.⁸⁰ Moreover, States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.⁸¹ Furthermore, the application of the restrictions permissible under article 12(3) needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. 'Thus it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'⁸² Where such restrictions are imposed only against asylum seekers, or to asylum seekers

⁷⁵ Under the ECHR, it would first need to be determined that in fact the confinement amounts to a deprivation of liberty: see, *Nielsen v Denmark* (1988), in which it was held that the placement of a twelve year old boy in a psychiatric ward by his mother was not of the same 'nature or degree' to other cases of deprivation of liberty. The Court held that the restrictions on the child were no more than normal requirements for the care of a child of that age receiving treatment in hospital.

⁷⁶ OHCHR and the Joint United Nations Programme on HIV/AIDS, *HIV/AIDS and Human Rights: International Guidelines*, HR/PUB/98/1 (1998) (henceforth "*HIV/AIDS and Human Rights: International Guidelines*"). See, in particular, commentary regarding rights No.7 and No.9.

⁷⁷ *HIV/AIDS and Human Rights: International Guidelines*, above footnote 76. Research in the United Kingdom, for example, found that out of 41,470 asylum seekers selected and consenting to be screened at Heathrow Airport between 1995-1999, 24 were found with the infectious form of tuberculosis and only two individuals absconded before further investigations could be made. See, e.g., Callister et al. in *Thorax* 57, 2002, pp.152-6. Quoted in R. Coker, *Migration, Public Health and Compulsory Screening for TB and HIV*, Asylum and Migration Working Paper No. 1, Institute for Public Policy Research, London, 20 November 2003. In Coker's survey of medical research, it was concluded that, despite its long historical tradition, '[t]he evidence base to support the use of detention as a tool in the public health armamentarium is limited.'

⁷⁸ In the case of tuberculosis, isolation should only be necessary for a few weeks if the person adheres to treatment.

⁷⁹ HRC General Comment No. 27, above footnote 55, at para. 14.

⁸⁰ HRC General Comment No. 27, above footnote 55, at para. 14.

⁸¹ HRC General Comment No. 27, above footnote 55, at para. 15.

⁸² HRC General Comment No. 27, above footnote 55, at para. 18.

from a particular country or region, or the law has this effect, brings into question their compatibility with articles 12(3) and 2 of the ICCPR. To be compatible, an assessment would need to be made on an individual basis to justify any particular restrictions, rather than on a group basis.⁸³

C. Regional refugee and human rights law

1. Detention

46. Regional human rights instruments contain prohibitions against unlawful or arbitrary detention similar to those set out above.⁸⁴ While they all guarantee against unlawful or arbitrary detention, the European Convention on Human Rights explicitly lists those situations in which detention may be justified.⁸⁵ It can be implied, therefore, that any attempt at detention beyond these situations is not permitted within its States parties. The European Court tends to approach the issue of whether a State has complied with article 5 in two stages: First, it is determined whether there has been a deprivation of liberty. If so, it is then determined whether it was justified under one of the enumerated sub-articles and in accordance with procedure prescribed by law.

47. The question of whether there has been a deprivation of liberty has been addressed by the European Court of Human Rights in relation to asylum seekers. The Court held that confinement in an airport, ‘when accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations’, particularly under the 1951 Convention and the ECHR.⁸⁶ It further stated that ‘States’ legitimate concerns to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.’⁸⁷ The Court further stated that ‘[s]uch holding should not be prolonged excessively, otherwise there would be the risk of turning a mere restriction on liberty ... into a deprivation of liberty. In that connection, account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled their own country.’⁸⁸ Therefore, the Court found it irrelevant that France referred to its airport holding area as an

⁸³ See, e.g., by analogy, *Lovelace v Canada*, HRC Case No. 24/1977, in which it was found that ‘the restrictions on internal freedom of movement associated with the protection of particular minorities must be reasonable and objective and, above all, not discriminatory. In particular, members of a minority may not be deprived of the right to leave their reserve and to return to it.’ (paras. 15-19). See, also recommendation (f) that non-custodial alternatives should be used in a way that is not discriminatory, Report of Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, *Migrant Workers*, submitted pursuant to Commission on Human Rights Res. 2002/62, E/CN.4/2003/85, 30 December 2002. See, also, CERD General Recommendation No. 30: Discrimination Against Non-Citizens, 1 October 2004, in which the Committee stated that ‘differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention [on the Elimination of All Forms of Racial Discrimination], are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’ (para. 4)

⁸⁴ See, Art. 5, ECHR; Art. 7, Inter-American Convention on Human Rights 1969, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 Nov. 1969; Art. 6 of the African Charter on Human and Peoples’ Rights 1981, adopted 27 June 1981, 21 ILM 58 (1982).

⁸⁵ The following situations when detention may be imposed are included within the exhaustive list of Art. 5 of the ECHR: after conviction by a competent court; for non-compliance with a lawful order to give effect to an obligation; in order to bring an individual suspected of having committed a crime before a competent court; of a minor by lawful order for educational supervision or to bring him (or her) before a competent court; for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; to prevent a person effecting an unlawful entry into the country or of a person against whom action is taken with a view to deportation or extradition.

⁸⁶ *Amuur v France*, above footnote 9, at para. 43.

⁸⁷ *Amuur v France*, above footnote 9, at para. 43.

⁸⁸ *Amuur v France*, above footnote 9, at para. 43.

‘international zone’ and that the applicants had not yet entered French territory according to French law; article 5 was still applicable. In addition, the Court held that the mere fact that they could return to Syria, a transit location, did not preclude a finding of a restriction on liberty. The Court stated that ‘this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.’⁸⁹

2. Other restrictions on freedom of movement

48. A range of regional standards determines what may be a permissible restriction on freedom of movement intended to serve as an alternative to detention. Article 2 of the Fourth Protocol to the ECHR, concluded in 1963, provides a right to freedom of movement very similar to that in the ICCPR. In addition to the grounds enumerated in Article 12(3) of the ICCPR, article 2(1)(3) of Fourth Protocol to the ECHR makes explicit reference to public safety and prevention of crime. Any restrictions must also be ‘necessary in a democratic society’. Like article 12 of the ICCPR, article 2 of the Fourth Protocol is also limited to those ‘lawfully within’ the territory of a State party.

49. Relevant European Union law, based on article 63(1) of the Treaty establishing the European Union,⁹⁰ is also applicable to EU Member States. Article 7(1) of the EU Council of Ministers’ Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States⁹¹ permits Member States to limit all asylum seekers’ freedom of movement to an ‘assigned area’, though such an area ‘shall not affect the unalienable sphere of private life...’ and it must not interfere with the enjoyment of other benefits in the Directive. The Directive also permits that ‘Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application’.⁹² UNHCR has expressed concern that this provision allows for ‘a wide measure of interpretation’ and notes that refugee-specific services, such as legal aid providers, and if possible the asylum seekers’ national or ethnic community, should be found in the location to which the applicants’ movement is restricted.⁹³

50. The EU Directive also allows Member States to make the provision of material reception conditions ‘subject to actual residence by applicants in a specific place’⁹⁴ and requires all asylum seekers within the EU to notify the national authorities of their host State of their current address and of any change in address ‘as soon as possible’.⁹⁵ It further provides, in article 7(5), that asylum seekers can request permission to make temporary visits outside the area to which they are restricted, for personal, health and family reasons as well as for the sake of preparing their application. There is no need to request such permission to keep appointments with the authorities or to go to court. Decisions on such requests ‘shall be taken individually, objectively and impartially, and reasons shall be given if they are negative.’ All EU Member States, except Ireland

⁸⁹ *Amuur v France*, above footnote 9, at para. 48.

⁹⁰ Treaty of European Union (Consolidated Version), Amsterdam, 2 October 1997.

⁹¹ Official Journal of the European Union L 31/20, 6 February 2003. The content of this Directive was strongly influenced by the British and German reception systems, which both include schemes of compulsory dispersal for all asylum seekers, though many European Union Member States do not operate such schemes.

⁹² Art. 7(2).

⁹³ ‘UNHCR annotated comments on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers’.

⁹⁴ Art. 7(4).

⁹⁵ Art. 7(6).

and Denmark, must bring their national law and practice into line with this Directive by 6 February, 2005.⁹⁶

51. Article 22(1) of the American Convention on Human Rights 1969⁹⁷ states: ‘Every person lawfully in the territory of the State Party has the right to move about in it and to reside in it subject to the provisions of the law.’ This right is to be interpreted in conjunction with article 32(2) of the same Convention which establishes that ‘the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society.’ Once again, it should be noted that this right raises issues as to the ‘lawfulness’ of a person’s presence in the territory.

52. The Caracas Convention on Territorial Asylum 1954⁹⁸ also contains standards relating to restrictions on the movement and residence of refugees, which may be imposed for reasons very similar to the grounds for a detention order. This Convention applies to all refugees, including those who enter ‘surreptitiously or irregularly’.⁹⁹ Article 9 of this Convention reads:

‘At the request of the interested State, the State that has granted refuge or asylum shall take steps to keep watch over, or to intern at a reasonable distance from its border, those political refugees or asylees who are notorious leaders of a subversive movement, as well as those against whom there is evidence that they are disposed to join it...’

53. These are highly individualised requirements.¹⁰⁰ Mexico has entered a reservation to article 9 and Guatemala has clarified that it understands ‘internment’ to mean ‘merely location at a distance from the border’. In practice, larger numbers of refugees than were ever envisaged in 1954 have meant the frequent use of camps and settlements and the Inter-American Commission has lamented that regional legal instruments do not fully address such conditions.¹⁰¹

54. Article 12(1) of the African Charter of Human and Peoples’ Rights 1982¹⁰² grants freedom of movement and residence to every individual within the borders of a State Party, ‘provided he [or she] abides by law’. The OAU Convention Governing the Specific Aspects of Refugee Problems 1969,¹⁰³ article 11(6), stipulates that for reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin. The principle that the location of asylum seekers should be determined by their safety and well-being is reiterated in several UNHCR Executive Committee Conclusions (for example, No.22 of 1981) and in the Declaration of Cartagena 1984.¹⁰⁴ It is therefore contradictory that many States cite national security and other public interest grounds to justify restrictions on the residence of refugees near to borders or in remote rural areas.

⁹⁶ This deadline applies equally to the new EU Member States.

⁹⁷ Pact of San Jose, Costa Rica, 1969, 9 ILM 673, entered into force 1978.

⁹⁸ Organization of American States, 29 March, 1954.

⁹⁹ Art. 5 of the Caracas Convention on Territorial Asylum 1954.

¹⁰⁰ Prof. Grahl-Madsen has emphasised the fact that the Latin American treaties, which contain restrictions on place of residence for the purpose of preventing subversive activities against countries of origin (the principle of so-called ‘safe location’), consider these restrictions as applicable only in individual cases where there is clear evidence of involvement in subversion. A. Grahl-Madsen, ‘Political Rights and Freedoms of Refugees’ in Melander and Nobel (eds.), *African Refugees and the Law*, (Uppsala, 1978), p.48.

¹⁰¹ C. Beyani, above footnote 64, at p.125.

¹⁰² 21 ILM 59, 1982, entered into force 1986.

¹⁰³ 1001 UNTS 14691, 1969, entered into force 20 June, 1974.

¹⁰⁴ Published by UNHCR, embodying the Conclusions of the *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*. Entered into force 22 November, 1984.

D. Consistency with other rights

55. Articles 9 and 12 of the ICCPR as described above are the principal provisions governing an individual's rights in relation to freedom of liberty and movement under international human rights law. However, there are also other rights that directly or indirectly are relevant to the treatment of those within detention or subject to other forms of restricted movement. Most notably, ICCPR articles 2 (non-discrimination), 7 (absolute prohibition on torture, and cruel, inhuman or degrading treatment or punishment), 10 (those denied their liberty to be treated with humanity and respect for human dignity), and 17 and 23 (right to privacy and to family life).¹⁰⁵ For children, separation from parents could breach a range of provisions under the Convention on the Rights of the Child.¹⁰⁶ Additional articles include the right to health and to an adequate standard of living in the International Covenant on Economic, Social and Cultural Rights 1966.¹⁰⁷

56. While all forms of detention or restrictions on movement must satisfy the standards enunciated above, article 2 of the ICCPR further prohibits discrimination in the enjoyment of rights under the Covenant. States cannot, therefore, detain or restrict movements of *particular groups* of refugees, based, for example, on their race, ethnicity, or country of origin. This principle is in conformity with the general requirement that any restriction be individually assessed on an ongoing basis.

57. The Human Rights Committee has decided that detaining an asylum seeker who developed a psychiatric illness as a result of a protracted period in immigration detention, and where the State failed to take steps necessary to ameliorate the complainant's mental deterioration, constituted a violation of article 7 of the ICCPR.¹⁰⁸ Failing to provide medical treatment has consistently fallen within the protection of article 7, either alone or in combination with other factors,¹⁰⁹ or at a minimum has violated article 10 in relation to rights to humane treatment. Conditions of detention such as poor sanitation, lack of bedding, cold floors, and/or over-crowding have been held to give rise to breaches of article 7, usually when combined with some form of physical violence,¹¹⁰ or, alternatively, separately or together under article 10.¹¹¹ Separation from family members pending or

¹⁰⁵ On right to family life and asylum seekers, see, K. Jastram and K. Newland, 'Family Unity and Refugee Protection', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 555; A. Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17 *Int'l J. Ref. L.* 1-38 (advance access).

¹⁰⁶ See, e.g., arts. 2(2), 3(1), 5, 9, 12(2), 16, 20(1), 22, 25, and 37.

¹⁰⁷ GA res. 2200A (XXI), 16 December 1966; entered into force 3 January 1976. Arts. 12 & 11, CRC respectively.

¹⁰⁸ *C v. Australia*, above footnote 42.

¹⁰⁹ See, e.g., *Williams v. Jamaica*, HRC Case No. 609/1995 (failure to provide medical treatment to redress serious mental deterioration in a death row inmate constituted degrading treatment); *Linton v. Jamaica*, HRC Case No. 255/1987; *Hylton v. Jamaica*, HRC Case No. 407/1990; *Deidrick v. Jamaica*, HRC Case No. 619/1995 (together with violence, failure to provide medical care).

¹¹⁰ See, e.g., *Hiber Conteris v. Uruguay*, HRC Case No. 139/1983, in which author was subjected to hanging from wrists for ten days, subjected to burnings, and *submarino*. Subsequent treatment in the form of solitary confinement, only a few minutes exercise per day, kept in the coldest part of the prison, and transferred from floor to floor to increase feelings of distrust, were also found to breach article 7, as 'harsh and, at times, degrading conditions of his detention ...'. See, also, *Deidrick v. Jamaica*, above footnote 109.

¹¹¹ See, e.g., *Ramon B. Martinez Portorreal v. Dominican Republic*, HRC Case No. 188/1984, in which the author was detained in a cell measuring 20x5 metres with 125 other prisoners, in overcrowded, hot and dirty conditions. Owing to a lack of space, some detainees had to sit on excrement. He was detained for fifty hours, without food or water on the first day. See, also, *Victor Francis v. Jamaica*, HRC Case No. 320/1988., in which breaches of articles 7 (degrading treatment) and 10(1) were found. In this case, the urine buckets of detainees were emptied on their heads, and his food and water were thrown on the floor, and his mattress was removed from the cell. Similar acts have been found to constitute degrading treatment by the European Commission and Court: see, *Hurtado v. Switzerland*, A 280-A (1994)

after removal has also been asserted by several complainants as in breach of article 7 of the ICCPR. While the HRC has not ruled this out entirely, it seems more likely to consider it under article 10.¹¹² It is possible that similar arguments could be mounted to argue that being separated from family members during extended periods of detention may amount to a form of cruel, inhuman or degrading treatment or punishment, rather than only in breach of articles 17 and/or 23, although this has not, as far as the writer is aware, been tested. Once again, it should be noted that alternatives to detention involving restrictions on freedom of movement need to comply with these other human rights norms just as fully as any deprivation of liberty.

E. Special legal protections for children

58. Persons under the age of eighteen years benefit from and are entitled to enjoy the range of rights outlined above that apply to adults. In addition to these, international human rights law has introduced a number of rights specific to children, which take account of their special vulnerability. In particular, at all times the ‘best interests of the child’ is to be the primary consideration.¹¹³ This means that even in cases where the above described conditions for restricting a child’s rights apply, the question must be asked whether limiting the right(s) in question is in the child’s best interests. As regards detention of children, UNHCR Guidelines on Detention state that ‘minors who are asylum-seekers should not be detained’.

59. Specifically in relation to deprivation of liberty, the Convention on the Rights of the Child 1989 (‘CRC’)¹¹⁴ states that children should only be deprived of their liberty as ‘a measure of last resort’ and for the shortest period of time.¹¹⁵ This requires that all possible alternatives, including unconditional release, must be reviewed prior to a final determination on a full deprivation of liberty. In those cases where a child is detained, he or she shall have the right to prompt access to legal and other appropriate assistance, as well as to challenge the legality of his or her detention before a court or other competent, independent and impartial authority, and to a prompt decision.¹¹⁶ These provisions are not limited to unaccompanied or separated minors, but apply to all children.

60. Difficult questions arise where a decision is taken to detain one or both parents of a child. As in all cases involving children, their best interests will remain of paramount importance. It is arguable that decisions to detain asylum seeking adults who arrive with children ought therefore to be taken in only very exceptional circumstances, as the consequences on other rights, including the rights of their children, must be balanced. Any decision to separate a child from his or her parents against the child’s will must be subject to judicial review.¹¹⁷ Any judicial review must be effective, that is, the court must have the power to order release or reunification. In addition, any child who is

Com. Rel. F. Sett before Court, in which the applicant defecated in his trousers because of the shock caused by a stun grenade used during his arrest. He was not able to change his clothing until the next day and after he had been transported between buildings and questioned. The Commission declared this to be degrading treatment. See, for further cases, D.J. Harris, M. O’Boyle and C. Warbrick, above footnote 30, at pp. 83-84.

¹¹² See, e.g., *Francesco Madafferi et al. v. Australia*, HRC 1011/2001, separation from family pending removal would cause psychological and financial problems. HRC found violation of article 10(1), but did not address article 7. See, also, *Charles E. Stewart v. Canada*, HRC Case No. 538/1993, the complainant asserted that enforcement of a deportation order resulting in the permanent separation of an individual from his family and/or close relatives, and banishment from the only country the author ever knew and in which he grew up, amounts to cruel, inhuman and degrading treatment. The HRC declared the claim to be inadmissible on the basis of a lack of substantiation of the claim.

¹¹³ Art. 3, CRC.

¹¹⁴ To date, only two States have not become parties to the CRC: namely, the United States of America and Somalia.

¹¹⁵ Art. 37(b), CRC.

¹¹⁶ Art. 37(d), CRC.

¹¹⁷ Art. 9(1), CRC.

placed in care is entitled to periodic review of treatment provided to him or her and all other circumstances relevant to the placement.¹¹⁸

61. Moreover, article 22(2) of the CRC requires that separated asylum-seeking children should enjoy all the protections for children deprived of their family environment contained in the CRC. Where a child is temporarily or permanently deprived of his or her family environment, or where it is in his or her best interests not to be allowed to remain in that environment, he or she shall be entitled to special protection and assistance.¹¹⁹

62. Protection concerns related to the issue of child trafficking are highlighted in various places throughout this study. In particular, the CRC offers a number of provisions that require States to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence and exploitation.¹²⁰

F. Analogous standards for non-custodial measures in the criminal justice field

63. Many binding human rights standards are reflected in the content of the United Nations Standard Minimum Rules for Non-Custodial Measures (the ‘Tokyo Rules’),¹²¹ which are the most comprehensive statement of principles relating to non-custodial measures in the criminal justice field. There is to date no equivalent set of rules relating to alternative measures in the immigration or asylum fields, although the Tokyo Rules are instructive by analogy. However, this should not obscure the fact that very few asylum seekers held in detention have committed offences other than violations of national immigration laws. Penalties imposed on asylum seekers for such violations may contravene article 31 of the 1951 Convention as stated above.

64. Rule 3.6 of the Tokyo Rules states that the person upon whom the non-custodial measure is imposed should be entitled to make a complaint or request regarding that measure. Rules 3.9–3.12 require that supervision shall not be carried out in a way that would harass the subject of the non-custodial measure, or jeopardise their dignity or intrude upon their privacy or that of their families. Methods of supervision that treat supervised persons solely as objects of control should not be employed. Surveillance techniques should not be used without the person’s knowledge, and third parties other than properly accredited volunteers should not be employed to conduct the surveillance.¹²²

65. Rule 7 of the Tokyo Rules relates to ‘social inquiry reports’ which are compiled for individual criminal offenders, relating to their past and present circumstances, so that the suitability of an

¹¹⁸ Art. 25, CRC.

¹¹⁹ Art. 20(1), CRC.

¹²⁰ Art. 19, CRC. See, also, arts. 11, 32, 33, 34, 35 & 36, CRC. See also the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000 which entered into force on 18 January 2002.

¹²¹ The Tokyo Rules (adopted by General Assembly resolution 45/110 of 14 December 1990 – A/RES/45/110) are the result of global discussion and exchange of experience, pursuant to Section XI of the Economic and Social Council Resolution 1986/10. It is widely recognised, in view of the individual and social harm caused by incarceration, that pre-trial detention should be used only as a last resort where there exists a danger of the accused absconding, interfering with the course of justice or committing a serious offence. In the case of an asylum seeker, the negative effects of detention may be compounded by the possibility of previous arbitrary detention and/or torture in the country of origin.

¹²² Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), UN Doc. ST/CSDHA/22, 1993, p. 13.

alternative may be considered in the individual case.¹²³ Rule 10.3 states that not only detention, but also ‘supervision ... should be periodically reviewed and adjusted as necessary’. The commentary on this Rule then adds that the important element is the personal relationship between the supervisor and the person supervised. It describes supervision as a ‘highly skilled task’, combining a control function with a welfare function. ‘Parts of the supervisory task may be delegated or contracted out to the community groups or volunteers’ while statutory power remains with the State authorities.

66. Rule 12.3 of the Tokyo Rules relates to the quality of information provided to the person who is the subject of the non-custodial measure. It notes that well explained obligations are more likely to be met. Rule 14.3 instructs that ‘[T]he failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.’ It comments that minor transgression can be handled by a good supervisor and that factors to consider include whether the non-compliance takes place at an early stage or after a period of time during which there was full compliance. Factors beyond the person’s control should be taken into account.

67. Rule 15.1 includes a statement of good practice in relation to alternatives to imprisonment in the criminal justice field, namely that ‘policy regarding staff recruitment should take into consideration national policies of affirmative action and reflect the diversity of the [persons] to be supervised’. Rule 17 encourages public participation in alternatives to detention and notes that ‘ethnic organisations’ can be a resource. Rule 19 similarly describes the role of volunteers, regarding them as working on behalf of the State and therefore requiring training, recognition and reimbursement of costs incurred. Rule 18.1 implies that the government should look favourably on funding nongovernmental schemes to secure release of detainees. Rule 20 encourages research and experimental projects in this field, and Rule 21 stresses the importance of evaluation. All these considerations apply equally, if not more so, to the search for alternatives to detention of asylum seekers.

G. Summary

68. Regional and international standards, taken together, provide a range of safeguards in relation to both detention and lesser forms of restrictions on the freedom of movement of asylum seekers and refugees, many of the latter being used as alternatives to detention.

69. The conditions in which international law permits the use of detention are set out in article 9 of the ICCPR. This provision prohibits arbitrary detention. It applies to all persons regardless of their status. Severe restrictions on freedom of movement which amount to a deprivation of liberty may come within the scope of article 9. In order for detention not to infringe this provision it must:

- a) be authorised by law;
- b) be reasonable and necessary in all the circumstances (including proportionate and non-discriminatory);
- c) be subject to periodic review;
- d) be subject to judicial review.

70. The consideration of alternative, non-custodial measures is a prerequisite for satisfying the principle of necessity in relation to lawful detention.

¹²³ At the moment it is extremely rare for specific evidence of an individual asylum seeker’s likelihood of absconding to be produced by any national authorities, and many of the alternatives to detention examined in this study include a much greater emphasis on case-by-case consideration of such individual evidence.

71. In addition, the conditions of detention as well as the treatment of persons deprived of their liberty must conform to relevant human rights standards. Moreover, should an individual be arbitrarily detained, he or she is entitled to compensation, per articles 9(5) and 2(3) of the ICCPR.

72. The right to freedom of movement as guaranteed under international human rights law is enshrined in article 12 of the ICCPR. This provision applies to individuals lawfully within the territory of a State party. Recognised refugees are covered and it is arguable that asylum seekers who have been admitted to the territory for the purposes of applying for asylum or who have registered their claim are also ‘lawfully present’. This is supported by article 31 of the 1951 Convention, which prohibits the penalisation of refugees and asylum seekers on account of their illegal entry or presence.

73. Under international human rights law, any restriction imposed on the freedom of movement of anyone lawfully within the territory (including asylum seekers), must:

- a) be provided by law;
- b) be necessary for one of the prescribed grounds (that is, to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others) and in proportion to the legitimate purpose;
- c) not cause the violation of other rights, such as not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, the right to health, or the right to enjoyment of family life;
- d) not be discriminatory.

74. Any restriction on freedom of movement imposed on asylum seekers who are not lawfully present under article 31(2) of the 1951 Convention must:

- a) be provided by law;
- b) be necessary;
- c) not be discriminatory;
- d) be applied only until status is regularised or until the person obtains admission into another country.

75. There is very little real difference in the scope of protection offered under Article 12(3) of the ICCPR and Article 31(2) of the 1951 Convention given that ‘necessary’ in relation to the latter is commonly seen as referring to one of the exceptions listed in the former as well as other provisions of the ICCPR.

76. Alternatives that restrict the freedom of movement of persons found not to be in need of international protection must also meet certain legal requirements, though the legitimate purpose behind the restriction will differ from that of the legitimate purpose for restricting the movement of an asylum seeker. As the standards relating to detention apply to all persons, regardless of their status, they also apply to failed asylum seekers. In so far as other forms of restrictions on movement are concerned, it would appear from case law that the safeguards in article 12 of the ICCPR would not generally apply to failed asylum seekers, but would apply where an individual is allowed to remain in a country because the host State is unable to carry out an expulsion or deportation order. As a consequence, any restrictions must be justified according to one of the listed grounds in article 12(3).¹²⁴

¹²⁴ *Celepli v Sweden*, above footnote 29.

77. All alternatives to detention of asylum seekers, whether or not they restrict freedom of movement, must comply with a wide range of other human rights standards relating, for example, to humane standards of treatment and protection of children. It is an increasingly recognised principle of international law that States parties are bound by many of these obligations whether the alternative to detention is implemented within or beyond their own territory when it concerns a person who is within the power or effective control of that State.¹²⁵

78. There are also international standards related to alternatives to detention in the criminal justice field, which are referenced here in order to seek analogous guidance – for example, the Tokyo Rules, article 9(3) ICCPR¹²⁶ and article 40(4) CRC.

III. ALTERNATIVES TO DETENTION IN PRACTICE

A. Overview of alternative measures

79. This study reviews a number of alternative measures to detention, ranging from the least intrusive to the most enforcement-oriented. In doing so, it elaborates upon those enumerated in the UNHCR Guidelines on Detention.¹²⁷ Prior to listing the alternative measures covered by this study, however, it is important to mention ‘unconditional release’. Rather than categorising it as an ‘alternative’ within the list below, it should be regarded as the normative starting point against which all other measures ought to be compared in order to assess their legality (see above Part II on applicable legal standards). It is equally important to take account of the fact that while the below mentioned measures are viewed as alternatives to detention for ease of categorisation for the purposes of this study, it ought to be borne in mind that should any of the measures be applied unreasonably, unnecessarily, or disproportionately, or without due regard to individual factors, a particular measure could amount to an unlawful restriction on movement or an arbitrary deprivation of liberty.

80. The following alternatives to detention were encountered in the course of the present study:

- a) Release with an obligation to register one’s place of residence with the relevant authorities and to notify them or to obtain their permission prior to changing that address;
- b) Release upon surrender of one’s passport and/or other documents;
- c) Registration, with or without identity cards (sometimes electronic) or other documents;
- d) Release with the provision of a designated case worker, legal referral and an intensive support framework (possibly combined with some of the following, more enforcement-oriented measures);
- e) Supervised release of separated children¹²⁸ to local social services;

¹²⁵ HRC General Comment No 31, above footnote 27.

¹²⁶ Article 9(3), *inter alia*, highlights the use of non-custodial alternatives: ‘It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...’

¹²⁷ See above footnote 2, Guideline 4.

¹²⁸ ‘Separated children’ are children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal/customary primary caregiver/s. Separated children may be seeking asylum because of fear of persecution or the lack of protection due to human rights violations, armed conflict or disturbances in their own country. This term distinguishes these children from ‘unaccompanied minors’ because often a separated child arrives in the company of an adult but that adult may not necessarily be a suitable guardian or be able to assume responsibility for their care.

- f) Supervised release to (i) an individual, (ii) family member/s, or (iii) nongovernmental, religious or community organisations, with varying degrees of supervision agreed under contract with the authorities;
- g) Release on bail or bond, or after payment of a surety (often an element in release under (f))
- h) Measures having the effect of restricting an asylum-seeker's freedom of movement (that is, *de facto* restrictions) – for example, by the logistics of receiving basic needs assistance or by the terms of a work permit;
- i) Reporting requirements of varying frequencies, in person and/or by telephone or in writing, to (i) the police, (ii) immigration authorities, or (iii) a contracted agency (often an element combined with (f));
- j) Designated residence in (i) State-sponsored accommodation, (ii) contracted private accommodation, or (iii) open or semi-open centres or refugee camps;
- k) Designated residence to an administrative district or municipality (often in conjunction with (i) and (j)), or exclusion from specified locations;
- l) Electronic monitoring involving 'tagging' and home curfew or satellite tracking.

81. Most of the above alternatives are used either for the full duration of an asylum determination process and if necessary, through the pre-removal stage, or for only a portion of the process.

82. Alternatives to detention ought to be distinguished from the general safeguards of due process and other formal channels through which a detained asylum seeker may secure his or her release under a specific legal regime (e.g. automatic review of detention, appeal rights, set limits on the duration of detention, ministerial discretion, etc). There is, however, a very close relationship between the two – particularly in systems where detainees are permitted to apply for release on bail or bond, or where the necessity and proportionality and hence the lawfulness of the detention order is reviewed with reference to available non-custodial alternatives.

83. At their most basic, 'alternatives' are often simply those places where asylum seekers, including those who had been formerly detained, are permitted to reside. In this study, all centres not specified to be detention centres are to be presumed to be open or semi-open centres, meaning that they commonly allow the residents to leave the premises at will, for periods of time, albeit with notification to the managers. This study has identified a type of centre emerging in a number of countries, that is, semi-open centres where, for example, permission for day release remains at the discretion of the centre's management or where residents live in the same premises but under different rules. Their legal status is not always easy to determine, given that they may in practice operate as any other open centre with some restrictions on residents, but the legal framework may indicate that the residents are in fact 'detainees'.

84. In terms of legislation and regulation, models that treat decisions to apply alternative measures and decisions to detain as part of one continuum and one procedure are to be commended for the emphasis they place upon applying the tests of proportionality and necessity at every stage. A number of European countries, particularly the Nordic States and Switzerland, have legislation reflecting such a continuum. This is in line with principles of European human rights law. The Refugee Law of Lithuania contains an especially strong safeguard requiring a court to set a time limit, not exceeding twelve months, for the application of each alternative measure. Other legal safeguards relevant to detention are similarly applied to the enumerated alternative measures.

85. This continuum is also the foundation of New Zealand policy where, according to the New Zealand Immigration Service ('NZIS') Operational Instruction to immigration officers, both a decision to detain as well as any decision to apply alternative measures or to grant unconditional

release, is to be periodically and promptly reviewed in light of changing circumstances affecting an individual asylum seeker. The same approach is recommended in three alternative proposals to the current Australian policy of mandatory detention.¹²⁹ Each proposal foresees varying levels of restriction, against which an individual's likelihood of absconding should be constantly reviewed. These models require that the necessity of a rights-restricting alternative measure be questioned, in individual terms, as much as the necessity of detention.

B. Alternative measures in practice

86. The following section provides an overview of selected alternatives to detention primarily from the standpoint of their practical *effectiveness* in meeting those objectives that States might otherwise meet, legitimately or illegitimately, by means of detention. In particular this section looks at the success or otherwise of various alternative measures in preventing absconding and ensuring compliance with asylum procedures. There are two main difficulties with undertaking such a review. First, statistics are incomplete, and second, it is not always possible to identify the actual reasons for the success of a particular program. Having said this, however, some attempt is made to identify methods that appear to have a positive impact on appearance rates.

87. One of the most commonly cited policy reasons given by States for detaining asylum seekers or imposing other restrictions on their freedom of movement is to prevent absconding and, correspondingly, to ensure compliance with asylum procedures. As stated above, 'likelihood of absconding' or 'lack of cooperation' have been accepted by the Human Rights Committee as grounds for detention in individual cases provided that all other legal requirements are met.¹³⁰ Presumably, therefore, they are equally acceptable grounds for imposing lesser restrictions on an individual's freedom of movement. The usual legal tests justifying the imposition of such measures would need to be satisfied in each and every case (See Part II above). Prevention of absconding itself is cited as a ground for detention in the texts of several national laws and in certain States' internal guidelines and regulations for immigration officers, as well as informally by some governments as their over-arching reason for detaining, or restricting the movement of, asylum seekers.

88. There is no consensus on what may be, in policy terms, an acceptable rate of compliance with a refugee status determination procedure. In the criminal justice field, compliance figures for felony defendants who are released under non-custodial measures before trial usually range from 40-70%. This study, therefore, assumes that any alternative measure applied to asylum seekers to ensure their appearance that achieves a success rate over 80% can be considered 'effective'. Any improvement in the compliance rate that a specific alternative can make in comparison to the average rate at which other asylum seekers abscond in the same country, is considered worthwhile.

89. The present study, however, is hampered by a remarkable scarcity of official data, at least in the public realm, relating to the number of (non-detained) asylum seekers, and failed asylum seekers, who abscond. Only a few host countries keep records of these statistics in a comprehensive and systematic way, and most States do not even attempt to collect or compile them. In light of this

¹²⁹ See, The Human Rights and Equal Opportunities Commission, ('HREOC'), the Refugee Council of Australia, and Justice for Human Rights.

¹³⁰ This interpretation of 'likelihood of absconding' and 'lack of cooperation' as factors justifying detention was confirmed by the Human Rights Committee in *A v Australia*, above footnote 39, at para. 9.4. See also: Para 11(b), Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees, November 2001, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds. Feller, Türk, Nicholson, Cambridge University Press, 2003, pp. 253-258. Also available on UNHCR website.

scarcity of statistical data this study often cites figures from those UNHCR offices that conduct refugee status determination procedures under the organisation's mandate, from academic studies, or from nongovernmental projects and lawyers who have tracked their own clients' actions. What national statistics are available usually do not distinguish between failure to appear at each of the various stages of the determination procedure, and failure to comply with a removal order – a crucial difference in terms of designing effective alternatives to detention and knowing when they can and should be relied upon to work. The scarcity of governmental statistics with regard to those who abscond severely weakens the empirical evaluation of one form of conditional release in comparison to another.¹³¹

90. The information in this study confirms the rather common sense conclusion that compliance of asylum seekers prior to receipt of a final decision on their claim is not a significant problem in the world's major 'destination' countries. People go to extreme lengths to enter these territories and to access their asylum systems, and have no obvious reason to disregard or abandon such systems so long as they have any hope of gaining legal status or some right to remain. The evidence suggests that alternatives to detention, including unrestricted stay in the community, are likely to achieve high rates of success in 'destination' States, at least until the final pre-removal stage, if applicable.

91. In a statistical survey of 76 countries relating to the first quarter of 2003, 20% (5,600 of 27,700) of all applications were closed for non-substantive reasons.¹³² From this figure it is apparent that most asylum applicants do not abscond prior to a rejection of their claim. An asylum seeker who may pose a flight risk in one country may pose none whatsoever in the country to which he or she is prevented from travelling (that is, his or her preferred final destination). Destination States should, therefore, be able to implement effective alternatives to detention, including unconditional release or admission to the community with only the minor duties to report addresses and appear for appointments. These alternatives ought to be implemented at least until their claim has been failed and they are required to be returned to their country of origin.

1. Bail, bond or surety

92. The terms 'bail', 'bond' and 'surety' are interlinked and are often used interchangeably. For the purposes of this study, the term 'bail' is used to denote a financial deposit placed with the authorities in order to guarantee the asylum seeker's future attendance for interviews during the processing of his or her case. This means that the sum of money is returned if the asylum seeker appears as required or it is otherwise forfeited. The term 'bond' is used to denote a written agreement, sometimes with sureties, guaranteeing the faithful performance of acts and duties, which may, in the case of an asylum seeker, include future attendance at interviews, inquiries and/or removal proceedings, and/or regular reporting requirements. The term 'surety' applies where a person vouches for the appearance of an asylum seeker and agrees to pay some or all of the agreed amount (the 'surety')¹³³ if the asylum seeker absconds. No amount is required to be paid upfront.

¹³¹ Appearance statistics are notoriously difficult to interpret since, in most places, no one can say whether a high percentage of appearances among those released was only attained because they were rightly designated as posing little flight risk, or whether a number of those who simultaneously remained in detention would also have appeared and complied if they had been released. Only pilot projects that experiment with the release of those designated as high flight risk cases can begin to produce data that answers this question.

¹³² Trends in RSD in 76 Countries (first quarter 2003), UNHCR statistics, 4 July, 2003.

¹³³ Note also that in some contexts the person vouching for the asylum seeker is also called the 'surety'.

93. The right to apply for release on bail, bond or surety is often closely linked to supervision by an individual resident or citizen, usually a family member, or by an organisation. In Canada, for example, where an independent adjudicator mediates between the immigration department and the asylum seeker to establish what conditions of release should be set, the State-funded Toronto Bail Program works to maximise the accessibility of bail by offering to supervise those who have no family or other eligible guarantors/sureties able to offer bonds. So long as the asylum seeker's identity has been established, and if they have met a number of other criteria, the Program may request release of a detainee, without bond, into its supervision. This supervision is conducted primarily by means of regular reporting requirements and unannounced visits to the asylum seeker's residence. The Bail Program has had an extremely high rate of success with its client base composed primarily of asylum seekers and persons found not to be in need of international protection, who would otherwise be regarded by the Canadian authorities as representing a high flight risk (91.6% compliance for Fiscal Year ('FY') 2002-2003).

94. It is also notable that several homeless shelters in Toronto volunteer their addresses at bail hearings of those asylum seekers who have nowhere to live, and that these shelters achieve equally high rates of compliance but without the intensive supervision undertaken by the Toronto Bail Program. The shelters merely support the former detainee with services, and often operate a curfew, but do not play any other surrogate enforcement role. They all ensure that the asylum seekers have legal counsel. Hamilton House, for example, reports that 99% of its residents have complied with the full asylum procedure; Matthew House reports that only three of 300 residents have disappeared from its premises in the past five years; Sojourn House reports that only two of 3,600 asylum seekers who have stayed there in the past six years have disappeared from its premises and from the asylum procedure. This suggests that asylum seekers in Canada, including those released on bail or bond, are generally compliant with the asylum procedure prior to receiving a final decision, especially when they are referred to competent legal representatives. The few individuals who absconded from these shelters were almost all persons known to have family in the United States. These shelters, however, usually do not see the asylum seeker through to the removal stage and so cannot comment on the compliance rate of failed asylum seekers with orders of deportation.

95. In the United Kingdom, there are two types of bail available to immigration detainees. They may apply to either (a) the UK Immigration Service or (b) an adjudicator/the Immigration Appeals Tribunal, although there is no automatic right to a bail hearing. In addition, strict means and merits tests applied to applications for legal aid contribute (along with the sheer difficulty of contacting a lawyer while in detention) to making bail an inaccessible remedy for many detainees. In response to this, two nongovernmental organisations, Bail for Immigration Detainees ('BID') and the Bail Circle, work to bring some equity to the system by offering bail, though their services are overwhelmed by demand. A British academic study that monitored 98 asylum seekers released on bail to BID (and therefore considered relatively 'high flight risks' by the UK Immigration Service) between July 2000 and October 2001, found that only 8-9% attempted to abscond. The median amount of sureties paid in these cases was only £250 and they were released on standard conditions, that is, notification of change of address and regular reporting. UK ports of entry indicate that of those granted 'temporary admission' (that is, they are not detained upon entry) only 3-12% of asylum seekers subsequently fail to reappear for their appointments. Again, this suggests not that BID improves the rate of compliance dramatically by its actions – indeed they do not aim to monitor their clients post-release – but rather that BID (through provision of legal representation to asylum seekers at their bail hearings) facilitates the release of asylum seekers. There is no information from the UK Home Office on what constitutes a 'normal' risk of absconding.

96. Other research in the UK suggests that families with children are even less likely to abscond due to incentives to remain in a system which, for example, provides free health care and education. As with Canada, the high compliance rates in the UK may be due to the general conditions of the country, in particular that it is a 'destination' rather than a 'transit' State for the vast majority of asylum applicants and State support is available throughout the procedure (at least for those who apply for asylum at ports of entry). The United Kingdom, furthermore, has a distinct bail regime – referral to the Special Immigration Appeals Commission – to examine detention based in any part on the grounds of a threat to national security.¹³⁴ The concept of a specialised body competent to handle evidence relating to such cases, and to grant release on bail and other conditions, is worth noting.

97. In Japan, asylum seekers may be released from detention on 'provisional release', which can be granted on a discretionary basis, so long as the detainee can present evidence of financial self-sufficiency, alternative accommodation, and can post a bond. The maximum amount requested as bond/bail is 3 million yen (US\$25,000-30,000). The number of detainees released to date has been too few for their compliance to be analysed statistically, but of those asylum seekers who apply while lawfully present in Japan and who are therefore not detained, 96% complied with the procedure in 2001 and 95% in 2002. These are especially impressive figures in a country where the recognition rate has been very low and where several serious inadequacies in the current refugee status determination procedure are known to exist. The system does favour wealthier asylum seekers.

98. As a model for how the international exchange of experience relating to bail provisions might work, the Open Society and Soros Foundation-Latvia justice initiative in Latvia is of interest.¹³⁵ It aims to promote bail supervision as an alternative to pre-trial detention. Since experience from transitional democracies indicates that it is usually unhelpful to establish a separate national probation service, the model developed in Latvia uses the local municipality as the supervisors of community service sentences. Special units of supervisors have been established and these supervisors have attended a training conference of international experts.¹³⁶

99. The Vera Institute of Justice was invited by the United States' government to conduct a three-year pilot project (1997-2000) to supervise the release on parole of selected detainees, including asylum seekers, with the intention to increase their rate of appearance. Vera's Appearance Assistance Program found that 84% of asylum seekers who were put under 'regular supervision' (mainly support services and referrals, with reminder letters and telephone calls) appeared for all their hearings, as compared to 62% of asylum seekers whose actions post-release were tracked as part of a non-participant control group. However, it should be noted that there was a subgroup in the non-participant group who were intent on transiting to Canada, and were it not for this subgroup, the non-participants would have appeared at a similarly high (over 80%) rate. Vera also found that asylum seekers under 'intensive supervision' appeared for their hearings at a high rate, but not higher. Based on these results, the Vera Institute concluded that asylum seekers with decisions still pending do not need to be detained to ensure their appearance, but moreover '[t]hey also do not seem to need intensive supervision.' The high (84%) rate of compliance revealed by Vera's work is

¹³⁴ Under the Anti-Terrorism Crime and Security Act 2001, the UK government may detain a 'suspected international terrorist' under immigration powers, without criminal charge, and this detention may extend indefinitely if the person can not be removed because his removal would breach article 3 ECHR: a measure which has required the United Kingdom to enter a derogation from article 5(1) ECHR.

¹³⁵ Latvia has the second highest rate of pre-trial detention in Europe (after Albania).

¹³⁶ University of Nottingham Human Rights Centre, *The Development of Alternative Sentences to Imprisonment in Ukraine: A Concept Paper*, May 2003, p.17.

mirrored by US Department of Justice statistics reported to this study for FY2003, which showed the nationwide rate at which non-detained asylum seekers appeared for their hearings to be 85%. This figure relates only to those whose claims were examined by an Immigration Judge – in other words, those who claimed ‘defensively’ after being apprehended for illegal presence and others whose claims were initially rejected by administrative adjudication. The figure, in other words, would undoubtedly be even higher if those who claimed asylum ‘affirmatively’, while legally in the US, were included.¹³⁷

100. The Vera findings are also confirmed by the experience of smaller, nongovernmental projects in the United States. These projects have provided volunteer sponsors/sureties and a fixed place of accommodation which asylum seekers can offer at their parole hearings. This has created opportunities for asylum seekers to benefit from alternatives. International Friendship House in Pennsylvania, for example, has had one resident who absconded (of some 100) in the past four years, and a community ‘circle’ of sponsors in the same area has housed 45 asylum seeker parolees over the past five years, none of whom has absconded. The Lutheran Immigration and Refugee Service managed an experimental project in 1999 which allowed the parole of 25 Chinese asylum seekers without sureties, and achieved a 96% appearance rate for that small but ostensibly ‘high flight risk’ group. The Refugee Immigration Ministries in Boston similarly reports that they have sponsored the parole of 45 asylum seekers over the past three years, all of whom have complied with the conditions of their parole and appeared for their hearings. It should be noted that only one of the latter 45 claimants was not granted asylum, which is certainly higher than the national recognition rate, and reflects the fact that the organisation generally chooses to support the parole of those persons it considers to be most in need of protection.

101. Incentives to comply with the asylum procedure analogous to those in ‘destination’ States can be created in predominantly transit countries; for example, if asylum seekers or refugees who are released on bail can shortly expect, once recognised, to be resettled to other countries. In Thailand, for example, there are very high bond amounts demanded and a great deal of ‘red tape’ in the bail application procedure, but a small number of recognised refugees have secured release on bail and to date none of them has absconded. This is considered to be because they have the tangible incentive of awaiting overseas resettlement.¹³⁸

2. Reporting requirements

102. In some countries, reporting is required of all or most asylum seekers not in detention. In those cases where this constitutes a limitation on an individual’s right to free movement within a country (that is, frequent reporting in person), legally it needs to be justified as necessary and proportionate to its stated objectives in each individual case. In the United Kingdom, the traditional bail condition that former detainees should report to the police has been combined, under recent legislation, with a wider duty for all asylum seekers receiving State support but living independently to report to special ‘reporting centres’. These centres monitor asylum seekers living within a 25 mile or 90 minute radius, but a ‘mobile centre’ has also been established. The authorities may also visit an asylum seeker’s accommodation where reporting is prohibitively difficult. No information is yet publicly available as to whether these new UK reporting requirements are increasing the national rate of compliance with the asylum procedure, though it is

¹³⁷ See US Country Section for explanation of the distinction between ‘defensive’ and ‘affirmative’ asylum applications.

¹³⁸ Bail is not available, however, to asylum seekers awaiting determination of their claims by UNHCR – a group very commonly arrested on grounds of illegal entry/stay – nor is it available to those detained in the ‘special detention centre’ near Bangkok.

believed that compliance is very high due to the fact that receipt of State assistance is conditional upon it.

103. Other countries, such as France, Luxembourg and South Africa, require asylum seekers to present themselves in person to renew their identity documentation. Depending upon the frequency with which an asylum seeker must renew his or her papers, it may form a kind of *de facto* reporting requirement. Luxembourg requires all asylum seekers to present themselves every month at the Ministry of Justice where they renew their asylum permits, needed to access monthly financial support. South Africa similarly requires asylum seekers to renew their permits every month, usually at the original office of application. This process is not for the purposes of accessing support but simply to check that they remain available. South African law also provides for the imposition of reporting requirements, however, they are not applied in practice.

104. A larger number of countries have provisions that may require particular released asylum seekers to report to the police or immigration authorities at regular intervals. Often reporting obligations are a condition of release on bail or bond, or 'parole', as in Thailand, Japan, Canada, and the United States. In Ireland, recent legislation introduced reporting requirements as one condition of release that may be applied. Should the condition be breached, it could carry a penalty of a fine or imprisonment. These reporting requirements may be seen as an additional restriction placed upon those asylum seekers who previously would have been released into the community without restriction, to better ensure their compliance with the system. They aim to tackle a comparatively high rate of non-compliance in Ireland (35% of asylum seekers failed to appear at the first instance in 2002, and 30% in 2003, as of November). In Australia, on the other hand, refugee advocates call for greater use of reporting (a condition of release on a particular class of visa) as a more lenient measure than the current system of mandatory detention of all asylum seekers having entered Australia without authorisation. Between February 2001 and February 2003, a nongovernmental organisation in Melbourne, named Hotham Mission, conducted research to track 200 asylum seekers (111 'cases' including families) living in the community on Class E bridging visas, of whom 31% were former detainees. Hotham Mission reported that not one asylum seeker of the 200 absconded during the two year period, despite the fact that 55% had been awaiting a decision for four years or more, and despite the fact that 68% were found to be at risk of homelessness or were in fact homeless.¹³⁹

105. As with most alternatives to detention, the possibility of imposing reporting requirements appears to be underutilised as a measure to be considered prior to and in place of detention, particularly in specific cases where there is deemed to be some moderate degree of flight risk. In Austria, for example, the law provides for *Gelinderes Mittel* (translated as 'more lenient measures'), which in practice means the requirement to report every second day and also to live in an assigned residence, with the threat of detention if the measures are breached. The authorities are obliged to apply such measures to minors, unless they can prove that such measures would be insufficient. During 2003, however, measures of a more lenient nature were applied to only 622 aliens (not solely, and probably not mainly, asylum seekers) in Austria. Statistics regarding the effectiveness of these measures in terms of ensuring compliance are not available. In Greece, weekly or fortnightly reporting requirements ('alternative restrictive conditions') are more explicitly stated to be applicable only to cases of vulnerable persons who may be released from detention by court order. UNHCR and nongovernmental advocates are involved in referring such cases. This study has received no information on the frequency of these orders or the compliance of those under them.

¹³⁹ In FY1995-97, no asylum seeker absconded from reporting requirements in Australia, and in FY1994 only 4.3% of asylum seekers breached their reporting requirements and 1.6% forfeited their sureties.

106. Similarly, in Scandinavia, the impressive lists of ‘alternatives to detention’ contained in national legislation are not, according to refugee organisations in those countries, applied in practice. In Denmark, the Aliens (Consolidated) Act contains reporting requirements that are, according to Danish asylum lawyers, very rarely applied to their clients. The Aliens Act of Finland also contains reporting requirements seldom used or even considered in practice, though the principle of proportionality (to limit each alien’s rights no more than necessary) is explicitly stated. The same is true in Norway. The conditions for placing an alien, including an asylum seeker, in detention and keeping him or her under supervision are all part of a single structure of considerations under Section 5, Chapter 6 of the Aliens Act of Sweden. Again, the starting point for the authorities is that they should not take more restrictive measures than are necessary in an individual case, but in practice certain regions of the Swedish Migration Board impose the measures of reporting and supervision in lieu of detention far less frequently than others. Such non-implementation of alternative restrictions is not a pressing policy concern so long as orders of detention are also relatively rare, but if alternatives are not fully considered by decision makers a detention order may be unlawful. The same high standards of excellent legislative clarity, combined with lack of implementation to date, perhaps due to lack of administrative capacity, appear to have been exported to Lithuania and are paralleled by a similar non-implementation of ‘designated residence’ provisions in Romania.

3. Open centres, semi-open centres, directed residence, dispersal and restrictions to a district

107. In Europe, asylum seekers awaiting first decisions on their claims are generally not detained. The measures described below, therefore, are generally part of national reception arrangements, not alternatives to detention *per se*. They are described to demonstrate that well-organised reception arrangements can have the effect of improving compliance with the asylum procedure. Open centres, semi-open centres, directed residence, dispersal and restrictions to a specified district are measures so frequently used in combination in European States that their effectiveness cannot be evaluated separately.

108. For the purposes of this section, it is important to distinguish between ‘reception centres’ and ‘accommodation centres’. ‘Reception centres’ refers to collective centres where asylum seekers may stay temporarily soon after arrival or application, whereas ‘accommodation centres’ are collective centres where they reside for either the partial or full duration of the asylum procedure. In practice, such centres can range from a camp accommodating hundreds to a small hostel accommodating no more than four or five persons – for example, a shared house, a bail hostel staffed with a rota of supervisors, or a night shelter run by a charity or church.

109. Germany operates a reception system that includes allocation to large collective accommodation centres as well as restrictions on movement to the district of the federal state in which the centre is located. Exceptions to this rule are authorised. Practice varies by federal state, but generally asylum seekers are not supposed to travel outside their district of assigned residence (some districts are no larger than 15 sq km) without special permission from the competent local aliens authority. They are subject to detention as a penalty if they do so. While the number of asylum seekers in Germany who fail to appear for their interviews is negligible (less than 5%), it is debatable whether this is a result of the restrictions on their movement or a result of the comprehensive provision of social support and the fact that Germany is a ‘destination’ State where asylum seekers want to remain. Switzerland operates a similar system of dispersal to its Cantons and residence in open centres for those who require State support. In contrast to Germany, however, asylum seekers can travel outside their allocated Canton without requesting permission (but do so at

the risk of missing a notification on their case, and hence perhaps a deadline for lodging an appeal). Moreover, the Swiss authorities may view leaving an assigned centre without a forwarding address as evidence that the person will fail to cooperate with deportation at a later stage, and hence as evidence in support of a detention order at that time.

110. Bulgaria operates open centres where residents must request permission for any absence of longer than 24 hours. In-country applicants must register at the centres even if not residing there, and asylum seekers who do not require State support may live independently. The centres are therefore intended more as a way of supporting destitute applicants than of ensuring compliance. Thus, in the decade between 1993 and 30 December 2003, 41.5% of asylum seekers in Bulgaria absconded and had their claims discontinued, a fact that can arguably be attributed to it being largely a ‘transit’ State during that period (with recognised refugees also disappearing west due to limited integration prospects). In Hungary, there used to be a system of fully open centres, but this was modified because of a 70% absconding rate; this was during the period when Hungary was predominantly a transit State. Now there are semi-closed centres, with an initial two to four weeks of ‘quarantine’ detention (for medical, identity and other checks) followed by a period of accommodation during which freedom of movement is not formally restricted. Asylum seekers are obliged to reside in these centres if they require State support. There are also several institutions, called (misleadingly, as they are run by the aliens police) ‘community shelters’, to which both asylum seekers and persons who have been granted a protection status may be released, often after spending the maximum period of twelve months in detention. Conditions in some of these ‘shelters’ have been found inadequate and unsafe by independent monitors in recent years. Perhaps for this reason, 65% of all asylum decisions in Hungary were ‘discontinued’ in 2002; a higher rate of absconding than in some neighbouring States which also run open centres. In Poland, receipt of State support is conditional upon residence in an open centre where there is an obligation to inform management of any absence of over 48 hours. An absence can extend for no more than 72 hours in total.

111. In Denmark, all State assistance is conditional upon residence in open centres run by the Danish Red Cross (and upon cooperation with the asylum procedure, unless the applicant is particularly vulnerable). The centres are located in rural areas and residents must be present to collect financial assistance every fortnight, but there are no other restrictions on freedom of movement to ensure compliance with the procedure. Staff leave the centres unattended after 5pm every night. In 2002, there were no fewer than 4,205 departures from Red Cross centres, including 147 by children.¹⁴⁰ As of November 2003, there have been 4,365 departures. These figures do not only represent asylum seekers who are absconding: many were multiple departures of persons who stayed for short periods with friends or family and then returned, others would be voluntary returns to countries of origin, while the majority is believed to represent asylum seekers transiting onwards to Sweden or Norway. Sweden receives most asylum seekers in furnished self-catering flats (‘group homes’¹⁴¹) for families or for groups of single asylum seekers. It detains asylum seekers very selectively and, as stated above, also applies other alternative restrictions very rarely. Between January and September 2003, of 23,507 asylum claims received by Sweden, and 22,314 claims processed, only 2,810 were classed as ‘annulled’. This latter figure represents the upper limit to the number of asylum seekers who could have absconded during the course of the procedure, but also includes voluntary returnees and cases closed for other miscellaneous reasons. Again, as a

¹⁴⁰ For a rough sense of what percentage this represents, a snapshot figure in October 2002 counted 7,686 persons under Danish Red Cross care.

¹⁴¹ Note that the system of ‘group homes’ is commonly used in Sweden for the disabled, drug rehabilitation, juvenile justice and for children and mothers released from prison, therefore, the system for asylum seekers is a product of a wider social welfare tradition.

'destination' State, residence in the community without restriction is shown to be an effective alternative, ensuring compliance in the majority of cases.¹⁴²

112. In Greece, there are open reception centres and several hostels run by the Red Cross (three centres), *Médicins du Monde*, and other agencies (ELINAS, Social Solidarity, Voluntary Work of Athens). If an asylum seeker is assigned to the centre in Lavrio, he or she must obtain permission for any absences, and if he or she leaves without permission, his or her asylum claim will be suspended. There are some problems with dispersal and assignment to the more remote centres, with people choosing instead to move to Athens despite their destitution. In 2002, when there were 5,600 new asylum applications in Greece, 697 applicants (12%) failed to appear for their interviews at either the first or second instance and, as a consequence, had their cases suspended then later closed. Similar percentages have occurred over the past several years. Despite the fact that Greece is a major country of transit, this is a relatively low rate of non-appearance and suggests that provision of adequate reception assistance, even in a very open system, can effectively raise the rate of procedural compliance.¹⁴³

113. Similarly, in Italy in 2001, the Ministry of the Interior, UNHCR and the Association of Town Councils together established a pilot programme, the National Asylum Programme (*Plano Nazionale Asilo* – 'PNA'), for the reception of asylum seekers. It aimed to provide accommodation for 2,000 asylum seekers in a network of 60 councils and to keep them from absconding by means of an incentive of adequate social provision. At the time of undertaking the research, some 1,300 places are filled by asylum seekers, but this is only a small percentage of the total number in Italy who require accommodation. Residence in such accommodation is therefore entirely optional. In 2003, some 45% of all asylum seekers in Italy subsequently failed to appear, whereas those accommodated under the PNA showed a much higher appearance rate for their appointments and interviews. If nothing else, the authorities had a reliable and stable address at which to contact these applicants.

114. Other countries have centres containing a mixture of detainees and non-detainees, but usually in separated sections. Finland, for example, has a detention centre in Helsinki for illegal aliens, including selected asylum seekers and failed asylum seekers. There are currently 30 places, but the centre will move premises in 2005 and add another 30 places for an 'open ward'. Accommodation in the 'open ward' will be an alternative to detention but nonetheless a restriction in comparison to the current regime of fully open centres, which are run by the State, local municipalities, or the Finnish Red Cross. Asylum seekers receive State support even if they do not live in these centres. There are no restrictions on freedom of movement and no legal obligations on staff to inform the police of an asylum seeker's whereabouts. The only *de facto* restriction comes from prolonged residence in sometimes remote locations. No official statistics regarding the rate at which asylum seekers fail to appear in the procedure are published, but the Finnish Refugee Advice Centre estimates that certainly no more than ten per cent abscond.

¹⁴² In Norway, asylum seekers are dispersed to remote open centres, but this system is designed in order to limit the social and financial burden on Oslo rather than to promote compliance with the procedure. Since Norway is a 'destination' State, the latter is not a matter of concern, at least not prior to the issuance of deportation orders.

¹⁴³ Spain also has a centralised system for the allocation of asylum seekers to entirely open accommodation for up to six months or, in some cases, a year. Almost all asylum seekers stay in the Spanish asylum procedure, despite its position as a major transit country, because – according to nongovernmental agencies working in Spain – those who wish to transit Spain illegally are seldom detained and so do not need to claim asylum as a defensive means of either evading detention or delaying deportation. This may change in the future, as a result of EU harmonisation processes and the Dublin Convention; if so, non-compliance rates are likely to rise accordingly. For further information on appendix on Spain.

115. In Lithuania, meanwhile, the Pabrade Foreigners Registration Centre contains both detainees and non-detainees. Oddly, therefore, it is both a place of detention and an alternative to detention. There is segregation of detainees and non-detainees, but similar services are provided to both groups. Detainees are only able to exit with permission and escort, whereas those not detained are able to leave unsupervised for a period of up to 72 hours upon notifying the management. For those asylum seekers in the full determination procedure and for children, accommodation in a more open centre (Rukla Reception Centre) is also possible, and those not in need of State support may live independently with relative ease. While there are no specific statistics on compliance with the Lithuanian system (and the number of applicants in total is currently small), it can be noted that only ten per cent of cases in 2002 and 40% in 2003 were classed as 'terminated'. As cases may be terminated for reasons other than absconding, this represents the upper limit of those that might have done so, and compares well with Hungarian figures, for example. The percentage of claimants who are detained and therefore unable to abscond must of course be taken into account when directly comparing the effectiveness of national systems. Also, the relevant legislation in Lithuania is only two years old, so it may be too soon to fully evaluate the regime's effectiveness.

116. In Austria, asylum seekers are dispersed to the nine provinces and they lose all rights to care and maintenance if they leave their designated accommodation centre, sometimes in quite remote locations without counselling or other services, for more than three days. Exceptions to this regime for vulnerable persons are permitted but rarely granted. Asylum seekers who are not in need of State assistance may live wherever they like. This lack of restriction for self-sufficient applicants suggests that the Austrian reception system is primarily designed as a system of burden sharing between the provinces, rather than as a measure to ensure the closer monitoring of asylum seekers' whereabouts. In practice, however, as the vast majority of asylum seekers do require State support, this is one of the policy's effects. In France, there are open centres with waiting lists of several months so their accommodation system cannot be effectively used to keep track of most asylum seekers. French refugee advocates believe that asylum seekers who cannot access accommodation are forced into itinerant lifestyles with no fixed address, which raises the national rate of non-appearance.

117. In Belgium, the centralised 'Fedasil' system, which provides asylum seekers with accommodation, is not specifically designed to improve compliance. The different types of accommodation provided – collective centres or private flats – are allocated based on need rather than on an asylum seeker's risk of absconding, and an asylum seeker is not considered to have absconded until he or she fails to appear for five days or fails to collect his or her financial assistance. In accordance with the incoming EU Directive, judicial oversight of a decision to assign someone to a place of accommodation is available, so that an applicant can be granted an exemption in exceptional circumstances. A large percentage of asylum seekers are believed to abscond during the Belgian asylum procedure,¹⁴⁴ though far fewer in the earlier stages now that the transit route to the UK has been made less accessible. In the Netherlands, asylum seekers who are not kept in the accelerated procedure are dispersed to large reception and accommodation centres. Residents must report to a centre's administration regularly, request permission for any absence, and if a resident is absent for more than three days then his or her place is withdrawn and his or her asylum application considered void. If the centres are full, which has not been the case recently, an asylum seeker may live independently and report daily. Until June 2002, permission to move out of the centres was also granted after six months, if all interviews were completed. No data is available from the Dutch government with regard to the number of asylum seekers who abscond or fail to appear in the

¹⁴⁴ National figures are not publicly available.

course of the main procedure. The availability for removal of persons found not to be in need of international protection is felt to be a far greater problem.

118. The United Kingdom has previously received asylum seekers into the community, but in future all those who request State support will be required to reside in large collective accommodation centres. As in Norway, this is more a cost-sharing measure, based on dispersal away from London and the southeast, rather than an alternative to detention, though the government did promote its new policy in terms of the beneficial effects that such centres, combined with electronic identity cards, would have in terms of controlling applicants' whereabouts. The fact that the same policy statement also announced the doubling of detention space, however, makes British refugee advocates sceptical that the collective centres will reduce the incidence of asylum seekers whom they consider are being unnecessarily detained. The British Refugee Council has proposed an alternative reception model, based on smaller scale centres and a case-management system, which they believe would meet all the State's legitimate concerns while allowing greater freedom to residents and avoiding the problems of large communal institutions.

119. In New Zealand, an innovative approach to collective accommodation and directed residence has been taken at the Mangere Accommodation Centre. This centre holds asylum seekers under orders of detention but it does so alongside housing quota refugees (those resettled from overseas via UNHCR). 85% of asylum seekers detained in New Zealand in the first year of New Zealand's new detention powers have been sent to Mangere. The only differences in the control of those detained and non-detained are: detainees must request permission to leave the centre during the day, as opposed to notifying the management of an intended absence, and detainees may not stay away overnight while the quota refugees may. To date, permission for day release into the community has never been denied and only 5% of residents are supervised during day release. Nonetheless, for those detained, any breaches in the centre's rules may be punishable by transfer to remand prison. Only one of 159 asylum seekers 'detained' in Mangere since September 2001 has absconded and nobody has yet needed to be transferred to remand prison. The environment of the centre, where specialised staff treat detainees and refugees alike with dignity and respect, is cited as a factor in its successful record. In part, this must also be attributed to New Zealand's relatively high recognition rates and the fact that the Mangere detainees receive prioritised processing, so stay at Mangere is usually for around six weeks and a prelude to permanent integration. Onward movement out of New Zealand is neither geographically feasible nor desired by asylum seekers.

120. In Romania, an asylum seeker may be accommodated in a reception centre if he or she cannot afford to rent a flat. The asylum seeker's movement is restricted either to the city of Bucharest or to the province of their registered address in so far as permission must be requested for any travel outside that city or province. The number of asylum seekers in 2003 who continued to abscond and transit west remained significant, but reportedly decreased in comparison to 2002.¹⁴⁵

121. In South Africa, for the past few years, there has been debate regarding the possibility of opening such collective centres – in practice, rural camps – for asylum seekers. The centres would be intended as a deterrent to irregular movement and economic migrants who claim asylum, but there is no evidence that collective centres are needed for either administrative efficiency or to reduce a high rate of absconding during the determination procedure.

122. While the grounds of establishing identity and protecting national security are the least contentious of the stipulated reasons for detaining asylum-seekers or refugees, the verification of

¹⁴⁵ Information provided by UNHCR. Government statistics are not available.

identity takes place successfully within open reception centres in a number of countries: for example, in Finland and in the majority of (non-airport) cases in Germany. In Romania, the Refugee Law permits the competent authorities to order an asylum seeker to live in a ‘designated’ place, on national security or various other specified public order grounds, for the entire duration of the asylum procedure. This provision is not implemented in practice.

4. Registration and documentation

123. While registration of asylum seekers is common practice in most Western countries, its increased use in several African States has reduced the incidence of arbitrary detention of undocumented asylum seekers. Advances in biometric technologies are currently transforming the nature of identity card systems, both for citizens and aliens, and it is hoped that these heightened internal controls will reduce the need for asylum seekers to be deprived of their liberty. Examples of such positive reforms include: the relative openness of refugee settlements in Uganda and the issuance of refugee identity cards there, the use of biometric identity cards in Zambia and the efficiency of its registration programme, as well as the willingness of the government of Kenya to move away from an inflexible encampment policy towards one where exit permits from camps, issued by UNHCR, are endorsed by the authorities, and where urban sweeps of illegal migrants no longer put unregistered asylum seekers at risk of detention and deportation.

124. In Bulgaria, a 1999 agreement to secure the release of registered asylum seekers protects them from being treated as illegal migrants and, at the end of 2003, the State Agency for Refugees established a mechanism for issuing identity documents on the day after registering the asylum application, which is expected to reduce the incidence of wrongful arrest. Since mid-2003, Tibetans seeking asylum in Nepal, arrested for unauthorised entry, are directly released from police custody upon UNHCR’s intervention, without having to go through the Department of Immigration and therefore without being fined or charged visa fees. Such asylum seekers are temporarily accommodated at the Tibetan Refugee Reception Centre, near Swayambunath on the outskirts of Kathmandu, while they are processed.

125. Deposit of travel and identity documents is an effective alternative to hinder some applicants who are in transit or who use the asylum channel as a temporary means of entry without a visa, only to return home in the middle of the procedure after having perhaps worked illegally for a short period. Asylum lawyers in Hungary, Poland, Austria, Luxembourg, Canada and Norway all report that this most simple and cost effective of alternatives is also highly effective in terms of preventing the above-mentioned practices and monitoring those who travel with their own identity documents. Of course, many asylum seekers do not.

5. Release to nongovernmental supervision

126. In the United States, the Vera Institute and now a company named Behavioral Interventions Inc. are nongovernmental entities contracted to conduct programmes of ‘supervision’ with as much of an enforcement as welfare ethos (see above summary of the Vera Institute’s results). Elsewhere, nongovernmental agencies have been given ‘custody’ of a released detainee as a pragmatic method of releasing vulnerable persons (e.g., the sick, the elderly, separated children, etc.) who have become, in fact, too great a liability or problem for the State to detain and who pose little risk of absconding. Often, in transit States where asylum seekers are arrested among other illegal aliens, this arrangement is supported by UNHCR. In Mexico,¹⁴⁶ for example, the nongovernmental

¹⁴⁶ There is no country section in relation to Mexico. Information received from *Sin Fronteras*.

organisation *Sin Fronteras* has successfully advocated for the release of particular vulnerable individuals and taken on some informal responsibility for them after release. In the Philippines, where detention is used only exceptionally, release to the community is coordinated by UNHCR's implementing partner immediately following an asylum seeker's registration with the Department of Justice. Of 52 asylum seekers whose claims were received or pending in the Philippines in 2003, none absconded.

6. *Electronic monitoring and home curfew*

127. Electronic monitoring or 'tagging' is a system whereby an electromagnetic device (sometimes called a 'Personal Identification Device' or 'PID'), which usually looks like a large black watch, is attached to a person's wrist or ankle. This tag emits a signal which is received by a box-shaped device attached to their home telephone, so the authorities can ring that number on an automated system and tell whether or not the person is within a certain radius of their home telephone. It is a means, therefore, of checking on the enforcement of a home curfew between certain, specified hours. Such a system may be used alone or in conjunction with other forms of traditional supervision, such as an assigned case-manager (in the criminal justice field, a probation officer).

128. In the criminal justice field, electronic tagging has gone through three phases of development.¹⁴⁷ It is now well established in the first three countries in Europe to have experimented with it (Sweden, the Netherlands and England/Wales), whereas Belgium, Portugal, Scotland, Spain and Switzerland are in the second phase of attempting to implement nationwide or regional schemes, and France and Finland are still in the pilot programme phase. This is of interest in so far as alternatives in the immigration detention field often trail developments in the criminal justice field. As of March 2003, 9,200 offenders were being tagged on a daily basis in Europe, but no asylum seeker has yet been electronically monitored.¹⁴⁸

129. The first trials of electronic monitoring of asylum seekers, in conjunction with home curfew, are currently being undertaken in the United States.¹⁴⁹ Pilot projects have been run in Miami, Detroit, Seattle and Anchorage; the implementation of the project in Miami has raised notable criticisms from refugee advocates there. No official information is yet available on the compliance rate of those monitored, though it has been reported that no one has yet been re-detained in Miami as a consequence of violating their curfew. Congressional funding will now extend the use of electronic monitoring to other cities in the US. As of March 2004, it is reported that the contract for

¹⁴⁷ See, 'Electronic Monitoring in Europe', 3rd CEP workshop, 8-10 May 2003 at Egmond aan Zee, the Netherlands.

¹⁴⁸ In England/Wales, the private sector is exclusively responsible for day-to-day operation of electronic monitoring ('EM'), including breach proceedings in courts. The British Curfew Order and Home Detention Scheme is currently handling approximately 70,000 people. In Belgium, the public sector is exclusively responsible for EM and has dealt with 1,200 prisoners so far. In Sweden, 400 prison places (ten small institutions) have been closed and replaced with EM, with a cost saving of 90 million Swedish Kroner. In the Netherlands, there is a capacity of only 200 for EM, and it is only ever half used. In Spain there are 3,000 early releases from prisons to EM per year. In France, there are nine local pilot projects to test EM but daily handling only about 100 people total. In Germany, the Federal State of Hessen has completed an EM pilot project – it is considered a 'last chance' community penalty. In Switzerland, pilot projects on EM are running in six Cantons. Evaluation results will be available in 2004. In Portugal, there is one pre-trial bail scheme involving EM. In Italy, fewer than 100 cases of EM have been applied, though the original target was 3,000.

¹⁴⁹ By way of background with regard to electronic tagging of criminal offenders, at present in the US, the daily average caseload of electronically monitored criminal offenders is 70,000-100,000 but could be as high as 150,000. Satellite tracking by Geographic Positioning Systems ('GPS') is being applied to a further 1,500-2,500 individuals at any point in time (e.g., in Florida, run by Pro-Tech Monitoring since 1997). Altogether 160 jurisdictions in 30 US states are now using satellite-tracking schemes. This new technology will make other electronic monitoring technology obsolete. It is currently double the cost of standard electronic monitoring but these costs are rapidly falling.

these further pilots will go to a private company named Behavioral Interventions, Inc., which has previously implemented electronic monitoring in the criminal justice field.

130. It is notable that, according to Department of Justice figures, comparable data for offenders and alleged offenders in the criminal justice field has achieved, at best, the same rate of compliance as paroled asylum seekers in the United States. Paroled asylum seekers are without any intensive monitoring or supervision. It is, therefore, highly questionable whether, for the overwhelming majority of asylum seekers who have every incentive to complete the US asylum procedure, the use of such an intrusive and stigmatising form of supervision can meet the tests of necessity and proportionality required by international law. Moreover, the extent to which monitoring is conducted (e.g., how frequently the asylum seeker is required to telephone into base and thereby affecting their ability to leave their house, etc.) could transform this alternative measure into a form of detention under international law. In the event that this program continues, it is hoped that preference will be given to less restrictive alternatives, such as another form of electronic monitoring – namely, voice recognition technology to facilitate monthly reporting requirements – under the new Intensive Supervision Appearance Programme in the US.

131. One of the problems with electronic tagging is that it is technically only applicable to persons who can stay in private homes, so they are usually people with family and community ties and who therefore are strong candidates for parole in any case.¹⁵⁰ It is simply unsuitable for destitute asylum seekers or those residing in large collective centres.¹⁵¹ For those who are not deemed high flight risks, the stigmatising and negative psychological effects of the tags are very likely to be disproportionate to the risk posed.¹⁵² US officials have said that they would like to apply tagging to all asylum seekers living in the community, while advocates question the necessity of such monitoring on the basis of general evidence that few asylum seekers (in 2003, at the very most, fifteen per cent) are likely to fail to appear and because of what they believe to be the low flight risk of individual clients. However, advocates concede that if monitoring were able to secure the release of demonstrably ‘high flight risk’ individuals who would not otherwise be released, it could be used as a preferable alternative. However, if the State is not the final destination for an asylum seeker, the technology is likely to prove impractical, as the expensive devices can be removed or destroyed by those determined to transit elsewhere.

132. In November 2003, the Government of the United Kingdom was the first in Europe to propose electronic tagging of persons to be deported, including failed asylum seekers, over the age of eighteen years. A UK Home Office evaluation in 2001 reported 90% compliance with electronic monitoring of criminal offenders, but it should be noted that costs were extremely high (£1,300 for an average 45 day curfew),¹⁵³ while research from the South Bank University in London revealed

¹⁵⁰ By way of analogy: A pilot scheme of home detention with electronic monitoring has been operated for offenders in New South Wales, Australia since 1992. Section 4(2) of the Home Detention Act 1996 (NSW) states that it is not aimed at detaining those offenders who would otherwise be sentenced to an entirely non-custodial sanction. See The Law Reform Commission website - Lawlink NSW: Report 79 (1996) Sentencing – No.7: Home Detention.

¹⁵¹ Voice recognition technology (a form of electronic monitoring which is far less intrusive and restrictive) and expensive global positioning devices may not suffer from these constraints.

¹⁵² While many refugee advocates feel that electronic tags criminalise asylum seekers, they do so no more than being detained; therefore, again, the question becomes one of whether they are used in good faith as an alternative for those who can be proven to need an intensive level of supervision. Criminal aliens may more often fit this description than asylum seekers.

¹⁵³ Electronic monitoring is not a cost-effective alternative to detention, but costs roughly as much in most countries. In Belgium, for example, the Ministry of the Interior reports that it costs some €10-12 per day per capita in a project involving some 300 offenders. There is a large investment for each device (an initial outlay of approximately €250,000), which is lost if the device is tampered with or destroyed. The newest form of the technology, involving

that persons whose asylum claims had been rejected, considered by the authorities to be high-flight risk but released on ordinary bail conditions, complied at a rate of 80% in any case. In certain individual cases, therefore, imposition of electronic monitoring may fail to pass the test of necessity and proportionality required by international law, especially if applied to low flight risk cases such as parents of young children or persons who have complied consistently with the asylum procedure. No evaluations of the pilot projects are yet available. With regard to treatment of persons found not to be in need of international protection, the European Commission has recently recommended the development of rules regarding ‘the possibilities of suitable alternatives to detention such as reporting duties, obligatory residence, bail bonds *or even electronic monitoring* [emphasis added].’¹⁵⁴

133. In Canada and Belgium there have recently been calls from certain quarters to use electronic monitoring in the immigration field, as an alternative to detention. The Canadian Auditor General estimates that the authorities currently do not know the whereabouts of some 36,000 ‘immigration violators’ (most of whom are neither asylum seekers nor persons found not to be in need of international protection) and proposes that electronic monitoring could reduce such non-compliance. In Belgium, at the end of 2003, the *Vlaamsblok* political party made some proposals for the electronic monitoring of persons found not to be in need of international protection and asylum seekers deemed likely to abscond. This prompted a lively debate on the issue in the Belgian media, but those responsible for the electronic monitoring of criminal offenders in Belgium report that they have not yet been asked by the government to develop any programme for the immigration field. It ought to be noted however that depending on the conditions attached to this form of monitoring, it may well be considered a deprivation of liberty.

134. European human rights law is also likely to make it difficult to apply electronic tagging, which is a severe restriction upon freedom of movement, without evidence in each individual case that it is necessary to ensure availability for removal or to meet some other legitimate ground for restricting one’s freedom of movement. Other relevant lessons that may be taken from the evaluation of electronic monitoring in the criminal justice field include: (a) that such monitoring does not work for very short durations (that is, less than a week), (b) that consent of the person tagged is essential both for practical reasons and for liability avoidance, and (c) that the education of both adjudicators and the public on the facts of the subject is essential.

7. Alternatives for children

135. UNHCR Guidelines on Detention emphasise that asylum-seeking children should never be detained. Under international law, detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time.¹⁵⁵ Where such children are intentionally detained by host States, it is usually argued that this is for the sake of preserving family unity, or in order to protect a separated child from abduction and exploitation by traffickers. Although protecting children from exploitation from trafficking is a legitimate purpose, detention and other measures which severely restrict a child’s freedom of movement may be unnecessary. With regard to the purpose of preserving family unity, the best interests of the child would be the overriding consideration. This study has therefore searched for alternative measures that may allow these two objectives to be met without resorting to deprivation of liberty.

satellite tracking, is currently two or three times the price per device and is just as easily destroyed if someone has no incentive to comply with the measure. Interview with Ralf Bas, Ministry of the Interior, Belgium.

¹⁵⁴ *Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents*, 14 October 2002, COM (2002) 564 Final, para 2.3.5.

¹⁵⁵ Art. 37(b), CRC.

136. In Europe, there are best practice guidelines relating to the guardianship of separated children,¹⁵⁶ and this guardianship involves varying levels of supervision. In some countries, such as Germany and Italy, pre-existing national guardianship mechanisms are used, whereas there is a specialised system in Norway, and a combination of both in the Netherlands. No research-based evaluations are yet available regarding the way in which different forms of guardianship influence the rate at which children appear throughout asylum procedures and remain safe from traffickers.¹⁵⁷

137. Throughout Europe, separated children continue to disappear at high rates.¹⁵⁸ In Bulgaria, the quality of alternative accommodation is not a factor because there are many adequate group homes, but attention focuses on a child's integration into a Bulgarian foster family environment, which is believed to reduce the chances of abduction or disappearance.¹⁵⁹ There is also a joint State-NGO initiative with regard to border monitoring for such children, which compensates for the commendable absence of internal controls on their movements. In Hungary, as a key element in a joint State-NGO Plan of Action to tackle trafficking of asylum-seeking children, a group home for separated children was established in June 2003, run by the local nongovernmental organisation, Oltalom, in the city of Bekescsaba.¹⁶⁰ Specialised homes for separated minors, run by nongovernmental organisations with State funding, have had a significant beneficial impact on lowering the rate at which children disappear in France. In Poland, a new ordinance has been introduced regarding the treatment of separated children and places of accommodation (open centres, State Emergency Care Centres or foster homes), however the rate of their disappearance remains high.

138. Belgium reports that around half of all asylum-seeking children still disappear from either a special section of an open centre or a foster home or youth care institution. A Belgian agency named Child Focus has conducted a study confirming that 45-50% of children disappear at varying points in the procedure. This agency believes that most of these disappearances are abductions by traffickers. While some parties have used this finding to call for the detention of separated children, a new law is instead establishing 'secure centres' that stop short of this. In Canada, the disappearance of a group of Chinese children following their release from detention in 1999-2000 led to improved preventive measures. Nongovernmental agencies in Ontario are currently proposing a project to supervise separated children, including adolescents too old to qualify for statutory protection by social services, without resorting to detention – involving, *inter alia*, more stringent background checks on adults who come forward to claim custody of a child. Italy possesses a number of successful projects to tackle the problem of protecting separated children from traffickers. One such project, run by a nongovernmental organisation and the local authorities in the port of Ancona in eastern Italy, is a monitoring project which interviews children in detail (in an age-sensitive manner) when they first arrive, in order to fully establish the nature of their relationships to any accompanying or receiving adults. This project has been very successful in

¹⁵⁶ UNHCR and Save the Children Fund, *Separated Children in Europe: Best Practice Guide*, 2000.

¹⁵⁷ Standards of assistance and protection for victims of trafficking also vary widely. In the Netherlands, the victim's status is temporarily regularised so that they may cooperate with enforcement officials. Under the Belgian Act on Human Trafficking, however, residence permits and social assistance are offered only on condition that testimony is submitted against the perpetrators. The United States created a special 'T visa' for victims in January 2002. See, Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, *Migrant Workers*, above footnote 83, at note 17.

¹⁵⁸ In Sweden, in October 2003, a government (*Migrationsverket*) report found that 103 children disappeared from State care during 2002. Most were 15-18 years of age and, in contrast to adult asylum seekers, 70% went missing before receiving the final decision on their claim.

¹⁵⁹ In the United Kingdom, there is a similar shift from use of a secure group home to foster care.

¹⁶⁰ Stricter age assessments in Hungary are also reducing the rate of disappearance as it is suspected that not all those previously claiming to be under 18, and therefore exempted from detention, were really minors.

reducing the rate at which children disappear and has also led to the readmission (to Greece and Albania) of 80 out of 98 minors interviewed between 16 September, 2002 and 20 November, 2003.

139. The flight risk of families with young children in destination States appears to be inherently low, and – if absolutely necessary – can be further reduced by detaining the head of the household. In Australia, and increasingly in the United Kingdom, however, families with children are detained in order, it is said, to maintain family unity. In response to this dilemma, agencies in Sweden find that in most cases parents, when they are given a choice to decide what is in the best interests of their own children, opt to split the family (with one parent granted release to care for the children alone) rather than have their children remain in detention. In cases where there is only a father and child, and for exceptional reasons the father needs to be detained, the child will normally be released into a group home for separated children, with regular access to the father. However, most families in Sweden are released into family accommodation at the Carlslund Refugee Reception Centre, with daily reporting requirements to the Immigration Department. This combination of alternatives has proved extremely effective, and such genuinely open accommodation may be contrasted to shelters in other host States which are really alternative places of detention – for example, the former Woomera Residential Housing Project in Australia, or the ‘shelters’ in the United States in which separated children have been supervised 24 hours a day, very rarely granted permission to leave the premises, and attended school inside the ‘shelter’. A new department of the US government now has responsibility for the care and welfare of separated and unaccompanied asylum-seeking children and is trying to move away from the use of such *de facto* detention towards an expanded number of foster placements.

8. Alternatives for other vulnerable persons

140. No State reviewed for this study had an alternative measure specifically designed to benefit torture survivors or asylum seekers with mental health issues. Several governmental and nongovernmental agencies in Europe, Australia and North America, however, operate counseling services which become available to those released from detention, and actively agitate for the early release of such individuals when they are identified to be suffering psychologically in detention.¹⁶¹ In Greece, vulnerable persons may be released from detention by court order and, in doing so, the court may impose an ‘alternative restrictive condition’ – in other words, reporting to the police once every week or fortnight. UNHCR and nongovernmental advocates are involved in referring such cases.

141. In Nicaragua and Mexico, Catholic charities and nongovernmental organisations sometimes succeed in securing the release of vulnerable asylum seekers. In Mexico City, such persons may live in the community on the condition of reporting and maintaining contact with the local nongovernmental organisation *Sin Fronteras*. Five unaccompanied minors were identified and released, under such *ad hoc* arrangements, during 2003. On Mexico’s southern border, in Tapachula, asylum seekers are usually not detained but instead accommodated in a Catholic ‘migrant house’ named *Albergue Belén*.¹⁶² The *Albergue Belén* has a 9 p.m. curfew, which is

¹⁶¹ See, e.g., Physicians for Human Rights (USA), *From Persecution to Prison*, 2003; C. Pourgourides, ‘The Mental Health Implications of the Detention of Asylum Seekers’, in Hughes & Liebaut (eds.), *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Kluwer Law International, 1998, Ch. 9.

¹⁶² During 2003, the migrant house reported having assisted 230,000 migrants. If an undocumented migrant is not intercepted by the National Institute for Migration, but is first identified by UNHCR, the National Commission for Refugee Assistance (‘COMAR’) or an NGO as being (potentially) in need of international protection, he or she is placed in the asylum procedure, but usually not taken into migratory custody. He or she is instead taken to *Albergue Belén*. If the asylum seeker has already been intercepted, then COMAR must request their release to the *Albergue*.

strictly enforced. The curfew exists principally as a security measure, and conditions in the shelter are considered to be open and good. Services offered there help enable asylum seekers to remain in the house during the processing of their claim in Mexico, rather than attempting to move northwards illegally.¹⁶³

C. Alternative measures aimed at failed asylum seekers

142. Ensuring availability for removal and compliance with removal of failed asylum seekers is a key policy reason why many States opt for either detention or other restrictions on freedom of movement. As stated above, the lawfulness or otherwise of such measures will depend on whether the tests of necessity and proportionality are met in each individual case. The detention of persons subject to a deportation order may be or may become arbitrary depending on the circumstances, for example, if an individual is detained beyond a reasonable period or indefinitely, or if their detention continues after it becomes clear that the deportation order cannot be carried out. Similarly, ongoing or indefinitely imposed restrictions on one's freedom of movement or restrictions that become onerous over an extended period of time (e.g. excessive reporting requirements over many years) may also become unlawful, and would need to be constantly monitored and subject to periodic review. The results of this study indicate that detention and restrictions of freedom of movement are not always necessary to ensure availability for removal.

143. Persons found not to be in need of international protection and those classed by States as 'failed asylum seekers' are included within the parameters of this study since the issue of detention is in practice closely connected to effecting removals and deportations. Unfortunately, there is limited international data relating to the compliance of persons found not to be in need of international protection with removal orders,¹⁶⁴ and hence limited opportunities for evaluating the effectiveness of non-custodial measures to ensure removal/return. Calculating the gap between the numbers rejected and those deported generally results in an extremely crude figure which does not take account of those whom it is impossible to deport, for whatever reasons, those who may still have appeals against their deportation pending or who may have been granted a subsidiary status, nor those who may depart without notifying the authorities. Nonetheless, this 'gap' between ordered and effected removals of failed claimants is clearly a critical concern for many host States and their electorates, leading to routine detention of such persons. South Africa, for example, has a major problem with the disappearance of refused cases. Those rejected under the normal procedure, after a final decision from the Appeals Board, are given one month to leave the country or they may be deported forcibly. In most cases, failed applicants fail to comply with this order and become subject to re-detention. In Japan, on the other hand, the percentage of asylum seekers absconding after receiving a rejection remains small: 4% in 2002 and 13.5% in 2001.

144. Available evidence does support the presumption that asylum seekers are more likely to abscond following receipt of a final rejection, and that non-custodial alternatives have limited impact on this fact. Yet, on a case-by-case basis, rejection of a claim cannot automatically be equated with a risk of absconding and hence with a need to detain.¹⁶⁵ In Canada, for example, a

¹⁶³ There are no country sections on either Mexico or Nicaragua. Information received from UNHCR and *Sin Fronteras*, Mexico.

¹⁶⁴ Officials in Paris and London have made unverified statements that some 70% of non-detained asylum seekers whose claims are rejected subsequently abscond. M.J. Gibney and R. Hansen, *Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom*, New Issues in Refugee Research Working Paper No.77, UNHCR Evaluation and Policy Analysis Unit, February 2003, p.11.

¹⁶⁵ See, G. Noll, *Rejected Asylum Seekers: The problem of return*, New Issues in Refugee Research, UNHCR Working Paper No.4, May 1999, p.28.

State-funded alternative project called the Failed Refugee Project has achieved a 60% success rate in effecting mandatory removal with consent, that is, without resorting to detention, force or other penalties. It operates on the basis of counselling, practical assistance and giving failed applicants 30 days to leave the country on their own accord – time enough to put their affairs in order. In Melbourne, Australia, the Hotham Mission Asylum Seeker Project has achieved similarly high numbers of mandatory returns with consent, and availability for forced returns without consent, by means of caseworker support and counselling. Between February 2001 and February 2003, they conducted research to track 200 asylum seekers (111 ‘cases’ including families) living in the community, of whom 31% were former detainees. Of the finally refused asylum seekers in the study, 85% voluntarily left Australia on receiving a final decision, within the 28 days usually allowed to them to do so. The other fifteen per cent were detained and then forcibly returned. Nobody absconded. The researchers concluded from this evidence that detention was usually unnecessary to ensure the availability for removal of persons found not to be in need of international protection.

145. The Vera Institute project in the United States was not able to track all the asylum cases it supervised until the end of the asylum procedure; most claims/appeals were still pending when the project ended. It can therefore tell us little about compliance with return. In general, the results of Vera’s wider project, involving other undocumented migrants and criminal aliens, found that community alternatives were only partially effective in relation to forced return. The project had an element of departure assistance and verification that incidentally uncovered the fact that the New York authorities were undercounting the number who complied with removal orders.¹⁶⁶ Vera concluded that, after careful individual assessment, re-detention may be necessary to ensure removal in selected cases.¹⁶⁷ Vera’s findings do not, however, suggest that there is empirical justification for the pilot policy introduced in Hertford, Connecticut, in late 2003, and now in other US cities, which requires the detention of all persons issued with removal orders from the moment of issue, regardless of the individual’s likelihood of absconding.¹⁶⁸

146. In the United Kingdom, the government’s declared intention is to shift towards detention as a tool for removal, and hence the detention centres have been re-titled ‘removal centres’. To date, however, refugee advocates report that the centres’ populations include many people with decisions and appeals pending. Research by the South Bank University in the UK found that, even amongst those on bail while awaiting removal, 80% of persons found not to be in need of international protection complied with bail conditions and thus remained available for removal. Meanwhile, the International Organisation for Migration (‘IOM’)¹⁶⁹ and the nongovernmental agency Refugee Action operate a counselling programme to help persons found not to be in need of international protection examine their choices and consent to return home. This is similar to the Canadian and Australian projects mentioned above. It is also similarly effective. In Sweden, through counselling efforts that may involve the applicant’s legal representative and other relevant actors, the State authorities help failed asylum seekers to reach their own decision that it may be best to leave Sweden. This approach, although resource intensive, is reported to be efficiently stimulating returns without enforcement measures. In general, following the return programmes for persons under Temporary Protection back to Bosnia and Kosova, European States have demonstrated great

¹⁶⁶ The US government reports that there are a total 400,000 migrants (including but not solely persons found not to be in need of international protection) who have absconded in the US after being issued with deportation orders.

¹⁶⁷ The New York immigration authorities acted on only 11 of 52 recommendations by Vera to re-detain supervised aliens, and the other 41 did indeed abscond.

¹⁶⁸ The Associated Press, 16 September, 2003.

¹⁶⁹ As of January 2002, IOM offered its services to nine European governments with regard to facilitating programmes of mandatory returns with consent (what IOM calls ‘voluntary return’).

interest in providing inducements and incentives for persons found not to be in need of international protection to cooperate with their mandatory return, through offers of assistance and counselling in place of, or in tandem with, threats of forced return. Such programmes are both more cost-efficient and humane than forced returns, though it is misleading to call them ‘voluntary’. A number of studies have recently begun to evaluate mandatory return programmes where incentives are offered, at least during an initial phase, but further research is required before conclusions can be reached on their effectiveness.¹⁷⁰

147. In contrast, some countries studied remove all material and social assistance from persons found not to be in need of international protection, either immediately or within a set number of days. While this may be aimed at encouraging the person to return, it is certainly not effective in keeping the person available for removal. Those who do not leave must simply go underground, as evidenced by the Central Bureau of Statistics in the Netherlands in 2002.¹⁷¹ Such a policy may be in breach of a State’s human rights obligations if the individual denied assistance is unable to return through no fault of his or her own.¹⁷² In Switzerland, as of 1 April 2004, persons who have received a decision of non-admissibility are excluded from automatic social assistance, though their most basic socio-economic rights remain protected by the Federal Constitution. Those whose claims are rejected under the full asylum procedure, if not detained, and if deportation proves impossible, are provided with social assistance when necessary, and housed in an open centre.

148. In Bulgaria, where deportations are rarely effected, persons found not to be in need of international protection and other illegal migrants are released from detention after 9-10 months, and stringent (daily) reporting requirements are imposed. Some eighteen persons were, as of February 2004, living under these alternative measures, of whom thirteen were persons found not to be in need of international protection. Similarly, The Netherlands Aliens Act 2000 can be used as a basis for restricting the movement of a failed asylum seeker by raising an obligation to report as often as twice each day after a negative decision has been taken on a claim.

149. In Belgium, most asylum seekers who are appealing their rejection to the Council of State disappear at the point when they are instructed to transfer to one of four special centres housing only pre-removal cases. These centres are no more closed or harsh than the other centres in which the asylum seekers are living, but NGOs report that asylum seekers fear the transfer, recognising it as a prelude to deportation, and resist the disruption caused to their lives by the move (for example, taking their children out of local schools where they may have been for some time). Between January 2002 and August 2003, therefore, 52% of such asylum seekers with appeals pending before the Council of State did not report for the transfer. The Flemish nongovernmental organisation, OCIV, argues that this high rate of absconding could be avoided by removing the trigger factor: namely, the four centres that seem to raise anxieties but are of little benefit in terms of facilitating removal.

¹⁷⁰ *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*, Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002.

¹⁷¹ In 2002, the Central Bureau of Statistics concluded that a minimum of 11,000 and a maximum of 41,000 failed asylum seekers from Afghanistan, Iraq, Iran, Somalia and the former Yugoslavia remained illegally in The Netherlands.

¹⁷² On 31 July 2003, the British High Court ruled that the refusal to grant support to three asylum seekers amounted to a violation of article 3 of the ECHR. A similar finding was reached on 17 February, 2004. The United Kingdom government has challenged these High Court rulings – see *Case of T v Secretary of State for the Home Department*, Court of Appeal, 23 September 2003 [2003 EWCA Civ 1285] - and the matter may ultimately go to Strasbourg for a ruling by the European Court of Human Rights. As the asylum seekers’ inability to exit the United Kingdom was a consideration in these cases, the position of non-returnable aliens might be viewed as closely analogous.

150. In many countries, indefinite detention of people who cannot be returned to their countries of origin in the foreseeable future, including for reasons beyond their own control, has become a growing human rights problem. Alternatives are therefore urgently needed to detention of such cases. A Report of the Special Rapporteur on Migrant Workers has recommended: ‘Detention should end when a deportation order cannot be executed for reasons that are not the fault of the migrant.’¹⁷³ Court rulings in the United Kingdom, United States, Australia and Canada, in line with important decisions of the European Court of Human Rights¹⁷⁴ and the UN Human Rights Committee,¹⁷⁵ have confirmed this general principle. A number of countries have legislated maximum time limits for detention, which should apply to this category of person as much as to any other alien.¹⁷⁶ In Switzerland, for example, ‘preparatory detention’ may be applied for no more than three months and ‘deportation detention’ may be applied for an absolute maximum of nine months, although in practice these two types of detention order may be consecutive. The essential principle applied to ‘deportation detention’ is that detention should continue only for as long as it is necessary to effect removal, otherwise it becomes arbitrary.

151. In Canada, the main complaints regarding reporting requirements have involved cases where they are indefinitely applied to persons found not to be in need of international protection who cannot be returned to their home countries, and where weekly reporting intrudes on their ability to work in and adjust to Canada over the course of many years. Nevertheless, such an indefinite obligation is undoubtedly a preferable alternative to leaving such persons languishing in indefinite detention.

152. In Germany, special return centres (‘*Ausreisezentren*’) have been established in a few federal States to accommodate undocumented illegal migrants, including persons found not to be in need of international protection and who refuse to return. Persons of the above-mentioned category are ordered to take up residence in these Centres, which are formally open. The residents, however, have to report on a regular basis (e.g. three times per week) and they are informed about their legal situation in regular conversations with a view to obtaining their cooperation in the administrative process and encouraging their departure from Germany. The standard of amenities in such Centres is generally set at a level that also acts as a disincentive to remain in Germany – that is, only basic needs are met.¹⁷⁷ Nongovernmental critics of this policy call for a greater use of the concept of ‘supported voluntary return’ – meaning the provision of counselling and incentives, including financial and practical assistance and vocational training, to promote mandatory return with the consent and cooperation of the person to be returned. This concept has seen a revival recently in Germany, with several projects at the *Länder* or district level, in most cases jointly carried out with various nongovernmental partners and co-funded by the European Refugee Fund. These projects are succeeding in minimising the use of pre-deportation detention, but also helping people see when return home may be in their best interests, and to make this a dignified process.

153. In the Netherlands, there used to be an open centre reserved for failed asylum claimants having exhausted all appeals (*Ter Apel*, in a small rural town). It was closed because of high costs

¹⁷³ See Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, *Migrant Workers*, above footnote 83.

¹⁷⁴ *Ali v Switzerland* (1999) 28 EHRR 304; *Quinn v France* (1997) EHRR 167.

¹⁷⁵ *A v Australia*, above footnote 39.

¹⁷⁶ For such persons, however, release is not a ‘solution’ to their situation if their status remains unregularised and they and their children are indefinitely denied any hope of integration. This problem relates to the reduction of statelessness and wider immigration issues beyond the scope of the present study.

¹⁷⁷ Germany’s aliens’ law also provides for possible restrictions on the free movement of persons found not to be in need of international protection, or any foreign national under a final obligation to leave German territory. If not detained or sent to a Return Centre, such a person must inform the competent aliens authority of any change of domicile – even within an assigned district – or of any absence from the assigned district for more than three days.

and failed to raise the rate of return for people who refused to cooperate. In mid-February 2003, the Dutch government voiced a proposal to open centres exclusively for those who have received a first rejection on their claims, focusing on return from this early point. Separated children have, since November 2002, already been housed in two special centres oriented towards return and away from integration into Dutch society. Nongovernmental organisations have criticised the harsh regimes of supervision and disincentives in these centres. In Norway, asylum seekers whose claims are deemed ‘manifestly unfounded’ (predominantly eastern Europeans at the moment) are sent to a return-oriented centre from day one of the procedure. It is intended to keep them easily available for deportation from Oslo. A recent drop in arrivals may be partly due to the deterrent effect of this return-oriented centre with accelerated procedures completed within one to two weeks. It is located in a former civil defence camp, surrounded by fences. There are no formal restrictions on residents’ movements but the gate is watched, visitors to the centre are restricted and the guards create an enforcement environment. There are proposals to accelerate the procedure in this centre to a total of 48 hours, but Norwegian refugee advocates question whether procedures with so few guarantees of due process can operate in an open centre without people fleeing from its premises.¹⁷⁸

154. A number of countries have time limits on the detention pending removal of persons found not to be in need of international protection who cannot be returned. The use of alternatives such as reporting requirements, as in Bulgaria, Canada and the United States (including the use of voice recognition technology), should be promoted where it may promote release of such persons – for example, in Latvia and Australia, where persons found not to be in need of international protection are detained indefinitely, pending the execution of their removal orders.

D. The Question of Effectiveness

1. Factors influencing effectiveness

155. Information in this study reveals that there may be several common factors which influence the effectiveness or otherwise of a particular alternative measure as far as preventing absconding and/or improving compliance with asylum procedures, namely: (a) providing legal advice; (b) ensuring that asylum seekers are not only informed of their rights and obligations but also that they understand them, including all conditions of their release and the consequences of failing to appear for a hearing; (c) providing adequate material support and accommodation throughout the asylum procedure; (d) screening for either family or community ties or, alternatively, using community groups to ‘create’ guarantors/sponsors. Some countries use a system of penalties or the threat of more severe restrictions, such as detention, to encourage compliance with asylum procedures. This study would recommend more research and evaluation in this area.

156. In several countries, the provision of competent legal counsel to asylum seekers was found, among other due process benefits, to significantly increase rates of compliance and appearance. Lawyers – especially lawyers working in the context of a refugee-assisting organisation – are able to act as an intermediate point of contact with the authorities, to remind their clients of appointments and explain the consequences of absconding. In the United States, according to

¹⁷⁸ As of 1 January, 2004, Norway has opened its first detention centre at Trandum, the former military barracks at Ullensaker, to detain asylum seekers who have committed crimes or absconded as well as persons whose claims for asylum have been rejected (including asylum seekers who may be appealing against a first instance rejection). A special police unit has also been formed that will, among other functions, find those who abscond. As this breaks a long-held Norwegian policy of avoiding the generalised use of detention, advocates fear that ‘manifestly unfounded’ cases may also, in the future, be detained throughout the asylum procedure.

official data from 2001, separated asylum-seeking children with legal representatives failed to appear 30% of the time, as opposed to 68% of the time when there was no legal representative. It is unfortunate, therefore, that legal aid to asylum seekers is being cut in a number of countries, such as the United Kingdom, at the same time as costly programmes of intensive supervision and electronic monitoring are explored as necessary means of tracking their whereabouts.

157. For example, the alternative (and legal remedy) of bail and bond is found most effective when it is an automatic right and where both access to legal advice and legal aid is provided to all detainees who need it. Decisions on the granting of bail are best taken by specially trained officers or adjudicators whose decisions should be challengeable in an independent and timely appeal process. Advocates recognise that it is necessary to put adequate resources into such an individualised system, but believe the more targeted use of detention (or lesser restrictions) will compensate for these costs. In the United States, where legal aid is never provided in immigration cases, ‘legal orientation’ presentations by nongovernmental agencies for immigration detainees have not only made the immigration and asylum determination systems more efficient, but have also increased the effectiveness and accessibility of parole and bond mechanisms for release, hence reducing the time spent in detention by an average of 4.2 days per detainee.

158. In the United States, the fact that failing to appear at an asylum hearing will automatically lead to an order of deportation *in absentia* is considered significant.¹⁷⁹ Elsewhere, alternatives to detention are perhaps more effective in conjunction with the threat of detention as an explicit penalty for failing to comply with alternative measures. In Hungary, for example, so-called ‘aliens policing detention’ may be applied as a penalty for failing to appear when summoned or failing to depart when ordered. In South Africa, detention may be ordered for failing to renew a permit every month or for failing to adhere to conditions of the permit (though such conditions, including being restricted to one district and being required to report regularly, are not implemented in practice). In Switzerland, an asylum seeker who breaches the ban upon presence in certain public places (that is, an ‘exclusion’ or ‘containment’ order) may be detained. Under the Irish Refugee Act, an asylum seeker who fails to appear for an interview must provide a reasonable explanation either beforehand or within three days of the appointment, otherwise their application will be deemed withdrawn, and rejected, with no possibility of appeal to the Refugee Appeals Tribunal. Such an asylum seeker does, however, have the option of seeking permission from the Minister for Justice, Equality and Law Reform to make a new application and retains the right to apply for judicial review of the decision to the High Court.

159. In other States, asylum seekers may be penalised for failing to appear by withholding or reducing State assistance provided to them. Denmark’s Immigration Service may deprive an asylum seeker of cash assistance if he or she does not cooperate with the examination of his or her claim – including by attempting to abscond. Such an asylum seeker would then only receive assistance in kind (i.e., food parcels). The only exception is where the asylum seeker in question were pregnant, a minor or had other relevant medical needs. In Poland, in any case of gross violations of an open accommodation centre’s by-laws by an asylum applicant, including unauthorised absence from the centre, the President of the Office for Repatriation and Aliens may decide to withhold assistance, in whole or in part. Upon request of the applicant, the President may restore full assistance once. If assistance is withheld a second time, the President may restore financial support again, but only at a

¹⁷⁹ The administrative bases on which States conclude that an asylum seeker has ‘absconded’ are diverse. In some cases, non-appearance leads to automatic closure of the case. In others (for example, in Greece) a certain number of days are allowed for the person to re-appear. In all States, the issue of a fair appeal against the closure of a case on grounds of non-appearance is of critical importance.

reduced level. The impact of such penalties on compliance with alternative measures (and on cooperation with the asylum procedure itself) has not been studied.

160. Adequate material support and accommodation during the asylum procedure was found to be critical to ensuring compliance, as inferred by the high rates of non-appearance in reception systems which exclude a large segment of asylum seekers from State assistance (such as that currently operating in Italy and, until late 2003, that in Austria). In the United States, nongovernmental agencies advocate that asylum seekers be released from detention with work authorisation in order that they should be able to provide for themselves, given that the US does not provide housing or other social services to them. One effect of being permitted to support themselves adequately is that they are more able to maintain a fixed address, which in turn makes communication with the authorities more reliable.

161. For adult asylum seekers, age, nationality and gender are not found to be factors by which flight risk can be predicted, whereas the desire to transit to another country for family reunion purposes appears to be a significant factor in decisions to abscond. Despite the presumed correlation between the strength or admissibility of an asylum claim and the right to liberty in most State systems, especially systems in which the legal review of detention is closely linked to consideration of the claim's merits, there is no evidence that a strong correlation exists between merits and flight risk.

162. Where alternatives to detention do exist, one of the ongoing questions is whether they are effectively available in practice. International experts on non-custodial alternatives in the criminal justice field have learned that legislation is of little use on its own, without additional endeavours relating to how they are to be implemented, as well as detailed guidelines and specific investment in training and infrastructure.¹⁸⁰ The same appears to be true in the asylum and immigration fields, where those who order detention often fail to rigorously apply their own legislation's requirements of necessity and proportionality and thereby fail to consider fully the applicability of various alternative measures.¹⁸¹

163. Alternative measures will not be effective in ensuring compliance and meeting other State concerns if they are not properly policed and if asylum seekers are kept away from essential services or labour markets for extended periods. Where people are kept under onerous restrictions for many years, it is inevitable that some may leave their designated address or district in order to reach urban centres and the companionship of members of their own ethnic community, or they may abscond in order to risk living and working illegally but with some degree of independence and the ability to better provide for themselves and/or their families.

¹⁸⁰ V. Stern, *Developing Alternatives to Prison in Central and Eastern Europe and Central Asia: A guidance handbook*, Constitutional and Legal Policy Institute ('COLPI'), Paper No.6, May 2002, p.54.

¹⁸¹ By analogy, see *Recommendation (2002) 22 on improving the implementation of the European rules on community sanctions and measures*, adopted on 29 November 2000 by the Committee of Ministers, Council of Europe. A number of initiatives are underway in the criminal justice field that may serve as models in the asylum and immigration field, with regard to monitoring the consideration given to, and application of, alternative measures. In Ukraine, for example, the Open Society Justice Initiative is now running a pilot study to monitor, with international and local NGO input, judicial decision-making in the city of Kharkiv [the second largest city] in order to ascertain whether, and to what extent, judges are actually making decisions in conformity with the international standards regarding non-custodial pre-trial options. See, University of Nottingham Human Rights Centre, *The Development of Alternative Sentences to Imprisonment in Ukraine: A Concept Paper*, above footnote 136, at p.23.

The Danish Refugee Council has proposed to monitor decisions to order alternative measures (and detention) in Danish courts in a similar fashion, but has not yet received funding for this project.

164. Large open centres are often difficult to introduce without opposition from local residents, and their effectiveness will be compromised if conditions are so poor or locations so remote that asylum seekers feel depressed and institutionalised. Electronic monitoring by means of ankle bracelets is dependent on certain factors being present, such as a fixed private home address where the device can be installed. Its effectiveness may be limited, however, where the desire and ability to transit to another country will outweigh the potential penalties for destroying or removing the device. Failure by police and other officials to respect or trust registration and refugee identification documents is a major limitation on the effectiveness of registration programmes.

165. While private security companies or State bodies may lack the necessary skills and community contacts required to make a programme of supervised release effective, so too problems arise with nongovernmental agencies running schemes that require a large element of enforcement and the threat of re-detention. Many nongovernmental actors acknowledge this constraint, though more commonly the absence of alternatives is due to an absence of State funding and government cooperation with their agencies.¹⁸²

2. Cost effectiveness

166. There are significant obstacles to collecting and calculating the financial costs of alternatives to detention in relation to the costs of detention. This is partly because most States do not report such costs. Since the length of the asylum procedure will make a great difference to the overall cost, data has been collected in per capita sums, relating to specified periods (daily, weekly), wherever possible. Such figures are seldom able to take account of capital costs and are seldom subjected to a sensitivity analysis in relation to all variables arising within the local asylum system (such as the length of initial detention to establish identity or the costs involved in locating and re-detaining persons who need to be forcibly removed).

167. Nonetheless, it is widely acknowledged that almost any alternative measure will prove cheaper than detention. In Belgium, the Fedasil Director confirmed this assumption, although comparative figures for detention are not published. In Australia, a report by Justice for Asylum Seekers calculated an eighteen per cent saving if its proposed model were introduced, including capital costs and sensitivity analysis for multiple variables. While this figure may be less impressive than a direct per capita daily figure comparison (an average of A\$170 for detention as opposed to A\$60 in community care), the eighteen per cent figure allows for the need to detain in exceptional cases and at certain (first and last) stages of the procedure. The report emphasises that low security alternatives are not cost-effective for cases assessed as high flight risk, and vice versa.¹⁸³

168. In the United States, the project run by the Lutheran Immigrant and Refugee Services ('LIRS'), involving 25 Chinese asylum seekers in 1999, found community release cost only three per cent of what would have been the cost of their detention. Such figures, however, are reliant upon a lot of donated time and services (*pro bono* lawyers, travel expenses) and asylum seekers having the right to work by which to subsidise their accommodation. The State therefore may save money, but at the expense of private charities. The Vera Institute was supplied by the US

¹⁸² Those in the criminal justice field struggle with the same issue of combining the welfare role with the sanctioning role: 'The social workers are torn between their wish to help the offenders and befriend them and the need to supervise them, exert control and report them to the court if they do not keep the requirements of the sanction.' V. Stern, *Developing Alternatives to Prison in Central and Eastern Europe and Central Asia: A guidance handbook*, above footnote 180, at p.43.

¹⁸³ By contrast, the Woomera Residential Housing Project, an alternative place of detention, was in fact more expensive (at around A\$492) than the daily per capita cost of detention at Woomera Detention Centre.

Immigration Department with US\$7,259 for the average cost of detaining an asylum applicant until a final decision. The cost of Vera's alternative supervision, on the other hand, including brief periods of detention where deemed necessary, was US\$2,626 over an equivalent period. American nongovernmental organisations conclude from the Vera findings that most asylum seekers do not in fact require intensive supervision and that therefore future alternative to detention projects could be implemented at an even lower cost per capita. Statements by the US Department of Homeland Security suggest that the electronic monitoring which they are testing through several pilot projects can be run at a cost of US\$10-20 per day per individual.¹⁸⁴ Voice recognition technology can be operated even more cheaply.

169. In the United Kingdom, the South Bank University research found that 73 of 98 people released on bail thanks to the intervention of Bail for Immigration Detainees ('BID') complied with the conditions of their bail. If their detention had not been challenged by BID, it was estimated that the government would have spent some £430,000 detaining them for the period studied. Similarly, the Toronto Bail Program is proud to report C\$12-15 per day staff running costs (not including costs of food and shelter etc.) as opposed to the C\$175 per day average cost of detention in a provincial jail in Canada.¹⁸⁵ In Germany, all the collective accommodation centres provide federally mandated allowances of 41 Euro per month for all residents over fourteen years of age and 20.5 Euro for all those under fourteen. Detention costs in Germany are seldom published, but it is estimated that one day of pre-deportation detention costs around 60-80 Euro, excluding capital costs and varying between *Länder*. Therefore, open centres are cheaper to run than closed. Most interesting, perhaps, is the practice whereby exceptions are permitted to the German dispersal and directed residence policy when available private accommodation, paid for by the State, is not more expensive than that in a centre. This pragmatic exemption may be one that any country considering the model of compulsory centres for all applicants may wish to incorporate.

170. In Lithuania, there is little difference in costs between those who are detained and non-detained in Pabrade Foreigners' Registration Centre (at a cost of some US\$1 million, including the cost of deportations).¹⁸⁶ Only the Rukla Reception Centre is cheaper because it is fully open (with an annual budget of some US\$450,000). For international donors, improving the reception and protection conditions in Lithuania such that refugees may opt to seek asylum there is a more cost effective and comprehensive solution than obstructing their transit movement by means of detention. The highly targeted issuance of detention orders in Lithuania ensures not only greater lawfulness of detention but also that only those individuals who require 24-hour supervision add to these higher costs.

171. In some countries, conditions in detention are so deplorable that a cost argument is almost irrelevant. Policies of interception and external processing also make cost arguments redundant if States can save costs by running closed camps or detention facilities in less developed transit States. In Guatemala, the US already pays US\$8.50 per day per migrant towards the cost of detaining migrants from outside the region (likely to become asylum applicants if they entered US

¹⁸⁴ One positive benefit of electronic monitoring in comparison to detention is that it can be scaled down more easily, so there would no longer be the dynamic whereby set costs of a detention facility are justified by keeping it filled to capacity, and whereby a reluctance develops to decommission facilities even if asylum arrival numbers fall.

¹⁸⁵ The fact that cost savings are far greater for those taken from the higher security jails has meant that criminal aliens are currently released to the Toronto Bail Program more frequently than asylum seekers detained in lower security centres.

¹⁸⁶ Though figures are not published, little difference in comparative costs might similarly be expected from the Mangere Accommodation Centre in New Zealand because it houses detainees and non-detainees under very similar conditions. High quality services are balanced by the lesser costs of low-level security.

territory).¹⁸⁷ On the other hand, in Indonesia, the Australian-funded IOM programme to accommodate asylum seekers and persons found not to be in need of international protection, without resorting to the use of detention, has been relatively cost-efficient in that it operated with a budget of around A\$250,000 per year and handled some 4,000 persons, for varying lengths of time, between 2000-2002. Whether or not this was cheaper than the cost of their detention in Indonesia, it was certainly cheaper than their detention in Australia. Interception measures used in this programme do, however, raise concerns.

172. Whilst intensive supervision and other restrictions placed on community release in order to raise the rate of compliance and appearance may – in some cases – help to do so, the human cost of such measures must also be counted. Alternative measures involving monitoring, supervision and restrictions will make life more difficult for those genuine refugees who, as asylum seekers, are trying to adjust to a new environment, and regain some normality and self-confidence based on newfound rights and freedoms. While the integration cost savings of early release into the community for such persons are impossible to quantify, there is ample evidence that detention exacerbates previous mental trauma and produces anxiety and depression,¹⁸⁸ which, aside from the unacceptable human cost, will incur medical and other costs for the State in both the short and long term.

IV. CONCLUDING OBSERVATIONS

173. UNHCR and non-governmental advocacy groups should continue to focus attention on the fact that basic legal safeguards of detention are not observed in many situations and that conditions of detention within many immigration detention centres, prisons and airport transit zones around the world fall below internationally acceptable standards. Finding alternatives to detention may not always be a key priority when it comes to resolving an inhumane or illegitimate detention policy, but these measures are important for longer-term policy relating to the treatment of refugees and/or asylum seekers.

174. For the world's major destination States, existing evaluations of alternatives – including monitoring of appearance rates during unconditional release or unsupervised stay in the community – support the position that asylum seekers very rarely need to be detained, or indeed restricted in their movements, prior to a final rejection of their claim or prior to the point at which their removal becomes a practical reality.

175. More national research needs to be done to support existing studies and findings need to be shared with a wider constituency, including prison and detention centre staff, judges, adjudicators and immigration officers, members of parliament and the general public. As in the criminal justice field, an alternative measure will not generally be ordered instead of detention unless judges and decision-makers trust their effectiveness and unless public fears about unsupervised release, often provoked by alarmism in the popular media, are allayed.

176. Further thinking, in particular, is required with regard to gaps in the legal standards and other safeguards relating to non-custodial alternatives. For example, there are specific gaps relating to

¹⁸⁷ US-subsidised Guatemalan enforcement operations are part of the 1997 US programme called 'Global Reach' which is a 'strategy of combating illegal immigration through emphasis on overseas deterrence.' INS Fact Sheet on Global Reach, 27 June, 2001.

¹⁸⁸ See, e.g., Physicians for Human Rights (USA), *From Persecution to Prison*, above footnote 161; C. Pourgourides, 'The Mental Health Implications of the Detention of Asylum Seekers', above footnote 161.

privacy and data protection in light of the increased use of biometric data and electronic monitoring in the asylum field. Another ‘grey area’ is the legal delineation of the difference between a detention centre or closed refugee camp and an open or semi-open refugee camp or reception centre.

177. Further research is also required at the global level with regard to protection of separated children in order to clarify when supervision or confinement to a particular location or facility ceases to be a measure of protection and rather becomes an unnecessary and perhaps harmful restriction on freedom of movement or deprivation of liberty. The findings of this study indicate that there are other more creative ways of tackling the threat posed by child trafficking rings to asylum-seeking children which are proving effective in several countries.

178. Little analytical research has been conducted on the functioning of alternative measures in predominantly transit States, where this study has identified greater challenges in applying such measures effectively. Nonetheless, the common sense conclusion that improving reception conditions and integration prospects in such States will directly raise the rate of compliance with asylum procedures has been borne out by this study’s findings.

179. Above all, this study has focused on the human rights argument that the necessity and proportionality of detention requires consideration of possible alternatives. To date there has been too little trial or testing of alternatives in the asylum and immigration field. Finally, such alternatives themselves must always meet the test of legality, necessity and proportionality.

APPENDICES

AUSTRALIA¹

I. DETENTION AND DOMESTIC LAW

A. Detention of unauthorised arrivals

The Migration Act 1958 (Cth) requires that all non-citizens who are unlawfully in Australia be detained, including asylum seekers and other migrants who have entered Australia unlawfully, those whose visa has expired, or whose visa has been cancelled (e.g. for breaching a condition of that visa). It establishes a system of mandatory, automatic, indiscriminate, and non-reviewable detention of all asylum seekers having entered Australian territory without authorisation (referred to as ‘unlawful arrivals’ under the law).² Under the law, release from such detention is only permitted until removal or until the granting of a visa. An asylum seeker will, therefore, remain in detention until all appeal avenues have been exhausted and should they fail, until removal. There is no maximum duration for a detention order. Detention is applied regardless of an individual’s likelihood of absconding and without any consideration as to whether non-custodial alternatives may be sufficient to prevent it. The Act applies to all illegal entrants regardless of age, sex, nationality or any other status and irrespective of whether they are asylum seekers.

Some detention facilities are located in remote, rural areas. They are completely secure, with electric fences and are under the management of a private security company to enforce rules and to provide security. This has been controversial as often prison-like conditions apply.³

B. The Pacific Solution

In 2001, Australia initiated a policy widely known as the ‘Pacific Solution’ or, more officially, its ‘offshore processing strategy’. This strategy involves the forcible transfer of intercepted asylum seekers arriving into either Australian territorial waters or the international sea, by boat via Indonesia, to locations in two Pacific States namely, Papua New Guinea (PNG) and the Republic of Nauru. The Australian government finances the entire costs of the camps, as well as providing large aid donations to the host countries. It also follows the excision by law of various island territories from the ambit of the Migration Act 1958 (Cth), which has the effect of denying the right to lodge an application by an asylum seeker should they reach one of the listed Australian island territories.⁴

The Australian government and its implementing partner, the International Organization for Migration (‘IOM’), maintain the position that the camps in PNG (currently emptied) and Nauru are not in fact places of detention. By this logic, the Australian government has declared that its detention policy has switched from being mandatory to discretionary, since an asylum seeker can

¹ The information presented herein is valid up to 31 March 2004.

² Ss. 176 – 196, Migration Act 1958 (Cth). Note that persons arriving in Australia with proper authorization who later apply for asylum are not subject to mandatory detention rules, but they may also be detained should they pose a security risk, etc.

³ Further information on conditions of detention, see ABC Four Corners video, ‘About Woomera’, 19 May 2003; US Committee for Refugees, *Sea Change: Australia’s New Approach to Asylum Seekers*, February 2002.

⁴ See, for further information, A. Edwards, ‘Tampering with Refugee Protection: The Case of Australia’ Vol. 15(3) *IJRL*, 2003, p.192.

now be moved to an ‘offshore processing centre’ rather than being detained on the Australian mainland.⁵

However, many critics of the policy, and the asylum seekers themselves, believe they are places of detention, and indeed places of ‘arbitrary detention’.⁶ Even the Australian Department of Immigration (‘DIMIA’) acknowledges that freedom of movement is substantially curtailed for those who may reside in the IOM-run camps – by the methods of camp administration and security, the narrow terms of entry visas granted to asylum seekers when they landed in PNG or Nauru, and by the sheer geographic isolation of the camps and the islands. UNHCR has expressed concern regarding the severity of such restrictions⁷ and no court or international human rights body has yet settled the question of whether the restrictions may amount to a deprivation of liberty within the meaning of article 9 of the ICCPR. For the purposes of this study, therefore, the Pacific Solution is considered a form of detention.

In view of UNHCR’s 2003 advice that Iraqis and Afghans from Ghazni cannot be returned due to general insecurity in their places of origin, the failed applicants on Nauru may be considered non-removable and their detention indefinite.⁸ Given that they are no longer on Australian territory, it may be that the Australian High Court decisions in *Al Kateb* and *Al Khafaji* (see below) would not apply.

C. Detention of rejected asylum seekers

Under the law and in practice, rejected asylum seekers who arrived in an unauthorised manner remain in custody until their deportation can be effected. The High Court of Australia (the highest court) upheld the law in a decision in 2004 that a failed asylum seeker did not have to be released. The effect of the decision is that failed asylum seekers could be detained indefinitely where they are unable to return home. The decision was reached by the narrowest of margins (4-3) and turned largely on the construction of the provision in question.⁹

Similarly, rejected asylum seekers who entered Australia in an authorised manner (that is, with a valid visa) are required to be detained under the law, as the conditions of their visa no longer apply. Whether they will be detained in practice however is not clear. They may be issued with another visa (e.g. a bridging visa) until they can be deported, rather than placed in custody.

D. Bridging visas

‘Bridging visas’ are granted by non-reviewable and non-compellable discretion of the Immigration Minister.¹⁰ While all asylum seekers may apply for a ‘bridging visa’ that would allow their release

⁵ Department of Immigration, Multicultural and Indigenous Affairs (‘DIMIA’), ‘Unauthorised Arrivals and Detention: Information Paper’, February 2002.

⁶ See, Amnesty International, *Offending Human Dignity – The Pacific Solution*, ASA 12/009/2002.; Human Rights Watch, *By Invitation Only: Australian Asylum Policy*, Vol.14, No.10(c), December 2002, pp.66-70.

⁷ Submission No.30, Senate Legal and Constitutional References Committee Inquiry into the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, p.8.

⁸ In December 2003, UNHCR and DIMIA reopened the Afghan claims in order to consider *sur place* elements, and the results of the review are currently awaited (as of March 2004).

⁹ See, *Al Kateb v Godwin* [2004] HCA 37, 6 August, 2004; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38, 6 August, 2004. Cf. *Al-Mazri v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 10009, 15 Aug, 2002.

¹⁰ The Minister may grant any of five classes of bridging visa (A-E), with Class A affording the person rights roughly equivalent to those of a citizen, dwindling down to the lesser rights entitlement of Class E. The Minister may, however,

from detention, the conditions are so strict it is almost impossible to comply. It is usually reserved for persons who enter Australia with a valid visa that has since expired. Many asylum seekers who arrive by air with documents are swiftly released from detention by this means. This is partly because the identities of those who arrive by air can be more easily verified by the documentation shown at their point of embarkation. For example, an individual who enters Australia on a tourist or student visa and who later applies for asylum is usually granted a bridging visa so they may remain in the community. The bridging visa may be issued without conditions, or with conditions, such as the payment of a cash bond, providing the names and addresses of family members in the community, or reporting requirements. Whether conditions are imposed, or what types of conditions are imposed, seems to vary from state to state.¹¹ There are no entitlements to work, health care or welfare support linked to this visa.¹²

'Class E' bridging visas can be applied to persons from one of five listed groups (minors, the elderly, those with special medical needs and applicants married to Australian citizens or permanent residents) on compassionate grounds. They may also be granted to any person who has a case pending before the High Court. Upon such release, the asylum seeker must provide a residential address and any absence from the address for more than fourteen days must be notified to DIMIA. They may also be required to post a bond and to comply with reporting requirements.

E. Detention of asylum seeking children

Like adult unlawful entrants, asylum seeking children who enter Australia without authorisation must be detained under the Migration Act 1958 (Cth). The Department of Immigration has sometimes argued that detention of a child may be in their 'best interests' because it preserves family unity in situations where the head of household is required to remain in detention. In an earlier High Court case, government lawyers have argued that release of a child during the determination procedure may cause psychological damage if it raises 'false hope' before the child is re-detained following rejection of their asylum claim and pending removal from Australia. Australian refugee advocates have answered the first point by recommending that a child's own parents (and the child themselves, where age appropriate) be allowed to make their own choice as to whether family unity or liberty from detention is in the best interests of the child. The second point is answered with reference to the documented evidence of psychological trauma, cumulative with every passing day, children suffer as a result of being in detention for the full duration of the procedure.¹³

The High Court of Australia in late 2003 found, in a unanimous decision, that it considered it not to be unlawful or unconstitutional to detain children in immigration detention, stating that there were no exceptions to the law for children.¹⁴ Another High Court case found that conditions of detention would not make an otherwise lawful detention, unlawful.¹⁵ Thus, asylum seeking children continue to be detained in Australia. This decision may well be in conflict with the Human Rights

only grant a bridging visa once, therefore people rarely apply to the Minister for one because they would then lose their chance to obtain a substantive visa. Information supplied by UNHCR Canberra.

¹¹ State offices of the Department of Immigration have the responsibility to impose and monitor bridging visa conditions.

¹² 'Bridging Visas' Form 1024i, DIMIA

¹³ See, 'Summary of evidence regarding the psychological damage caused by long term detention' compiled by Zachary Steel, Clinical Psychologist, 3 July, 2002.

¹⁴ *Woolley & Anor; Ex parte Applicants M276/2003 by their next friend GS (M276/2003)* [2004] HCA 29, 7 October 2004.

¹⁵ *Mahran Behrooz v MIMIA, Attorney-General of the Commonwealth of Australia, Australasian Correctional Management Pty Ltd and Australasian Correctional Security Pty Ltd*, 6 August 2004.

Committee's views in which it held that article 9(4) of the ICCPR requires that detained individuals be entitled to review by a court and that any review must be effective, most notably, that a court must be able to order release (see below).¹⁶ Moreover, a full inquiry into children in detention was conducted by the Human Rights and Equal Opportunities Commission, finding that the policy of immigration detention as it applied to unauthorised asylum seeking children was 'fundamentally inconsistent' with the Convention on the Rights of the Child 1989.¹⁷

F. Residential Housing Projects

An alternative place of detention for women and children was established some two kilometres from the former detention centre at Woomera, South Australia. The Woomera Residential Housing Project involved four houses with lesser security arrangements and far less harsh material conditions than those in the detention centre, but residents were supervised by at least three staff from Australasian Correctional Management Pty Ltd (the same company guarding the detention centres) for 24 hours a day. They were unable to leave the fenced cluster of houses except on chaperoned excursions to community facilities. There were also problems with a lack of cultural sensitivity in the Project, with male security staff given unhindered access so that, for example, Muslim women had to wear their chadors at all times of day. This detention venue has now closed, along with the main detention centre.

It is notable that only fifteen of the twenty-five places at the Woomera Residential Housing Project were occupied, despite the much better detention conditions there. DIMIA stated that this was due to difficulty matching families to the layout of the houses, but it was also believed to be due to the fact that many families did not wish to be divided, with the fathers forced to remain at the main detention centre.

DIMIA considered the Project a success, preparing participants for wider release into Australian society should they be granted a protection visa. No asylum seeker attempted to escape from the Project, despite its lesser security arrangements. DIMIA acknowledges, however, that it remained a detention environment. The Department is currently replicating this Residential Housing Project – which UNHCR Canberra considers a desirable 'interim' measure until families are released unconditionally or to a real alternative – in Port Headland, northern Western Australia, and in Port Augusta, near to the present Baxter Detention Centre. It is to this latter Housing Project that families previously housed at the one near Woomera have been moved. It is reported to face many similar problems as the former project with regard to privacy. The women may not receive visitors at the Housing Project but visit their husbands at the Baxter Detention Centre.

The Woomera Residential Housing Project was extremely expensive. DIMIA stated the total costs to be around A\$1.5 million, which equals a daily per capita cost of approximately A\$492.¹⁸

G. Legal aid for detained asylum seekers

Detainees receive State-funded legal aid via the Immigration Advice and Application Assistance Scheme ('IAAAS') but this is only available to assist them with presenting their application for a protection visa to the initial immigration officer and subsequently to the Refugee Review Tribunal,

¹⁶ *A v Australia*, Human Rights Committee (HRC), CCPR/C/59/D/560/1993, para. 9.5; *C v Australia*, HRC, CCPR/C/76/D/900/1999, para. 8.3.

¹⁷ HREOC, 'A last resort?' The National Inquiry into Children in Immigration Detention, Executive Summary, April 2004, para. 1.

¹⁸ Quoted and calculated in the JAS costings report, 2003, p.15 (see below).

but not in relation to judicial review, including challenges to their detention. Moreover, some of the detention centres are located in remote, rural areas, where access to lawyers is limited.

H. Judicial review of detention

The power of the courts to specifically review the legality of such detention has been removed by operation of law.¹⁹ The High Court of Australia has held however that this does not oust its own original jurisdiction and that any attempt to do so would be unconstitutional.²⁰ Appealing to the High Court can be costly and lengthy thus deterring many asylum seekers from pursuing this avenue. The lack of effective means of appeal or review has been held by the UN Human Rights Committee to render such detention 'arbitrary' within the meaning of Article 9 of the ICCPR.²¹

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

As of July 2002, 1,434 adults and 184 children were detained in six mainland²² Australian immigration detention facilities. By mid-September, there were 1,180 persons detained, and indeed the numbers have continued to decline steadily, largely due to the fact that Australia is operating a policy of *non-entrée* for all unauthorised boat arrivals. As of October 2003, there were only six asylum seekers with pending cases among those detained. As of 12 March 2004, there were reported to be 1,086 persons detained in mainland facilities, of whom the majority (661) were classified as 'awaiting removal'.²³ The detainee population is thus increasingly composed of failed refugee claimants.

The Immigration Minister has very rarely exercised her discretion of granting a 'bridging visa' for the release of an unlawful entrant asylum seeker from detention on compassionate grounds.²⁴ In those rare cases where release has been granted, it has usually followed intense pressure from advocates who brought the case before the media.

III. ALTERNATIVES TO DETENTION

A. Separated children and other vulnerable individuals

A handful of separated/unaccompanied asylum seeking minors²⁵ have been released from detention prior to the determination of their claims. In 2002, for example, nine unaccompanied minors were

¹⁹ S. 183, Migration Act 1958 (Cth).

²⁰ *Plaintiff S157/2000 v Commonwealth of Australia*, [2003] HCA 2, 4 Feb. 2003.

²¹ *A v Australia*, HRC Case No. 560/1993. At para 9.4, the Committee found that the likelihood of a person absconding is a factor particular to an individual case and, where no such factors pertain, detention on such a basis may be arbitrary. See also the more recent decision: *C v Australia*, HRC Case No. 900/1999. See, also, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2003/8/Add.2, 24 October, 2002.

²² The qualifying term 'mainland' is used to differentiate the centres in Australia from the Australian-sponsored detention centres in other countries (e.g. those within the Pacific Solution) or other Australian island territories.

²³ Statistics supplied by DIMIA to UNHCR Canberra.

²⁴ Between 1994-1998, only two out of 581 children in detention were released through the exercise of Ministerial discretion. Source: Human Rights and Equal Opportunities Commission ('HREOC'), *Those Who've Come Across the Seas*, 1998. As of June 2002, there was found to be only one separated asylum-seeking child under foster care on a Class E Bridging Visa. Source: HREOC National Inquiry into Children in Immigration Detention, Background Paper 1: Introduction.

²⁵ An unaccompanied minor is defined by DIMIA as 'a non-Australian minor (a child under 18) who does not have a parent to care for them in Australia'. An 'unaccompanied ward' does not have a parent or relative over the age of 21 to care for them in Australia. An 'unaccompanied non-ward' does not have a parent but does have a relative over the age of 21 to care for them. The Immigration (Guardianship of Children) Act 1946 ('IGOC Act') provides that such children

transferred from the Woomera Detention Centre to ‘alternative places of detention in foster care arranged by the South Australian Department of Human Services.’²⁶

In 2003, Centacare (a Catholic charity near Adelaide) offered community care as an alternative to the detention of children, following its success providing such care to five children of the Bakhtiyari family (aged 6-15) who were ‘released’ (in fact, though not legally) from Baxter Detention Centre in the summer.

In December 2001, DIMIA signed a Memorandum of Understanding with the South Australian Department of Human Services (‘DHS’) regarding children in detention. A complementary MOU was signed with the South Australian Department of Education and Children’s Services (‘DECS’) regarding ‘the provision of care and education for detainee children, usually unaccompanied minors, in alternative places of detention in home-based care (foster care).’²⁷ This MOU gives a designated person, usually a school principal, responsibility for the whereabouts of a detained child while he or she is attending school. Such a person is obliged to exercise moral, though not physical, restraint over the child and is obliged to notify DIMIA or the detention centre’s management as soon as there is any problem or indication that a child may abscond. In December 2002, Migration Series Instructions on Alternative Places of Detention emphasised that persons transferred to such ‘alternative places’ must be kept under constant supervision and other restrictions on their freedom of movement should be imposed.

Both in South Australia and in Victoria, a few asylum seekers have quietly been released to community care on compassionate grounds – for example, a woman with a daughter was released to live in a motel and a man to the care of a mental institution.

These exceptional arrangements could be formalised into a wider system for the transfer (i.e., *de facto* release with the threat of immediate re-detention at any time) of vulnerable persons into the community or into more appropriate care institutions.²⁸ NGOs and welfare agencies in South Australia, however, have serious concerns about the implementation of such arrangements, the isolation and lack of self-sufficiency they can involve, and whether such arrangements are always in

become wards of the Minister for Immigration and Multicultural and Indigenous Affairs who then delegates this function to officers of the child welfare authority in each State or territory. Source: DIMIA Factsheet No.84 ‘Caring for Unaccompanied Minors’, October 2003. Critics of these arrangements feel that they create a conflict of interest in situations where DIMIA is the detaining authority or responsible for the child’s removal from the country. See, UNICEF Submission to the HREOC Inquiry into Children in Immigration Detention.

²⁶ Lawyers Committee for Human Rights, *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, p.8.

²⁷ *Memorandum of Understanding between the Commonwealth of Australia and the State Government of South Australia Providing Access for Immigration Detainee Children in South Australia to Education in South Australian Government Schools*, quoted in Hansard (records of the Australian Parliament), 16 June 2002, p.11510.

²⁸ Any agency involved in supervising someone in an ‘Alternative Place of Detention’ needs to assure the Immigration Minister with regard to several points: (a) the standard of care and services to be provided to the ‘detainee’; (b) the responsibility for the costs and the day-to-day needs of the ‘detainee’; (c) respect for the privacy of the ‘detainee’; and (d) the availability of the ‘detainee’ for processing and, if necessary, removal from Australia. For welfare agencies, most concerns obviously focus on this final requirement, as it would entail an element of immigration enforcement on their part. Welfare agencies often already have extensive experience with exercising a duty of care with regard to people released on parole or juveniles released on correctional sentences, and DIMIA would implement some supervision requirement as a condition of the transfers – such as a reporting requirement to the police or a government office, either daily, three times a week or weekly – thereby retaining primary responsibility for the person’s appearance and compliance. At the same time, the welfare agency would be expected to exercise moral restraint over the individuals, persuading them to comply with these requirements. They would also have to be willing to notify DIMIA whenever anyone seemed likely to abscond. The agency would not chaperone the transferred ‘detainee’ everywhere, but in some accommodations a curfew system might operate, as already in many treatment centres and hostels.

the best interests of children. They are currently proposing to DIMIA that release on a bridging visa, with minimum entitlements to the Asylum Seeker Assistance Scheme guaranteed, is a more suitable option than expanding the number of 'Alternative Places of Detention' (see below – Hotham Mission Asylum Seeker Project).

B. Hotham Mission Asylum Seeker Project

The Hotham Mission Asylum Seeker Project ('HMASP') in Melbourne and other agencies across Australia have proposed increased use of release on Class E bridging visas, combined with an addition of minimum entitlements to the Asylum Seeker Assistance Scheme, currently run by Red Cross.²⁹ Housing support workers and caseworkers would both support those released to welfare agencies' care, providing supervision primarily through a personalised assistance programme. HMASP points out that, aside from providing practical assistance with material needs, and ensuring that minimum welfare conditions are met, 'casework would play a pivotal role in preparing, supporting and empowering asylum seekers throughout the determination process. While not responsible for implementing immigration decisions or providing legal advice, the caseworker would play a key role in case coordination, including liaising with lawyers and DIMIA/Minister's office.'³⁰

The nature of support that could be provided to former detainees granted community release on a bridging visa has been detailed by the Hotham Mission based upon their long and somewhat unique experience of working with asylum seekers in the community – both those who arrived in Australia with legitimate documentation and were 'immigration cleared' to live in the community, and those who were left to survive in the community without welfare entitlements. In February 2004, the HMASP reported that it was currently working with 250 asylum seekers, housed in 33 properties.³¹ To date, the Mission and its many NGO partners have worked with 66 asylum seekers released on bridging visas but without welfare entitlements.³² Hotham Mission notes an extremely high percentage of their clients who have complied with negative asylum decisions. They attribute this success both to the case-management model and the fact that their clients have received adequate legal representation.³³

Between February 2001 and February 2003, they conducted research to track 200 asylum seekers (111 'cases' including families) living in the community on bridging visa Class E, of whom 31% were former detainees. The Hotham research reported that not one single asylum seeker of the 200 absconded during the two year period, despite the fact that 55% had been awaiting a decision for 4 years or more and the fact that 68% were found to be at risk of homelessness or were actually homeless.³⁴

²⁹ The major opposition party in Australia (the Labor Party) has proposed similar case-management arrangements for non-detained asylum seekers, not as an alternative to detention, but as a solution to reducing levels of immigration litigation by ensuring that asylum seekers better comprehend the system. 'Guardians to manage asylum case load: Labor', *Sydney Morning Herald*, 31 March, 2004.

³⁰ Hotham Mission Asylum Seeker Project, 'Minimum Standards of Care for Asylum Seekers in the Community', (DRAFT working paper) Melbourne, 24 March, 2004.

³¹ Church properties, 'nominated transitional properties', rentals and bungalows.

³² Eleven in 'Alternative Places of Detention', fifteen psychological/medical cases, one unaccompanied minor, 32 on bond, two released on court order, and five 'interlocutory' cases. Hotham Mission Asylum Seeker Project End of Year Report, February 2004.

³³ Submission to the National Inquiry into Children in Immigration Detention from Hotham Mission, Human Rights and Equal Opportunities Commission, No.174.

³⁴ Hotham Mission Asylum Seeker Project, 'Welfare Issues and Immigration Outcomes for Asylum Seekers on Bridging Visa E, Research and Evaluation,' November 2003. See also: www.hothammission.org.au

Of rejected asylum seekers in the study, 85% voluntarily left Australia on receiving a final decision, within the 28 days usually allowed for them to do so. The other fifteen per cent were detained and then forcibly returned. Nobody absconded. The researchers concluded from this evidence that detention was unnecessary to ensure the vast majority of failed asylum seekers' availability for removal, and that absconding of such persons could be prevented with the use of lesser restrictions and positive support, specifically:

- a) Compliance requirements such as regular reporting;
- b) Living assistance linked to maintained contact with the authorities;
- c) Careful risk assessments;
- d) Comprehensive case management.

Finally, it should be noted that the HMASP produced a wealth of other welfare benefits for its clients, allowing them to live in dignity, quite aside from its success in preparing asylum seekers for any outcome of their cases and preventing absconding.³⁵

C. Proposed models of the Human Rights and Equal Opportunities Commission (HREOC)

In its May 1998 report, *Those Who've Come Across the Seas*, HREOC recommended an 'alternative to detention' model for the Australian system, involving imposition of varying degrees of restrictions on asylum seekers' freedom of movement. It recommends a presumption in favour of granting a bridging visa unless the government could produce evidence of a need to detain. DIMIA would need to demonstrate, among other things, a likelihood that the person will abscond, or, if the conditions of a bridging visa have already been breached, that the asylum seeker has failed to show good reason for such a breach.³⁶

Under the proposed model, asylum seekers would be released within 30 (or maximum 90) days. They would be given either: (1) an 'open detention bridging visa' or (2) a 'community release bridging visa' (to community, family or own recognisance). An open detention bridging visa would be more supervision and enforcement oriented, with accommodation provided by the State, operated with a curfew, a regime of signing in and out during the day, permission to work (which, if obtained, would entail paying a fee for the accommodation) or eligibility for welfare assistance if no right to work.

In comparison, the latter visa would involve: provision of a designated address, a duty to notify the authorities of any change of address within 48 hours, reporting requirements, possibly a bond or surety, and a duty to remain available to report to a case officer within 24 hours of being summoned. Both types of proposed bridging visas would, HREOC notes, require 'adequate funding of the community sector so that it can meet the additional demands placed on it by a comprehensive community release scheme.'³⁷ If re-detention were to be necessary, due to a breach of conditions or because a failed asylum seeker had to be detained pending removal, the individual would be unable to apply for re-release for another thirty days.³⁸

³⁵ Hotham Mission Asylum Seeker Project, 'Welfare Issues and Immigration Outcomes for Asylum Seekers on Bridging Visa E, Research and Evaluation,' November 2003.

³⁶ HREOC, *Those Who've Come Across the Seas*, Part 6: An Alternative Model, May 1998, p.235.

³⁷ HREOC, *Those Who've Come Across the Seas*, Part 6: An Alternative Model, May 1998, p.242.

³⁸ HREOC, *Those Who've Come Across the Seas*, Part 6: An Alternative Model, May 1998, p.243.

In April 2004, HREOC is expected to publish the report of its National Inquiry into Children in Immigration Detention, which will detail recommendations for the release and proper accommodation and protection of children.

D. Proposed model of the Refugee Council of Australia

The Refugee Council of Australia (an umbrella organisation for nongovernmental organisations working with refugees and asylum seekers across the country) has developed a similar model to that proposed by HREOC, which calls for more individual assessment as to whether an asylum seeker requires detention or some level of restriction on their whereabouts. They identify as potential beneficiaries of release to an alternative detention model as those who are unlikely to abscond and the expected outcome of their cases looks positive, as well as those who should be released for other humanitarian reasons.

Their Alternative Detention Model³⁹ is based on the argument that individual cases can be reviewed on a regular basis in order to choose the level of control demonstrably required for each person. There are three levels:

Level 1: Closed detention (which all asylum seekers experience initially upon arrival at a port or airport);

Level 2: Open detention (which equates to open centres of compulsory collective accommodation in Europe). Open detention would involve accommodation in a hostel, maintained and regulated by DIMIA, with a curfew from 7pm to 7am, and asylum seekers would be eligible to work or to receive financial assistance;

Level 3: Community release, which involves residence at a designated address and reporting requirements. There are three forms of such release:

- a) Family release. It is proposed that this form of release would be at a designated address, with a nominated close family member, and that the asylum seeker must report to the authorities at regular intervals, the frequency of which would be decided by the case officer after an individual assessment. The family member would be required either to pay a bond in advance or to sign a recognisance with the authorities. If called upon at any time, the asylum seeker must report to the authorities within 24 hours;
- b) Community organisation release. This would be much the same as family release, except with the designated address nominated by a recognised community organisation, and omitting the possibility to ask the community organisation to pay a bond.
- c) Release upon own recognisance. Again, very similar obligations would apply, except that the asylum seeker would be able to change his or her designated address by notifying DIMIA within 48 hours.

Applicants can be moved flexibly up or down these levels of control as their circumstances change. The level is stated upon their visa, and a new visa must therefore be issued every time that the level is adjusted. Anyone who is not released must be provided with a statement of the reasons for ongoing detention.

The Alternative Detention Model proposes that priority be given to securing and sustaining the community release of children, close relatives of children, elderly persons, single women, persons

³⁹ Developed in the late 1990s, this model is found on the website of the Refugee Council (www.refugeecouncil.org/au) and remains a current proposed alternative.

with special health needs or persons with previous experience of torture or showing symptoms of trauma. The penalty for an unjustified failure to cooperate with any of the non-custodial levels of control is return to detention, with a brief period in which it is impossible to apply for re-release.

E. Justice for Asylum Seekers report on costs of alternatives to detention

In 2002, Justice for Asylum Seekers ('JAS'), an alliance of over 25 national, church and community organisations, published its *Alternative approaches to asylum seekers: Reception and Transitional Processing System*. This model introduced three key elements: (1) case management to assist asylum seekers throughout the asylum and review processes; (2) several accommodation options; (3) risk evaluation early in the process, to identify which type of accommodation suits which individuals and to minimise absconding.

JAS recently commissioned a costing analysis from a specialised consulting firm, in order to compare the costs of detaining asylum seekers with the costs of receiving asylum seekers under their proposed, community model.⁴⁰

The report's authors noted that they could not quantify and therefore could not reach conclusions regarding the possible deterrent effect of detention, nor could they precisely estimate the medical and other social (integration) cost savings that might be achieved if the trauma of time spent in detention was minimised. The report accepted as its starting point that the mandatory detention policy for unauthorised arrivals would continue, but then proposed that an early risk evaluation would refer each asylum seeker to either: (a) a community alternative, (b) a moderate security hostel, or (c) recommend continued detention.

It was concluded that, even counting the additional costs of introducing a case management system, the proposed model would be eighteen per cent cheaper than the current detention system. It noted that each level of accommodation – community care, hostels and detention – is also the cheapest option for its appropriate level of security requirement (low, medium or high). It is not cost effective, in other words, to try to provide high levels of security in a community or hostel environment nor to provide low level security to a person that is truly 'high risk'.

The report relied upon figures from a number of sources, including a DIMIA statement in February 2003 that, in FY2001-2002, the average per capita per day cost of detention was A\$160 (and ranged from A\$95-A\$533).⁴¹ These figures did not include capital costs, therefore, a rough approximation was made by JAS based on the capital costs for correctional and elderly care residential facilities in Australia. They found that these costs ranged between A\$30-50 per person per day.⁴²

The report compared this cost evidence to the average cost of care in the community and accommodation in a semi-secure hostel, and concluded that if the daily cost of detention (A\$160) were added to the daily cost of case-management (A\$10) to make a total cost of A\$170, this could be directly compared to a total cost of hostel accommodation including case-management of A\$110

⁴⁰ This 'costings report' was published by JAS in September 2003. JAS received grants from foundations for this commission, which they reported to have cost some A\$10,000 in total.

⁴¹ Letter from DIMIA to JAS, quoted in JAS costings report, 2002, p.9. A direct comparison in September 1997 found that the costs of detention at Port Hedland were A\$161.77 per day, compared to the costs of community-based release provided by the Society of St Vincent de Paul at A\$14 per day. See, HREOC, *Those Who've Come Across the Seas*, Part 6: An Alternative Model, May 1998, p.237.

⁴² JAS costings report, 2003, p.12.

and community care including case-management of just A\$60.⁴³ They then subjected these figures to a ‘sensitivity analysis’ regarding key variables, including the time period of the initial mandatory detention varying between 15-60 days, and reached the final conclusion of an average eighteen per cent savings between detention and the JAS model.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

No specific alternative to detention projects have been implemented in Australia in recent years on any large scale, so evidence relating to the success of such alternatives is limited. Nor does the Australian government publish statistics relating to the overall compliance of released or non-detained asylum seekers.

The Department of Immigration reported in late 1997 that no single asylum seeker released on a bridging visa in the previous two fiscal years had failed to meet their reporting obligations or failed to appear for scheduled appointments.⁴⁴ Nor have any of the asylum seekers detained under less stringent security at the Residential Housing Projects near Woomera, Baxter and Port Headland, or at ‘Alternative Places of Detention’ in South Australia, attempted to abscond. The Hotham Mission in Melbourne reported 100% compliance of 200 asylum seekers, of which 31% were former detainees, tracked over the course of two years. In 1994, a parliamentary committee found that only 28 of 648 persons (4.3%) breached their reporting conditions and 11 of 697 sureties (1.6%) were forfeited.⁴⁵ Figures such as these, though either dated or localised, would suggest that alternatives involving additional supervision or restrictions are not needed to ensure compliance in Australia.

The mandatory detention policy and the reluctance to release asylum seekers to alternative measures cannot be explained with reference to national security concerns either. On 22 August 2002, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade asked the Director-General of the Australian Security Intelligence Organisation (‘ASIO’) about the security screening of asylum seekers and learned that out of 5,986 screenings conducted since 2000, not one single asylum seeker was found to pose a national security risk. The same Committee also heard no evidence of a statistical linkage between asylum seekers and criminality (other than immigration violations) since 2000.⁴⁶

What then are the policy objectives being met by Australia’s detention policy? It has been repeatedly acknowledged by the former Minister for Immigration in his public statements that the policy serves a deterrent function. It is presumed that this deterrence is directed against abusive claimants rather than genuine refugees, but in fact the debate has become far more complex since it began to focus on the issue of secondary movement from countries of first asylum and the legitimacy or illegitimacy of the reasons for those intra-regional movements. In any case, mandatory detention was introduced in 1992 yet the numbers of unauthorised asylum seekers

⁴³ Evidence was collected from various types of residential care, and also from the Hotham Mission Asylum Seeker Project in Melbourne (costs ranging from A\$19.70 per capita per day for a single adult man to A\$37.70 per capita per day for a high needs family – but note that these low costs were reliant on the donated time of many volunteers); Anglicare NSW (which had spent around A\$168 per day to assist a family of three with special needs – that is, around A\$27 per day per person of case worker expenses, and A\$41 per day per person for living expenses); and the Red Cross IHSS proposal which suggested it could deliver social assistance in place of detention at an average daily cost of A\$11.60 per capita.

⁴⁴ DIMA response to a question on notice by Senator Stott-Despoja on 1 September 1997 – Question No.803.

⁴⁵ Parliamentary Joint Standing Committee on Migration report, *Asylum, Border Control and Detention*, February 1994.

⁴⁶ Quoted in JAS costings report, 2003, p.8.

arriving in Australia continued to rise steadily (and then dramatically in 2001), which suggests that detention was not a very effective deterrent. Australia did not truly begin to deter asylum seekers until it closed its coastal borders completely in September 2001 and boat arrivals did not stop until one vessel (known as Siev X) sank en route, drowning over 300 asylum seekers.

B. Do alternatives ensure availability for return?

The Minister for Immigration stated in 2002 that immigration detention ensured persons are available for removal and identified this as a key component of effective border control. As one of the only alternatives to detention in Australia, the Hotham Mission Asylum Seeker Project has achieved excellent results in ensuring availability of failed asylum seekers for return, by alternative means of early intervention, counselling and assistance. From a cost-efficiency perspective, the government would have to compare the costs and results of locating and re-detaining those few applicants who might abscond when released into the community with the costs of keeping them in detention for long periods while their removal is arranged.

Now that the Australian government is issuing only 'temporary protection visas' the issue of availability for forced return will become increasingly focused on the return of recognised refugees whose protection is withdrawn. If such refugees can be located and returned, then so, presumably, can the majority of failed asylum seekers.

C. Cost effectiveness?

The JAS model (see above), with an element of community care delivered properly and without reliance on charitable funds, represents a potential eighteen per cent cost saving compared to the current policy of mandatory detention for all unauthorised arrivals. For this reason it is extremely persuasive.⁴⁷ The few cases tested to date, where welfare agencies have taken responsibility for low-risk individuals, supports this report's evidence of value for money at no additional risk to the public.

No costing evidence, however, is likely to outweigh the arguments by some Australian policy makers that detention is required as a deterrent against people-smugglers. As of September 2003, the Pacific Solution was reported to have cost over A\$500 million, indicating that almost any expenditure will be considered worthwhile if it delivers a deterrent message to those the Australian government believes to be heading to Australia without legitimate cause.

D. Export value?

As Australia continues to operate under a system of mandatory detention for all unauthorised arrivals, it has yet to introduce any systematic alternatives to that detention. There are a few, *ad hoc* examples, although they are limited in scope and generally have a large number of restrictions imposed on freedom of movement. They are not, therefore, considered to be best practice.

⁴⁷ The number of asylum seekers per case manager will vary depending on the needs of the clients, but JAS found that the supervisor/case ratio tends to vary between 1:6 and 1:30. They used an average of 1:15 (representing 25 individuals) and noted that most of the costs need to be loaded to the first month of arrival and evaluation (making case management 50% more expensive during this period).

AUSTRIA¹

I. DETENTION AND DOMESTIC LAW

A. Detention at borders or transit zones

Prior to a decision on the admissibility of a claim, confinement in a border or transit zone (*Konfinierung*) is permitted for those who apply for asylum at Vienna International Airport. This is not considered, under Austrian law, to be detention.²

UNHCR Vienna has a role in consenting to the rejection of ‘manifestly unfounded’ claims in the accelerated airport procedure. Such rejected applicants must remain in detention at the airport pending any appeal. In 2003, UNHCR gave its consent to 150 of 182 cases referred to it for review.³ Most of these persons were detained for a short period, however some had to stay for over a month, until a decision on their claim was taken. In 2003, 2,984 asylum applications were registered at the airport. It should be noted that most of these applicants were not processed through the airport procedure or detained, but rather were admitted immediately onto Austrian territory as their claims were not deemed to be manifestly unfounded by the Federal Asylum Agency. The high rate of release is also partly due to a lack of detention capacity.

B. Detention for in-country applicants

Asylum seekers are also detained if apprehended after having entered the country illegally.⁴ In most cases they are released after their first eligibility interview by the Federal Asylum Agency, provided their claim is not deemed ‘manifestly unfounded’.⁵ These asylum seekers whose entry took place by evasion of the border control or in breach of the provisions of the Aliens Law are usually held in custody by the district border police. At the eastern border (Lower Austria and Burgenland) and near the Italian border at the Brenner, there are special detention facilities for this purpose. Otherwise, local police facilities are used.

¹ The information presented herein is valid up to 31 March 2004.

² Art. 18(1), Asylum Law. Holding asylum seekers at the airport does not qualify as ‘detention pending deportation’ (and, therefore, is not subject to the same safeguards (see C. Detention pending deportation, below)) according to the explanatory remarks to the Asylum Law, which claim that this provision is in conformity with article 5(1)(f) of the European Convention on Human Rights 1950. This is counter to the position of UNHCR, which defines detention to include severe curtailment of freedom of movement within such locations, regardless of asylum seekers’ supposed ability to depart the receiving country. See, also, ECHR decision *Amuur v France* (1996) on unlawful restrictions on freedom of movement.

³ Information received from UNHCR BO Vienna.

⁴ An asylum seeker may be subject to the provisions of article 63(1)(1) and (2) of the Aliens Law, whereby he or she may be taken into custody for the following reasons: (a) issuance of an arrest warrant ordering that he or she be brought before the relevant authority; or (b) discovery within seven days after illegal entry, unless the individual indicates that he or she will immediately leave the territory. According to article 64 (1) *leg. cit.* the agent of the public security forces shall, without delay, and within twelve hours, inform the authorities of the arrest of an alien pursuant to article 63 *leg. cit.* Any such alien arrested under this provision may be held in custody for up to 48 hours. Beyond that limit, deprivation of liberty shall be permissible only by way of detention pending deportation (art. 61, Aliens Law).

⁵ Asylum seekers whose entry took place by evasion of the border control or in breach of the provisions of the Aliens Law are only granted a provisional right of residence when, after the first eligibility interview, their applications are deemed admissible and not manifestly unfounded (see art. 19(2), Asylum Law). Pursuant to article 21 of the Asylum Law, asylum seekers possessing a provisional right of residence shall not be arrested and detained if (1) they have submitted their application personally to the Federal Asylum Agency without being brought before it, or (2) they have filed their application at the time of the border control or on the occasion of other contact made by them with a security authority or with an agent of the public security service. Those asylum seekers who lodge asylum applications only after being arrested or detained may remain in detention regardless of their provisional residence rights.

C. Detention pending deportation

Asylum seekers and failed asylum seekers may be held in detention pending deportation under a variety of removal provisions.⁶ Article 61 of the Asylum Law allows aliens to be arrested and held in detention where it is considered necessary in connection with the imposition of a residence ban or expulsion order, until the latter can be enforced, or as a security measure in connection with deportation, forcible removal or transit.

The period of any detention pending deportation is supposed to be, according to law, as short as possible, that is, such detention should be enforced only until the reason for it ceases to exist or its objective can no longer be achieved. Detention pending deportation or other removal measures shall not exceed two months, and may only exceptionally be extended for a total duration of up to six months.⁷ Whereas some aliens police districts conduct regular, internal reviews to consider the continuing necessity of their detention orders, others do not. Some border districts have computerised systems that give them notice when the two or six months deadlines are approaching in each case, whereas others do not – occasionally leading to cases where the detention exceeds the lawful maximum period⁸.

D. Legal Advice and Appeals

Asylum seekers have rights of appeal or ‘complaint’ to the Independent Administration Senate, which is a quasi-judicial body in each province. Appeal to higher courts, including the Highest Administrative Court, may also be pursued. Legal aid for detainees making such appeals is limited. Most asylum seekers depend upon legal advice provided by voluntary organisations.⁹

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

During 2003, some 11,150 aliens (not only asylum seekers) were detained pending deportation. According to the estimates of several NGOs, approximately 10% of these persons were asylum seekers.

Most detained asylum seekers are single adult males, originating from countries with low recognition rates (e.g., Armenia, Georgia, India, Nigeria, etc.). However, starting from November 2003, some district authorities also began to detain heads of households while their wives and children were accommodated in reception facilities for asylum seekers. As the authority to impose detention lies with the district administrative authorities, practice varies considerably depending on

⁶ Art. 61, Asylum Law.

⁷ In four exceptional situations listed in article 69(4) of the Aliens Law the detention order can be upheld for a maximum period of six months. It includes situations in which it is not possible or permissible to expel an alien solely because: (a) a final ruling has not yet been pronounced concerning the inadmissibility of deportation to a specific country pursuant to article 75 of the Aliens Law (in cases contrary to article 3 ECHR), or (b) the establishment of his or her identity and nationality is not possible, or (c) he or she does not possess the necessary entry permit or transit permit from another State, or (d) he or she frustrates the deportation order by resisting the measure of constraint. The Aliens Law fixes also a maximum time limit for cumulative detention pending deportation. Within a two-year period, an alien cannot be held in detention pending deportation for more than six months by reason of the same facts (art.69 (6)).

⁸ There are over 91 first instance authorities (*Bezirke und Magistrate*) in Austria with varying practices, which have not been surveyed in detail by this study.

⁹ Article 40 of the Asylum Law provides for legal counsellors at the Federal Asylum Agency. However, detained asylum seekers do normally not have access to them and are, therefore, dependant on counselling services provided by NGOs. Social counsellors present in the detention facility usually facilitate the establishment of contacts.

the competent border district. Some districts hardly issue detention orders to asylum seekers, while others do so regularly. If the asylum authorities consider the claim not to be manifestly unfounded or inadmissible and issue a provisional right of residence, the asylum seeker is normally released from detention.

During 2003, most detained asylum seekers were held either during the period leading up to the first instance asylum interview or for the full two-month period permitted by law. Longer detention was exceptional and mainly concerned individuals to be returned under the Dublin Convention procedure or cases where the aliens authorities believed that a final negative decision on the asylum request was forthcoming.

III. ALTERNATIVES TO DETENTION

A. Open centres¹⁰ and dispersal arrangements restricting freedom of movement

Non-detained asylum seekers are entitled to be issued with a provisional right of residence until a final decision on their asylum application is taken. They must register their addresses with the federal authorities.

Each asylum seeker is first received at an open 'initial reception centre' (in Thalham, Traiskirchen or at the Vienna International Airport) and provided with an 'asylum procedure card'. They are then dispersed to designated accommodation centres throughout the nine provinces or Federal States (*Bundesländer*).

Destitute asylum seekers may receive assistance through the federal care scheme.¹¹

According to the Federal Care Provision Act, asylum seekers in federal care shall not be relocated to another accommodation or Federal State except in cases involving the closing down of accommodation facilities, the reuniting of families, particularly deserving personal reasons (including needs for psychological or medical treatment), or organisational requirements. As many federal care facilities are small *pensions* located in relatively remote areas, often lacking the necessary treatment for traumatised individuals, asylum seekers often request to be relocated. UNHCR intervenes in a few serious cases.¹²

¹⁰ Austria's so-called 'open stations' (*offene Stationen*) should not be confused with the open centres discussed here, nor with any other form of alternative to detention. The *offene Stationen* are, rather, detention facilities in which aliens who have been detained for some time and behaved cooperatively may be given more space to move around outside their cells, yet within a restricted area of the facility, during the daytime.

¹¹ Austrian policy is currently at a turning point with regard to the provision of social assistance to asylum seekers. Up until late 2003, a large number of asylum seekers were excluded from federal assistance on the basis of the revised Federal Care Provision Act, which entered into force in November 2003,¹¹ and prior to its entry into force on the basis of internal Ministry of Interior guidelines excluding certain nationalities of asylum seekers from all federal assistance.¹¹ Almost two thirds of all asylum seekers in Austria were dependent upon charity and often forced to sleep in the streets. In such cases, ironically, the warmth of a bed in detention during winter was sometimes considered preferable to this 'alternative'. At the time of writing, in early 2004, an agreement for the sharing of costs relating to the reception of asylum seekers had been negotiated between the Ministry of Interior and the provinces (*Bundesländer*). According to this agreement, which is expected to enter into force on 1 May 2004, all needy asylum seekers will once again be eligible for assistance. At the end of 2003, the Ministry of Interior decided to anticipate a solution and agreed to provide federal care to all needy asylum seekers prior to the agreement's entry into force.

¹² E.g., a 2002 case of a seven-year old asylum seeker who needed regular therapy in Vienna. Information received from UNHCR BO Vienna.

Following the entry into force of the new asylum law, all asylum seekers will have to proceed to the 'initial reception centre'. Once admitted to the regular procedure, those asylum seekers who are not in need of State assistance, may live wherever they choose. Their asylum applications will be allocated to one of the seven branch offices of the Federal Asylum Agency in a particular province. An asylum seeker does not need to move to that province if he or she is able to commute there for all appointments.¹³ This lack of restriction for self-sufficient applicants suggests that the Austrian reception system is primarily designed as a system of burden-sharing between the provinces rather than as a measure of enforcement to ensure closer monitoring of asylum seekers' movements. In practice, however, as the vast majority of asylum seekers do require State support, the latter becomes one of the policy's effects when it is fully implemented.

B. Reporting requirements, designated residence, or other 'more lenient measures' (*Gelinderes Mittel*)

The current Aliens Law provides for a number of more lenient measures of a non-custodial nature as alternatives to detention. In practice, these measures are either reporting requirements every second day and/or the requirement to reside at a place, usually a boarding house, specified by the Aliens Police (regardless of the applicant's need for federal care).¹⁴ Accommodation at a boarding house designated as a 'more lenient' measure can last twice as long as detention.¹⁵

The authorities may refrain from imposing a detention order if it is believed that the person will not abscond but will remain available for deportation by the use of such 'more lenient' measures.¹⁶ In particular, the authorities are obliged to apply such measures to minors, unless they can prove that such measures would be insufficient.¹⁷

Should an asylum seeker fail to comply with these measures or fail to appear when summoned, he or she may be detained. The threat of detention acts as a form of assurance against failure to comply. In addition, prior to moving to a designated residence, an asylum seeker is photographed and fingerprinted.

During 2003, measures of a more lenient nature were applied to 622 aliens. This constituted a slight decrease in the use of these alternatives in 2002. In January 2003, 1,042 persons were detained and sixteen benefited from more lenient measures. In December 2003, 983 were detained and 27 benefited from more lenient measures.¹⁸

In Graz, in the province of Styria, some 60% of detainees are asylum seekers, detained on average for around three weeks. While child asylum seekers in Graz are not detained, the 'more lenient'

¹³ UNHCR survey on Reception Standards for Asylum Seekers in the European Union, Geneva, July 2000, p.31.

¹⁴ Article 66, paragraph 4, last sentence of the Aliens Law.

¹⁵ *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*, Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002, p.62.

¹⁶ Art. 66(1), Aliens Act 1997.

¹⁷ With instruction No. 31.340/17-III/16/00 of 10 April 2000, the Minister of Interior instructed the authorities not to detain minors but to apply instead the more lenient measures. In case this should not be possible the reasons must be communicated to the applicant. The instruction also clearly stipulates that children under fourteen years of age are never to be detained (following an age determination made in close consultation with the Youth Welfare Office).

¹⁸ www.bmi.gv.at - Federal Ministry of the Interior asylum statistics. Prepared by ICMPD for the European Refugee Fund, Final Report, January 2002, p.62.

measures are not applied to adults. In St Pölten, Lower Austria, the ‘more lenient’ measures are only applied after a person has been in detention for up to two months.¹⁹

C. Other alternatives for separated children

The number of asylum seekers below the age of eighteen years who are detained in Austria is extremely small, though there are indications that the number rose in 2003.

As described above, according to the Aliens Law, separated children are among the key beneficiaries of the ‘more lenient’ measures, both to monitor them and, according to the legislators’ intentions, for their own protection. Separated children seeking asylum in Austria can also be referred to ‘clearing houses/centres’. These are hostel-type accommodation facilities in which separated children are hosted immediately after their arrival to Austria and where they have access to a comprehensive psychosocial support network. Due to the limited capacity of existing ‘clearing houses/centres’, only a small proportion of separated children have access to such comprehensive care arrangements. Other separated children seeking asylum in Austria are provided only with the necessary material assistance (shelter, food, etc.) under the Federal Care Provision Act and are otherwise left to their own devices.

The Youth Welfare Agency acts as the legal representative of any child in the asylum process,²⁰ but this agency does not automatically take on a guardianship role and usually only accompanies such children during their asylum interviews and lodges an appeal on their behalf if required. The explanation leaflet given to minor asylum seekers states:

“[T]he Youth Welfare Agency, being your legal representative, will be served with the decision of the Federal Asylum Agency (and of the Independent Federal Asylum Review Board). Therefore you ought to stay in touch with the Youth Welfare Agency during the entire asylum proceedings, or at least until you are 18 years old, and advise them of any change in address of residence.”²¹

Thus the onus for maintaining contact and complying with the procedure falls to the child. If the court becomes aware of the presence of a separated child in Austria it has to appoint a guardian. However, the court is only exceptionally informed by either the Youth Welfare Agency or nongovernmental organisations and therefore the appointment of a guardian is rather exceptional.

This study is not aware of any national statistics on the rate at which separated child asylum seekers abscond or remain in the Austrian asylum procedure. Therefore it is very difficult to draw conclusions regarding whether or not the current arrangements for children’s care and protection are effective, in both ensuring their compliance with the procedure and their protection from abduction by traffickers.

¹⁹Information forwarded from: Leitung Flüchtlinge Migrationsfragen, Caritas Austria.

²⁰Art. 25, Asylum Law.

²¹Quoted in: UNHCR survey on *Reception Standards for Asylum Seekers in the European Union*, Geneva, July 2000, p.30 (but age limit amended to reflect the change of law since 2000).

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

The return to full and non-discriminatory social assistance for all asylum seekers in Austria who need it²², is likely to have beneficial effects not only on the well-being of the asylum seekers themselves, but also on the efficiency of processing asylum claims and on the State's ability to ensure applicants' availability for removal if their claims are unsuccessful. It will mean that the majority of asylum seekers will be more easily contactable at fixed addresses or collective accommodation centres. Although comparative national data is not available, one would expect a decline in the number of asylum seekers recorded as 'no shows' for their interviews when they are no longer preoccupied with the challenges of daily survival.

To date there has been little evaluation, certainly at a national level, as to whether the measures of a 'more lenient' nature, or the care provided to separated children such as the 'clearing houses', are proving to be effective alternative means of ensuring the compliance and appearance (as well as protection from abduction for children) of those selected for these schemes.

B. Cost effectiveness?

There is no doubt that all forms of open accommodation are cheaper to run than closed centres. However, there may be costs saved by ensuring, by means of detention, that rejected asylum seekers who can be returned home are available for immediate return (if an individual assessment indicates a risk of absconding).

²² See above footnote 11.

BELGIUM¹

I. DETENTION AND DOMESTIC LAW

The Belgian authorities may detain asylum seekers at international ports, including at the airport, if they enter without valid documents.² They may detain in-country applicants without valid documents if the claim is deemed inadmissible.³ An asylum seeker may also be detained if he or she is considered to pose a threat to public order or national security.⁴ The only mandatory medical exam is for tuberculosis, so the public health grounds for quarantine detention are limited.

An asylum seeker may only appeal the technical legality of a detention order, without entering into the facts of the case.⁵ There are maximum durations for any such order: two months pre-admissibility, five months pre-removal, and eight months in cases relating to public order or national security.⁶ However, CIRE, a Belgian nongovernmental organisation, reports that these legal maximums are circumvented in practice by the issuance of multiple detention orders consecutively. Also, after every aborted removal attempt, a new detention order may be issued, thus starting a new period from zero.

Asylum seekers are not entitled to legal representation at the admissibility stage of the procedure before the Aliens' Office, however detained asylum seekers are entitled to legal aid to challenge the legality of their detention.

At the end of 2003, the Minister of Interior announced that irregular migrants caught a second time after being issued with an order to leave Belgian territory would henceforth be kept in a detention centre pending their removal. The Department of Immigration, which was not consulted on this policy shift, objected that it had insufficient detention capacity.⁷

Asylum seekers detained in closed centres may challenge their detention before the *Tribunal de Première Instance*, and such appeals have become almost routine. This is especially true in the case of children, who are usually released if suitable alternative accommodation is found.⁸ In the first nine months of 2003, there were a total of 1,163 requests for release from detention.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

There are six detention or 'closed' centres for illegal aliens in Belgium, including two at the airport. One of these is used to detain passengers who do not have the required entry documentation and apply for asylum (capacity 60); the second one houses those refused entry to the territory but who

¹ The information presented herein is valid up to 31 March 2004.

² Art. 74(5), Aliens Act.

³ Art. 74(6), Aliens Act.

⁴ Arts. 63(5)(3), 52, and 54(2), Aliens Act.

⁵ Arts. 71 and 63, Aliens Act.

⁶ If a failed asylum seeker does not leave the territory on his or her own accord, he or she may be detained and expelled. He or she may be detained for a maximum period of two months which may be extended for up to five months, if: (a) the necessary steps for removal are initiated within seven days of detention; (b) these steps are pursued with due diligence; and (c) timely removal is foreseen, or (d) up to eight months, where the person is a threat to national security or public order.

⁷ Expatica News, November 5, 2003.

⁸ If the Tribunal orders release, the Aliens Office does not necessarily allow a detainee access to the Belgian territory but sometimes 'releases' him or her into an airport transit zone. In answer to a written question of July 2003, the Minister of Interior stated that eight people had been transferred to a transit zone by the Aliens Office after their asylum application had been rejected and prior to removal.

do not apply for asylum (capacity 30). Four centres detain illegal aliens, including some whose asylum applications have been rejected (total capacity 504).

In 2002, 627 asylum seekers were detained at the border, and out of these, 65 were separated children.⁹ 648 asylum seekers whose applications were rejected by the Aliens Office at the admissibility stage of the procedure were detained on the territory, none of whom were minors.

In its decision of 27 December 2002, the *Chambre du Conseil de Bruxelles* ordered the release of the applicant, a minor born on 30 June 1985, detained at the border in Zaventem since 16 November 2002. Considering that the detention of a minor is not compatible with the Convention on the Rights of the Child 1990 or the European Convention on Human Rights 1950, the Chamber demanded her release if specific reasons for her detention were not produced. On 17 November 2003, the *Tribunal de Première Instance* of the Brussels court decided that separated children cannot be expelled without the guarantee that there is reception in the country of origin, as long as the law on guardianship for separated children of 24 December 2002 has not come into force. The NGO 'Defence for Children International', which had challenged the expulsion in the particular case, also asked the court for immediate release of children from detention. However, the Court ruled that such detention - even if not appropriate - is neither illegal nor contrary to international norms.¹⁰

Another important case concerns two Palestinians who were 'released' from detention into the transit zone of the airport, rather than being set at liberty. The Aliens Office regularly applies such 'release'. On 6 August 2003, four NGOs – among them the refugee agencies OCIV and CIRE – brought the case of the Palestinians to the European Court of Human Rights. Their main argument is that restricting persons in the transit zone amounts to detention and inhumane treatment. As of February 2004, the ECHR ruling is still pending.

III. ALTERNATIVES TO DETENTION

A. Dispersal policy/Directed residence

Asylum seekers who are not detained while awaiting decisions on the admissibility of their claims are assigned by the dispatching unit of the Aliens Office to accommodation centres run by (a) the Red Cross, (b) the State, (c) local initiatives, or (d) other nongovernmental organisations.¹¹ The Federal Agency for Asylum (Fedasil)¹² is responsible for the delivery of this centralised reception and assistance system.

The Director of Fedasil states that the reception system is not intended to have any supervisory or enforcement function, and as such can not be considered an 'alternative to detention' in any

⁹ From the record figure of 42,691 in 2000, the number of asylum requests in Belgium came down to 24,549 in 2001 and 18,805 in 2002.

¹⁰ 'Tabita' Decision of Tribunal de Première Instance of Brussels Court, 17 November 2003.

¹¹ 43 open centres, with a capacity of 75 to 850 people each, cater for over 12,652 asylum seekers as at 31 December 2003. Two of these, with a joint capacity of 190 places, are for emergency accommodation and for short stays (overnight before dispatching to other reception centres). Nineteen of the centres are run by Fedasil, an autonomous administrative body under the Ministry of Social Affairs, and 24 by the Red Cross, CIRE, OCIV (two refugee NGOs) and the Mutualités Socialistes.

¹² Fedasil started operations in May 2002 as an autonomous agency under the authority of the Ministry for Social Integration.

immediate sense.¹³ There is a clear institutional division of responsibility between Fedasil and the Ministry of Interior which operates the detention centres.

The history of how the system developed is also very similar to the current course of reception policy in the UK. Municipalities previously provided assistance in the form of a cash allowance to asylum seekers, but certain Brussels municipalities were overburdened and threatened to load asylum seekers onto buses and dump them in the richer municipalities unless a more equitable solution could be found. The system of collective centres thus began in 1986 and, as of February 2004, there are 15,185 places in the total system, with asylum seekers accommodated in private flats as well as larger centres. Receipt of material assistance is dependent upon residence in the centre or designated residence. Again, the fact that an asylum seeker is not sent to one or the other on the basis of his or her individual need for supervision or risk of absconding, but rather on the basis of need (for example, large families or those identified as vulnerable are sent to private flats) indicates that the system is not geared toward enforcement.

Finally, the fact that people move out of larger centres after six months or so, if their procedure is still ongoing,¹⁴ in order to prevent institutionalisation, suggests that freedom of movement is not restricted for any reason other than efficient delivery of social assistance. On the other hand, in practice, the fact that the vast majority of asylum seekers must stay in a certain place in order to receive State assistance makes it much easier to locate them throughout the processing period.

A person is deemed to have absconded from a reception centre if they fail to appear for five days in a row. The private flats are more difficult to monitor in this way, but social services tracks people in them relatively closely in the course of providing assistance.¹⁵

The objective of the shift away from private rentals and provision of assistance in cash to collective centres and provision in kind¹⁶ was to prevent the start of the integration process for those cases likely to be rejected. This is similar to the reasons for detention of manifestly unfounded cases.

A decision to assign an asylum seeker to a particular place of residence, like a decision to detain, can be taken subject to a series of judicial appeals¹⁷ and an ultimate appeal to the Council of State (*Conseil d'Etat*).¹⁸ If an asylum seeker has sufficient resources to live on his or her own, he or she is not required to reside in a centre or designated place.

B. Arrangements for departure/removal of failed asylum seekers

When a claim is rejected, an asylum seeker is ordered to leave the country – usually within five days - and an *Ordre de Quitter le Territoire* ('OQT') is issued. There is no obligation to report to the authorities with a view to deportation. (But note the recent declaration of a policy change on this matter, as mentioned above.) Asylum seekers whose cases are declared inadmissible because another country of the European Union is responsible for the examination of the asylum request (Dublin Convention cases) are told to report to the Aliens Office to collect their one-way air ticket

¹³ Interview with Director of Fedasil, October 2003-March 2004

¹⁴ The average time before someone receives a first decision is three to four months, but Belgium is currently running a 'last in/first out' system to prevent expansion of the backlog, so the old backlog cases have been in reception system now for a very long time.

¹⁵ Interview with Director of Fedasil, October 2003-March 2004.

¹⁶ If the centres and other accommodation are ever temporarily filled to maximum capacity, then financial assistance may be given directly to any additional asylum seekers.

¹⁷ Art. 71, Aliens Act.

¹⁸ Art. 63, Aliens Act.

to the responsible EU Member State. The majority fail to appear. If the responsible EU Member State is a contiguous country, the asylum seeker may be detained for a few days before being driven to the border and handed over. In 2002, 12,589 aliens were served with an OQT, and 2,398 were detained.¹⁹

Four reception centres are used as open centres for rejected asylum seekers who have appealed the rejection of their claim to the Council of State (*Conseil d'Etat*) under general administrative law; technically speaking, they are no longer in the asylum procedure.²⁰ The appeal does not carry suspensive effect and does not therefore freeze the OQT. They may be deported at any time.²¹

When issuing OQTs, the Aliens Office assigns each asylum seeker or family to one of four centres, which involves transfer from their previous place of abode, whether at a centre or in a private apartment. Most do not subsequently report to the assigned centre but rather abscond at this point.

The Flemish nongovernmental organisation, OCIV, has published a study on this high incidence of absconding during transfer from the general reception to (still open) centres for Council of State applicants.²² OCIV found that between January 2002 and August 2003, at least 2,103 asylum seekers did not report for transfer to such centres (that is, some 52% of those eligible to be transferred). A further 144 did report for the transfer but did not arrive at the centre itself. This is despite the surprising fact that the police do have the power to remove failed asylum seekers from these open centres in order to effect a removal. OCIV believes it is largely a question of perception, that is, asylum seekers fear that these four centres are akin to detention. In addition, some long-staying asylum seekers may not want to abandon their community ties in the areas where they live (for example, removing their children from local schools). Those who fail to make the transfer presumably go underground in the larger cities, surviving without support, or leave for other European countries.

There is no evidence that these centres are meeting the government's stated objective of increased return (either voluntary or forced).²³ OCIV therefore recommends several alternatives, as follows: (a) solving the root cause which is the quality of the asylum procedure itself and the lack of suspensive effect of final appeals; (b) providing a legal status for persons who cannot be returned through no fault of their own; (c) programmes of self-directed voluntary return allowing people up to 30 days to leave in dignity (as in Canada – see Canada section); (d) better provision of advice to those facing deportation; and finally, (e) an even stricter separation between the roles of reception staff and police enforcement.²⁴

¹⁹ Information received from UNHCR RO Brussels.

²⁰ UNHCR, in contrast, would class those who have not exhausted all appeals as 'asylum seekers'.

²¹ Following an important decision by the *Cour d'Arbitrage* (case number 43/98 of 22 April 1998) which held that, despite the lack of suspensive effect, persons residing illegally on Belgian territory are nevertheless entitled to social aid, the number of appeals lodged before the Council of State has increased dramatically. There were 7,519 such appeals in 2002 and 7,171 in the first nine months of 2003. From April 2003 to September 2003, a total of 163 appeals to the Council of State were made by separated children.

²² OCIV Report, 'Evaluatie Omzendbrief opvang asielzoekers tijdens procedure Raad van State, Voorstellen voor alternatieven', 25 September 2003.

²³ The Belgian government has reported that compulsory stay at designated residences, combined with obligations to report to authorities at regular intervals, 'appears to be unproductive.' *Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has ended, and Rejected Asylum Seekers*, prepared by ICMPD for the European Refugee Fund, Final Report, January 2002, p.68.

²⁴ OCIV Report, September 2003, and interview with OCIV legal department, October 2003-March 2004.

C. Alternatives for separated children

Belgium does not have a system of guardianship for separated children who are seeking asylum.²⁵ Therefore separated children face numerous problems, including a lack of alternative care arrangements pending a solution to their cases. For some years there have been reports that around half of separated asylum seeking children in Belgium disappear before the completion of the determination procedure.²⁶

Separated children who arrive at the Belgian border seeking asylum are usually, like adults, detained in the transit centre if they do not meet the entry conditions. This phenomenon is being tackled by the systematic introduction of an injunction to obtain the minor's release. The Brussels Bar has a pool of 40-50 lawyers who are on stand-by to request the competent court to order the release of a minor, once a suitable alternative reception arrangement has been made. This has reduced the detention of minors substantively. Once admitted to the territory, these minors are usually accommodated in a special section of an open reception centre, such as the ones in Bevingen, Deinze, Florennes or the *Petit Château* in Brussels (35 spaces), or, more rarely, in a foster home or special youth institution. There are presently seven centres hosting separated children seeking asylum (totalling 390 places).

Psychological and social welfare needs are handled by a nongovernmental organisation, EXIL, which continues to provide this support even after a minor leaves the centre.

For its 2001 annual report, a Belgian nongovernmental organisation called Child Focus studied 234 files concerning 284 missing children. By the year's end, 271 children were still considered missing. The majority of those missing were aged between fourteen to sixteen years and 75% were male. In April 2002, Child Focus released a study on the disappearance of separated children and child victims of human trafficking. This study, based on the examination of 255 disappearances, revealed that some of the children immediately disappear and fail to appear at their assigned place of residence,²⁷ some disappear from accommodation at private addresses under the supervision of a briefly vetted adult, while most children disappear after some time in their assigned place of residence (be it a host centre, an institution or a host family). Here, the figures given by the various host centres reveal that 45-50% of separated children end up disappearing from these centres.

Child Focus concluded that, while some cases concerned minors who ran away voluntarily to eventually reach their chosen final destination,²⁸ this was a small percentage of the disappearances, most of which could be counted as abductions.²⁹ This controversial finding has been used by certain Belgian personalities as a strong argument in favour of detention centres for minors.

The government currently intends to end the detention of separated children and instead to establish 'secure centres' adapted to their needs. This will be accompanied by the obligation to appoint a guardian for each separated child arriving in Belgium or intercepted by the police. The relevant

²⁵ There were 603 unaccompanied minors in 2002, and 415 in the first nine months of 2003.

²⁶ UNHCR survey on Reception Standards for Asylum Seekers in the European Union, Geneva, July 2000, p.36.

²⁷ Another study by the International Organisation for Migration found that 67.8% of the separated children seeking asylum never reach their assigned host centres (50% of females and 26.6% of males). A direct link is made with human trafficking.

²⁸ As far as final destination is concerned, the study reveals that nearly half of the missing children and a fifth of the girls had stated a final destination upon their apprehension in Belgium; most intended to go to the United Kingdom.

²⁹ 64 cases of missing children were concretely linked to the trade in human beings. 48 minors were victims of the trade in child prostitution and the rest was victims of the trade in forced labour.

legislation was adopted in December 2002,³⁰ a Royal Decree to implement the law was published in the Official Journal on 22 December 2003 and the law will enter into force on 1 May 2004. This represents a major advance to curb the detention of minors in closed centres and will help support separated children in all administrative matters.

The legislation also contains an article authorising Child Focus to undertake a further in-depth study on unaccompanied minors seeking asylum in Belgium, in order to clarify and propose solutions to the continuing problem of disappearances.³¹

D. Electronic monitoring proposals

At the end of 2003, the *Vlaamsblok* political party made some proposals for the electronic monitoring of failed asylum seekers and asylum seekers deemed likely to abscond. This prompted a lively debate on the issue in the Belgian media, but as of the writing of this report, those responsible for the electronic monitoring of criminal offenders in Belgium report that they have not been asked to develop any programme by the immigration authorities.³² At present, the cost of electronic tagging involving satellite tracking would be twice or three times that which uses radio frequencies, which already costs some 10-12 Euro per capita per day (for a project monitoring, approximately 300 people). An initial investment of 250,000 Euro per device is also required and this will be lost if the device is destroyed. Thus the costs of such monitoring would only be slightly lower than the costs of detention, while guaranteeing far less control. In practical terms, the technology is only useful where there is a fixed home address with a phone line – not the most frequent circumstance for asylum seekers in Belgium – and where the person does not wish to transit to another country or otherwise abscond (see United States section).

E. Return programmes as alternatives?

The International Organization for Migration runs a return programme in Belgium (and in some eight western European countries) where people are offered incentives to return to their countries of origin.³³ As these offers are also made to detainees in closed centres (including asylum seekers and failed asylum seekers with appeals still pending), the programme is sometimes described as providing an alternative to detention. In so far as such return may become an ‘alternative to seeking asylum’, however, these programmes are not in the same category as the other alternatives discussed in this study and deserve separate evaluation.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

Though Belgian statistics are not analysed in terms of the point in the procedure at which asylum seekers abscond, it is the impression of Fedasil’s Director and of OCIV that the vast majority of failures to appear occur only after a negative decision on the asylum claim has been delivered. Many adolescents who receive final negative decisions remain in the system because they know

³⁰ Introduced through the ‘*loi-programme*’ of 24 December 2002 (published in the Monitor Belge, 31 Dec. 2002).

³¹ In early October 2003, a 17 year old failed asylum seeker was reported missing from the Brussels Airport. Reported on October 10, 2003 – Expatica News.

³² Interview with Ralf Bas, Belgian Ministry of the Interior, October 2003-March 2004.

³³ In the Belgium programme, the returnee is given either (1) 250 Euros and put on a plane or bus, and received at the other end, or (2) a grant of several thousand Euro to set up a small business upon return, training for this before leaving Europe and a contact to support the enterprise upon return.

they are protected from forced return, but then disappear just before their eighteenth birthdays. Previously, many asylum seekers used to depart from the reception centres earlier in the procedure, when transit to the UK was relatively easy, but since the Sangatte Centre closed which narrowed options, such early failures to appear have become relatively rare.³⁴ This is despite the fact that the current Belgian refugee recognition rate is relatively low.³⁵

The fact that people who cannot be returned to their countries of origin, but who cannot be lawfully held in indefinite detention, are simply released onto the streets without assistance or supervision perhaps shows that the concern of the government is not with reducing overall number of people illegally present in Belgium (or in the EU as a whole) but with reducing the number of 'returnable people who refuse to return'.³⁶ In 2003, 10,584 individuals, both illegal migrants and failed asylum seekers, were expelled from Belgium.³⁷

Similarly, the OCIV evidence that so many of those moved to the four special centres for failed asylum seekers (those appealing to the Council of State) regularly disappear in the course of the transfer also suggests that the authorities are somewhat tolerant of such absconding, so long as the person is no longer claiming State support.

A larger State concern also served by detention may be the deterrence of future arrivals, and in this respect the alternative restrictions on free movement, including provision of assistance in kind and on condition of a designated places of residence, are said to have been equally successful in steadily reducing the number of people seeking asylum in Belgium in recent years.

It seems, however, that the implicit agreement that no more closed centres should be constructed to expand detention capacity looks likely to come to end, due in part to pressure from neighbouring countries and from the local police who are frustrated by the revolving door of apprehending illegal migrants who then immediately get released with an order to leave the country.

B. Cost effectiveness?

The Director of Fedasil confirms the assumption that the per capita costs of open centres are significantly less than the per capita costs for detention in Belgium.³⁸ The cost argument has not been a convincing one in Belgium though as the high costs of detention are believed to reap benefits in the longer term in terms of easier deportations or if abusive applicants are deterred from coming to Belgium.³⁹

C. Export value?

There are some excellent collective reception centres in Belgium – for example, the *Petit Château* centre – but even the best such centres are inappropriate for the length of time that many residents remain in them. There is a lack of privacy and difficulties for families to maintain their cultural structures. Since the Belgian procedure can take years, and yet results in a relatively low

³⁴ Interviews with Director of Fedasil and with staff of OCIV, October 2003-March 2004.

³⁵ Recognition rates in Belgium are approximately 5-8% at first instance and close to 20% on appeal.

³⁶ Interviews with OCIV staff, October 2003-March 2004.

³⁷ Information received from the Belgian Aliens Office, October 2003-March 2004.

³⁸ According to the *Moniteur belge* the total running cost of the Aliens Office for 2003 is 66,486,000 Euros, out of which 10,642,000 EUROS are for closed centres: 3,303,000 Euros are spent on clothing, food and health care. An additional 5,023,000 Euros are allocated for the repatriation and removal of undesirable aliens.

³⁹ Interview with Director of Fedasil, October 2003-March 2004.

recognition rate, the majority of those in the allocated residences are being 'warehoused' unproductively for the duration of their time in Belgium. There does not seem to have been a thorough study comparing the costs and benefits of collective centres as opposed to more mainstream assistance in the community. Such a study should be conducted not only in terms of financial costs, but also by assessing elements such as the standards of education for children inside or outside of centres and the sociological and psychological consequences of such institutional living.

The research undertaken by Child Focus on the problem of separated children disappearing deserves citation and replication in numerous other countries struggling with the same problem.

BULGARIA¹

I. DETENTION AND DOMESTIC LAW

A. Asylum-Seekers

According to the Law on Asylum and Refugees 2002 ('LAR'),² all applications for protection in Bulgaria are dealt with under an accelerated procedure³ with the exception of applications from unaccompanied minors.⁴ The State Agency for Refugees, the central competent refugee authority in Bulgaria, is under an obligation to decide, within three days of the registration of the application for protection, between the following three options:⁵ (a) to refuse the application as manifestly unfounded; (b) to discontinue the procedure; or (c) to admit the applicant to the general refugee status determination procedure. Detention of asylum seekers during the latter general, non-accelerated determination procedure is very rare and the majority of asylum seekers in Bulgaria enjoy freedom of movement, as guaranteed by article 35 of the Bulgarian Constitution.

There are two types of detention under Bulgarian legislation: (1) detention used as a measure to secure appearance before a judicial body for the purposes of criminal prosecution (i.e. detention 'in custody') and (2) administrative detention applied in cases of unidentified aliens illegally residing in the country, as a measure prior to expulsion.⁶ According to article 44 (6) of the Aliens Law, after issuing an 'expulsion' or a 'forcible removal to the border' order, an alien may be forcibly accommodated in a special centre until the administrative measure is executed. There is no other maximum duration for such detention.

According to article 30 of the Bulgarian Constitution, detention is only possible on the basis of law. Judicial authorities (including, in Bulgaria, the Prosecutor's Office) must be contacted immediately and must confirm the legality of the detention within twenty-four hours. A person has the right to legal counsel from the moment of detention or from the moment he or she is charged.⁷ According to the Bulgarian Penal Code,⁸ the detention of an asylum seeker carries the same safeguards against arbitrariness as any other detention.⁹

Cases still exist where the Bulgarian police do not distinguish adequately between asylum-seekers and illegal aliens and consequently apply the Aliens Law and the Ministry of Interior Law¹⁰ to all aliens without giving special consideration to the rights of asylum seekers. In the past, the Ministry

¹ The information presented herein is valid up to 31 March 2004.

² LAR, in force as of 1 December 2002. Available at: http://www.unhcr.bg/bglaw/en/ukaz_162_en.pdf.

³ Ch. 6, Section II, Ars. 68 – 71, LAR.

⁴ Art. 71, LAR.

⁵ Art. 70(1), LAR.

⁶ There are no Acts specifically regulating detention of asylum seekers or refugees. The main Acts regulating detention in Bulgaria are the Penal Code; the Penal Procedure Code; the Ordinance N 2 for the Situation of Accuseds and Defendants with 'Detention in Custody' Measure to Secure Appearance of the Ministry of Justice and Legal European Integration (in force since 30 April 1999); Ordinance N 20 for the Organization, Aims and Activities of the Places for Temporary Accommodation of Adult Persons (24 January 1978); some provisions of the Law for the Ministry of Interior and the Aliens Law; Regulations for the Organisation and Work of Places for the Temporary Accommodation of Minors and Underage persons (21 July 1998). Information received from UNHCR BO Sofia.

⁷ Art. 30, para 4 of the Constitution.

⁸ Penal Code promulgated in State Gazette issue 26 of 1968, last amendment State Gazette issue 101 of 2001, effective from 28 November 2001.

⁹ The time limits for detention are determined in Arts. 152 (3), 202 (1) and 203 of the Penal Procedure Code, promulgated in State Gazette issue 89 of 15 Nov 1974, last amendment promulgated in StateGazette issue 42 of 2001, effective 31 April 2001.

¹⁰ Ministry of Interior Law, promulgated in State Gazette issue 122 of 19 Dec 1997, last amendment promulgated in State Gazette issue 28 of 2001, effective 27 March 2001.

of the Interior has detained asylum seekers without proper Bulgarian identity documents as if they were illegal residents. At the end of 2003, however, the State Agency for Refugees established a mechanism for issuing identity documents on the day after registering an asylum application, which is expected to reduce such incidences of wrongful detention. A goodwill agreement, relating to the prompt release of wrongfully detained refugees or asylum seekers, was concluded between the National Service Police, Guards Department of the Ministry of the Interior and the Bulgarian Helsinki Committee legal network in 1999.¹¹

B. Rejected asylum seekers pending removal

Release from administrative pre-removal detention may be secured with the granting of status or a stay of a deportation order on humanitarian grounds. Aside from 1951 Convention refugee status, the Bulgarian Law on Asylum and Refugees also provides for humanitarian status and the Law on Foreigners allows for the granting of a visa of short-term residence for up to ninety days in any case. During 2003, 77 persons were released from pre-removal detention on the basis of applications for protection.¹²

Bulgaria does not presently deport rejected asylum seekers¹³ due to limited State resources, therefore, after three to six months in detention, such persons are often released and asked to report every day to the regional police station nearest to wherever they are registered as residing (see below, under alternatives).

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

In 2000, Bulgaria detained 137 asylum seekers at border points on the grounds of illegal entry.¹⁴ The two major border points where applications are filed are Sofia International Airport (Vrazhdebna) and the checkpoint at GKPP Kapitan Andreevo on the Bulgarian-Turkish border. Those detained at the airport are held in the transit zone, which is just a separated part of the arrival/transit hall. UNHCR and the Bulgarian Helsinki Committee have limited access to these detainees, who are in some cases held there for up to two weeks. The average length of detention though is two to five days. According to the information from the National Service Border Police for 2003, 421 aliens were detained at the borders while attempting to cross illegally. In addition, 6,907 persons were denied entry due to the lack of a visa, travel documents and/or financial resources.¹⁵ In 2003, according to the figures of the Bulgarian Helsinki Committee, 77 individuals were released from detention on the basis of their applications for protection.

Some persons detained at the airport are, if their case is deemed ‘manifestly unfounded’, transferred directly to a detention centre, such as that in the neighborhood of Droujba in Sofia. As at 28 February, 2004, twenty-two failed asylum seekers were reported to be detained in the Droujba centre.¹⁶ According to an Ordinance of February 2004, the new Migration Directorate within the Ministry of the Interior shall construct and maintain special centres for temporary accommodation

¹¹ Information from UNHCR BO Sofia.

¹² Information from Bulgarian Helsinki Committee, Protection of Refugees and Migrants Program, 16 February 2004.

¹³ According to the official State Agency for Refugees statistics for the period from 1993 to 31 December 2003, a total of 12,803 persons applied for protection in Bulgaria. For 2003, 1,036 persons were denied protection (including 45 children).

¹⁴ ‘Safeguards for asylum-seekers and refugees in connection with the prevention of irregular migration into and within Europe: A survey of law and practice of thirty-one European States’, ICMPD & UNHCR, June 2001.

¹⁵ Letter from the Director of the National Service Border Police, Ministry of the Interior, dated 23 January 2004, quoted by UNHCR BO Sofia.

¹⁶ Information received from the Bulgarian Helsinki Committee.

of aliens who have been issued with orders for forcible removal to the border or expulsion.¹⁷ With funding from the EU PHARE programme, Bulgaria is now planning to build two transit centres to accommodate 300 asylum seekers and refugees each, at Busmanci (close to Sofia International Airport) and in the village of Pastrogor (close to the Bulgaria-Turkish border crossing point at Kapitan Andreevo), scheduled for completion by the end of 2005.¹⁸

If someone detained at the airport needs to be detained for more than a few days, they can be transferred to the airport hotel of Bulgarian Air. UNHCR Sofia and the Bulgarian Helsinki Committee report, however, that this practice has not been seen for several years.

III. ALTERNATIVES TO DETENTION

A. Suspension of case due to failure to appear for an interview

For asylum seekers awaiting a decision on their claim, article 14 of LAR permits suspension of the procedure if the applicant fails to appear within ten days of a summons for interview. Article 15(7) states that if the applicant does not appear within three months of such a suspension, then the case will be officially discontinued. The case can be re-opened if evidence of reasonable grounds for absence (e.g., serious illness) is produced. These provisions are derived from the general Law on Administrative Procedure.

For asylum seekers whose claims are rejected but who are not deported,¹⁹ stringent (daily) reporting requirements may be used as an alternative to their indefinite detention. As of February 2004, there were eighteen persons in Bulgaria living under this stringent reporting regime, of whom thirteen were failed asylum seekers and the others, illegal migrants.²⁰

B. Alternatives for separated children

Separated asylum seeking minors in Bulgaria are not detained since they are exempt from the accelerated procedure. According to article 25 (1) of LAR, a guardian shall be appointed for any unaccompanied minor who seeks or has been granted protection on the territory of Bulgaria. Under article 25(2), the State Agency for Refugees has an obligation to accommodate unaccompanied/separated children seeking or granted protection, until they come of age, at the specialist institutions managed by the Ministry of Health, Education and Science and Ministry of Labor and Social Policy. The State Agency for Refugees is responsible for the protection of such children against physical or mental torture, or cruel, inhuman or degrading treatment. They are entitled to financial and material assistance, equal to that provided to adult refugees as well as to free primary and secondary education in public schools.²¹ The directors of orphanages are legally appointed guardians for the unaccompanied/separated minors accommodated there.

Nonetheless, the frequent disappearance of separated children from their places of accommodation and their high rate of absconding from the procedure is an issue of concern in Bulgaria. The quality

¹⁷ Ministry of Interior Ordinance 13 February 2004, State Gazette No. 12 of 13 February 2004.

¹⁸ Twinning Project BG 2003/004-937.08.05 under the EU Phare National Program 'Institutional Strengthening of the State Agency for Refugees'. The EU Commission will finance the Project with 3,750,000 Euro and Bulgarian government will co-finance with 1,250,000 Euro.

¹⁹ During 2003, only five failed asylum seekers were deported from Bulgaria. Information received from the Bulgarian Helsinki Committee.

²⁰ Information from the Bulgarian Helsinki Committee, Protection of Refugees and Migrants Program received on 16 Feb. 2004.

²¹ Information received from UNHCR BO Sofia.

of the accommodation is not the problem because there are good social homes available, but a new initiative is trying to promote the integration of such children into Bulgarian foster homes since it is believed that traffickers are less able to take children who are settled with Bulgarian guardians in a family environment. Monitoring at borders is another part of this joint State-NGO initiative to prevent the trafficking of children without overly restricting their freedom of movement within the country.²²

C. Open centres and directed residence

During an asylum procedure, an asylum seeker is obligated to stay at an address authorised by the State Agency for Refugees, and to be at the Agency's disposal at all times. Article 93(2.2) of LAR provides for administrative penal liability of an asylum seeker if he or she leaves the address without authorisation by the Agency.

Depending on availability of beds, asylum seekers under the general procedure, including those released from the airport, are received into two open centres. One centre is within the premises of the State Agency for Refugees in Sofia, with the capacity to accommodate about 400 asylum seekers. The second centre is located in the village of Banya, near Nova Zagora, with the capacity to accommodate some 80 asylum seekers. In-country applicants must register at these centres whether or not they need to reside there. In addition, there are two temporary centres, located at the Bulgaria-Turkish border checkpoint and in Ljubimetz. All four of these centres are open, but a resident must request permission to be absent for longer than 24 hours.

LAR provides for accommodation of asylum seekers at these open centres,²³ but also provides for permission to stay at an independent address if the asylum seeker does not require State support.²⁴ The fact that this greater freedom of residence is accorded to those with their own funds or family ties in Bulgaria shows that the open centres are intended and used more as a way to support destitute applicants than as a way to control applicants' movements, ensure their efficient processing, or prevent them from absconding.

D. Wider policy solutions to transit migration

Eurodac (the EU database which will identify irregular movers within Europe using their biometric data), combined with increased border controls and surveillance, will have the most dramatic impact on transit migration, which is the main reason for asylum seekers absconding in Bulgaria. The number of personnel in the Migration Police Unit is currently being increased as one of the requirements of EU accession.

Bulgaria operates a strong exiting regime, which is another major disincentive for asylum seekers considering abandoning their claims in Bulgaria and moving west by land. According to article 279 of the Bulgarian Penal Code, illegal crossing of a border (to enter or exit) is a crime punishable with imprisonment of up to five years as well as a fine or probation. Paragraph 5 exempts asylum seekers entering Bulgaria without authorisation (in compliance with article 31 of the 1951 Convention), but refugees or asylum seekers who are apprehended while trying to exit Bulgaria illegally are liable to prosecution. In practice, most refugees and asylum seekers apprehended in this way are not prosecuted or incarcerated but are simply returned to the State Agency for Refugees, where their

²² Interview with Bulgarian Helsinki Committee.

²³ Arts. 69(1) and 72(2).

²⁴ Art. 72(3).

attempted exit may impact on the outcome of their claim. It is very rare for anyone to be prosecuted for illegal exit, but there have been a few cases in recent years.²⁵

The long-term solution to reducing transit migration, however, is clearly the creation of improved protection and integration prospects in Bulgaria. Increasingly, both asylum seekers and recognised refugees are opting to remain in Bulgaria rather than transit west, showing that the procedural reforms and social programmes of the past few years have worked as incentives to lower the rate of absconding.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

Since 1993 (when the 1951 Convention was ratified by Bulgaria) until 30 December 2003, there has been a total of 12,803 asylum applications lodged in Bulgaria, of which some 5,186 (41.5%) have disappeared or been discontinued. It is presumed that most of these absconders transited towards the European Union.

It can therefore be concluded that alternatives to detention – whether open centres, reporting requirements or social homes for separated children – are not effective in ensuring compliance with asylum procedures where the country is only a transit, rather than a final, destination. It should be noted that, although there are no statistics available on the rate of transit migration for recognised refugees with status, it is estimated to be quite high. Thus, though alternatives may be ineffective, detention of asylum seekers who will be released after recognition as refugees may be equally futile in the longer term.

B. Cost effectiveness?

According to the information provided by the Department of International Cooperation of the Ministry of the Interior,²⁶ the cost of maintaining a detained illegal migrant per day in Bulgaria amounts to 4.30 BGN (equivalent to approximately US\$3), including 1.30 BGN for daily nutrition costs.

No information is available on the relative costs of detention in comparison with other alternatives, but in cases where indefinite detention may occur, the authorities often find it both more humane and more affordable to release the failed asylum seeker on condition of frequent reporting requirements.

C. Export value?

The Bulgarian asylum system generally is marked by a liberal approach in terms of reception arrangements, with detention used only as an exceptional measure. Unfortunately, the high rates at which asylum seekers fail to appear and at which failed asylum seekers continue to disappear rather than comply with expulsion orders, limit the international ‘export value’ of these alternatives. This is entirely due to the fact that many refugees and migrants still perceive Bulgaria as a transit, rather than destination, State.

²⁵ Interview with Bulgarian Helsinki Committee.

²⁶ Information from Official letter from the Department of International Cooperation, MOI, dated 20 August 2003.

CANADA¹

I. DETENTION AND DOMESTIC LAW

A. Asylum seekers

The Immigration and Refugee Protection Act 2001 ('IRPA')² contains three principal grounds for detention of an asylum seeker, at any time and without a warrant: (a) to ascertain identity; (b) if there is reason to believe that the claimant will fail to appear for further proceedings; (c) if the person is likely to pose a danger to the public. Detention on entry is also permitted 'for the examination to be completed', which some critics translate as meaning 'for administrative ease' and allowing an overly broad discretion.

Immigration officers are required by their own internal rules³ to make decisions to detain on the basis of an individual, case by case risk assessment, with a view to the following situations:

- where safety or security concerns are identified, including criminality, terrorism or violent behaviour at the time of examination;
- where identity issues must be resolved before security or safety concerns are eliminated or confirmed;
- where removal is imminent and where a flight risk has been identified;
- where there are significant concerns regarding a person's identity including multiple identity documents, false documents, lack of travel documents or non-cooperation in assisting Citizenship and Immigration Canada ('CIC') to establish their identity.

The standard of procedural guarantees for immigration detainees in Canada is relatively high. There are rights to automatic and then periodic review (after 48 hours or without delay thereafter, then 7 days, then every 30 days) of such detention by a member of the Immigration Division of the Immigration and Refugee Board ('IRB') (the quasi-judicial refugee status determination authority).

The detainee has the right to counsel and legal aid, subject to a means and merits test.⁴ Interpreters are provided, oral reasons for detention decisions are given and written transcripts subsequently supplied to the detainee. To protect confidential information, detention reviews are no longer held in public.

B. Conditions of release: bail or bond, reporting and supervision requirements

At such detention reviews, people may be released unconditionally or they may be released with payment of a deposit or the posting of a guarantee to ensure compliance with stated conditions. CIC can request which conditions should be set, but the independent adjudicator of the IRB will consider whether they are in fact necessary and will order release subject to any terms or conditions deemed appropriate.⁵

¹ The information presented herein is valid up to 31 March 2004.

² Bill C-11, enacted in November 2001 and entered into force on 28 June 2002, s. 55.

³ See, Enforcement Manual 20 – Detention. Ss. 3.1-3.2.

⁴ The merits test is roughly based on the recognition rates for various nationalities. UNHCR has expressed the view that it would be desirable to dispense with the merits test, which to some extent is a pronouncement by a body other than the refugee status determining body upon the substance of the claim.

⁵ See, IRPA Regulations, Canada Gazette, EXTRA Vol. 136, No.9, Part II, Friday June 14, 2002, ss.45-48. Section 45 relates to setting the amount to be deposited or set as a guarantee, and part (c) takes consideration of the costs incurred to locate and arrest a person who forfeits a bond.

Compulsory requirements include the provision of an address in the community where the asylum seeker can live and be contacted by the authorities,⁶ the asylum seeker must present himself or herself to the authorities as needed,⁷ and must acknowledge in writing his or her understanding of these obligations.⁸ The Canadian Council for Refugees, an umbrella NGO in Canada, has lobbied unsuccessfully against the automatic first requirement for release since many asylum seekers detained immediately upon arrival in Canada have great difficulty locating such an address whilst detained, but relative ease in supplying one after a few days staying in the community or searching the rental market. Similarly, complaints have been levelled against the second requirement, a condition imposed variously depending on the case in question. Complaints relating to these reporting requirements are focused on cases where they are applied indefinitely. While Canadian courts have consistently prohibited the use of indefinite detention in cases where a migrant or rejected asylum seeker cannot be removed, the alternative of releasing such a person to reporting or supervision requirements may also become punitive if applied without limitation – as, for example, in the case of a rejected asylum seeker who was obliged to report twice a week for over five years after his release, which seriously impaired his ability to find or hold down a job.⁹ Even for those asylum seekers present in Canada for shorter periods, the reporting requirements can be onerous if they have a job or children they can not leave unattended: for example, the journey from the centre of Toronto to the reporting station can involve two bus fares and take 40-50 minutes, and it closes at 3pm daily.¹⁰

The conditions of release may also include payment of a security deposit or the posting of a performance bond (that is, a promise to pay a stated sum in case of breach). Most asylum seekers are released directly from the airport, after their identity has been established, and ‘on terms’ (meaning bail or bond paid by themselves, friends or family). Others are only released with the assistance of the Toronto Bail Program, which is also the only organisation conducting systematic and active supervision of those released (see below¹¹).

These reporting requirements contrast to the general freedom of movement and residence afforded to non-detained asylum seekers in Canada. Most choose to stay in the main urban centres of Toronto, Montreal, Vancouver and Ottawa. Once asylum seekers have made their claims, they have the right to apply for a change of venue. The Refugee Protection Division of the IRB often refuses applications for a change of venue, to prevent ‘forum shopping’ and so asylum-seekers who move to a different region may be obligated to return to their original place of residence for the hearing of their claims. The Refugee Protection Division maintains regional offices in Toronto, Montreal, Vancouver, Calgary and Ottawa and its Members also travel to smaller centres to hear claims.¹²

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

An average of 440 people were detained under IRPA powers at any point in time during 2002, of whom only a portion would be asylum seekers.¹³ Of these, an average of five persons were detained

⁶ IRPA Regulations, s.48(a).

⁷ IRPA Regulations, s.48(b).

⁸ IRPA Regulations, s.49(1).

⁹ Interview with representative of Canadian Council for Refugees, October 2003-March 2004.

¹⁰ Interview with staff of Hamilton House, Toronto, October 2003-March 2004.

¹¹ The Bail Program is only able to offer supervision to a limited number of individuals upon satisfaction of its program criteria. Therefore some asylum seekers may be kept in detention until they are able to satisfactorily establish their identity.

¹² Information from UNHCR BO Toronto, 2002.

¹³ ‘Snapshot’ statistics provided by CIC indicate that 475 persons were detained under IRPA powers on 19 December 2002 and 524 on 9 January 2003.

for security reasons.¹⁴ Any foreign national, including an asylum seeker or recognised refugee, may now be detained if the Minister of Citizenship and Immigration is ‘taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security.’ Since Canada received 33,428 asylum claims in 2002, it is clear that detention continues to be used quite selectively and that an asylum seeker about whom there are no security concerns will be generally released once their identity is established.

According to legal representatives, there is wide regional variation regarding the rate at which asylum seekers are detained – Toronto receives most asylum claimants and has a higher detention rate, whereas people are far less likely to be detained if they claim in a locale receiving fewer claimants.¹⁵

Since the attacks of September 11, 2001, the Canadian government has been under pressure from some quarters to move towards a policy of mandatory detention for all undocumented or improperly documented asylum seekers, resembling that of the US or Australia. So far, this pressure has resulted in a new policy at Pearson International Airport, Toronto, whereby all undocumented or ‘uncooperative’ asylum seekers are initially detained. In support of this project, CIC reserves a number of beds at the immigration detention centre that is a few kilometres from the Toronto Airport. There are plans to open a new, better designed, immigration detention centre in the Greater Toronto area in April 2004.¹⁶ The need to promote maximal use of alternatives, with particular emphasis on how alternatives can satisfy national security concerns, is therefore urgent.

Legal representatives report that the grounds of detention often shift during the course of detention. For example, detention may be ordered originally due to a failure to establish identity, but then, after satisfactory identity documents have been secured from overseas, the grounds for detention are amended to flight risk and a high bond (e.g., some C\$10,000) is requested. If the bond proves too high for the applicant to pay at first, then the adjudicators may reduce it over time until it reaches a level (e.g., C\$1,000) which the detainee is somehow meant to raise.¹⁷

III. ALTERNATIVES TO DETENTION

The conditions of release identified above – release on bond or bail, reporting or supervision requirements – may all be viewed as alternatives to detention. However, their effectiveness depends upon organisations which assist with raising bail, provide addresses for detainees to offer at their detention reviews, or which commit to undertake supervision where required.

A. The Toronto Bail Program (‘TBP’)

Canada is the only country in the world where the government has funded an initiative specifically aimed at maximising alternatives to detention. However, it should be noted that this project, the Toronto Bail Program, is limited in scale, operates solely in the province of Ontario,¹⁸ and has been

¹⁴ Source: Citizenship and Immigration Canada, Enforcement Branch.

¹⁵ Persons on immigration hold are detained at CIC immigration centres as well as provincial correctional facilities since the number of persons being detained exceeds current CIC holding centre capacity.

¹⁶ Information supplied by UNHCR Toronto.

¹⁷ Interview with Toronto asylum lawyers, October 2003-March 2004.

¹⁸ This may be a function of the fact that the authorities in Ontario detain under IRPA powers far more frequently, especially since a notorious case in 1994 when an undocumented alien shot a policeman. It is notable, however, that this project has not yet been replicated elsewhere within Canada.

criticised by some refugee and migrant advocates for not being sufficiently inclusive of the range of asylum seekers or independent of CIC.

The principal aim of TBP is 'to remove the element of financial discrimination from the bond system'.¹⁹ Its immigration section has an office in downtown Toronto, currently employing eight supervisors. The supervisors consider applications from those who are deemed by CIC to pass all other tests (security, identity, etc) but who have no community ties from whom to raise the requisite bond money.

The Program can receive case referrals from any source, for example, directly from detainees themselves, their families, lawyers, the detention management, or CIC. The first stage is to note the basic information of the detainee (who, where detained and why). TBP verifies whether or not the detainee has been in the Program before. Prior participation means disqualification. Interviews are conducted with the detainee, via an interpreter, stated facts are verified, and decisions are then made whether the person is considered a 'good risk' (meaning that the TBP itself has confidence they will not abscond). If so, once a housing placement is available, the person will be released into the supervisory custody of the TBP. This involves stringent reporting requirements, which, if broken, result in re-detention.

The TBP has been in operation since 1996. At the beginning, it accepted some 50 clients, mostly asylum seekers, released from the minimum security detention centre in Toronto called the 'Celebrity Inn', as well as a few others who were detained pre-removal in provincial jails. Now the Program has some 200 clients (maximum capacity 220) and a much higher proportion (about 70%) come from the provincial jails. This represents a corresponding shift towards more criminal aliens and over-stayers among the TBP clients, rather than asylum seekers. If a client is a refugee claimant, then he or she is likely to be what in the US is known as a 'defensive asylum seeker' – that is, claiming only after having been apprehended for illegal presence. The majority of such asylum seekers are not from the major refugee producing countries and they tend to be of nationalities with low recognition rates (e.g., Jamaica, Costa Rica, etc.).

The TBP cannot assist a person whose identity has not been verified to the satisfaction of CIC, regardless of the length of their detention. Much of the criticism by those who feel that the TBP should be more inclusive relates to cases referred to the TBP despite the fact that they are detained on grounds of unverified identity, but where the advocate or visitor may feel that the CIC is setting too high a standard for identity verification. Sometimes advocates or visitors also refer people who could, in fact, be released 'on terms' because they have resident or citizen family members in Canada who could raise bail. Often asylum seekers deny that they have these ties (perhaps, understandably, because they hope that the TBP might supply bail without them having to inconvenience their relatives) and advocates or visitors seldom have the time or resources to check these statements before contacting the TBP. The Program, however, always investigates the claims of the asylum seeker to be without family ties and quite often uncovers a potential bondsperson. The Director describes this 'bail verification' to track down a bondsperson as 'an unmeasured success', which in itself makes the Program cost-efficient for the government to run.

¹⁹ This statement and all following factual description of the TBP are based on an interview with its Executive Director, David Scott, and the TBP website, October 2003-March 2004.

The TBP also refuses to accept people who have been found to be removable and already had their Pre-Removal Risk Assessment (PRRA)²⁰ determined, since it is almost certain that they will be removed within a few months.

A detainee will also be barred from participating in the Program if the CIC file has noted that they are not cooperating with re-documentation. The Director reports that they would exercise some flexibility if such a person were from a country that was very unstable or dangerous, or if their country of nationality was also known to be uncooperative with supplying such documentation to Canada.

Out of every fifty detainees who might meet all these tests and be eligible, the TBP only accepts some eight or ten. The main selection criteria are the individual's credibility and the TBP interviewer's professional judgement as to whether the individual will be amenable to supervision. The TBP is given full access to the CIC files, but states that it makes its own, independent decisions regarding flight risk. Breach of previous conditions of release – bail, bond or reporting conditions – will be a factor in this decision but a single 'failure to appear' would not automatically exclude a detainee from participating in the Program (as it would in the main criminal justice section of the TBP). The TBP can therefore be considered part of the 'natural progression' in ways to ensure compliance. This aspect of admission to the Program, however, is of less relevance to newly arrived asylum seekers who are without a record of behaviour in Canada.²¹

The TBP supervision consists of a twice-weekly reporting requirement to their offices (sometimes combined with an additional reporting requirement directly to CIC), social counselling and frequent, unannounced visits to the designated address of the former detainee in order to check they are still living there. Their clients must either be in work or at school, and, if there are mental health issues, in treatment. Curfews are sometimes imposed by the TBP, but very seldom on asylum seekers. The main means of checking on someone's continued intention to comply with conditions, however, is asking them whether they have received any communication from CIC (for example, a removal notice) – an answer that the TBP can check against CIC files. If the client lies about this fact, they are considered a likely future flight risk and may be re-detained.

The TBP will find a lawyer for an asylum seeker who does not have one and will help apply for legal aid to pay for the lawyer. The TBP Director also knows of some six to ten local *pro bono* lawyers to call if necessary. The Program does offer all kinds of advice and support, but provides it very much on condition of conscientious compliance – as the Director put it, 'If you play by the rules, we will do whatever we can to help you.' Great emphasis is placed on making sure that clients understand the reciprocal nature of the Program and their duties within it.

The TBP will locate housing for their clients, and it has an especially good relationship with Sojourn House, a homeless shelter very near to the TBP offices (see below). Sojourn House used to reserve beds for TBP clients so that release could happen as quickly as possible, whereas now they

²⁰Foreign nationals subject to a removal order that is in force, including rejected asylum seekers and those denied access to the refugee status determination procedure, may apply for this Pre-Removal Risk Assessment ('PRRA') prior to their removal from Canada. A Canada Border Services Agency (CBSA) official conducts this review, which is based on the same three protection grounds (albeit with different standard of proof) assessed by the IRB: i.e. (a) risk of persecution under the 1951 Convention; (b) personal risk of torture under the CAT; and (c) personal risk to life or risk of cruel or unusual treatment or punishment under the Canadian Charter of Rights and Freedoms – that exists in every part of the country and is not faced generally by other individuals. A PRRA is thus only given once a person has been determined to be removal ready.

²¹ Some 40 of the 200 people (mostly criminal aliens or over-stayers, not asylum seekers) handled by the TBP have a significant history of non-compliance.

are simply prioritised in the waiting list. The shelter's proximity facilitates the supervision aspects of the TBP.

To date, the TBP has been extremely successful in ensuring compliance. A 'failure to appear' at the airport for deportation was reported in September 2003 – the first in four or five years. The TBP keeps a record called the 'lost client ratio' (combining the percentage of those who fail to comply with conditions of their release such that a re-detention warrant is issued and the percentage of those who fail to appear for deportation). They have never had an overall lost client ratio of more than 10% (for all the clients they supervise – 230 in April 2002-April 2003, in which the total lost client ratio was 5.65%). For 'Pool B' (consisting mainly of refugee claimants and failed refugee claimants) their lost client ratio for the April 2002-April 2003 period was 8.42% and for the fiscal year as of the time of writing it was running at only 3%.²²

The careful eligibility screening process of the TBP – of which some advocates complain, believing it to place an additional hurdle into the paths of people who, under the terms of IRPA, deserve to be released with minimal conditions – is explained in part by the funding arrangements with the CIC. There is a 'fee for service' contract by which the TBP gets repaid costs only for those clients who do not abscond.

Provincial jails in Canada currently charge an average of C\$175 per day to CIC, while the Celebrity Inn Immigration Holding Centre, with less security in a retro-fitted hotel, costs somewhat less. Both are significantly more expensive than the TBP, which has per capita running costs of C\$12-15 a day. Since the TBP does not run a group centre, almost all its costs are staff costs.²³ It is, however, an irony of this cost-saving argument that it has pushed the Program towards taking more clients out of provincial jails rather than the minimum security detention centre. Thus aliens with criminal records or repeated evidence of breaches in conditions are being released long before asylum seekers with no history of non-compliance.²⁴

The TBP does not attribute this shift in clientele solely to the cost-saving influence of their CIC funders but also to the fact that the TBP has longer experience with criminal justice bail supervision and is thus more effective in these cases. The latter part of this statement points towards a wider lesson learned: that the vast majority of asylum seekers in Canada will comply with conditions of release, such as reporting requirements, even without additional, intensive supervision. The TBP has therefore learned to target its resources to those other immigration detainees where it can make a measurable difference in appearance rates.

The Director of the TBP believes that this Program is now operating at full efficiency, that is, achieving the release of all those who are safely releasable under present circumstances. He notes that there are some 230 persons detained under IRPA powers in Ontario, of which 150-60 are in jails, so the TBP is more than matching the CIC's capacity for detention in high security locations. He attributes this to the trust which CIC places in the TBP, established through the Program's high

²² Statistics received from the Toronto Bail Program, January 2004.

²³ Another, larger section of the Toronto Bail Program supervises people released under the criminal justice system. A recent study by the Attorney General concluded that supervising a client under the TBP costs C\$3 per day, whereas the cost of incarceration is C\$135 per day. The amount saved by having one person supervised under the Program instead of in jail is therefore \$924 per week or almost \$50,000 per year. Source: 'Bail system taking on water' by John Sewell, Eye Weekly, 14 August 2003.

²⁴ Note that the CIC always has to pay the same rent and site costs for the hotels that have been retro-fitted for detention purposes (namely, the Celebrity Inn, or, as of April 2004, the Heritage Inn) so an alternative program can not affect these costs. Empty spaces in these centres do not save the CIC money in the same way that an empty cell in a provincial jail.

success rate proven over eight years. 99% of cases which the TBP asks CIC to release into its care are in fact released. To make such an alternative scheme successful, he believes that it must:

- be managed by someone who knows the immigration authorities from the inside;
- begin tentatively and expand only as interviewing and supervising staff develop experience and instinct, especially regarding who to accept onto the scheme and when it may be necessary to re-detain;
- consult with community groups and immigration lawyers, but not let their advocacy concerns dictate the criteria for selection without regard for State concerns;
- have the respect of the releasing authority but also operational independence from it.

Whereas at the beginning of the TBP, 70% of referrals came from lawyers or the refugee and immigrant community, today the majority come directly from the CIC itself. This, however, may also indicate a declining level of trust in the TBP on the part of advocates and communities, perhaps due to a different definition of objectives for such a scheme.

The TBP, with frank financial incentives for doing so, is almost unique in the world in terms of the expertise it has developed in defining the profiles of those who are likely to abscond. For example, special mention was made of those asylum seekers who are apprehended trying to enter the USA illegally and only then claim asylum in Canada. Experience has taught the TBP that they will definitely abscond in order to attempt to cross the border again, especially if they appear to be the client of a people-smuggler or the victim of a trafficker. Few of the latter cases are referred to the TBP, however, since smugglers and traffickers are usually those best able to find the large sums of bail money requested from detainees (one notable inequity common to all systems where bail is the primary means of release).

On the other hand, a refugee claimant of US nationality (which Canada occasionally receives) may have a claim that is likely to be unfounded but there is still no need to detain the person since it is clear that they will not abscond. The fact of lodging an asylum claim to delay removal is evidence that they have no wish to cross the border or leave the country, so the TBP would be very willing to take their cases. This is the inverse of the usual logic in other ‘alternatives to detention’ whereby the stronger the asylum claim the more incentive the person is believed to have to comply with the procedure.

From the perspective of some refugee and migrant advocates, the parameters of the TBP make release from immigration detention more difficult, not easier. They argue that where detention is unnecessary – because identity is established and the person poses no security risk and a very low flight risk – release should be unconditional. They also complain that the Program moves slowly, often taking two or three months from referral to release, though this may be due to miscommunication about the eligibility of a certain asylum seeker for the Program, for example if identity is not yet established. In other cases, where CIC policy is itself at issue, the TBP may refuse the application of a detainee to the frustration of its supporters and representatives.²⁵ There is no doubt, however, that on a case by case the TBP is achieving release of individuals who would otherwise remain in detention unnecessarily, perhaps because they represent a relatively low, but not zero, flight risk.

²⁵ For example, a 2002 case was reported of a Nigerian refugee who had been granted status in Brazil, found his protection there ineffective and so boarded ship for Canada. He was regarded by CIC as having enjoyed effective protection, so was ineligible to make a claim until his lawyer argued it successfully in the Federal Court. While classed as ineligible, his applications to the TBP were refused several times, though the man was definitely a refugee and had gone to extreme lengths to enter the Canadian asylum system, which suggested that he would not abscond.

B. The Toronto Refugee Affairs Council ('TRAC')

TRAC is not an alternative to detention so much as a nongovernmental initiative in Toronto, Ontario to try and maximise the means of release contained in legislation. It visits detention centres, gives 'legal orientations' to detainees and assists them with filling out forms, including applications for release 'on terms'. TRAC has no real budget, but depends upon staff donated by the Quaker Committee for Refugees and the Hamilton Refugee Project, as well as volunteers. One detention visitor from TRAC visits the Celebrity Inn Immigration Holding Centre and estimates that approximately one quarter of those he sees are detained for failure to comply with departure or deportation orders.²⁶ The other three quarters are mostly asylum seekers with decisions still pending, who have no record of failure to comply or appear. This visitor also reported that he knew of cases where a person had failed to appear to receive their deportation orders, or failed to appear for the deportation itself, but this was not the person's fault – for example, where the authorities did not properly record a reported change of address before sending out a notice.²⁷

It should be noted that such programs are not available in the provincial jails. As of January 2004, detention orientation visits are being conducted in two correctional facilities in Ontario through a pilot project initiated by UNHCR and in collaboration with key NGOs and law students of Osgoode Hall Law School.

C. Shelters housing former detainees

While the Toronto Bail Program is the only organisation with a budget to provide bonds to secure the release of detainees, many other local NGOs, shelters, and community-based organisations provide addresses for detainees so that adjudicators gain some confidence that they can be released. In some cases, especially those involving vulnerable persons, these groups actively campaign for the release of individual detainees and then, if successful, take on informal responsibilities that permit lesser measures to be applied in place of continued detention. They therefore deserve to be considered as 'alternatives'. It is interesting to note the extremely high compliance rates of asylum seekers living in these shelters, just as high as those of asylum seeking clients in the Toronto Bail Program, even when there are no additional supervision measures applied. The most obvious explanation for this is the incentive provided by the relatively high refugee recognition rate in Canada, especially amongst those who are not detained and referred to competent lawyers.

Hamilton House has spaces for some 35 women and children (a rooming house of 11-12 rooms for short stays, and five apartments for longer stays). Residents are mostly asylum seekers coming into Canada across the land border with the US or referred by other women's shelters in Toronto, but they also include people received directly from detention who are referred by the CIC itself or by a lawyer. It is rare for detainees to be released to Hamilton House on humanitarian grounds, without bail, though it has happened recently in the cases of two women – one who was sick and one with a baby. In most cases, the asylum seeker has paid a cash bond of around C\$1,000 with another bond on property or salary of C\$4,000.

Hamilton House provides long-term accommodation, until the person receives a decision on his or her claim. The manager of the House reports a 99.9% success rate with appearance and compliance,

²⁶ In Canada, a 'departure order' is a self-executing order that obliges the individual to confirm his or her departure from the country within 30 days; a 'deemed deportation order' is issued if departure is not confirmed as required above; a 'deportation order' is issued for violations of immigration law and, unlike the other two, permanently bars individual from returning to Canada.

²⁷ Interview with TRAC staff member, October 2003-March 2004.

in her view due to the House's supportive atmosphere and integrated approach to services. Specifically, elements of the program's success were identified as:

- its small scale;
- provision of stable accommodation for the full duration of the asylum procedure;
- generous donation of interpreters' services allowing good communication;
- referrals of all kinds – to excellent legal counsel, legal aid, social services (including the shelter allowance used to reimburse Hamilton House for its costs);
- staff assistance with compilation of information for lawyers, with ensuring forms are submitted on time and with delivering people to their hearings and other official appointments.

In short, the staff of Hamilton House are willing to help with all aspects of day-to-day life, and this willingness continues even after residents have received refugee status and moved elsewhere. This creates a reciprocal network – for example, there is the incentive of a revolving loan fund to help newly recognised refugee mothers pay the fees and airfares to bring children from overseas. Even amongst the asylum seeking residents of the House, there is much internal mutual support among people of the same nationalities or language groups. It is not an environment, in other words, which claimants would wish to leave.²⁸

Matthew House is another temporary shelter which can, incidentally, provide an address for a detainee so that they may be released 'on terms'. It is completely open, with no security or curfew. It has run for five years, housing some 300 asylum claimants, in the course of which only three have disappeared from its accommodation and, presumably, absconded from the procedure.²⁹ Besides this shelter in Toronto, Matthew House also has shelters in Fort Erie and Windsor providing similar services and facilities.

Sojourn House is another well-respected temporary shelter that mainly accommodates asylum seekers released from detention at Toronto Airport. It has some forty beds and reserves its space for asylum seekers who are new to the city of Toronto, rather than, for example, in-country applicants who may have lived in Canada for some time. Sojourn's residents may be referred from the Toronto Bail Program, the Hamilton Refugee Project or the Toronto Refugee Law Project. The House has a very diverse staff with expertise in asylum matters and, like Hamilton House, they assist claimants and their lawyers with the preparation of cases, with finding longer-term housing once the claimants become eligible for housing support, and with reminding them of their appointments. There is no set limit on how long a person may stay at the House, and in vulnerable cases – a separated child who could not be found a good foster home, a pregnant woman who stayed until she had given birth – residence may last far longer than 'temporary shelter' implies.

Sojourn House is funded through the municipality's per diem for all homeless people, of which twenty per cent is supplied by the City of Toronto and 80% by the province. In the past six years, the present manager reports that out of some 3600 residents (approximately 600 per year), only two individuals have disappeared from the House. The manager confirms the hypothesis that asylum seekers have every incentive to remain in the Canadian asylum system so long as they have not received a final rejection, and that they exhibit an 'almost paranoid fear of defaulting on their release conditions'. It should be noted, however, that people have moved out of Sojourn House to live independently in the community by the time they might receive a final rejection and departure/deportation order, so the House can not testify to the rates of appearance for deportation

²⁸ Interview with manager of Hamilton House, October 2003-March 2004.

²⁹ Interview with manager of Matthew House, October 2003-March 2004.

amongst this group. There is no particular distinction made in the House between those who must appear and meet their reporting requirements on their own recognisance and those who are intensively supervised under the Toronto Bail Program, located a few blocks away.³⁰

D. Other alternatives/proposed alternatives

The CIC also runs a ‘Failed Refugee Project’ in Ontario, for those asylum seekers who have exhausted all appeals. Subject to a Pre-Removal Risk Assessment, they are handed departure orders in person, counselled on their limited options and given thirty days to leave the country. This programme has a high success rate (60%), in terms of effecting removals without resort to detention, for a variety of reasons. People feel that they are being treated with dignity and are given time to conclude all their personal business in Canada and make arrangements to go home. They know that the CIC will help with arranging flights and paying for the airline ticket without the negative consequence of detention or a deportation order, and so they are more likely to come forward to collect the departure order.

Nongovernmental organisations, such as the Canadian Council for Refugees, have lobbied unsuccessfully to be given a monitoring/advisory presence at Canada’s international airports. This is in part motivated by their belief that the frequency of detention could be reduced if they were permitted to help clear up misunderstandings and to advise applicants of their rights at an early stage. To some extent this proposal, modelled on the airport project of the Danish Refugee Council in Copenhagen, could be described as a ‘preventive alternative’. In the current security-conscious environment, however, it is unlikely that an NGO presence at Toronto Airport would be able to moderate the policy of almost mandatory detention applied to those arriving without valid documentation and proof of identity.³¹

There is currently a lively debate in Canada on the possible introduction of identity cards (including biometric data) for all residents and citizens. While this may be helpful in tackling fraudulent documentation issues, it will not help with verifying the identities of asylum seekers and so is unlikely to reduce the incidence or length of their detention upon entry. It could, on the other hand, increase the frequency of re-detention for rejected asylum seekers who abscond and attempt to remain illegally in the country.³²

There have also been calls for the use of electronic tracking bracelets as an alternative to immigration detention. The Canadian Auditor General estimates that the authorities currently do not know the whereabouts of some 36,000 ‘immigration violators’ and proposes that electronic monitoring could reduce such non-compliance.³³ The likelihood of such a scheme being introduced is increased as a result of pilot projects relating to immigration detainees now running in the US (see US section), given that the technology’s use in the Canadian criminal justice field has tended to follow practice in the US. Both countries now use satellite tracking technology as part of the electronic monitoring of criminal offenders, and though the cost of this second generation technology is currently double that of standard electronic monitoring equipment, the cost is falling rapidly and it is no more expensive than detention in provincial jails or the capital costs of building

³⁰ Interview with manager of Sojourn House, October 2003-March 2004.

³¹ There is a Memorandum of Understanding between CIC and the Canadian Red Cross to monitor detention activities in CIC run facilities. The Red Cross has been fulfilling this monitoring function in selected cities in British Columbia, Quebec and Ontario since 2002.

³² The Canadian Alliance has urged the federal immigration authorities to take DNA samples of all asylum seekers in order to help find those who abscond after rejection. *The Toronto Sun*, November 7, 2003.

³³ Reported in *The Toronto Sun*, August 12, 2003.

new detention facilities.³⁴ On the other hand, it does not produce a cost-saving. If applied to a person who is a low flight risk, as the vast majority of asylum seekers in Canada are, such electronic tagging would not only be a waste of tax-payers' money but may also fail to meet the tests of necessity and proportionality required by international law with regard to any restriction of an asylum seeker's right to freedom of movement. If electronic monitoring were introduced, therefore, the crux of the matter would be to ensure that it was reserved solely for high-risk cases who would otherwise need to be detained.

E. Alternatives for separated children

Under IRPA, detention of minors should take place as a measure of last resort taking into account the best interests of the child principle.³⁵ During 2002, CIC detained an average of eleven minors on any given day, most of them accompanied by family. One or two were, on average, separated minors.³⁶ Less separated children have been detained since the introduction of the IRPA. Regulations require that the detention of minors depend upon '(a) the availability of alternative arrangements...'³⁷

Concern for a separated asylum seeking child's welfare is not considered sufficient reason to detain, but 'the indigence of a minor...may be a strong indicator that the minor is unlikely to appear for inquiry or removal.'³⁸ Before deciding to detain, the immigration officer should consider 'how self-sufficient a child is or whether someone is willing to look after the child...'³⁹ If not, the officer is instructed to contact local child welfare agencies or social or child protection services to determine whether they can take custody of the minor.

Each province of Canada has its own child protection and guardianship legislation and system:⁴⁰

- (a) In British Columbia, they are under the custody of the Migrant Services Team of the Children and Family Development ('MCFD').
- (b) In Québec, they are normally under the custody of a para-public agency called SARIMM (Service d'aide aux réfugiés et aux immigrants du Montréal métropolitain), mandated by the Ministry of Social Services, which has existed for over thirty years. SARIMM works closely with the Centre Jeunesse of Montréal, attached to the Ministry of Social Affairs, which provides placements including foster homes, group homes and semi-independent living. They also use the model of a 'famille d'entraide' within the child's own ethnic community, but such families receive less financial support than other foster families. There is no one who acts as a legal guardian in the full sense.
- (c) In Ontario, one of the 52 local Children's Aid Societies or another nonprofit agency contracted by the Ministry of Community and Social Service, which has statutory child protection duties for all those under sixteen, should in principle be requested by CIC to

³⁴ It should be noted that Canada has been at the forefront of developing a set of ethical guidelines for the electronic monitoring of criminal offenders, including emphasis on 'respect for the dignity of individuals' under such supervision and, therefore, may develop as a model of best practice in this area.

³⁵ IRPA, Section 60.

³⁶ Citizenship and Immigration Canada, Enforcement Branch.

³⁷ Canada Gazette Part II, Vol. 136, s.249. In the criminal justice field, by way of analogy, Canada's Youth Criminal Justice Act ('YCJA') sets out the minimum or threshold criteria for applying custodial sentences (s.39(1)(a) to (c)). One minimum criterion is that the young person must have previously failed to comply with two or more non-custodial sentences.

³⁸ *Canadian Immigration Manual*, EC1, subsection 10.2.

³⁹ *Canadian Immigration Manual*, 'Port of Entry Processing', Ch 1, subsection 7.1.2.

⁴⁰ *Separated children seeking asylum in Canada*, Wendy Ayotte, UNHCR, July 2001 – See this report for detailed analysis regarding the effectiveness of protection within the following three systems.

assume custody. Minors of 16-17 years of age, however, are excluded by law from receiving this protection and assistance. They are in urgent need of an alternative form of accommodation and de facto guardianship that would prevent them from being detained or left without assistance. At the moment, as an interim measure, such adolescents usually stay in homeless shelters, such as those described in the preceding section, and also at Covenant House, which specialises in accommodating 16-18 year old street children in the city of Toronto. Covenant House only reports one to two such adolescents to have ever disappeared from their shelter and abandoned the asylum process, but notes that the mix of street children and asylum seekers is not positive for the latter group.⁴¹

UNHCR, CIC and the IRB are currently cooperating to develop best practice models for the care of separated children seeking asylum in Canada, designed in part with the aim of preventing the use of detention.⁴² This initiative originates from the experience of 1999-2000 when British Columbia received over a hundred separated Chinese children and adolescents who arrived in unseaworthy vessels on the west coast. Later smaller groups were also apprehended while trying to illegally transit Canada to the USA. The authorities at first detained the influx of children, but most were later released into foster care or shelters.

Problems arose with regard to protecting the children, outside detention, from their traffickers. For example, some dozen such children in Windsor were at first detained in a Young Offenders Facility, then transferred to the Celebrity Inn immigration detention facility, then released on large bonds to private shelters. All subsequently disappeared and it was rumored that they later turned up in New York City. Based on this experience, thinking has been done on how to better supervise and protect such children without resorting to detention, particularly in relation to checks on adults who may come forward claiming to be their relatives. The detention of the Chinese minors during 1999-2000 was partly motivated by the aim of deterring the traffickers and people-smugglers, but any lesser measure which similarly interfered with delivery of the children to their intended destination (the US) could presumably serve the same purpose.

F. Alternatives for women, families and vulnerable persons

There are homeless shelters specialising in the accommodation of women and female headed families (such as Hamilton House – see above), however advocates believe that a number of such asylum seekers, posing negligible flight risks and deserving of release on humanitarian grounds, remain in detention for longer than necessary. Recently, for example, there was a high profile case of a wheelchair-bound 63-year-old Pakistani woman and her 17-year-old son who were detained at Laval Detention Centre in Montreal for two months, awaiting removal, despite the willingness of the South Asian Women's Community Centre to vouch for their appearance and find them shelter.

Canadian legislation and regulations do not specifically mention the humanitarian release of elderly persons, torture survivors or those with apparent or possible mental health problems. In practice, however, CIC refers many vulnerable persons for release at the point when they become problematic to detain and often does not set 'terms' (bail or bond) when doing so. One particular group at risk of harassment in detention centres or prisons and therefore sometimes referred to the Toronto Bail Program are asylum seekers from Latin America claiming asylum on grounds of sexual preference.

⁴¹ Interview with manager of Covenant House, October 2003-March 2004.

⁴² Interview with UNHCR Legal Officer for Ontario, October 2003-March 2004.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

To the knowledge of UNHCR, Canadian government statistics relating to rates at which non-detained and/or released asylum seekers abscond are not currently available. Without such statistics, and in the absence of analytical data as to how the application of alternative measures such as reporting requirements of various frequencies or security deposits affect these rates, it is difficult to reach definitive conclusions. There are too few undocumented asylum seekers currently released without the setting of ‘terms’ (and unconstrained by their own vulnerability – sickness, young children, etc.) for the restraining effects of the bail and bond system to be measured against the behaviour of a control group with similar characteristics.

Organisations accommodating or supervising asylum seekers interviewed for this research reported uniformly high (over 90%) rates of compliance by their residents or clients within the asylum procedure – a determination procedure in which most applicants continue to place considerable faith. Even those staying in temporary shelters for the homeless, with little stability or support, are usually determined and anxious to attend their appointments. In those rare cases where an asylum seeker in Canada has absconded, it has tended to be where the individual was intent on going to the United States to join family, or at the very end of the procedure following issuance of a departure order.⁴³

The only other notable cases of absconding in recent years have involved minors who appeared to be victims of traffickers. These traffickers were presumably complicit in their disappearance from shelters and foster homes. In future, this problem could be resolved through the careful design of non-custodial alternatives that maintain an appropriate level of supervisory protection for such minors, including those between 16-17 years old, until they can be reunited with their families.

B. Cost effectiveness?

There is clear evidence that most alternatives (except home curfew and electronic tagging) produce large cost savings over detention in the Canadian context, though it should be noted that this argument has greater impact on achieving release of asylum seekers from provincial jails than from facilities built or adapted for immigration detention.

C. Export value?

The Toronto Bail Program may provide a positive model for replication by ‘destination States’ currently operating policies of mandatory or routine detention for undocumented asylum seekers, particularly those with a common law system in which bail is commonly applied. Within Canada itself, there appears to be a need for better dialogue between this Program and other refugee advocates concerned to secure the release of larger numbers of asylum seekers. This dialogue could potentially produce a new program designed simply to assist detained asylum seekers unable to raise their own bail but *without* additional reporting requirements or intensive supervision. Such a program would then become a highly exportable model to destination countries that are detaining asylum seekers with any degree of frequency.

⁴³ The Safe Third Country Agreement between Canada and the United States should, through the exemptions regarding family reunion in Article 4(2)(a)-(d), help to regulate and alleviate this problem.

DENMARK¹

I. DETENTION AND DOMESTIC LAW

Section 36 of the Aliens (Consolidated) Act permits the detention of asylum seekers for a maximum of three days before being brought before a court. Those in Denmark's 'manifestly unfounded' procedure can be detained for up to seven days in the prison section of Sandholm camp.² Detention of an asylum seeker may also be ordered when 'lesser restrictions' (as outlined in Section 34, Aliens (Consolidated) Act – see below) are deemed insufficient – that is, following a 'failure to comply with a Danish Immigration Board decision requiring the asylum seeker to reside at a specified residence' or general 'non-compliance with alternatives to detention.'³ Detention is to be used only where alternatives have been evaluated and found insufficient in the individual case.⁴

Detainees have automatic review and appeal rights to a city court and then to a higher court, but there is no maximum limit on the duration of detention. Failed asylum seekers are sometimes detained, pending removal, for over a year. Detainees receive legal aid both directly from the State and via the Danish Refugee Council.⁵

Detention was previously used in Denmark strictly for those who had evaded deportation orders, but now it is reportedly used more widely at first reception. The court nearest to the Sandholm camp is approving renewals of detention every four weeks. Usually those detained are Roma or eastern Europeans, especially single adult men. If they have a family or community tie in Denmark, this fact can actually work against their chances of release as it is considered to make them more likely to be 'manifestly unfounded' applicants.⁶ (This is very much counter to the logic of bail hearings in the UK and the US, for example, where family ties are considered to make an individual a much lower 'flight risk').

Nevertheless, Denmark manages its asylum system with a relatively limited use of detention. In 2001, for example, there were 12,403 asylum applications, with 666 detained.

II. ALTERNATIVES TO DETENTION

A. Failure to implement legislative requirements

The Danish Aliens (Consolidation) Act, Section 34(2), provides for an impressive range of alternatives to detention, including: deposit of travel documents, posting of bail, reporting to the police at specified times, and staying at a designated address until deportation.

The legal representatives of the Danish Refugee Council, however, report that these lesser, alternative measures are not applied in practice.⁷ This apparent failure to consider and apply alternatives prior to detention, which should be a last resort after alternatives have proven insufficient, has never been challenged in court, despite the clear wording of the Aliens Act.

¹ The information presented herein is valid up to 31 March 2004.

² Under the responsibility of the Ministry of Justice.

³ Section 35 and 36(2) of the Aliens (Consolidated) Act.

⁴ An assessment of the possible necessity for an order of detention is to be based on a number of factors: where the asylum seeker is not cooperative, or fails to appear at a hearing or to respond to a police summons, or exhibits violent or threatening behaviour to staff or other residents in the reception centre, or who fails to stay in an address designated by the Danish Immigration Service, or does not comply with deportation.

⁵ Pursuant to Section 37(2) of Aliens Act, a lawyer is assigned until a decision is made by a court on the lawfulness of the detention. The Refugee Council provides free advice during first instance of the determination procedure.

⁶ Interview with Legal Section, Danish Refugee Council, October 2003-March 2004.

⁷ Interview with Legal Section, Danish Refugee Council, October 2003-March 2004.

B. Open centres

There are two open reception centres run by the Danish Red Cross on behalf of the Danish Immigration Service, both within 50km of Copenhagen with a combined capacity of 900. Sandholm is half an open centre and half a detention centre. Initial contact with the police, including fingerprinting and photographing of the asylum seeker, takes place at these reception/registration centres.

After six weeks at the 'reception centre', an asylum seeker is normally assigned to an 'accommodation centre', unless they make a special application to live with friends or family. All financial assistance and social services are conditional on residing in the centres (in contrast, for example, to the system in Sweden). The only exceptions to this rule are people whose medical needs require them to live outside the centres. On the other hand, permission to leave the centres for up to six weeks per year may be requested, so long as the resident leaves a contact address or telephone number where he or she can be reached.

As at October 2002, there were some fifty accommodation centres run by a variety of organizations. 8,744 asylum seekers were housed in these centres, of whom 7,686 were in those run by the Danish Red Cross, 941 in one run by the Danish Emergency Management Agency on the island of Funen, and 147 in those run by municipal operators (for example, in Hanstholm municipality).⁸

All the accommodation centres are equally open. The *de facto* restrictions on freedom of movement come from their frequently remote rural locations and the fact that asylum seekers must be continually present for the handing out of food parcels, but this supervisory function is not reported to be a primary purpose of the centres.⁹ Most centres only have a staff of one or two people who leave at 5pm and the centres are not staffed at night.

The only way, for example, that the Red Cross can tell if someone has left one of their centres is if they fail to collect their financial support which is distributed every two weeks. Many disappear in this way, even separated children. In 2002, there were 4,205 recorded departures from the Danish Red Cross centres, including 147 by asylum seeking children. In 2003, there were 4,365 recorded departures.¹⁰ These figures, however, include multiple departures by the same asylum seekers who go to stay with friends or families for short periods and then return. They also include people who might have opted to return to their home countries. It is clear, however, that the majority leave to transit to Sweden or Norway, their intended destination countries.

This transit movement is tolerated, as there is a very open border and it is just an easy twenty minute journey. The main cause of this transit movement is believed to be Denmark's more restrictive immigration and asylum policy and corresponding legislative changes which were introduced in 2002. In particular, Denmark's increasingly restrictive rules concerning the grant of family reunion to refugees. Incentives to remain in the centres, such as educational courses for adults or counseling for victims of torture or trauma, cannot begin to compensate for these strong 'push factors' out of the country.¹¹

⁸ UNIYA Jesuit Social Justice Centre, *Overview of Denmark's Asylum System*, Anna-Louise van Gelder, February 2003.

⁹ Interview with staff of the Danish Red Cross, October 2003-March 2004.

¹⁰ Statistics supplied by the Danish Red Cross.

¹¹ Interview with staff of Danish Red Cross, October 2003-March 2004.

In practice, if an asylum seeker does not show up for an interview or other official appointment, the authorities ask the accommodation centre management whether they know of any good reason for this (for example, misdirected notices or a doctor's appointment). If not, the person is recorded as having absconded.

C. Alternatives for separated children and other vulnerable persons

Detention of minors, families or the seriously ill is avoided as far as possible and determination of their cases is prioritised. Separated children are always provided with a Red Cross guardian *ad litem* but are not provided with free legal advice.

There are two special centres for separated children who are not detained or who are released from detention: one for 17-18 year olds and the other for younger children. They are far from being detention centres, but they are located in the countryside so it is impossible, for example, to go out after midnight. They operate like a rural boarding school. If the Danish Red Cross and the municipality approve, a minor may request to stay with family members residing in Denmark. This does not affect his or her right to financial support.

D. Penalties regarding denial of cash assistance

The Danish Immigration Service may deprive an asylum seeker of cash assistance if he or she does not comply with the obligations to cooperate with an examination of his or her claim. Such an asylum seeker would then only receive assistance in kind (e.g. food parcels). The only exception would be where the asylum seeker in question were pregnant, a minor or had other relevant medical needs.¹²

III. CONCLUSIONS

A. Do alternatives ensure compliance?

It is clear that the system of open accommodation centres does not prevent absconding, and the failure to implement the other legislated alternatives to detention as reported anecdotally by asylum lawyers, would suggest that the rate of non-compliance is not a priority concern for the authorities.

B. Cost effectiveness?

The Danish Immigration Service provides an allowance for food, clothing and pocket money to all asylum seekers in accommodation centres. The totals in 2002 were: DKK1,481 per child, 1,899 per teenager, and 2,458 per adult.¹³ Information on capital costs and on comparative running costs for the detention of asylum seekers is not published.

C. Export value?

The fact that Denmark manages to conduct most of its identity, security and health checks in the context of an open reception centre demonstrates that this can be done without serious breaches in national security or threats to society. Such an approach, however, may only be feasible in a context where the risk of absconding is not viewed as a major policy concern.

¹² UNHCR Reception Survey, July 2000, p.43.

¹³ UNIYA Jesuit Social Justice Centre, *Overview of Denmark's Asylum System*, Anna-Louise van Gelder, February 2003.

FINLAND¹

I. DETENTION AND DOMESTIC LAW

Under the Aliens Act, an asylum seeker may be detained on a number of grounds, namely: (a) if entry was illegal or the legality is under deliberation, or (b) where he or she is awaiting deportation or such a decision is being prepared. In each case, it must also be shown that there is reasonable cause to believe that the asylum seeker is likely to abscond,² to commit a crime in Finland, or his or her identity needs to be investigated.³ There are no internal guidelines on the use of immigration detention and no mention of detention in the Ministry of Interior's guidelines on asylum.⁴

A decision to detain is taken by a senior officer of the local police, Central Criminal Police, Security Police or Mobile Police responsible for the matter.⁵ Information on the reasons for detention is provided to the detainee in writing in Finnish, which is then interpreted orally into a language the asylum seeker understands. The police officer responsible for the decision must, without delay and at the latest on the day following the detention, notify the detention to the local lower court where the detainee is being held or, if reasons of urgency so require, another lower court. Notification may be made by telephone for this purpose, but must be confirmed in writing without delay.⁶ The case must come before a court within four days of notification. If the person has not been released within two weeks, the court shall of its own initiative review the case and can extend the detention for two weeks at a time, as long as the appropriate legal conditions prevail.⁷ There is no maximum period of detention as long as a case is being reviewed every two weeks. The Finnish Refugee Advice Centre is funded to provide legal advice to detainees.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

During 2002, a total of 145 asylum seekers were detained in Finland. This included 118 men, 27 women and 4 unaccompanied minors. In July 2002, however, the first detention facility for illegal aliens (including selected asylum seekers) was opened in Helsinki and the extent of detention is expected to rise to meet this expanded capacity. Currently there are 30 places, but the facility will move premises in 2005 with another 30 places as part of an 'open ward'. It will have an emergency capacity of 90 places.

The chances of detention on grounds of the likelihood of absconding are higher following a failed asylum procedure and while awaiting deportation. The courts are very reluctant to release the detainee at this point. In some cases, the person is detained immediately upon being served his deportation order and is then deported some days later, without any opportunity to take care of practical or personal matters before leaving the country.

The police order detention in 10-15% of asylum cases each year, and detention lasts for approximately 3-5 weeks on average. In practice, the police (rather than the courts) usually order the release of detainees after Dublin Convention requests have been answered by other EU States.⁸

¹ The information presented herein is valid up to 31 March 2004.

² The likelihood of absconding is usually considered to be established when the applicant has previously been in another European State, or has not responded to an invitation to appear at the police to collect a decision on his or her case.

³ Section 45 (general criteria) and 46 (specific criteria), Aliens Act.

⁴ Information received from the Helsinki Police.

⁵ Section 47, Aliens Act.

⁶ Section 48, Aliens Act.

⁷ Section 51, Aliens Act.

⁸ Interview with Finnish Refugee Advice Centre, October 2003-March 2004..

III. ALTERNATIVES TO DETENTION

A. Reporting requirements

Section 45 of the Aliens Act provides that asylum seekers may be required to report to the police at regular intervals until it has been decided whether they should be admitted to the procedure, refused admission, deported, or the matter otherwise resolved. In practice, the Finnish Refugee Advice Centre observes that this reporting duty is seldom applied in the first instance, prior to detention, even though Section 1.3 of the Aliens Act includes the proportionality principle – that is, to limit the alien’s rights no further than necessary.

B. Alternatives for separated children

A child under eighteen years of age cannot be placed in detention without a hearing with the social welfare authority or the Ombudsman for Aliens. There are two specialised open centres for the reception of separated children and each child is allocated a guardian *ad litem* by a judge. This guardian is often the legal representative or an employee at the centre where they reside.

C. Open centres

Asylum seekers generally enjoy freedom of movement in Finland. They must register with the reception centre closest to their point of entry unless it is full. These centres are run by the State or local municipalities or by the Finnish Red Cross. Asylum seekers are able to stay in the open centres for the full duration of procedure, including all appeals. Asylum seekers may also opt to live outside the reception centre system. Should they choose to do so, they still receive State welfare payments (minus the cost of accommodation, estimated at a 15-20% reduction).

Other than registering to collect monthly subsistence monies, the reception centres exercise no supervisory controls over asylum seekers, except the closed centre run by the city of Helsinki. In practice, though, the staff in the centre may cooperate with the police.

Asylum seekers feel that their freedom of movement is *de facto* restricted because the centres are often located in isolated areas of the country. Because the asylum procedure may last for years, this can lead to mental stress and health problems in the longer term. According to information from the Ministry of Labour, the average length of stay in reception centres is thirteen months. However, there are asylum seekers who have been living in the centres for five years or more.⁹

The Helsinki Rehabilitation Centre for Torture Victims is open to asylum seekers released from detention, but such services are not provided in other municipalities to which asylum seekers are dispersed.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

There are no statistics on absconding or ‘failure to appear’ rates currently collected by either the Ministry of the Interior or the Helsinki Police. Nor are there any statistics which could be analysed to measure whether those under reporting requirements or housed in open centres (including

⁹ Information received from UNHCR.

children's centres) are less likely to abscond. According to the impressionistic experience of the lawyers at the Finnish Refugee Advice Centre, it is not usual for an asylum seeker to abscond.¹⁰

B. Cost effectiveness?

The central government pays to the municipality EUR 1,900 per refugee over the age of seven and EUR 6,223 per refugee under the age of seven, each year for three years. The State also covers the living allowance granted to refugees. Comparative information on the per capita costs of detention is not available.

C. Export value?

The Finnish 'open centre' reception system is in no way conceived as an alternative to detention but it does demonstrate, despite the absence of precise statistics on absconding, that an asylum system can operate successfully without resorting to routine detention and with a very high level of legal safeguards in place to protect the rights of detainees.

¹⁰ They estimate this is to be less than 10%.

FRANCE¹

I. DETENTION AND DOMESTIC LAW

Asylum seekers are generally not detained in France while decisions on their claims for asylum are pending. There are two exceptions, however, as follows:

A. Zones d'attentes/waiting zones

Asylum seekers are detained in France's airports or other international ports (including railway stations) during the application of a preliminary screening procedure to determine whether or not their claims to protection are 'manifestly unfounded' (as defined by French law²). These so-called 'waiting zones' (*zones d'attentes*) are not regarded as detention under French law.³ UNHCR, the International Organization for Migration (in French 'OMI'), a variety of independent observers such as French senators, and currently eleven nongovernmental agencies⁴, are all entitled to access these waiting zones, in particular Roissy Charles De Gaulle Airport where the vast majority of asylum applicants arrive. The maximum time permitted in a waiting zone is 20 days.⁵ If the claim is deemed unfounded yet the alien cannot be returned to his or her country of origin within that period of time, then he or she must be admitted to French territory.

An administrative decision refusing entry into France, and thus confining an asylum seeker to the waiting zone,⁶ may be appealed to the competent territorial Administrative Tribunal. Since January 2001, there is the possibility to make a *référé liberté* to the Tribunal,⁷ which is decided upon very quickly (within a few days) and is thus quite an effective remedy. Prolongation orders (after the first four days) may also be appealed to the first President of the Court of Appeal or his or her representative, and subsequently to the highest court, the *Cour de Cassation*.

B. Rétenction administrative/administrative detention

The other exception to France's general non-detention of asylum seekers involves administrative detention (*rétenction administrative*)⁸, which is applied primarily to certain aliens pending their deportation from France. Most are persons whose removal (*éloignement*) cannot be achieved immediately for various reasons, such as the need to obtain a travel document from the Consulate concerned. Asylum seekers, after a refusal of an *admission au séjour* by the *Préfecture*, while in the process of applying for asylum, may find themselves in this form of detention if they fall into one of

¹ The information presented herein is valid up to 31 March 2004.

² As provided for by article 12 of Decree No. 82-4242 dated 27 May 1982. It should be noted that this 'manifestly unfounded' screening procedure does not include a safe third country criterion (as in most other European countries).

³ The UNHCR position is that any place, including an international port, where an asylum seeker or refugee's freedom of movement is severely curtailed may be considered a place of detention, regardless of their supposed ability to exit the territory.

⁴ ANAFE (Association Nationale d'Assistance aux frontières pour les Etrangers), ASPR (Association pour le personnel de santé réfugié), Amnesty International, CIMADE, Croix-Rouge française, Forum Réfugiés, France Terre d'Asile, GAS (Groupe Accueil et Solidarité), Ligue des Droits de l'Homme, Médecins sans frontières, and MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples*).

⁵ Made up of 4 days that can be ordered by the border police (the Chief Border Officer, his or her representative or someone holding at least inspector level) and extensions of up to 16 days which can only be authorized by the President of the *Tribunal de Grande Instance*.

⁶ This order of confinement is called a '*maintien*', to distinguish it in French law from detention, but in fact it may be equated with a detention order.

⁷ Article L-521-2 of the Administrative Justice Code.

⁸ Under the responsibility of the Ministry of the Interior.

the following categories:⁹ (a) a cessation clause applies to their country of nationality; (b) the asylum seeker represents a serious threat to public order or national security (*'une menace grave pour l'ordre public, la sécurité publique ou la sûreté de l'Etat'*); (c) the asylum application is considered by the *Préfecture* to be abusive, fraudulent or lodged with the intention of postponing a deportation.¹⁰ With regard to such cases, a *Préfecture* will first deny a temporary residence permit and ask OFPRA, the determination body, to render a decision on the claim as a matter of priority (*procédure prioritaire*). If rejected, the claimant may then be sent to *réétention administrative*.

Sometimes an undocumented alien is sent to *réétention administrative* in order to prepare for the implementation of a return measure and only then, in the detention centre, decides to submit an asylum request from within the centre.¹¹ According to the latest amendments to the French law, such an asylum claim must be submitted within five days of the alien being notified of his rights during the initial *réétention administrative* order. A small number of rejected asylum seekers with appeals pending before the *Conseil d'Etat* may be detained, but most of those in *réétention administrative* who have not exhausted all remedies are appealing to the Administrative Tribunal against their removal (*arrêté de reconduite à la frontière*), and, simultaneously, regarding the country to which they may be removed

As of 2003, there were 24 centres (with 775 beds) registered as places of *réétention*. There are, in addition, over one hundred other places which can be temporarily used as sites of *retention*, such as, police stations or, exceptionally, hotel rooms. These are not alternatives to detention, but alternative places of detention. The use of *ad hoc* sites causes some difficulties for organizations seeking to monitor immigration detention in France and to visit and to advise detainees. CIMADE, for example, reports not having the capacity to visit all such places.

The first four days of *réétention administrative* may be authorized by the *Préfet* or by a civil servant with delegated authority from the *Préfet* as having the quality/status of a judicial police officer (*'ayant la qualité d'officier de police judiciaire'*). The President of the *Tribunal de Grande Instance* or a magistrate delegated by him or her must authorize the prolongation of a detention order (*'maintien order'*) after 48 hours. The current maximum period of such detention is 32 days.¹²

Réétention administrative may be appealed either to the courts or to the Administrative Tribunal, the latter being the most frequently used and the most effective. Such appeals may be brought simultaneously with an appeal against a return order or an appeal that does have suspensive effect. Asylum seeker appealing the legality of their detention before a court must be provided with a court-appointed lawyer.¹³ Nongovernmental organisations help provide referrals to competent lawyers. Persons challenging their removal have the right to free legal aid.

Detainees in both the *zones d'attentes* and *réétention administrative* are notified of the reasons for their detention in writing and, according to the latest amendments to article 35 bis of the Ordinance of 1945 implemented on 26 November 2003, they must be informed of their rights in a language they understand. Many detainees nonetheless complain that they do not understand their rights. In

⁹ Described in article 8 of the new French law on asylum of 10 December 2003.

¹⁰ This includes a subset of persons who submit new applications after having been first rejected, as these new claims are generally considered fraudulent or abusive, triggering the issuance of a return order.

¹¹ Refugee advocates are particularly concerned that such asylum requests are automatically presumed by adjudicators to be obstructive, when some may simply be lodged by people who were arrested as illegal aliens before they had time to present themselves to the *Préfecture* and thereby initiate the process of claiming asylum.

¹² According to a new law in force since 27 November 2003. Information received from UNHCR Paris.

¹³ *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, Lawyers Committee for Human Rights, p.35.

both types of detention, detainees may contact UNHCR (usually by phone from a waiting zone or in writing from a *réention administrative* centre). Furthermore, the judge, when requested for the first extension of a *retention* order, must remind such persons of their rights and must be satisfied that they have been sufficiently informed of their rights during the initial decision and that they could exercise them effectively.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

A. Zones d'attentes/waiting zones

In 2003, the percentage of asylum seekers released from waiting zones and admitted to French territory was 68.8%. There is no provision requiring separated or unaccompanied minors to be automatically released from the waiting zones and admitted to French territory.¹⁴ Children under the age of thirteen years cannot be put in the special minors section of the waiting zone (e.g., Zapi 3 for the Roissy Airport) but must stay in a hotel under the supervision of an airline company staff member. Not being technically on French territory while within the waiting zone or in a hotel room according to French law, these children are not protected by the prohibition against the expulsion of anyone under eighteen years of age from French territory.

B. Réention administrative/administrative detention

The maximum period for administrative detention pending removal is briefer than in most other European countries and chances of release prior to return/removal are high. During recent years (statistics for 2003 are not yet known), the average percentage of persons released from *réention* has been approximately one third and the average length of time spent under this form of detention was four and a half days. The problem of the detention of children does not arise in the places of *réention administrative*, except perhaps where there is a dispute regarding an age assessment, since everyone under the age of eighteen is protected against return to the border and expulsion (subject to A. above).

III. ALTERNATIVES TO DETENTION

A. Renewal of temporary permits as a *de facto* reporting requirement

The first document granted to an asylum seeker released from one of the waiting zones is a safe conduct permit (*sauf-conduit*), which is valid for eight days. He or she then receives an *autorisation provisoire de séjour*, valid for one month, from the *Préfecture*. Subsequently, she registers with OFPRA, the determination body, and receives a three-month permit, which must be continuously renewed.¹⁵ The numerous times that an asylum seeker in France must make administrative contact with the authorities in these first weeks and months after release therefore serves as a kind of *de facto* reporting requirement. In practice, the chance of non-appearance at one of these appointments may be increased due to the rather complicated nature of the process and the fact that so many meetings are required.

¹⁴ The *Commission nationale consultative des droits de l'homme*, which advises the Prime Minister, has recommended immediate access to the territory for separated and unaccompanied children (rather than keeping them in the waiting zones at ports for any length of time). See, Advice of 6 July, 2002 (p.6) repeating his earlier Advice of 21 Sept, 2000. A number of other independent observers and refugee advocates have made the same recommendation, although some admit that greater attention and funding would need to be given to 'alternatives' so that children are not released from the waiting zones without adequate care and protection during their first days in France.

¹⁵ *Reception Standards for Asylum Seekers in the European Union*, UNHCR, July 2000, p.58.

Anyone who fails to renew their permit would have to convince the *Préfecture* official that they had good reason for failing to do so and, if he or she failed to do so repeatedly it could become more difficult for the claimant to be readmitted to an asylum procedure. If an asylum seeker fails to show up for a long time and has no satisfactory explanation when he or she finally reappears, it may be that OFPRA would discontinue the claim.

B. Random identity checks

Free movement is one of the highest values of the French Constitution, but may be limited for reasons of '*ordre public*' and/or to control certain groups. All people in France must carry their registration/identity documents at all times. Recognized refugees are required to present their residence cards and asylum seekers are required to present their temporary permits upon request. A 2001 ruling allowed these controls/checks on foreigners in all public spaces, such as train stations, and rejected a strict interpretation of the concept 'threat to public order'.¹⁶ While this is not an alternative to detention in any strict sense, this form of widespread surveillance serves, in part, to meet the same objective (preservation of '*ordre public*') as met by *rétenion administrative* in certain cases.

C. Exceptional provisions for directed residence?

Article 28 of the Ordinance of 2 November 1945 (an old wartime provision) provides that foreigners may be forced to stay at a designated residence (*assignation à résidence*) as an alternative to expulsion from French territory. This is considered a protective measure, which confers some legitimacy on the foreign national's stay on the territory. As a consequence, it is applied very exceptionally. It is a kind of 'home detention' and not currently relevant to asylum seekers whose claims are still pending. It could potentially be used, however, where a refugee (or other person in need of international protection, who already has permission to stay in France) is deemed a threat to national security, or is liable to be expelled after having finished serving a criminal sentence, as an alternative to a ministerial expulsion order.¹⁷ Although there is potential in this restriction on freedom of movement to be applied to particular asylum seekers and/or refugees and in this sense it may appear, superficially, to be a possible 'alternative to detention', this is not the intention or current use of the provision.

D. Alternatives for separated and unaccompanied children

In practice, separated or unaccompanied children seeking asylum are usually released from waiting zones and admitted to French territory as soon as the border procedure has been completed. They are appointed an *administrateur ad hoc*,¹⁸ who represents the interests of the minor in the border procedure and, once the child is admitted to the French territory, also through the normal asylum procedure before OFPRA. This representative is to be provided in addition to a legal guardian who may be appointed, such as the government department *Aide Sociale à l'Enfance* or a French citizen or resident.

Three or four years ago, there was a major problem in France with separated children disappearing, presumably into the hands of traffickers. Many disappeared immediately upon release from waiting zones at airports. The situation has now much improved, with the opening of two special reception

¹⁶ Cour de Cassation, 7 June 2001.

¹⁷ Information received from UNHCR Paris.

¹⁸ Art. 17 of the new law of 4 March 2002 regarding assumption of parental authority and the *décret d'application*.

centres to accommodate such children, funded by the State and run by the French Red Cross (near to Roissy Airport) and by the NGO *France Terre d'Asile*. These are open centres, but ones to which children are escorted directly from the waiting zones and in which they are closely supervised in an age-appropriate manner. Very few minors ever disappear from these centres, and far fewer do so than from other forms of accommodation they may stay in later. The key problem is the limited capacity of the two centres such that children remain there for only two months on average, before having to be transferred to other social homes for children (not specialising in asylum seekers) or other less secure places of accommodation (e.g., hotels). The situation is currently improving, especially as the number of separated children arriving declined in 2003.

E. Open centres

Open centres ('CADA' – *Centres d'Accueil pour Demandeurs d'Asile*) are managed by nongovernmental agencies on behalf of the State and provide shelter to asylum seekers and, in about half the centres, a mixture of other young workers, unemployed persons etc.¹⁹ As of July 2003, there were 151 CADA, with 11,500 beds. There are also, in addition, various other types of accommodation – including hotels – provided by the State to asylum seekers. Residents in a CADA must request permission to be absent, although these centres are primarily designed to meet basic needs and do not serve any kind of enforcement or monitoring purpose if only for the practical reason that they are usually full to capacity, with a waiting list of several months.

Those who cannot get a place in a centre may be housed in homeless shelters and may receive less financial and social assistance than those in the centres. It is thus clear that the material aspects of the French reception system are not organised with an emphasis on keeping track of asylum seekers' whereabouts, preventing their onward movement to other EU States, or ensuring either their compliance with asylum determination procedures or their availability for deportation following rejection of their claims. The organisation and operation of the French reception system is, however, likely to improve in order to be in line with the new EU Directive on reception conditions.

Rejected asylum seekers usually receive an order to exit the territory, within a specified period of time, and many of them disappear within France. Very few are apprehended and put into *réention administrative* immediately upon receipt of their order to leave.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

No statistics are available on the rate at which asylum seekers abscond from the French reception/asylum system, however the anecdotal impression of those interviewed for this study was that they do so at a high rate, both because the lack of accommodation for all who need it forces many into an itinerant lifestyle and because a significant percentage wish to transit to other EU States. There is a continuing problem with regard to the disappearance of unaccompanied and separated minors from certain places of accommodation, though not from the two specialised centres run by the Red Cross and *France Terre d'Asile*.

¹⁹ Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report, September 2002, Lawyers Committee for Human Rights, p.33.

B. Export value?

The reported success of the two specialised centres for separated children, mentioned above, may serve as evidence that such accommodation can make a positive difference to the rate at which such children abscond or disappear, without the need to resort to deprivation of their liberty.

There are no other specific initiatives or studies in the field of alternatives to detention reported from France, where the only publicly debated ‘alternative’ to the waiting zones is considered to be externalisation of asylum processing. This would constitute an ‘alternative to arrival’, not an ‘alternative to detention’, and therefore falls beyond the scope of the present study.

GERMANY¹

I. DETENTION AND DOMESTIC LAW

In Germany, as a rule, asylum seekers are not subject to detention during asylum procedures. The exceptional nature of detention is shown in the unofficial statistics compiled by the Federal Office for the Recognition of Foreign Refugees ('Federal Office'). In 2003, out of a total number of 50,563 first asylum applications, only 1,683 (3.3%) were filed by applicants in detention, compared to 1,923 out of 71,127 (2.7%) in 2002.

If a person is already in detention, e.g. pre-trial detention, imprisonment on grounds of a criminal conviction, pre-deportation detention according to section 14(4) of the Asylum Procedures Act can be ordered during the asylum procedure. Pre-deportation detention must be lifted when the Federal Office has decided on the claim but no later than four weeks after the application for asylum has reached the Federal Office, unless the claim has meanwhile been rejected as 'manifestly unfounded' or 'irrelevant'. Persons applying for asylum for a second (or further) time might, however, be held in pre-deportation detention, unless their second application is admitted by the Federal Office in accordance with section 71(8) Asylum Procedures Act.

A. Detention during accelerated procedures at the airport

Asylum applicants arriving at one of the major German airports and coming from 'safe countries of origin' or without a valid passport are subject to a special accelerated asylum procedure conducted at the airport (the 'airport procedure'). An applicant may be held in facilities at the transit zone of the airport until he or she is granted entry or his or her application for asylum is rejected as 'manifestly unfounded'. According to a decision of the German Constitutional Court², the holding of asylum-seekers in closed facilities in the transit zone during the airport procedure does not amount to either detention or a limitation of liberty, since the individuals were free at any time to leave for the country they came from or another destination. The time limit for the airport procedure is 19 days.

Applicants whose claims are rejected as 'manifestly unfounded' and who cannot return to their countries of origin may spend several months in *de facto* detention at the airport. The Regional Civil Court Frankfurt (the court of second instance competent for detention matters with respect to the Frankfurt airport), ruled on 5 November 1996³, however, that as soon as an asylum application has been rejected and the removal order enforced, any obligation of the concerned asylum-seeker to remain in the transit zone without prior order by the responsible judge would violate his/her right to liberty. This decision corresponds to the *Amuur v. France* decision by the European Court on Human Rights.⁴ The incidence and duration of such long-term stays have significantly decreased in recent years.

In 2003, according to statistics collected by the Federal Office, 850 persons filed applications for asylum at German airports. Of this number, 458 applications were granted entry in accordance with section 18a(6) of the Asylum Procedures Act. Free legal counselling is supplied to all those persons whose claims were rejected as "manifestly unfounded" within the airport procedure.

¹ The information presented herein is valid up to 31 March 2004.

² Decision of 14 May 1996, 2 BvR 1516/93.

³ Case No. 20 W 352/96.

⁴ ECHR decision of 25 June 1996, 17/1995/523/609.

B. Pre-deportation detention for rejected asylum seekers

Failed asylum applicants liable to deportation may be detained under the conditions of section 57(2)(1) of the Aliens Act. Pre-deportation detention can be ordered for a maximum period of two weeks if the deadline for a voluntary departure has elapsed and if it is certain that the deportation can be enforced.⁵ In such cases, the detention can be prolonged for up to six months, unless it is established that – for reasons not the fault of the alien him or herself – the deportation cannot be enforced within the next three months. However, if the alien prevents the deportation through his or her own actions, the order can be extended for further 12 months, allowing for a total of up to 18 months detention pending deportation.⁶

In practice, the length of detention differs by country of origin,⁷ but on average it lasts between five to six weeks. Although the Constitutional Court has repeatedly ruled that pre-deportation detention may not be ordered if actual deportation can not be foreseen, UNHCR reports that it is aware of many cases in which rejected asylum seekers have been detained although it was unclear whether the (alleged) countries of origin would readmit them.

The imposition of pre-deportation detention must be determined by the local civil or criminal courts on request of the aliens authorities, within 24 hours. The alien concerned can appeal against such an order to the District Court within two weeks, and thereafter to the Regional Court, within a further two weeks.⁸

Any foreign national who enters and stays in Germany illegally may be taken into pre-deportation detention based on their illegally entry.⁹ Such a detainee should, as a rule, be immediately released from detention if he or she applies for asylum, except where he or she has stayed on German territory without authorisation for more than one month.¹⁰ In practice, many adjudicators do not apply this test because it can be difficult to prove.

Pre-deportation detention is ordered in a considerable number of cases, especially if the identity of a rejected asylum seeker is in question or if he or she provided false information regarding his or her identity. Sometimes requests for detention orders by the aliens authorities are based on insufficient or unconvincing facts. Some aliens authorities seem to routinely request pre-deportation detention, while others are less inclined to do so. No comprehensive figures on the number of rejected asylum seekers in pre-deportation detention are available. Existing *Länder* statistics do not distinguish between rejected asylum seekers and other aliens.

⁵ S.57(2)(1), Aliens Act. The test is that (a) the deadline for voluntary departure has elapsed and the person has changed address without notifying the aliens authority; (b) the person failed to appear at the arranged place and time of deportation; (c) the person has otherwise evaded the deportation order; or (d) the person is considered 'for well-founded reasons' likely to do so.

⁶ S.57(3), Aliens Act.

⁷ Rejected Romanian asylum seekers are returned via a simplified procedure under the German-Romanian Readmission Agreement and frequently held for only a few days, for example, whereas rejected asylum seekers of other nationalities may only be deported after several months of detention.

⁸ In view of the fundamental importance of the right to liberty, the Federal Constitutional Court has clarified that the detainee can appeal against the detention order even after release. BVerfG, judgement of 15 December 2000, 2 BvR 347/00.

⁹ Section 57(2) No.1 Aliens Act.

¹⁰ Section 14(4) No.4 Asylum Procedures Act states that detention in those cases can be continued, irrespective of a pending asylum procedure.

Rejected asylum seekers in pre-deportation detention are generally subject to normal prison regimes. No specific rules, rights and duties of these detainees have yet been fixed into formal law. In principle, the detainees may contact lawyers, UNHCR or NGOs, but in practice access is unsatisfactory and there is a severe shortage of professional counselling. Many detainees complain that they do not know how their cases are proceeding or what will happen to them. Courts grant legal aid only after a strict merits test. Further, many lawyers are reluctant to represent pre-deportation cases because such cases are very time-consuming if they are to be handled successfully and most detainees are not in a position to pay for a lawyer. Instead of detaining rejected asylum seekers in regular prisons, some federal states have established special detention centres for aliens pending deportation.

C. Detention of minors

In general, minors who are found not to be refugees may be placed in detention to secure deportation. This happens, for instance, when the rejected minor - regardless if he/she is unaccompanied or if he/she stays with his/her family - is suspected of trying to go into hiding. Furthermore, if a minor alien is found to have already stayed illegally in the FRG for more than four weeks, he/she may be detained. As a rule the authorities try to avoid detention of minors and in case they suspect a family of going into hiding they detain the male head of the household only. Some federal states released special decrees with different regulations on when and how to detain minors. For instance, children and minors under age 16 are in principle not detained in the *Länder* of Berlin, Schleswig-Holstein, North Rhine-Westphalia and Hesse. In Berlin, mothers and single fathers with children under the age of 7 may not be detained. In addition, children and minors aged 16 to 18 may only be detained for a maximum duration of three months. Furthermore, in North Rhine-Westphalia, persons under 18 are neither subject to detention if they attend school, hold a work place or an apprenticeship trainee position, or are still living with their parents. In Saxony-Anhalt minors between ages 14 and 18 may only be detained under very special circumstances, and the decision may be taken with the participation of the respective youth authority only.

The Federal Ministry of Interior published statistics on minors in deportation detention, which had been collected from all federal states. The figures show that consistent nation-wide registration systems for such cases do not exist, and that certain figures are not comparable. Four federal states did not provide any figures at all. The Ministry's statistics yield that in 2004 at least 318 - alleged - minors had been temporarily detained. Only 9 federal states provided information about the respective age of the minors (2 minors were 14 years old, 5 were 15, and all the others were aged 16 to 17). The relatively high number of minors in detention is, however, contrasted by recent jurisprudence, which has increasingly emphasized that detention was the last resort only and any means to avoid detention of minors had to be examined first, e.g. the accommodation in a youth welfare centre.¹¹ According to UNHCR's observations, minors are often released if they challenge the detention decision.

Minors accompanied by the parents, or separated children, are also subject to the rules relevant during the airport procedure. However, unaccompanied minors under the age of 16 are in most cases granted leave to enter the German territory to pursue their procedure inland.

¹¹ Higher District Court of Braunschweig, 6 W 26/03, decision of 18 September 2003, Higher District court of Cologne, 16 Wx 614702, decision of 11 September 2002.

II. ALTERNATIVES TO DETENTION

As already pointed out, asylum applicants and refugees in Germany are seldom subject to detention. In order to ensure compliance during the asylum procedure and availability for removal, as well as a means of cost reduction and national ‘responsibility sharing’, they are, however, subject to certain restrictions regarding settlement and freedom of movement.

A. Identity registration

The Border Authorities and the Federal Office are responsible for establishing the identity of asylum seekers. The Federal Criminal Police Office takes fingerprints and cross checks them in order to grant security clearance. Identity, security and health checks generally take place within open reception centres. It is not known exactly how many asylum seekers in Germany abscond during this initial period.

B. Distribution and accommodation in collective centres/restrictions on freedom of movement

In principle, applicants for asylum are supposed to live in large initial reception centres (*‘Erstaufnahmeeinrichtung’*) of the *Länder* to which they have been assigned under the nationwide initial distribution system¹² for a maximum of three months. Subsequently, as provided for in section 50 of the Asylum Procedures Act, applicants are distributed among the districts of the responsible federal state. As a rule, after re-distribution to the district level, they are supposed to live in collective centres managed by the districts¹³ during the entire asylum procedure.¹⁴ Exceptions to this rule are authorised, but practices vary between federal states.

UNHCR has objected to accommodating asylum seekers in collective centres where these facilities are excessively isolated and where no counselling or other NGO services are available. This has been a chronic problem particularly in the federal states of the former East Germany where reception/accommodation centres tend to be in very isolated areas, such as in barracks of the former East German border police. UNHCR has repeatedly called on the authorities to exempt traumatised individuals, such as torture survivors or unaccompanied minors, from the obligation of staying in collective reception and accommodation centres.¹⁵

For the duration of the asylum procedure,¹⁶ applicants are subject to restrictions on their freedom of movement.¹⁷ They are generally not supposed to travel outside their district of assigned residence without special permission from the competent local aliens authority. Should they breach this requirement, they may be subject to detention as a penalty. Some districts are no larger than fifteen square kilometres. No such permission is required for the purpose of appearing in court or before

¹² The distribution system is called ‘EASY’, *‘Erstverteilung von Asylbewerbern’*. Allocation is based on the population of the Lander and its sub-districts, though authorities are required to take the place of residence of a spouse, children and/or parents into consideration when deciding on these allocations.

¹³ Some districts, however, transmitted the operation of these collective centres to private agencies or nongovernmental welfare organisations.

¹⁴ S. 53, Asylum Procedure Act

¹⁵ Information received from UNHCR BO Berlin.

¹⁶ In Germany, 28% of all first instance decisions are taken within one month. Altogether, 81 % of all first instance decisions are made within six months upon application. The average length of an asylum procedure in Germany, inclusive of the court proceedings, amounts to 22 months.

¹⁷ As provided for in Sections 56, 57, 58 and 59 Asylum Procedures Act.

other authorities.¹⁸ It is regularly granted to allow an applicant to seek advice from a lawyer or an NGO if such advice is not available within the assigned district.¹⁹ Permission to visit family members residing in other federal states is granted on a very restrictive basis only. In a 1997 decision, the German Constitutional Court held that these limitations on the movement of asylum seekers are not disproportionate and, therefore, are in line with constitutional guarantees.²⁰ The limitations are lifted if and when the applicant is recognised as a refugee, even if the decision has not yet entered into legal force.²¹

In general, persons granted subsidiary forms of protection are also confined to the federal state or even the district of the aliens authority to which they were previously assigned during the determination procedure.

C. Alternatives for separated children

Child asylum seekers and aliens are subject to the same legal regimes as adults, except that they are also subject to German child welfare law (The Youth Welfare Act) and must be appointed a guardian for the asylum procedure while under the age of 16.²² The guardian, appointed by the local court, may be a youth welfare officer, a nongovernmental representative, a relative of the minor or any interested individual who is regarded as reliable by the court. In cities such as Hamburg or Berlin, appointed guardians are mainly from youth welfare offices and are responsible for a large number of wards at any one time. In various *Länder*, e.g. in Baden-Württemberg, Bavaria, Saxony and Lower Saxony, guardianship projects have been established to encourage individuals to become guardians for unaccompanied children up to the age of 18 and to provide them with the necessary support.

Unaccompanied minor applicants under 16 are, as a rule, received in special accommodation centres and are not obliged to stay in initial reception or accommodation centres of the districts. Minors above 16 are as a rule accommodated in reception centers for adults and families, however, in some *Länder* special projects have been established which provide special accommodation for adolescent unaccompanied minors.

D. Return Centres for ‘non-cooperative’ rejected cases

In light of the prevailing jurisprudence of the Federal Constitutional Court, according to which prolonged pre-deportation detention is prohibited as a means of pressuring an asylum seeker to cooperate in the process of return, the authorities of several federal states have started to establish so-called Return Centres (*Ausreisezentren*).²³ Given the rise in the number of rejected asylum seekers in recent years whose identity/nationality cannot be clarified by ‘traditional methods’, or who refuse to cooperate in obtaining travel documents, the Return Centres have been introduced to induce cooperation and consent in such problematic cases.

¹⁸ S. 57(3), Asylum Procedure Act.

¹⁹ Ss. 57(2) and 58(2), Asylum Procedures Act.

²⁰ BVerfG, decision of 10 April 1997, BVerfGE 96, 10 ff.

²¹ Restrictions to freedom of settlement pertain, however, when the refugee is dependent on State social benefits.

²² In 2002 and 2003, 873 and 977 separated children under sixteen years of age applied for asylum in Germany, respectively.

²³ In other words, failed asylum seekers may be ordered to reside at such centres indefinitely because they are not technically places of detention.

Return Centres exist in Lower Saxony (Braunschweig and Oldenburg with a combined capacity of 250 places; Bramsche-Hesepe, with 200 places), in Rhineland-Palatinate (Ingelheim, 180 places), in Saxony-Anhalt (Halberstadt, 100 places) and in Bavaria (Fürth, 50-100 places). Rejected asylum seekers who are non-cooperative may be ordered to take up residence in one of these Centres. The Centres are generally open, although residents must report on a regular basis (e.g. three times per week). They are informed about their legal situation in regular conversations with a view to obtaining their cooperation in the administrative process and encouraging their departure from Germany, through, for example, return projects providing short-term vocational training. The standard of amenities in these Centres is generally set at a level that also acts as a disincentive to remain in Germany, that is, only basic needs are met.²⁴

The legality and effectiveness of these Centres has been the subject of heated public debate ever since the first one was opened. While some *Länder* have not adopted this ‘alternative’ at all, and some are considering the closure of existing centres, others intend to further expand their use. Debate continues as to whether everybody already sent to these Centres truly meets the criteria for being labelled ‘non-cooperative’. In certain cases, advocates report that no formal evidence of non-compliance was provided to justify transfer to such a facility.

Critics of this policy advocate instead a greater use of the concept of ‘supported voluntary return’ – meaning the provision of counselling and incentives, including financial and practical assistance and vocational training, to promote mandatory return with the consent and cooperation of the rejected asylum seeker. This concept has recently seen a revival in Germany, with several projects at the *Länder* or district level, in most cases jointly carried out with various NGO partners and co-funded by the European Refugee Fund. These documented successful efforts contribute to minimising the use of pre-deportation detention.

E. Restrictions on freedom of movement for rejected asylum seekers

A rejected asylum seeker, or any foreign national, under a final obligation to leave German territory, if not detained or sent to a Return Centre, may have her freedom of movement restricted as provided for in section 42(5) Aliens Act, irrespective of her former status. Accordingly, the individual must inform the competent aliens authority of any change of domicile – even within the assigned district – or of any absence from the assigned district for more than three days.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

In Germany, non-compliance during the asylum procedure is not reported to constitute a major problem. According to estimates by the Federal Office, the rate of asylum seekers who fail to attend their interview with the Federal Office is negligible and does not exceed 5%. In fact, this high compliance rate during the asylum procedure is an achievement of the legal and reception system, which guarantees that asylum seekers are accommodated and materially supported upon submission of their asylum application and are thus not preoccupied with daily survival strategies. Further, asylum seekers are called in for interview within the first days following their asylum application, so there is not a lot of time in which to lose track of people or for them to grow discouraged.

²⁴ Interview with staff of Pro Asyl, October 2003-March 2004.

With regard to the absconding rate among failed asylum seekers, it should be noted that the gap between the number of claims rejected and the number of persons deported must take account of the large number granted a toleration permit (*'Duldung'*). 226,547 persons were living in Germany under this tolerated status at the end of 2002. Keeping rejected asylum seekers available for removal is obviously a key priority for the German government. In most cases, however, disappearances during the removal procedure can be avoided by restrictions of movement (see above, section II.E).

B. Cost effectiveness?

All the collective accommodation centres provide federally mandated allowances of 41 Euro of pocket money per month for all residents over 14 years of age and 20.5 Euro for all those under 14. This amount has remained unchanged since 1993. This study is not aware of any figures publicly available on the costs of running the accommodation centres. Detention costs in Germany are also seldom published, but it is estimated that one day of pre-deportation detention costs around 60-80 Euro, varying between the federal states. Although official comparisons of costs between open and closed centres do not exist, it can be assumed that open centres are less costly to run than closed.

C. Export value?

The German system, in a sense, is already being exported to the rest of Europe via the EU Directive on reception conditions.²⁵ It is a system that seems to confirm the logic that controls on freedom of movement can reduce the overall statistical flight risk among asylum seekers. However, in practice, the low absconding rate may be due primarily to the fact that Germany is a major destination country, for family reunion and other reasons, and may therefore have a naturally low rate of absconding in common with countries such as the US, UK, Canada and Sweden.

²⁵ For further evaluation of the German dispersal system, and how it is being replicated on the regional level, see: 'Burden Sharing in the EU: Lessons from German and UK experience', Christina Boswell, *Journal of Refugee Studies*, Vol.16, Issue 3, September 2003, pp.316-335.

GREECE¹

I. DETENTION AND DOMESTIC LAW

Most reported cases of detained asylum seekers involve persons who enter or reside in Greece illegally without lodging an asylum application.² In a few cases applicants are detained when attempting to exit Greece and travel to a third country using invalid/forged documents.

The Aliens Act 2001³ provides for both court review of detention and limits on the permissible period of detention of 15 days, or up to a maximum of three months. If a claim is rejected, the authorities have only three months within which to effect the removal of the rejected asylum seeker or he or she must be released. NGOs, however, report that asylum seekers and failed asylum seekers are still being unlawfully held beyond the three-month deadline.⁴

II. ALTERNATIVES TO DETENTION

A. Notification of address and change of address

There is general freedom of movement for both asylum seekers and refugees in Greece, despite the Greek government having entered a reservation to article 26 of the 1951 Convention. Asylum seekers are required however to keep the Aliens Department of the Police informed of their address or change of address (whether chosen personally or assigned by the government as a form of alternative supervision). If an asylum seeker changes residence without notifying the authorities, examination of his or her claim is likely to be interrupted.

B. Open reception centres and directed residence at Lavrio

A number of organisations are involved in the provision and management of reception centres and hostels to where asylum seekers are assigned.⁵ It is not clear how controlled these centres are, but the oldest reception centre at Lavrio, Attika, housing between 250 and 300 persons, requires that permission be sought for any absences where the centre is their designated or directed place of residence. There are some problems with achieving dispersal and assignment to the more remote centres, with people choosing instead to move to Athens despite their destitution.

C. Rental assistance

In addition to the reception centres and hostels, the Social Work Foundation ('SWF') runs a programme called 'Nefeli' which subsidises rent for asylum seekers during the first six months of their stay in Greece. Asylum seekers must request permission to move out of the centres if that is their 'designated address.' Nongovernmental organisations give limited assistance with arranging other types of accommodation.

D. Alternatives for separated children and other vulnerable persons

Some vulnerable persons are released from detention by court order subject to a reporting requirement to the police, either once every week or fortnight. There is no statistical information on

¹ The information presented herein is valid up to 31 March 2004.

² Art. 44(3), Aliens Act 2001.

³ No. 2910/2001.

⁴ ECRE Country Report, Greece, 2003, p.14.

⁵ E.g. the Red Cross (three centres), Médecins du Monde, ELINAS, Social Solidarity, Voluntary Work of Athens, etc.

the frequency of these orders or the rate of compliance of those under them. UNHCR and nongovernmental advocates are involved in referring such cases.

In 2002, 247 separated children claimed asylum in Greece.⁶ Detention of such children is very rare. They are instead referred to the Prosecutor for Minors or the local First Instance Public Prosecutor who takes responsibility for them and decides whether to appoint an individual guardian.

Sometimes separated children are accommodated at specialised youth hostels rather than in general reception centres.⁷ The most important such centre is in Anogeia, Crete, and is run by the National Youth Foundation. It has capacity to house some 25 separated asylum seeking minors. Sometimes separated children are placed in foster care if family tracing or return to the country of origin proves impossible.

During the second half of 2001, Greece built new reception centres and introduced assistance programmes for vulnerable asylum seekers. Preference for places in the centres is given to the elderly and families with children. There are also special centres for women and families, such as the Kokkinopilos centre near Elassona. Such accommodation needs to be promoted as an alternative measure, since the detention of families with young children is not uncommon in Greece. There are also special centres helping asylum seekers with psychiatric or other illnesses.⁸

III. CONCLUSIONS

D. Do alternatives ensure compliance?

In 2002, there were 5,600 new asylum applications and 9,400 decisions taken. Of these, 697 applicants (12%) failed to appear for their interviews at either the first or second instances and, as a consequence, their cases were suspended or closed. Similar percentages occurred for the previous several years. Despite the fact that Greece is a major country of transit, this is a relatively low rate of 'no shows' and suggests that open reception systems can indeed ensure compliance of most asylum seekers, at least until a final decision is delivered.

E. Cost effectiveness?

No information is available on costs. The European Refugee Fund and nongovernmental organisations carry much of the financial burden for the reception centres in Greece. Investing in the improvement of the reception and integration prospects of asylum seekers and refugees in Greece is considered a more constructive and cost-efficient solution than attempts at obstructing transit movements through resort to increased detention capacity.

F. Export value?

The model of small specialised centres for different categories of vulnerable asylum seeker is an interesting one, and, in view of Greek evidence of high rates of compliance, may be worth exploring as a model of best practice in the context of any transit country with limited social welfare services for asylum seekers.

⁶ Greek government statistics, cited in ECRE Country Report, Greece, 2003, p.11.

⁷ E.g., the Centre for Childcare in Lamia provides housing to approximately 30 minors, including asylum-seeking children if necessary; the Aghia Barbara Special Professional School in Athens can temporarily host asylum seekers alongside other Greek minors.

⁸ E.g., Iolaos hostel has capacity for 10 asylum seekers with psychiatric illnesses; Naysika hostel is intended for those who need regular hospital treatment.

HUNGARY¹

I. DETENTION AND DOMESTIC LAW

Until September 1998, asylum seekers who had no family ties or means of living on their own were accommodated in refugee reception centres run by the governmental Office for Immigration and Nationality ('OIN', then 'ORMA'). The centres were open and asylum seekers fully enjoyed freedom of movement. However, over 70% of these applicants left the centres and absconded from the asylum procedure. Some were apprehended by the border guards of neighbouring countries and Hungary was heavily criticised by its EU neighbours for not guarding its borders adequately. In response, Hungary established detention centres for foreigners apprehended either entering or staying in Hungary unlawfully, including potential asylum seekers apprehended prior to lodging an application.

As of the time of writing, release of an asylum seeker from detention at a Border Guard shelter to a 'community shelter' or refugee reception centre (both managed by OIN) can be carried out by the OIN's asylum determination units with the consent of the Aliens Police unit of the same organization.² The Aliens Police often denies such consent. In 2002, a total of only 54 asylum seekers were transferred from detention to open reception centres.³ In 2003, almost all Afghan and Iraqi asylum seekers were transferred from detention to open reception centres, as the Hungarian government decided to treat these nationalities more leniently in light of the unstable situations in their home countries.

As of 2003, detention was not being ordered in cases of separated children or families with children, though this is not explicitly prohibited by the law (see below, under alternatives).

No legislative or administrative regulations or other measures apply specifically to refugees or to asylum-seekers with respect to detention. However, the Aliens Act 2001 introduced three different forms of detention of foreigners (at large, not only applicants for refugee status).

Lack of guidance to the Aliens Police and Border Guards on how to implement the detention policy, coupled with a lack of clarity in the legislation itself, has produced some apparently arbitrary decisions to detain. This lack of clarity is perhaps the most significant failing of Hungarian detention practice. Encouragingly, however, Hungarian courts are increasingly refusing to extend orders of detention where the initial decision appeared arbitrary.

As mentioned above, the Aliens Act 2001 contains three different forms of detention. These are: (1) detention for refusal,⁴ (2) 'aliens policing detention'⁵ and (3) detention prior to expulsion.⁶

In the first case ('detention for refusal'), detention for up to five days may be ordered to effect a removal in accordance with a readmission agreement. This may be extended by a local court to a maximum of 30 days.

¹ The information presented herein is valid up to 31 March 2004.

² S. 10 (4) of Government Decree No. 172/2001.(IX.26.) on the detailed rules of the asylum procedure.

³ Information received from UNHCR BO Budapest.

⁴ S. 47, Aliens Act.

⁵ S. 46, Aliens Act.

⁶ S. 48, Aliens Act.

In the second case ('aliens policing detention'), detention for up to five days (extendable by a local court to a maximum of six months, reviewed every 30 days, and by a county court after six months to a maximum of twelve months, reviewed every 90 days) may be ordered to ensure the execution of an expulsion order if the alien: (a) has been hiding from the authorities or has prevented the implementation of the expulsion order; (b) has refused to depart or there are other good reasons to presume that he or she would delay or try to obstruct the implementation of an expulsion order; (c) is subject to expulsion and prior to departure has committed a petty offence or criminal act; (d) has severely or repeatedly violated the prescribed rules of behaviour in the place designated for his or her mandatory stay, has failed to meet the obligation to appear prescribed for him or her in spite of being called upon to do so and has thereby impeded the alien policing procedure; or finally, (e) if he or she has been released after a criminal sentence.

In practice, even if an individual does not personally obstruct his or her own expulsion, and it is evident that expulsion cannot be implemented in the foreseeable future, stateless persons and others who cannot be returned will frequently spend the maximum period of twelve months under 'aliens policing detention'.

In the third case ('detention prior to expulsion'), the aliens police may detain, for reasons of public security, for up to five days (or up to 30 days, if extended by a local court) an alien whose identity or legality of stay is unclear. If an expulsion decision is taken and further detention is justified in accordance with section 46 of the Act, parallel with a termination of detention in preparation for expulsion, 'aliens policing detention' of the alien may be ordered.⁷

A detained alien may request judicial review of the lawfulness of the first instance decision to detain. Appeals submitted against the decision of the local court are to be considered by the county/capital court within five days. The detainee does not bear the costs of such proceedings, including the cost of interpretation, but must pay for his or her own legal representative. During the second instance judicial procedure the detainee can present his or her application and evidence orally. Most of the criminal procedure rules established by the Criminal Code are applicable to such a procedure.⁸ The Hungarian Helsinki Committee states that these judicial reviews are an ineffective remedy, especially in cases detained at the airport transit zone, which can be detained during pre-admissibility and then, if the case is not admitted, transformed directly into pre-removal detention.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

According to the Director General of Hungary's Office for Immigration and Nationality, 28% of all asylum seekers in 2002 were detained.⁹ While this is a significant percentage, it should be noted that the number of asylum seekers detained has decreased each year since 1999.¹⁰ However, the number of asylum applications has also been declining (e.g., 33% between 2001-2002), so this does not necessarily indicate that Hungary is relying more on alternative measures than in any previous year since 1998.

⁷ S. 59 (2) of Government Decree No. 170/2001.(IX.26.) on the implementation of the Aliens Act

⁸ S. 356 of Act No. I of 1973, promulgated by the official gazette on 31 March 1973, date of enforcement, 1 Jan. 1974

⁹ Information received from UNHCR BO Budapest.

¹⁰ In 2002, the monthly average of foreigners detained decreased to 345 (from 660 in 2001, 720 in 2000, 900 in 1999). Eight detention centres of the National Border Guards are operational, with capacity ranging from 26 to 242 persons, and totaling 593.

The transfer of asylum seekers from the Border Guard shelters to the open reception centres has sometimes been prevented in previous years by lack of available space. In this respect, UNHCR has expressed concern regarding the policy of refurbishing detention facilities and increasing their capacity, while letting the open reception centres deteriorate. The 1999 EU PHARE National Program included 600,000 Euros to refurbish and expand the open reception facilities and this has now taken place.¹¹

III. ALTERNATIVES TO DETENTION

A. Alternatives for separated children and other vulnerable persons

Separated asylum seeking children¹² are to be released from detention and appointed a temporary guardian to assist with all legal proceedings, as well as a permanent guardian to represent them in relation to social and educational matters.¹³ There are, however, several shortcomings in the Hungarian arrangements, which are currently being addressed through a plan formed jointly by UNHCR, the Hungarian government and a local nongovernmental organisation, Menedek. This Plan of Action is based on 'best practice' identified under the Separated Children in Europe Programme. One key element is the establishment of a group home for separated children, with a capacity of 30, run by the local nongovernmental organisation, Oltalom, in the city of Bekescsaba. The home was inaugurated on 27 June 2003 and has been operational since. It is hoped that this new accommodation will help tackle the problem of separated children disappearing, presumably into the hands of traffickers, during the procedure. Previously high rates of absconding for separated children may have been due to the fact that traffickers and smugglers told their victims/clients to claim to be under 18 as a means of evading detention whilst in transit through Hungary. Thus stricter age assessments may, in part, be responsible for closing this 'loophole'.

There are no legal requirements for the release from detention or special reception of other vulnerable groups, such as torture survivors or pregnant women. Those released are sometimes cared for by nongovernmental organisations on an *ad hoc* basis.

B. Registration and documentation

Asylum seekers must deposit their original identity and/or travel documents with the authorities at the time they submit their application for asylum. This is intended to prevent non-detained asylum seekers from transiting westwards. In return, they are provided with a humanitarian residence permit/identity card.¹⁴ Such identity cards were issued during 2003, except to those in detention (a practice which gives rise to some concern, since detained asylum seekers are not equipped with any document indicating that they are asylum applicants).¹⁵ The residence permit is renewed every three to six months, and permit holders must report in person for renewal.

¹¹ Information received from UNHCR BO Budapest.

¹² In 2002, 658 asylum applicants were identified, following new methods of age assessment, as being separated children (10.2% of the total number of asylum applications).

¹³ *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, Lawyers Committee for Human Rights, p.45.

¹⁴ Ss. 15 (a) and 16 (b) of the Asylum Law, and ss. 13, and 16-17 of the implementing Government Decree on the detailed rules of asylum procedure.

¹⁵ Information received from UNHCR BO Budapest.

C. Open centres

Asylum seekers who are admitted to the Hungarian procedure may be referred to one of three open reception centres run by OIN. If an asylum seeker needs State support, they are obliged to reside one of these centres. A small number of recognised refugees also reside in these collective centres, alongside asylum seekers.

The three centres are located in Bekescsaba, Bicske and Debrecen with a capacity of 250, 360 and 1,500 persons respectively. Residents of these facilities enjoy full freedom of movement, except for an initial period of two to four weeks where they are placed in 'quarantine', while medical checks are conducted.¹⁶ It has been suggested that a number of the compulsory medical tests conducted are unnecessary (or unreasonably applied to asylum seekers while not to any other foreigners) and that this time in quarantine detention could be safely reduced, bringing Hungarian practice more into line with that of other European States.

There is a high rate of turnover for residents, with the average time spent in the centres being between 84-108 days.¹⁷ This is probably largely due to the fact that asylum seekers are not authorised to work outside the centres and the centres are located in economically depressed areas where it is difficult to integrate even temporarily into society. Moreover, the level of support and services provided by the centres is also extremely limited. Support services are currently available only to vulnerable cases such as the elderly or sick, female heads of households, torture survivors or those suffering from PTSD, and most such services, as well as several other basic amenities, continue to be funded by UNHCR.

Some residents may also leave because there is an absence of separated and safe living quarters for families. Women and children are housed in centres with an overwhelming number of single male residents. UNHCR and others have recommended the development of separate, protected accommodation for women, female-headed households and families with children, but as of the time of writing, this had yet to be instituted.

D. Community shelters

Smaller, so-called 'community shelters' are another alternative in Hungary for housing aliens who are ordered to reside in a designated place. The minimum living standards set for community shelters are very similar to those set for detention facilities and there are far fewer services and amenities than in the open refugee reception centres. The community shelters are run by the same Aliens Police (OIN).¹⁸ These officers are supposed to play a dual role, as quasi-social workers but also as enforcers of expulsion, deportation and re-detention orders.

The shelter's residents are mainly foreigners released after having spent the maximum twelve months in detention, but who are destitute and have no other place to stay. Many are also, since July 2002, foreigners holding a residence permit issued on humanitarian grounds (i.e., beneficiaries of subsidiary protection or 'Persons Authorised to Stay' ('PAS')).

¹⁶ S. 16(c), Asylum Law, s. 12 of Government Decree No. 172/2001.(IX.26.) on the detailed rules of the asylum procedure. The average time spent in quarantine to undergo mandatory medical examinations, including HIV/AIDS tests, in 2002 was: Bekescsaba, 17 days; Bicske, 18 days; Debrecen, 15-20 days.

¹⁷ In 2003, the average length of residence in the Bicske Refugee Reception Centre had increased from two months (in 2002) to six. It is too early to tell whether this increase will continue as a positive trend in 2004 and coming years. Information received from UNHCR BO Budapest.

¹⁸ S. 70-76 of Government Decree No. 170/2001(IX.26) on the implementation of the Aliens Act.

At the end of 2002, there were three operational community shelters – in Balassagyarmat (capacity 70), Győr (90), Nagykanizsa (43).¹⁹ All were located within Border Guard premises, next to a detention facility or sharing the same building. Freedom of movement is in practice extremely restricted so that residents perceive little difference between being in a community shelter and being in detention. For example, residents are sometimes escorted by armed guards and dogs to and from the shelters and the communal canteen, or to and from the exit gate of the Border Guard barracks.²⁰ There are barred windows and doors on the shelters, which are supposed to be to protect the Border Guard premises from outside intruders. If a resident commits any petty offence or fails to abide by the shelter's rules, they may be liable for 'alien policing detention' (see above) and immediately re-detained.²¹

Women, families, children and other vulnerable persons are among those sent to such shelters, though the shelters are presently wholly unsuitable for them. Apart from the lack of services, some of the premises are in an extremely poor condition (as of mid-2002) and lack separate spaces for women and children to feel protected from male residents. There are no playgrounds for children in these facilities.

After eighteen months in community shelters, the residents are supposed to receive another, better form of accommodation²² but in some cases they remain there.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

Hungary received 6,412 asylum applications in 2002, but 5,073 cases were discontinued in the same period, mainly due to the applicant absconding. That is equivalent to almost 65% of all decisions taken during 2002 (including those pending from previous years). This high rate of non-appearance and non-compliance indicates that the alternatives – open centres and 'community shelters' – are failing to address this issue, despite the *de facto* restriction of free movement in the shelters. This is no doubt partly due to Hungary's continuing role as a gateway to the EU, in turn due to limited integration prospects for refugees in Hungary, but it also may be due to the poor conditions inside certain centres and shelters and the fact that there is no regular reporting obligation applied to non-detained asylum seekers who do not seek State support.

More broadly, there may be a relationship between the fact that Hungary's recognition rate for 1951 Convention refugees is less than 10% (3% in 2002), such that asylum seekers feel little incentive to remain in the procedure. Having said this, it should be noted that a large number of claimants are granted a secondary or subsidiary status (i.e., PAS) which gives them a legal right to remain, though less equal rights, in Hungary. For example, in 2002, while only 104 persons were granted refugee status out of 6,412, there were 1,128 persons granted PAS status.²³

¹⁹ A total of 424 foreigners were hosted in community shelters during 2002.

²⁰ Reported by UNHCR BO Budapest.

²¹ S. 46 (9), Aliens Act.

²² Ss. 56 – 57, Aliens Act.

²³ One particularly worrying finding of a UNHCR mission to Hungarian detention facilities in April-July 2003 was that no detained asylum seeker had been recognised as a refugee or granted the subsidiary status of 'Person Authorised to Stay' since 1 January 2001. It was concluded that there was an implicit bias against the claims of those held in detention, despite the fact that decisions to order detention or release continue to appear arbitrary in many cases.

B. Cost effectiveness?

In 2003, the average cost of running the open refugee reception centres was reported to be HUF4000 (some US\$19) per person per day. In comparison, the ‘community shelters’ cost HUF1650 (some US\$8) per person per day, reflecting their lower standard of accommodation and services.²⁴ No comparative figures were available for the costs of running Hungary’s detention centres, though these are presumed to be relatively high. Thus while it might be argued that a greater use of open centres and community-based reception as an alternative to detention would prove cost-efficient, the transfer of ‘Persons Authorised to Stay’ and other vulnerable cases from the community shelters to the open centres, in order to supply them with the treatment to which they are entitled, would involve an increase in cost. On the other hand, it is hardly cost-efficient for the open centres to be under-occupied so long as arrival numbers are declining, as many of the overhead costs of those facilities would be fixed.

The reduction of time spent in ‘quarantine’ detention upon entry to the reception centres, through reduction in non-essential mandatory medical testing, would not only bring Hungarian practice more in line with international norms, but would also produce significant cost-savings.

C. Export value?

Hungary’s open centres and shelters are not examples of ‘best practice’, yet Hungary should be commended for reducing the percentage of asylum seekers it is detaining on average every year. It is the only country in Europe to have done so in recent years. The centres and shelters deserve to be viewed as alternatives in light of the intense pressure put upon Hungary by western European States to crack down on absconders and to prevent irregular movements by any means – including, potentially, greater use of detention.

²⁴ Office for Immigration and Nationality figures, as reported by UNHCR BO Budapest.

INDONESIA¹

I. DETENTION AND DOMESTIC POLICY – PRE-2001 PRACTICE

The Indonesian Immigration Law 1992 governs who is permitted to lawfully enter the country, but contains no provisions relating to the granting of asylum.² Under this law, all asylum seekers and refugees in Indonesia are at least formally subject to detention, as migrants attempting to enter or stay in Indonesia unlawfully.³

Indonesian immigration detention centres are called '*karantina*' ('quarantine centres')⁴ and, prior to mid-2001, it was common for persons in need of international protection to be indefinitely detained in either prisons, police stations or *karantina*. Primarily these persons were from the Middle East and other extra-regional refugees transiting Indonesia in an attempt to reach Australia to claim asylum there.⁵ They usually had not contacted UNHCR Jakarta, either by choice or because they were prevented from doing so by smugglers, and so had not been registered by that Office. Persons arriving at the airport in Jakarta were the most likely to be detained, however, those transiting the country under the direction of local smugglers by land and boat were also arrested.

Accounts of the conditions in the *karantina* and Indonesian police cells during the period 2000-2001 suggest that they were far below international standards. There were no legal safeguards or means of release available to immigration detainees unless they had their own resources or a smuggler who was able to bail them out.⁶ People are known to have been held in detention for several years under these conditions.

UNHCR was given access to such detainees and conducted refugee status determination interviews in the *karantina* for those persons wishing to claim asylum. Those recognised as of concern to the Office were released to its supervision by the Indonesian authorities and accommodated in Jakarta pending resettlement to another country. Recognised refugees were accommodated in Jakarta and assisted by UNHCR, rejected refugees, including those with pending appeals, were accommodated outside of Jakarta and assisted by IOM. The Jakarta police generally respected, and continues to respect, the letters of attestation issued by UNHCR, written in both Bahasa Indonesia and English.

The International Organization for Migration ('IOM') was also given permission to visit detainees and supply them with additional food and water.

After the introduction of the IOM Program described below, any extra-regional refugees/ asylum seekers/ migrants (mainly Iraqis, Afghans and Iranians) intercepted trying to leave Indonesia for Australia were released to the supervision of IOM. Rejected asylum seekers who were not considered to be intercepted cases were not entitled to IOM's assistance and are left to find their own means of support.

¹ The information presented herein is valid up to 31 March 2004.

² Immigration Act No.9/1992, Sections 8 and 24.

³ Sections 1 (15) & (16) and 44.

⁴ These quarantine centres also hold other illegal immigrants serving sentences while awaiting deportation. Indonesia generally does not deport illegal migrants due to lack of funds, unless the illegal migrants have their own means to leave the country.

⁵ They hoped to reach Australia for a variety of reasons including the lack of integration prospect in Indonesia and the wish to reunite with family members.

⁶ '*By Invitation Only: Australian Asylum Policy*,' Human Rights Watch report, Vol.14, No.10(C), December 2002, pp.36-37.

II. ALTERNATIVES TO DETENTION – POST-2000

At the beginning of 2000, IOM commenced a program which later became known as the ‘Regional Cooperation Model’. It was a program originally entitled ‘The Interception Program’ and driven primarily by the Australian government’s interest in stemming the flow of migrants and refugees transiting Indonesia on their way to Australia. The program was fully funded by the Australian government.

Between 2000-2002, the program handled just under 4,000 ‘irregular migrants’ and ‘stranded transit migrants’. Almost all of these persons chose to submit applications for asylum to UNHCR when it became apparent that they would not reach Australia. As of October 31, 2002, 734 asylum seekers and failed asylum seekers were under IOM’s supervision, 198 Afghans having chosen to voluntarily repatriate between May and October 2002.

Under the program, while their status was being determined by UNHCR, ‘irregular migrants’ were accommodated by IOM at various locations around Indonesia, such as former tourist hotels and army camps.⁷ These were open shelters rather than places of detention and as such the program can be described as an ‘alternative to detention’. IOM Headquarters has stated that it was conceived specifically to alleviate the inhumane conditions of detention in Indonesia.⁸

People living in IOM’s open camps while their claims were processed were not permitted to work but were given assistance with basic needs. At first the level of assistance was inadequate and the locations were not always sustainable (for example, the camp in Kupang prior to January 2002), but material conditions and security generally improved during the course of 2002. Residents of the camps still complained of the lack of education for children, of failings in the health care provision and a lack of independent legal advice. Another major difficulty was that the Indonesian government insisted that all the accommodation sites should be outside Jakarta, dispersed in relatively remote towns. By 2004, this was limited to two sites outside of Jakarta, Situbondo and Mataram. If asylum seekers tried to leave their designated places of accommodation (as some did in order to protest their situation outside the UNHCR Office in Jakarta at the beginning of the program), they were threatened with denial of further assistance and/or detention if they refused to return. They were not provided with assistance in Jakarta, but their assistance was re-instated upon their return to their designated area.

As of the time of writing, the number of persons under IOM’s supervision has reduced dramatically as a result of far fewer extra-regional arrivals in Indonesia, in turn a result of Australia maintaining closed coastal borders and a high number of returns to countries of origin. Those remaining are mostly failed asylum seekers, left over from the groups intercepted at sea by the Australian navy during late 2001. Those who have left the IOM accommodation and moved to Jakarta have ceased to receive material assistance but have not been arrested.

⁷ For example, in Kupang, Mataram, Surabaya and Cisawa.

⁸ ‘*By Invitation Only: Australian Asylum Policy*,’ Human Rights Watch report, Vol.14, No.10(C), December 2002, p.52.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

It is extremely difficult to evaluate the impact of the IOM assistance program for released and intercepted asylum seekers in Indonesia as distinct from the impact of Australia's interception and other asylum policies (see country annex on Australia). In other words, the fact that almost all asylum seekers complied with the UNHCR determination procedures while under IOM's supervision in Indonesia was arguably influenced by the fact that Australia closed its coastal borders and thus transformed Indonesia into a long-term transit country or a resettlement-processing country. It is interesting, however, to compare the relative freedom of movement afforded to asylum seekers in Indonesia with the detention of an identical caseload of asylum seekers in Nauru and Papua New Guinea during the same period (also under the management of IOM and funded by the Australian government). It would seem that there was no more risk of onward transit from these nations than from Indonesia. Moreover, the local Nauruan and PNG populations needed no greater protection or separation from the asylum seekers as did Indonesia, so the difference in liberty afforded to the groups remains difficult to justify on objective grounds.

B. Cost effectiveness?

For the Indonesian government, the program was extremely cost effective in the sense that it removed a group of 'illegal aliens' from their custody and budget and transferred all costs to IOM Jakarta, which in turn was fully funded by Australia at a reported cost of US\$250,000 per month (80% of which was spent on direct assistance). Compared to the high capital and per capita running costs of detention in Nauru or Papua New Guinea,⁹ the Indonesian program was also much cheaper and easier for the Australian government to administrate.

⁹ For full description of these costs, see the Australian Senate's Inquiry into a Certain Maritime Incident, Final Report, Chapter 11.

REPUBLIC OF IRELAND¹

I. DETENTION AND DOMESTIC LAW

A. Asylum seekers

Ireland does not have a general policy of detaining asylum seekers and does not have any dedicated detention centres for illegal immigrants or asylum seekers. However, legislation provides for the possibility of detention in certain exceptional circumstances.² Section 9(8) of the Refugee Act 1996, as amended, provides for the detention of an asylum applicant if ‘an immigration officer or member of the Garda Síochána [police], with reasonable cause, suspects’ that an applicant: (a) poses a threat to national security or public order; (b) has committed a serious non-political crime outside Ireland; (c) has not made reasonable efforts to establish his or her true identity; (d) is attempting to avoid a Dublin Convention transfer; (e) intends to leave and enter another State unlawfully; or (f) has destroyed identity or travel documents or is in possession of forged documents ‘without reasonable cause’.

Section 10 of the Refugee Act 1996, as amended, further provides that the person detained under the above provision will be informed of his or her rights, ‘where possible in a language that the person understands.’ These rights include, *inter alia*, the right to be brought ‘as soon as practicable’ before a court, to consult a solicitor, and to have the assistance of an interpreter for these purposes. It also provides, in section 10(4), for the prioritised examination of asylum applications from detainees.

The new Immigration Act 2003 amended the Refugee Act 1996. Importantly, it increased the period of time an asylum seeker can be detained from a period not exceeding ten days to a period not exceeding 21 days.

B. Asylum seeking minors

Section 9(12)(a), (b) and (c) of the Refugee Act 1996, as amended, provides for the exemption of minors from detention, other than where deemed on ‘reasonable grounds’ to be an adult. This provision further requires that ‘Where an unmarried child under the age of 18 years is in the custody of any person (whether a parent or a person acting *in loco parentis* or any other person) and such person is detained pursuant to the provisions of this section, the immigration officer or the member of the *Garda Síochána* [police] concerned shall, without delay, notify the health board for the area in which the person is being detained...’

C. Rejected asylum seekers pending removal

Section 5 of the Immigration Act 1999 provides for the detention of any individual subject to a deportation order, including rejected asylum seekers where, ‘an immigration officer or a member of the *Garda Síochána*, with reasonable cause suspects’ that a person against whom a deportation order is in force: (a) has failed to comply with any order to leave the country; (b) intends to leave Ireland or enter another State unlawfully; (c) has destroyed his or her identity documents or is in possession of forged identity documents; or (d) intends to avoid removal from Ireland. A person may only be detained under these provisions for a maximum of eight weeks.

¹ The information presented herein is valid up to 31 March 2004.

² As there are no dedicated detention centres, an asylum seeker who is detained under the following provisions would be held in a prison, albeit separated from convicted criminals.

II. ALTERNATIVES TO DETENTION

A. Reporting requirements, restrictions on freedom of movement and residence, and deposit of documentation

Section 9(5) of the Refugee Act 1996, as amended, provides that an immigration officer may require an applicant to reside or remain in a particular district or place in Ireland, or alternatively, to report at specified intervals to an immigration officer or member of the *Garda* (police). This provision is subject to review upon application by the affected asylum seeker to the Minister to waive the reporting/residency requirement. According to the same section, an applicant's failure to comply with such requirements shall render him or her guilty of an offence and liable, upon conviction, to a fine not exceeding 500 pounds, or to imprisonment for a term not exceeding one month, or both.

The new Immigration Act 2003 further amended the Refugee Act 1996 such that section 9(10)(a) and (b) provides for a detained asylum seeker³ to be brought 'as soon as practicable' before a judge of a District Court, who may either confirm the detention order or release the person 'subject to such conditions as he or she considers appropriate.' Such conditions may include any one or more of the following: (a) that the person resides or remains in a particular district or place in Ireland; (b) that he or she reports to a specified police station or immigration officer at specified intervals; or (c) that he or she surrenders any passport or travel documents in his or her possession.

B. Alternatives for separated children

Separated children, upon applying for asylum, are appointed a guardian by the Health Board and are accommodated by the Reception and Integration Agency in a specially designated hostel in Dublin. They are not dispersed. Those who subsequently leave the designated hostel are considered to have 'disappeared.' This number is very small compared to numbers accommodated.

C. Reception/accommodation centres

All asylum seekers arriving in Ireland are housed in a reception centre for the initial two weeks after making their application. They are then dispersed to one of the 63 accommodation centres throughout Ireland, which are administered by the Reception and Integration Agency, where they are accommodated and provided with full board for the duration of the asylum procedure. They are permitted to move freely out of the reception and accommodation centres.

Asylum seekers who reside outside designated reception/accommodation centres are, since May 2003, no longer entitled to rental allowances from the State, although asylum seekers with special needs may be exceptionally provided with self-catered accommodation.

D. Implications of failure to appear

Amendments to the Refugee Act 1996, which came into force in September 2003, provide for negative decisions to be issued to applicants who fail to appear for their asylum interviews or other appointments. Section 11(10) states that an asylum seeker who fails to appear for an interview must provide a reasonable explanation either beforehand or within three days of the appointment or their

³ Under s.9(8).

application will be deemed withdrawn and rejected with no possibility of appeal to the Refugee Appeals Tribunal. Such an asylum seeker does, however, have the option of seeking permission from the Minister for Justice, Equality and Law Reform to make a new application⁴ and retains the right to apply for judicial review of the decision to the High Court.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

The Irish government reports that 48% of asylum applicants failed to appear at the first instance in 2001, 35% in 2002 and 30% in 2003 (as at November). Of the 5,850 who failed to appear in 2001, 2,233 failed to appear again at the second instance, and of the 4,499 of those who failed to appear in 2002, 1,380 continued to fail to appear.⁵

On the one hand, a 70% or higher appearance rate (as in 2003) demonstrates that the Irish policy of resorting to detention of asylum seekers only in exceptional cases⁶ does not have adverse consequences in processing the overwhelming majority of cases. In particular, the Irish system appears relatively successful in protecting separated children from disappearing into the hands of traffickers or otherwise absconding. These statistics imply, however, that the Irish system, at least prior to recent amendments of the Refugee Act, while protecting the rights and freedoms of those within it, did not result in optimal administrative efficiency. The new rule requiring an explanation within three days for any failure to appear is likely to have a significant impact on these already declining rates of disappearance. It is also widely expected that other aspects of the Irish reception system will become more restrictive in the future, with greater control being exercised over applicants' freedom of movement as the new provisions of the Act are implemented.⁷ It is hoped that wherever possible, any restrictions that are necessary in an individual case, will involve the alternative measures set out in the Act, rather than full deprivation of liberty.

⁴ S. 17(7) of the Immigration Act 2003.

⁵ Statistics received from the Department of Justice, Equality and Law Reform, January 2004.

⁶ This is not to overlook the large numbers of persons not in need of international protection and other aliens awaiting mandatory removal who are detained in Ireland.

⁷ Interview with 'Door to Limerick' NGO, October 2003-March 2004.

ITALY¹

I. DETENTION AND DOMESTIC LAW AND PRACTICE

Aliens who arrive in Italy by boat – that is, ‘mixed-flows’ of potential asylum seekers arriving alongside irregular migrants – are held in ‘first reception centres’, located relatively close to their landing point, for the purpose of identification and initial clarification of their status (as irregular migrants or asylum seekers). When larger vessels arrive, these aliens may be immediately transferred to centres in other regions.

The first reception centres for boat arrivals are closed centres, without judicial controls. The amount of time spent there depends on the length of time needed to determine their identity/nationality and status (asylum seeker versus immigrant). On average, it lasts between a couple of days to, exceptionally, two months. This deprivation of liberty in the first reception centres is similar to the condition of foreigners held in the ‘*zones d'attente*’ in France. Asylum seekers may also be detained in airport transit zones for hours or days prior to a decision on admissibility or identity. They are then usually released with a renewable three-month residence card. According to general practice in Italy, as soon as an alien has his or her identity verified and claims asylum, he or she is automatically released.

An alien found undocumented on Italian territory is brought to a ‘Centre for Temporary Stay’ (‘CPT’), from where he or she is to be returned to his or her country of origin within 60 days. If such an alien’s identity cannot be verified within 60 days, he or she must be released. If an alien applies for asylum from within a CPT, and if his or her identity can be established, he or she is automatically released. An exception to this practice, however, is found in the *Ponte Galeria* centre located between Rome and Rome Airport, where undocumented aliens who are apprehended and then claim asylum are brought promptly (within the 60 days) to the city for their first asylum interview. Those whose claims are rejected at first instance may remain in detention until removal.

In September 2002, a new law² was introduced, however, the sections on asylum have yet to be implemented, as relevant implementing regulations are still awaited.³ The asylum part of this law modifies substantially some important elements of the previous asylum procedures under the Immigration Law 1990. In particular, it provides for the establishment of a number of ‘identification centres’. The status and characteristics of these centres will be defined by the above-mentioned regulations. In this regard, on 26 January 2004, the State Council requested, as a pre-condition for its approval of the implementing regulations, a number of corrections to the current draft/text. The quantity and quality of these corrections suggest that approval of the implementing regulations may be indefinitely postponed.

Were the current provisions of Law 189/2002 implemented, certain categories of asylum seekers would be accommodated in identification centres throughout the refugee status determination procedure (which is, rather ambitiously, expected to last no more than thirty days in the first instance). Asylum seekers would have to request authorisation for absences from the identification centres, but if they abandoned the centre without authorisation their asylum claim would be considered withdrawn.

¹ The information presented herein is valid up to 31 March 2004.

² Law No. 189/2002.

³ Arts. 31 and 32.

It is unclear from the text whether the application of this provision would amount to a deprivation of liberty; the Italian term translates literally as 'keep in custody'. The implementing regulations would need to define this more precisely. In its above-mentioned evaluation of the implementing regulations, the State Council made reference to article 13 of the Italian Constitution which stipulates that 'personal freedom is inviolable...' and asserted that the holding of an alien in an identification centre would have to be considered a restriction on this constitutional guarantee to personal freedom.

At the time of writing, the Italian parliament was examining a draft, prepared by a number of parliamentarians of both opposition and majority parties, of a comprehensive asylum law. The parliamentary debate on this initiative was still in its very early stages and there was no clearly defined position on detention. The debate on the possible detention of at least certain categories of asylum seekers will most likely become an important issue in the debate, certainly influenced by the comments of the State Council to the implementing regulations of 26 January 2004. As of March 2004, the outcome of this debate is difficult to predict.

II. ALTERNATIVES TO DETENTION

A. Reception arrangements following release

In the initial phase, undocumented (potential) asylum seekers are held in reception centres for identification purposes. Once the identity and nationality of an asylum seeker is ascertained, and after his or her application for asylum is submitted, he or she obtains a stay permit and is released. Thereafter, he or she may freely choose a place of residence in Italy.

In 2001, the Ministry of the Interior, UNHCR and the Association of Town Councils ('ANCI') established a National Asylum Programme (*Programma Nazionale Asilo* – 'PNA'). It aimed to provide accommodation for 2,000 asylum seekers in a network of 60 councils. Currently, some 1,300 places are provided. These places are insufficient in proportion to the number of asylum seekers in need of assistance in Italy as a whole, and there are plans to increase the number of places available.

There are no real criteria to select those who are actually accommodated through the existing PNA. The original intention was to have a turnover every six months but this has not occurred due to the fact that the status determination procedure takes between nine months and two years, severely limiting the number of places available for new arrivals. It is notable, however, that asylum seekers seem to abscond far less often from these accommodation centres than if they are not assisted by the State. The 'centres' in the PNA, scattered throughout the country, range from private apartments to centres for up to 50 persons. If a resident is absent for three days, then he or she loses his or her place but is not considered to have withdrawn his or her asylum application.

The PNA was established as a pilot project, with a view to creating a basis for a well-structured assistance system for asylum seekers and refugees at national level in the future. The Immigration and Asylum Act 2002 provided the legal basis for a consolidation of this programme, mentioned in Law 189/2002 as 'Central Services to supply information, promotion, advice, monitoring and technical support to the local bodies that provide the reception services'.

B. Confinement to a designated province

According to an old law, applicable both to aliens and Italian citizens, freedom of movement may be restricted for the protection of public morals (traditionally, to prevent prostitution). This could, theoretically, be used to confine an individual to a certain province of Italy as an alternative to detention. To the knowledge of UNHCR Rome, these measures have never been applied to asylum seekers.

C. Alternatives for separated children

Separated children seeking asylum in Italy are not detained. They are instead accommodated in reception centres suitable for their age group, or assigned to a foster family. In a number of cases, however, it has taken the competent tribunal quite some time to nominate guardians. Furthermore, experience has shown that the guardians or the local institutions taking care of separated children are often insufficiently informed about the possibility of the minors applying for refugee status.

It is reported that many separated children in Italy disappear from the system, presumably into the hands of traffickers. A number of nongovernmental organisations in Italy have been extremely active in tackling this problem, and combined with a new law against trafficking and other initiatives by the Italian authorities themselves, these nongovernmental projects have been successful at reducing the rate at which separated and unaccompanied children disappear. One model approach has been to focus on in-depth interviewing of children who may be at risk at the earliest point of reception and to fully establish the nature of their relationships with the adults accompanying them or who claim custody. This reduces the risk of child trafficking *without* resorting to limitations on the children's freedom of movement.⁴

III. CONCLUSIONS

A. Do alternatives ensure compliance?

There were approximately 14,000 applications for asylum in Italy in 2003. The applications examined by the Commission during 2003 numbered 12,858, with 625 granted 1951 Convention refugee status and 10,555 claims rejected. Among the 10,555 persons whose claims were rejected, 1,678 were granted a subsidiary form of protection, 3,207 were rejected after the interview and 7,348 failed to appear for their interviews. Hence, some 60% failed to appear for their interviews.⁵ It can be concluded that Italy's current failure to provide adequate reception standards to all asylum seekers is one of the main reasons, together with the length of the asylum procedure, for the system failing to ensure compliance. The minority of asylum seekers who have received State assistance through the existing PNA have the highest rate of appearance for interviews – if only because the authorities have an address at which to contact them to inform them of appointments. Working to

⁴ For example, since December 2001, the Italian Refugee Council ('CIR') has been running a monitoring programme in the south of the country (the Prefettura of Ancona), named the 'Initiative against the irregular access to Italy of abandoned foreign minors'. The programme's agents are on call by the border police at any time to interview children at the point of first arrival/interception. The aim is to identify those children at risk of abduction or in the process of being trafficked, but also to protect the role of the family as the essential social group protecting the welfare of children by preventing unnecessary and traumatic separations of family members when they do not have documentation certifying the identity of the minor. Of 98 minors interviewed between 16 September 2002 and 20 November 2003, 80 children were successfully readmitted to Greece and Albania and fifteen children were admitted to Italy, of which five separated children were hosted in a protected location. Nine of the admitted children claimed asylum. 'Minors met at ANCONA port border', statistics and information supplied by the Italian Refugee Council, November 2003.

⁵ Statistics received from UNHCR Rome, March 2004.

improve reception conditions in Italy may also have a beneficial impact on the efficiency of the status determination system.

Many asylum seekers who stay in Italy through the full procedure ‘disappear’ into Italian society after receiving a first rejection, since it makes more sense for them to await a regularisation amnesty for illegal migrants in the country than to pursue an expensive appeal case through the courts that might take many years.

B. Export value?

The fact that providing social assistance to asylum seekers (the minority assisted to date via the PNA) has had a measurable impact on their willingness to comply with the asylum procedures and to avoid onward migration to other EU States is an important demonstration that, in a country that generally avoids detention of asylum seekers, other more positive incentives will in many cases achieve the same results.

The preventive/early intervention programme in Ancona, designed to combat the trafficking of children, is one of several Italian projects that can point to clearly successful results without resorting to oppressive restrictions on the children’s liberty and freedom of movement. It may therefore be a model for similar cooperation between local authorities, border police and nongovernmental agencies elsewhere.

JAPAN¹

I. DETENTION AND DOMESTIC LAW

According to the Immigration Control and Refugee Recognition Act ('ICRRA'), aliens in Japan can be detained for the purpose of deportation if they have infringed the regulations on legal entry or presence.² An immigration officer may issue a detention order against any alien who falls within the scope of the deportation procedures as set out in article 24.³ In addition, article 70 of ICRRA provides that all aliens who are apprehended for illegal entry or unauthorised stay may be subject to imprisonment for up to three years and/or a fine of up to 300,000 yen (some US\$2,500). However, refugees are exempted from these penalties under certain conditions.

In May 2004, Japan amended several provisions of ICRRA, which are due to enter into force in 2005. Based on the new provisions, an asylum applicant who would have entered or remained in Japan without authorisation may be entitled to a temporary permit (and hence release into the community) *only if* he or she: (a) applied for asylum within six months of arrival in Japan;⁴ or (b) came 'directly' from a territory where his or her life, physical security or physical freedom was threatened due to the reasons defined in article 1A(2) of the 1951 Convention;⁵ or (c) is considered unlikely to abscond;⁶ and (d) has not been 'convicted of a violation of any law or regulation of Japan, or of any other country, and sentenced to penal servitude of one year or more' except for political crimes.⁷

Prima facie, the new provisions are an improvement as asylum seekers in Japan will receive temporary permits reflecting their status provided they satisfy the elements above. As a result, they should not be detained during the asylum procedure. The extent to which detention is used however will depend on the implementation of these new provisions, in particular the application of the condition of 'coming directly' in (b) above. Thus, there will continue to be asylum seekers who fail to meet these conditions of a temporary permit and will be detained as a consequence. The only other possibility to avoid detention or to be released is to be granted a 'permit for provisional release' from detention as set out in article 54 of ICRRA (see under Alternatives to Detention below).

Until the new law comes into force, an asylum applicant who has overstayed his or her visa will continue to be denied any form of status and will, therefore, in principle, be subject to detention as if he or she were an illegal alien. This would occur regardless of whether he or she is awaiting the outcome of an asylum application. A detention order (followed by a deportation order) may be issued at any time during the asylum procedure since the triggering element is the expiry of the visa. In practice, however, the Ministry of Justice usually resorts to detention only when an appeal has been rejected, or during the first instance procedure if the authorities have reason to believe that the applicant poses a danger to the community or will abscond. There is no requirement for the authorities to supply evidence for the latter belief.

¹ The information presented herein is valid up to 31 May 2004.

² Art.24, ICRRA, as amended in 2001.

³ Art.39, ICRRA.

⁴ Art. 61-2-4 (1) (6).

⁵ Art. 61-2-4 (1).

⁶ Art. 61-2-4 (1) (9).

⁷ Art. 61-2-4 (1) (4) in connection to art. 5:1:4.

Article 41 of ICRRA provides a 30-day limit on detention, which can be extended by a further 30 days only once.⁸ Prior to this, such detention may be challenged in court. A deportation order must be issued within 60 days. Detention for the purposes of carrying out a deportation order, however, has no fixed time limit and may be extended indefinitely.

Detention for the purpose of deportation is not subject to mandatory judicial or administrative review, which is a matter of concern to UNHCR and other refugee advocates. However, provisional release from detention can be sought at any point of time by the detainee, his legal representative, or the detainee's relatives (article 54, ICRRA). The other remedy available is the Habeas Corpus Act procedures enacted in 1948. Under this Act, a court may order the provisional release of the detainee under oath to appear when summoned (article 10), or release the detainee upon questioning of the parties concerned (article 16). The UN Human Rights Committee has expressed the view that the Habeas Corpus Act procedures are ineffective since there have been no known successful challenges under this Act.⁹ Asylum seekers may also file lawsuits to cancel (or nullify), and/or suspend the execution of a detention order as well as a deportation order (under which an asylum seeker can be detained pending deportation). However, it is only in recent years that lawsuits of this nature have met with success.

Airport detention of asylum seekers, in 'Landing Prevention Facilities' or 'Airport Rest Houses', and the detention house (*shuoyo-ba*) which belongs to the Narita branch of the Immigration Bureau, occurs regularly.¹⁰ There are concerns that asylum seekers detained at the airport, in particular those without proper documentation, do not have the possibility to receive legal counselling or basic information on asylum procedures. There is resulting uncertainty as to whether detainees may be *refouled* or prevented from submitting an asylum claim.¹¹ In 2003, all UNHCR's requests to access asylum seekers held in the 'Landing Prevention Facilities' were accepted by the authorities. In cases that UNHCR was aware of, asylum seekers have been able to contact a local NGO and UNHCR. The Ministry of Justice is bound to provide free interpretation during the eligibility interviews, however there is no State-funded project for providing legal aid to asylum seekers. There is limited legal aid via the Japan Legal Aid Association, partially funded by UNHCR.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

As detention of illegal aliens (including asylum seekers falling into that category) is not mandatory, Japanese immigration officers have a discretionary power to decide whether or not asylum seekers should be detained. Both 2002 and 2003 saw a drop in detention numbers in Japan compared to the practice in the months post September 11, 2001, due in part to a new policy of suspending the issuance of deportation orders until asylum decisions are made at first instance or appeal, unless the individual constitutes a threat to the community. This reduces the number of persons subject to detention under ICRRA and is, to some extent, a return to earlier practice, prior to 11 September 2001. In fact, however, under the legislation in force until 2005, only those in-country applicants who come forward and apply before being apprehended are left at liberty. This is a commendable feature of the Japanese system. On the other hand, those who apply for asylum after being

⁸ Art. 41 of ICRRA (www.moj.go.jp/ENGLISH/IB/ib-42.html)

⁹ UN Human Rights Committee, 1998 Observations to the periodic report from Japan – CCPR/C/79/Add.102.

¹⁰ In 2002, Amnesty International reported that there were "a daily average of some 7 persons detained in the landing Prevention Facility" in Narita airport. Source: *Welcome to Japan?*, Amnesty International, ASA 22/002/2002.

¹¹ Carriers have partial legal responsibility for the detention of deportees at the 'Airport Rest Houses' and during the transportation of the detainee between locations, employing private security companies for this purpose. *Welcome to Japan?* Amnesty International, ASA 22/002/2002.

apprehended for illegal entry or stay are likely to be detained and kept in detention for the entire determination procedure, unless UNHCR or lawyers successfully intervene.

Separated asylum seeking children are not detained in Japan, though Amnesty International did identify at least one such child detained at an airport in 2000.¹² (Recently, based on the information available to UNHCR, there have been no cases of asylum seeking separated children in Japan.) In most cases, if parents are detained, the children are accommodated in specialised institutions for minors, or placed in foster care. An NGO, partly funded by UNHCR, provides social services to detained parents and children in specialised institutions. It is reported that the frequency of visits to parents is at the discretion of the institutions' caretakers.¹³

Torture survivors and those suffering from severe mental or physical health problems are generally not released on compassionate grounds. There is the possibility of submitting medical reports as part of an application for release, but there is no requirement for these facts to be considered under the law. However, based on the 2001 'Provisional Release Manual' issued by the Immigration Bureau, the detainee's health condition is a relevant factor to decide on a request for provisional release. One asylum lawyer reported that Afghan asylum seekers were in detention at the East Japan Immigration Center (Ushiku) for several months (3-7 months) suffering from a long list of medical conditions including depression and PTSD due to previous hardships in their country of origin and indefinite detention in Japan, yet were still denied release by the Tokyo courts. There were also several cases of self-harm among the Afghan asylum seekers detained at Ushiku during 2002. In 2002 and 2003, UNHCR has also raised concerns about the long-term detention of mandate refugees, including refugees suffering from serious health problems.

In practice, due to administrative delays and various practical problems, it is virtually impossible to effectively challenge the detention order before civil courts, therefore most challenges are made at the deportation stage. For example, an important legal challenge was mounted concerning nine Afghans arrested after September 2001 on unproved suspicion of links with terrorism. On November 6, 2001, the Tokyo District Court made a historic decision to suspend the detention order for the five Afghans who were earlier arrested. While it was overturned by the High Court on December 19, 2001, this decision was the first victory in thirty years regarding the suspension of detention order for asylum seekers in Japan.¹⁴ By the end of November 2001, however, all of the nine Afghans were denied refugee status and were subsequently sent to Ushiku Detention Centre. After the nine Afghans were transferred to this detention, the lawyers representing the nine discovered a further 14 Afghan detainees, many of whom had been detained at the airport and directly transferred. On March 1, 2002,¹⁵ Tokyo District Court suspended the deportation order for seven Afghan asylum seekers who were released as a result. By April 16, 2002, the remaining 16 Afghans in the Ushiku Detention Centre had been granted provisional release. On June 11, 2002, the Tokyo High Court confirmed the Ministry of Justice position that seven of the Afghans had breached the immigration law by their illegal entry, but due to the publicity attracted by the case, they were not re-detained. In another case involving a refugee from Myanmar who had been detained for several months and subsequently recognised as a refugee, the Tokyo District Court granted compensation damages for the hardship suffered in detention. The decision was however later overruled by the High Court.¹⁶ In another case concerning Vietnamese refugees, a court

¹² *Welcome to Japan?* Amnesty International, ASA 22/002/2002.

¹³ Information received from UNHCR Tokyo.

¹⁴ There was a similar outcome in another Afghan case before the Hiroshima High Court. Other cases regarding a number of Afghans at Ushiku Detention Centre are still pending in District Court, with the judgment expected in 2004.

¹⁵ Tokyo District Court, H13 (2001) (gyo-ku) No. 1-4, No.166, No.170, No.187.

¹⁶ 14 January 2003 (Gyo-Ko) No131, Appeal to claim compensation.

challenge against their indefinite detention was launched at the Osaka District Court in November 2003, and a decision is still pending.¹⁷

III. ALTERNATIVES TO DETENTION

A. Conditions of provisional release

Under the current legislation, as stated above, immigration rules regulating detention are entirely independent from asylum procedures. Under the immigration law, asylum seekers, like any other immigration detainees, may be released if they meet certain conditions, and as with the issuance of the original detention order, decisions on so-called ‘provisional release’ are purely discretionary.

The conditions of provisional release are set out in article 54 of ICRRA and require that the detainee should present evidence of financial self-sufficiency (personal income or a sponsor’s income), ‘taking into consideration of circumstances, evidence produced in support of the application’, and the payment of a bond.

This provision does not clearly define when a detained asylum seeker should receive provisional release, that is, the ‘circumstances’ to be taken into account in any assessment are not disclosed to the applicant and the decisions are made on purely discretionary bases. This raises concerns that alternatives to detention will not be properly considered in the assessment. Based on the information available to UNHCR, a number of asylum seekers have been kept in detention for the entirety of the asylum procedure despite their apparently low risk of absconding, the existence of alternative accommodation, and the deposit of bail and other guarantor requirements (see below).¹⁸

In practice, alternative accommodation may be offered by anyone with legal residency rights – that is, an individual or NGO. In principle, nothing precludes the government itself acting as a sponsor and offering accommodation to support a request for provisional release. However, securing alternative accommodation is very difficult. This is true, in particular, for refugees under UNHCR’s Statute who, by definition, are not assisted by the Japanese government.

Under present reception arrangements, whether or not asylum seekers hold a temporary permit, they can have access to assistance from the Refugee Assistance Headquarters, a quasi-governmental organisation, until the completion of the asylum procedure before the Immigration Bureau of the Ministry of Justice. This assistance includes financial assistance and accommodation for selected cases. Asylum seekers with a temporary permit may be allowed to work under certain conditions, subject to the decision of the local authority. There are restrictions on accessing social welfare, including medical insurance, for aliens with a permit of less than one year. Under the amended provisions, the new temporary residency permit will not be considered by the Japanese authorities as a form of legal status which would enable asylum seekers to work under certain conditions, as at present. It would, however, protect them against detention.

State financial support for asylum seekers lasts four months (though it is renewable), while the average waiting time to receive a first decision on a claim is one year. State support is no longer available after rejection on appeal before the Immigration Bureau. Asylum seekers with cases that go to court, therefore, do not receive assistance. In 2004, however, free accommodation was provided for the first time to selected needy asylum seekers (see below). As this shelter programme

¹⁷ Osaka District Court, 2003(u) No.108-110, 20 November 2003.

¹⁸ See UNHCR comments on the amendments to ICRRA, 19 May 2004, available on unhcr.or.jp

is still at a very early stage, it is difficult to assess whether provisional release might be facilitated through this programme.

In 2003, State assistance was provided to some 108 persons – that is, to the majority of those who applied for such assistance and approximately a third of all non-detained asylum seekers.¹⁹ In addition, only asylum seekers who apply in-country, after having entered Japan on a valid visa, may be given work authorisation under certain conditions, within the period of the validity of their stay permit, and upon request. Some needy asylum seekers have been accommodated with shelter charities, such as the Japan Evangelical Lutheran Association (JELA), which lodged 10 destitute asylum seekers in 2002 and 15 in 2003.

When the 23 Afghans were released from the detention centre based on the court decision as well as the provisional release permits throughout March to April 2002, the difficulty of where to house them immediately arose. However, church groups such as the Catholic Commission of Japan for Migrants, Refugees and People on the Move (J-CARM) immediately arranged the church premises and private apartments to host these Afghans. Further, individual lawyers, activists, and NGOs such as the Japan Association for Refugees (JAR) and the International Social Services Japan (ISSJ) coordinated with each other to provide stipends and, very importantly, to help young asylum seekers to access education (junior high school) in Japan. Without any duty of supervision, these groups act as informal case managers in the sense of accompanying asylum seekers to all appointments and meeting their basic needs. There is a small, established Afghan community in the Chiba area that was also helpful. Other communities of refugees, such as Burmese, Chinese (Falun Gong) and Turkish Kurds, sometimes help provide the bail and accommodation.

B. Registration, reporting requirements and bail

All non-detained asylum seekers must register at the municipality of their residence and obtain an ‘aliens registration card’. Those released from detention (or subject to detention but not actually detained) carry a permit for their provisional release²⁰ on conditions of reporting and bail. These provisional release permit holders are subject to re-detention if their status is not renewed.

UNHCR has helped to obtain the provisional release of asylum seekers and mandate refugees on the basis that the individual concerned will be accommodated with a guarantor. Accommodation must be found with friends or relatives, or in few cases with a nongovernmental or religious organisation (see description above of some such arrangements). The Ministry of Justice has usually put several conditions upon the release: a legal resident must act as a personal guarantor; deposit of bail; and monthly reporting requirements. The section responsible for examining requests for provisional release is the Enforcement Section, while the directors of detention centres have the formal authority to decide on the request. They may consider factors such as the strength of the claim, the asylum seeker’s financial situation or character, medical conditions or psychological state (though, as stated above, the latter are rarely accepted as grounds for release).

Provisional release is thus restricted to one designated area: the Prefecture the asylum seeker selects for his or her residence. Prior approval must be sought from the Immigration Bureau to travel outside the designated area. Most former detainees are required to report on a monthly basis, and to notify the authorities of any change of address within the Prefecture.

¹⁹ Information received from UNHCR Tokyo.

²⁰ These permits for provisional release are not to be confused with Japan’s ‘Special Residency Permit’ (SRP), which is a form of legal status.

The maximum amount requested as bail is 3 million yen (US\$25-30,000). A famous Japanese authoress, Ms. Kayoko Ikeda, founded a local charity to raise bail monies for the Afghan asylum seekers after their detention in 2001. Although it is of limited capacity, this charity may develop in time into an organisation similar to The Bail Circle in the United Kingdom (see UK section).

The new May 2004 Act, amending ICRRA, includes a new temporary status for asylum seekers, as described above. Based on the flight paths of recent arrivals in Japan, however, less than 20% of asylum seekers would be eligible for this new permit, if the term 'coming directly' were to be strictly interpreted.²¹

C. New initiatives for state-sponsored accommodation

In December 2002, the Japanese Cabinet's Coordinating Committee on Refugee Matters invited civil society to make presentations regarding the co-ordination of alternative reception arrangements for asylum seekers. Long-standing proposals to convert a centre (previously used to house Indochinese refugees) at Shinagawa were inconclusive. Although the centre has already been converted to a language training programme and temporary housing for recognised refugees,²² it has been decided that it will be closed in 2006. At the end of 2003, the Japanese government instead opted for a reception policy for destitute asylum seekers consisting of direct financial assistance and free accommodation in rented apartments under the management of a local NGO, Japan Association for Refugees.

There is no statistical or other evidence that Japan has a problem with absconding asylum seekers prior to the receipt of final decisions. They almost all comply with procedures, as Japan is their 'destination' country so long as any hope of recognition remains (see statistics under Conclusions, below). The newly instituted reception arrangements for destitute asylum seekers, hopefully including those on provisional release permits, are therefore intended to efficiently address their socio-economic needs in an environment of independent living, rather than being designed to maximise control over their whereabouts or activities within Japan.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

For those who have been actually released from detention, the numbers are so small that there is little point in examining their compliance or appearance rates. According to the Ministry of Justice, there are some 20-25% non-detained asylum seekers who 'abuse the system' by, among other things, absconding (the Ministry of Justice classifies all absconding, withdrawal of applications, falsification of identity, multiple applications or repatriation prior to the completion of the procedure as: 'abuse of the asylum system'). However, Ministry of Justice statistics record that, in 2002, 250 applicants out of 264 who remained in the country reported to the authorities throughout the first stage of the procedure.²³

²¹ UNHCR's estimate based on cases registered with its implementing partner, Japan Association for Refugees.

²² As of February 2004, there were less than ten Convention refugees accommodated in Shinagawa on voluntary basis, as part of the six months language training programme.

²³ Ministry of Justice, Table: 'Abuse of RSD Procedures', supplied October 2003. The figures do not include compliance at the appeal stage. In 2002, though 57 persons (21.6%) were reported as "abusing the system" in various ways, only 14 absconded prior to rejection of their claims. 28 of the 57 returned to their country of origin or otherwise departed Japan. In 2001, 91 persons (24.6%) 'abused the system' but again, only 14 actually absconded during the procedure. 17 returned to their countries of origin or otherwise departed Japan. In 1999 and 2000, the percentages

This percentage of compliance (95%) is especially high considering the risk of being detained at any time in the case of applicants whose visa has expired. In 2001, similarly, the percentage of asylum seekers who absconded during the first stage of the procedure was only 4% of the total of 370 applicants.

A further number of failed asylum seekers do fail to appear when summoned by the Immigration Bureau to receive the deportation notice. In 2002, 11 of 264 applicants (4%) did so, and in 2001, 50 of 370 applicants (13.5%) absconded after rejection.²⁴ While in part this is a typical problem regarding unfounded claims, it is also a reflection of several serious inadequacies in the Japanese determination procedures, such as the overly high burden of proof commonly demanded and the absence of an independent review level within the determination procedures.²⁵ Procedural reform may therefore be the only policy solution to the non-compliance of some persons in this group who believe they have been unjustly rejected and so continue to fear *refoulement*.

B. Do alternatives meet other State concerns?

The inadequate welfare provision to some asylum seekers and the denial of work authorisation to all asylum seekers (including, under the current regime, to asylum seekers without legal status, such as visa overstayers) appears intended to serve a deterrent purpose alongside detention. Penalties for illegal employment include imprisonment for up to three years (article 73(2), ICRRA). It is true that better social provision and accommodation might reverse this deterrent purpose, but the ban on legal employment would still continue to deter most applicants with unfounded claims.

Although the detention of the Afghan asylum seekers after September 2001 was most likely based upon security concerns (Japan has US bases and has supported the US counter-terrorism campaign), this was not cited as the legal grounds for the orders of detention. Indeed, most of the Afghans detained were Hazara victims of the Taliban and the authorities ultimately acknowledged that there was no evidence of a security threat among them. The need for alternatives that meet national security concerns has therefore not yet arisen in Japan.

C. Export value?

Japan's practice of leaving in-country asylum seekers, who pro-actively apply for asylum, at liberty in the community may serve as a model to certain other countries, and in one sense the Japanese public's outcry at the unusual and unnecessary detention of Afghan asylum seekers in 2001, to which the government was responsive, was a positive development which, together with other factors, mobilised a larger movement for reform of the immigration legislation.

In Japan, alternatives to detention are not necessarily linked to alternative accommodation arrangements. The Ministry of Justice applies other criteria (health, family situation, etc.) in a purely discretionary manner. While the reform of ICRRA and extension of temporary residence permit to a wider range of asylum seekers are important signs of progress, detention of asylum seekers who do not meet certain conditions will continue to be an element of Japan's reception

recorded as 'abusing the system' were lower (19.1% and 17.3% respectively). The percentage who absconded in Japan were therefore as follows - 1999: 2%, 2000: 8%, 2001: 4%, 2002: 5%. See Ministry of Justice 2003 Annual Statistics.

²⁴ Ministry of Justice, Table: 'Abuse of RSD Procedures', supplied October 2003.

²⁵ See, for further information, Mrs. Sadako Ogata's speech at the Japan Federation Bar Associations Symposium of November 2002 and her lecture at the LAWASIA Conference, 9 September 2003, available at www.unhcr.or.jp

policy. In particular, the requests for ‘provisional release’ will need to be handled by the Ministry of Justice on the basis of transparent and objective criteria.

Until 2004, the ‘alternative’ accommodation arrangements of church shelters were extremely *ad hoc* and only provided a place to sleep for very limited numbers of people released from detention on a provisional permit. These arrangements were not a model of best practice, but rather a pragmatic solution in a difficult situation. Nevertheless, they showed how much can be done even in a country where non-governmental organisations generally do not receive State funds for the reception or legal assistance of asylum seekers. The first experiments with State-funded support for destitute asylum seekers, delivered via a local nongovernmental organisation, are a positive development. Although to date this programme has not been used as an alternative to detention, this use could be further explored.

KENYA¹

I. DETENTION AND DOMESTIC LAW

On the basis of the Aliens' Restriction Act and the Immigration Act, an alien must report to a registration officer within 90 days of entry. Detention of asylum seekers and refugees occurs at Kenya's borders, particularly the border with Ethiopia, and at airports, as well as within urban areas, on the basis of these laws which define who is a prohibited immigrant.² Illegal entry/stay is a violation that carries a penalty of imprisonment of between three months and one year, and it may result in deportation.

The legal provisions concerning the arrest of refugees and/or asylum seekers are the same as for all other persons in Kenya, including citizens. Importantly, police custody without charge is limited to 24 hours, although, as much for Kenyan citizens as for aliens, this time limit is not always adhered to in practice.

Since 1991 and the mass influx of refugees from Somalia and Sudan which severely strained existing structures and procedures, Kenya adopted a policy of confining refugees to camps, such as Kakuma and Dadaab.³ Although the camps are not fenced, they are notionally semi-closed: a camp resident must request permission to reside or even travel outside the camp perimeters (see below for details). Refugees and asylum seekers who live in Nairobi in defiance of the encampment policy may be subject to arrest on charges of irregular entry/stay and/or vagrancy. Arrest may take place on an individual basis (and, in that case, release is often allegedly obtained through payment of bribes) or on a mass scale following 'urban sweeps' motivated by domestic political pressures.

Refugees who arrived prior to 1991 and who were recognised under the 1951 Convention enjoy a wider range of rights, including freedom of movement. These refugees are legally entitled to live in the cities.⁴

A. The 'encampment' policy

While the encampment policy is loosely based on the Aliens Restriction Act, which provides that the Minister may impose restrictions on aliens' freedom of movement, the practice has never been formally articulated. It is understood to be based on two stated concerns of the Kenyan government: (a) national security, in relation to unconfirmed but frequently cited concerns that refugees are involved in illegal activities, and (b) public order, which may be threatened if large numbers of refugees were permitted to converge on the labour markets of the main cities.

Both the Dadaab and the Kakuma camps are located in remote, inhospitable, semi-arid areas, close to borders. Refugees, like local residents of the area, are exposed to raids by bandits, both locally and from across the border. The refugees also often allege infiltration of the camps by agents from their countries of origin. No meaningful economic activities can be pursued in either environment.

¹ The information presented herein is valid up to 31 March 2004.

² Kenya is a party to the 1951 Convention and its 1967 Protocol, as well as to the 1969 OAU Convention. However, it has no domestic asylum legislation and has tended to leave management of refugee matters to UNHCR in practice. If the proposed terrorism Bill is enacted, there are likely to be additional legal grounds for detention of refugees and other foreigners.

³ At the end of 2003, there were an estimated 245,000 refugees remaining in Kenya.

⁴ Department of Immigration estimates 12,500 such refugees.

The present Kenyan government has stated its intention to relocate the refugees and allow greater economic opportunity, thus relaxing the encampment policy. The possibility of relocation, however, remains unrealistic in view of the complex nature of land ownership and the limited availability of productive land in Kenya.

Although accorded the standards of treatment laid down by UNHCR ExCom Conclusion No.22 (XXXII) on responses to a mass influx, the overwhelming majority of the *prima facie* refugees in Kenya do not have access to 1951 Convention standards of treatment. Human Rights Watch has concluded that refugees in these camps are deprived of freedom of movement to such a great extent that they may be considered, following the UNHCR Guidelines on Detention which define a place of detention as one where movement is ‘substantially curtailed’, as living under conditions at least ‘analogous to’ detention.⁵

During 2003, the Kenyan government agreed to authorise certain refugees and asylum seekers to reside outside the camps upon UNHCR request and, in several cases, without it. UNHCR requested such authorisation for individuals with protection needs that could not be addressed at camp level, students, refugees in transit to a resettlement country or repatriating, and refugees financially supported by nongovernmental organisations or others.

Permission to leave the camps is given for several reasons. Refugees who find admission to an educational institute can obtain a ‘Pupil’s Pass’ from the immigration department, which is a valid document to remain outside a camp. ‘Travel permits’ may also certify permission to travel outside the camp for short periods – for example, for medical needs or other compelling personal reasons – and for periods up to one year. The permit is issued and signed by UNHCR and endorsed by the District Officer. During 2002, UNHCR Kakuma issued an average of 500 permits per week, of varying durations.

Police and immigration officers are usually willing to honour UNHCR’s travel permits from the camps or *ad hoc* certification issued in Nairobi,⁶ but such certification may not always protect the holders from police harassment. This may have more to do, however, with failings in the general rule of law in Kenya than with either discrimination against or deterrence of refugees.⁷

B. Detention of urban refugees

As a consequence of the situation described above, hundreds of refugees and asylum seekers are arrested in urban areas for illegal entry/stay or for vagrancy. UNHCR or nongovernmental intervention leads to release in most cases. In others, refugees are charged with an immigration violation, most often illegal entry under Kenya’s Immigration Act, and sentenced.

⁵ Refugees in Kenya, whether recognised on a *prima facie* (i.e. Sudanese and Somali refugees) or an individual basis, are ‘lawfully present’. Therefore their confinement to camps may be examined under article 12 ICCPR and article 26 of the 1951 Convention. Human Rights Watch reasons that, while some refugees do reside outside of the camps or move in and out of the camps without permission, they do so at risk of arrest and possible deportation. Their research in 2002 concluded that permission to exit the camp is in many cases granted on an arbitrary basis, making confinement to the camp analogous to arbitrary detention. *Hidden in Plain View: Refugees living without protection in Nairobi and Kampala*, Human Rights Watch, November 2002.

⁶ The Kenyan authorities do not endorse documentation issued by UNHCR to refugees located in Nairobi.

⁷ Transparency International, an organisation which aims to curb both international and national corruption, found that six out of ten urban Kenyans pay bribes to the police or are mistreated or denied service if they do not. See, *Hidden in Plain View: Refugees living without protection in Nairobi and Kampala*, Human Rights Watch, November 2002, p.43.

In addition, thousands of refugees choose to defy the encampment policy and reside in Nairobi without a permit or any other legal status, and so are at risk of arrest and detention at any time. Their departure from the camps may be for a variety of reasons: because they do not wish to live in the harsh conditions of the camps, dependent on inadequate humanitarian assistance; because many rely on remittances from abroad and the financial institutions are located in Nairobi; because they have fled ineffective protection in a camp, including abuse of women and children, or, as some refugees allege, continuing persecution by persons who have pursued them into exile in Kenya; or because the refugees erroneously believe that physical proximity to the UNHCR office and to foreign embassies will give them better chances of resettlement or emigration to the west. When such unregistered refugees are arrested, UNHCR is less easily able to secure their release but normally manages to do so eventually.

In May and November 2002, thousands of foreigners, including refugees authorised by permits to live in Nairobi, were arrested for illegal entry/stay. In response, UNHCR set up a special task force to visit all detention facilities in order to identify detained refugees and asylum seekers and seek their release.⁸ In 2003, UNHCR made around 90 interventions in cases of detention. The Refugee Consortium of Kenya legal aid programme also plays a key role in interventions to ensure that individual detention decisions are properly reviewed.

During 2002, UNHCR recorded 1075 known cases of detention in Nairobi, including 54 children, though the actual number of such detainees may be higher. Most of the detainees originated from Ethiopia.

In May-June 2002, after the discovery of the unauthorised landing of a plane carrying Somali citizens near Nairobi, some 800 people were arrested in indiscriminate police sweeps on the Eastleigh Estate, a slum area inhabited by Somalis and Ethiopians. UNHCR addressed a written request for the immediate release of all women and children, and all those in possession of refugee documentation, to the Ministry of Home Affairs. The remaining group was charged with unlawful presence in Kenya, and failure to report to the authorities within 90 days of arrival, as required by the Aliens Restriction Act.⁹

On 28 November 2002, prior to the national elections, the Kariobangi and Kawangware Estates, where mainly Congolese and Sudanese congregate, were also subject to police sweeps and many refugees were arrested, though they did not appear to be targeted over other foreigners who were detained to prevent them enlisting as voters. Since the new government was elected, and as of November 2003, there have been no further mass arrests of illegal migrants. The problems surrounding arbitrary police arrest of individual urban refugees, including permit holders, do continue but the situation has generally improved.

II. ALTERNATIVES TO DETENTION

A. Improved registration and joint issuance of permits

In 2001, the Kenyan government agreed accept joint responsibility for registering and documenting asylum seekers and refugees. The District Officers became involved in the issuance of permits to refugees for travel outside the camps. A registration and documentation exercise carried out in Kakuma with UNHCR support led to the issuance of refugee cards to some 20,000 refugees. A

⁸ Previous round-ups also occurred in September 1998, October 2001 and twice during February 2002.

⁹ Information received from UNHCR Nairobi.

similar exercise was planned for Dadaab though it could not be carried out. With the progressive assumption of responsibility for refugee management by the government, it is envisaged that permanent registration structures will be established in both camps and in Nairobi in 2004. The question of the joint UNHCR-Kenyan government issuance of documents to asylum seekers and refugees in cities, however, remains unresolved.¹⁰

B. Proposed alternatives

In November 2002, Human Rights Watch¹¹ made a number of recommendations for reform of the Kenyan system of encampment and detention of urban refugees, including:

- a) A list of five groups of persons who, in the view of Human Rights Watch, should be eligible for exemption from encampment to be provided for by domestic law or regulation¹²;
- b) Standard procedures, before an impartial decision-maker, for both refugees recognised on an individual or *prima facie* basis, to apply for permission to leave the camps;
- c) The establishment of temporary reception sites for new arrivals, including those who have left camps, providing them with safe shelter for at least the first two weeks they are in Nairobi;
- d) Training of all police officers in refugee protection, including incorporating it into the police academy curriculum;
- e) Training of all magistrates on the principles and standards of international refugee law.

III. CONCLUSIONS

The pragmatic arrangements which have developed over the past decade, by which UNHCR identifies and documents individuals whom it considers ought to be exempt from encampment, create some flexibility in the encampment policy. As the issuance of travel permits does not assist the Kenyan government to regulate individuals for the sake of protecting national security or public order, and the individual is not provided with an alternative place of residence, the practice is not an ‘alternative to detention’ in the standard or strict sense. Nonetheless, the system could be conceptualised as an ‘alternative’ if the camps are considered, as Human Rights Watch argues, places of *de facto* detention, since it allows the Kenyan government to recognise that not every individual refugee needs to be confined to camp residence in order to maintain public order and security. If the camps are not classified as places of *de facto* detention, then the issuance of travel permits may at a minimum be labeled an ‘alternative to encampment’ which removes restrictions on individual refugees’ right to freedom of movement.

Longer-term ‘travel permits’ issued to those who need to reside outside the camps may be viewed as an ‘alternative to encampment’ available for those with protection or other needs that can not be addressed at camp level, although it is an alternative that in many cases does not guarantee access to safer or more adequate living conditions in Kenyan cities.¹³

¹⁰ Information received from UNHCR Nairobi.

¹¹ See, *Hidden in Plain View: Refugees living without protection in Nairobi and Kampala*, Human Rights Watch, November 2002, pp.6-8.

¹² These five groups include individuals with serious security problems in the camps; individuals in need of medical care only available in urban centres; individuals who have been living in a refugee camp for an excessive length of time, such as three years or more, and for whom alternative permanent solutions in the foreseeable future appear unlikely; individuals who are in need of educational opportunities not available in the camps; and individuals with family members who are residing legally outside the camps.

¹³ *Hidden in Plain View: Refugees living without protection in Nairobi and Kampala*, Human Rights Watch, November 2002, pp.28-42.

The continuation of this alternative policy requires though improved respect for the rule of law, specifically recognition and observance of the ‘travel permits.’ This could be achieved by means of, *inter alia*, improving the ability of the police to check the validity of documentation, police and court reform, refugee law training, the distribution to police stations of information concerning refugee rights and conditions of detention, and funding of legal aid programmes to secure the release of those refugees charged with illegal presence. The establishment of a recognised joint document certifying that the bearer is authorised to reside outside the camps will be the most important safeguard for such refugees.

A. Export value?

The situation of urban refugees in Kenya – living with the constant possibility of arrest and detention for the purpose of police extortion – is common to a large number of other States, such as Egypt, Guinea, Pakistan, Iran, etc. The Kenyan government’s willingness in 2003 to begin endorsing UNHCR-issued travel permits and to refrain from ordering urban sweeps of refugees with or without such permits, indicates a gradual move away from an inflexible encampment policy. Such changes are positive steps and show that such moves can be made without disturbing public order or increasing threats to national security and they could be applied in other States hosting large refugee populations in semi-closed camps for prolonged periods.

LITHUANIA¹

I. DETENTION AND DOMESTIC LAW

In January 2002, major legislative amendments to Lithuania's Refugee Law elaborated upon the grounds for which a detention order may be imposed and, in the same framework, less restrictive, alternative measures. These amendments included a requirement for courts to consider the sufficiency of alternatives to detention in each individual asylum case prior to ordering detention, forming an important safeguard against the possibility of arbitrary detention. Courts considering the necessity of a detention order may choose, instead, to assign an alternative measure.

Article 12 of the Refugee Law has also been supplemented by Government Regulations of 29 January 2001 laying down the procedures and standards of treatment for both detained asylum seekers and migrants and, at the same time, for those accommodated without detention in collective accommodation (see below).

The Refugee Law requires a court to sanction a police order of detention, made on any of the following grounds, within 48 hours:

1. to prevent a foreigner from making an unauthorised entry into the country;
2. when actions are being taken with regard to deportation of a foreigner;
3. to ascertain the identity of a foreigner, or the reasons why the foreigner used forged identity documents or destroyed them;
4. to prevent the spread of an infectious disease; or on
5. other grounds provided by the laws of the Republic of Lithuania.

Provision for independent, periodic review is guaranteed. It is the duty of the Foreigners' Registration Centre ('FRC') (that is, the place of detention) to apply to the court for review of each detention order once the grounds for detention have ceased to exist. Decisions to confirm or extend detention orders taken by a district court may be appealed to the High Administrative Court.²

Legislative amendments limit the total detention period to twelve months, which is intended to be sufficient time to complete the full asylum procedure. State-funded legal aid is available via the Red Cross Legal Assistance Project to Refugees and Asylum Seekers.³ When the detention of a minor, unaccompanied by parents or legal representatives, is examined by the court, the interests of the child are to be represented by an assigned guardian, and the Law of the Republic of Lithuania on the Protection of the Rights of the Child is to be taken into consideration.

Procedural safeguards are lacking, however, for applicants who choose to seek a complementary form of protection/humanitarian status, rather than refugee status under the 1951 Convention (two separate procedures in Lithuania). Those seeking humanitarian status fall under the general provisions of the Aliens Act, which allows detention in cases of illegal entry and/or to establish identity. A new draft Aliens Act, which was still under discussion as of March 2004 in the Lithuanian Parliament, seeks to remedy this unequal treatment.⁴

¹ The information presented herein is valid up to 31 March 2004.

² Art. 12(3), Refugee Law. Law supplemented by Art. No. IX-704, 15 01 2002, News, 2002, No. 13-466 (6 February, 2002).

³ Interview with Lithuania Red Cross, October 2003-March 2004.

⁴ Information from UNHCR Lithuania.

Another gap in the legal safeguards for detainees concerns failed asylum seekers. Once an asylum claim is rejected, the failed applicant is detained. In practice, this may only amount to removal of exit privileges from Pabrade FRC (see below). Neither the new Refugee Law nor any other national legislation provide for the possibility of release on a temporary residence permit for those who cannot in practice be deported in the foreseeable future. The Lithuanian government does not have the financial capacity or institutional capability in many cases to return a person to his or her country of origin, leading to some failed asylum seekers being held indefinitely.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

Lithuania received 256 asylum applications in 2001. Of this, five asylum seekers were detained.⁵ After November 2001, however, some Afghan asylum seekers were detained on national security grounds related to terrorism. The Red Cross, supported by UNHCR, appealed for their release, calling for faster verification of their identities and initiation of court reviews. Consequently, the Migration Department verified their identities in April 2002 and the FRC recommended their release to the regional court. However, the court extended the detention order due to prevailing security concerns and the Afghans were only released at the expiry of the maximum twelve month period in detention, at the end of 2002.

III. ALTERNATIVES TO DETENTION

A. General legal framework for alternatives to detention

Article 12 of the Refugee Law, as amended in 2002, explicitly provides a list of alternatives to detention that may be assigned by the court, including periodic reporting requirements, release to a nongovernmental organisation, release to a Lithuanian citizen or to a foreigner legally residing in Lithuania who is a relative of the asylum seeker, or custody of a separated child to social services.⁶ The courts are required to consider the applicability of such alternatives based on an applicant's individual characteristics, including their vulnerability, the level of threat posed to society, the probability of cooperation in ascertaining the reason for using forged or damaged/destroyed documents, and the strength of their asylum claim.

If the conditions of such alternative measures are not complied with, the Migration Department may approach the court again and request detention of the asylum seeker.

When taking a decision to apply an alternative measure, the court is required to set a time limit, not exceeding twelve months, for its application.

The same safeguards that apply to a detention order (described under 'Detention and Domestic Law' above) also apply to any assignment of an alternative measure. Thus a court must confirm the imposition of an alternative measure, as made by the Migration Department, within 48 hours. The asylum seeker must be immediately informed of the decision to apply the measure in a language that he or she understands and he or she must receive a written copy of the decision. Legal aid must be provided for this hearing.⁷ Furthermore, the decision of a district court regarding the imposition of an alternative measure may be appealed to the High Administrative Court either directly or via

⁵ ECRE Country Report, 2001.

⁶ Art. 12(1), Refugee Law. Law supplemented by Art. No. IX-704, 15 01 2002, News, 2002, No. 13-466 (6 February, 2002).

⁷ Art. 12(2), Refugee Law. Law supplemented by Art. No. IX-704, 15 01 2002, News, 2002, No. 13-466 (6 February, 2002).

the Foreigners' Registration Centre, where it is to be examined by a collegium of three judges. The court may not only confirm or deny the assignment of the alternative measure, but it may also change the nature of the assignment to another alternative or even order release without any restrictions on freedom of movement.⁸

B. Reporting requirements and directed residence

Asylum seekers in Lithuania who do not reside in a collective accommodation centre may be required to report periodically to the territorial police and to inform the police of their whereabouts at all times. Statistics regarding the number of asylum seekers in Lithuania living under such a reporting regime and the percentage complying with it are not available.

C. Pabrade Foreigners' Registration Centre

The Pabrade FRC houses both detained and non-detained asylum seekers. Oddly, it is therefore both a place of detention as well as an alternative to detention. Government Regulations provide that asylum seekers may be detained in the centre on the basis of a court decision, while those merely 'accommodated' there are assigned by the Migration Department. Although the regulations do not specifically mention the different regimes applicable to the different categories of inhabitants, they do refer to restrictions on freedom of movement. In particular, those who are detained in the Centre may only exit its premises under the supervision of a staff member.⁹ Regulations specifically address the question of disciplinary measures, which may be assigned for violating an internal order of the centre. In contrast, since February 2001, asylum seekers who are not detained are able to leave the centre for a period of up to 72 hours upon notifying the centre's administration.¹⁰ This partial freedom of movement was generally respected throughout 2002, except in November, when permission to exit was restricted for a period of several weeks on the stated grounds of protecting public health.

In relation to lodging arrangements, in practice, detained illegal migrants are lodged separately from detained asylum seekers; detained asylum seekers are lodged separately from non-detained asylum seekers; males and females are separated; and unaccompanied minors are housed separately from adults.

Article 13 of the Refugee Law specifies that those asylum seekers under the accelerated procedure should be accommodated in the Pabrade FRC, while those whose claims are considered under the normal procedure are accommodated in the Refugee Reception Centre (see below). A separated child seeking asylum should also be accommodated in the open Refugee Reception Centre unless the assigned guardian of the child decides otherwise.

Foreigners, who legally entered the territory of Lithuania or who are legally present, including asylum seekers, may be allowed to choose their place of residence.¹¹ Such an asylum seeker may also choose, if destitute, to reside in the communal Pabrade FRC under the 'open regime' for non-detainees, to which he or she would be transferred after the initial period in quarantine.

⁸ Art. 12(3), Refugee Law. Law supplemented by Art. No. IX-704, 15 01 2002, News, 2002, No. 13-466 (6 February, 2002).

⁹ 'On approval of order and conditions of temporary accommodation of foreigners at Foreigners' Registration Centre', Decree No.103, 29 January 2001, Vilnius.

¹⁰ 'On approval of order and conditions of temporary accommodation of foreigners at Foreigners' Registration Centre', Decree No.103, 29 January 2001, Vilnius.

¹¹ Art. 13, Refugee Law. Amendments to Art. No. IX-704, 15 01 2002, News, 2002, No. 13-466 (6 February, 2002).

Those who apply for humanitarian status, sometimes on grounds very similar to 1951 Convention status, are also accommodated in the Pabrade FRC, but they are treated under the same regime as other migrants. In some cases the authorities have agreed to transfer them to the section lodging other asylum seekers.

Among the rights of inhabitants, government regulations include a possibility to make use of State guaranteed legal aid and interpretation services to request contact with UNHCR, and for children to attend school. Specialist psychological assistance is available for victims of torture, violence or rape and for other vulnerable persons.

D. Rukla Reception Centre

Lithuania has also operated a fully open reception centre for asylum seekers since the first asylum law was adopted.

E. Alternatives for separated children

Children can only be detained in exceptional circumstances.¹² In 1999-2000, there were eleven separated asylum seeking children in Lithuania, with a guardian appointed to help them represent themselves in court regarding all decisions on their detention or accommodation. Such children may be assigned to Rukla or to other independent accommodation.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

There are no statistics available specifically concerning rates of non-compliance with asylum procedures and/or non-appearance of failed asylum seekers subject to deportation orders. No statistics are available as to the numbers who have had alternative measures assigned to them, nor on how well such measures have helped to ensure compliance and appearance.

Of a total of 546 applications pending or received in 2002, 55 (some 10%) were 'terminated'. Of 406 such cases in 2003, 165 (some 40%) were terminated. This termination figure includes not only absconding asylum seekers but also voluntary departures from the country, which may explain the thirteen Afghan cases of the 165 that were terminated in 2003.¹³ In any case, these figures represent an upper limit regarding the numbers who abscond and, for a traditional transit country, they are relatively low percentages. To some extent, therefore, the alternative measures employed in Lithuania must be considered effective in terms of ensuring compliance.

Precise statistics are not available on the number of failed asylum seekers who abscond. However, they usually have several days to abscond before a detention order is approved by the court and, therefore, the rate of disappearance at this point is high.

¹² Art. 12, Refugee Law.

¹³ Statistics provided by UNHCR Lithuania.

B. Cost effectiveness?

To date, international funding has carried the costs of building and running both the accommodation for asylum seekers at Pabrade FRC (at a cost some US\$1 million, including the cost of deportations) and the Rukla Reception Centre (with an annual budget of some US\$450,000). For these international donors, improving the reception and protection conditions in Lithuania such that refugees may opt to seek asylum there is a more cost effective and comprehensive solution than obstructing their transit movement by means of detention. The highly targeted use of detention orders ensures that only those individuals who require 24 hour supervision are detained and therefore keeping costs down.

C. Export value?

Lithuanian legislation is a model of nuance in this field, incorporating a wide range of alternative measures and orders of full detention into a single continuum. The many legal safeguards applied to alternative measures rightly recognise the fact that they involve restrictions on the basic human right of free movement, which must therefore be necessary and strictly proportionate to its intended purpose and assessed on a case-by-case basis. What statistical information is available also suggests that this system is working to meet governmental concerns regarding compliance, at least prior to the delivery of final negative decisions. This case study shows what can be done with adequate international funding in a context where the number of asylum applicants is not overwhelming.

LUXEMBOURG¹

I. DETENTION AND DOMESTIC LAW

Detention is applied at Luxembourg Airport to those asylum seekers without valid documents, or to facilitate Dublin Convention transfers. One month detention orders are issued, renewable up to a maximum of three months. There is independent, automatic and periodic review, and detainees receive legal aid. Courts have ordered release whenever faced with asylum seekers being held in penal institutions. According to a report from the Luxembourg government in January 2002, family units are never detained.²

Detention of both illegal entrants and persons who are ordered to be removed, including rejected asylum seekers and those awaiting removal to another Dublin Convention country, is applied at various locations, such as Schrassig Detention Centre.

II. ALTERNATIVES TO DETENTION

A. Reporting requirements

All asylum seekers in Luxembourg must present themselves every month at the Ministry of Justice to renew their identity papers/asylum permits. This documentation is needed to access monthly financial support and forms a *de facto* reporting obligation.

B. Deposit of identity or travel documents

To prevent onward transit, all asylum seekers with their own identity or travel documents must deposit them with the Ministry of Justice until the end of the procedure.

C. Open centres

After registration with the Ministry of Justice's Refugee Reception Office, asylum seekers are referred to the *Commissariat du Gouvernement aux étrangers* ('CGE'), where they are interviewed by a social worker who evaluates their needs in terms of accommodation, basic support and health care. Upon arrival, single males may be provided with emergency accommodation in shelters for homeless persons, including Luxembourg City's reception shelter or Caritas' night shelter, while families are usually accommodated in hostels or in youth hostels. This kind of emergency accommodation is provided free of charge unless asylum seekers have their own financial means.

Asylum seekers who have no family members living in Luxembourg are then offered accommodation in one of the CGE's reception centres or one of the centres run by various NGOs such as Caritas or the Red Cross. There are about 40 centres in Luxembourg. Twelve hostels are run by the CGE and are government property. Seven hostels are being leased and managed by the CGE. Other hostels are shelters or hotels managed privately or by NGOs. In addition, there are *pensions de famille*, hostels and campsites. In some very rare cases, applicants may find private accommodation and have the rent paid by the CGE.

¹ The information presented herein is valid up to 31 March 2004.

² Information received via UNHCR RO Brussels.

Collectively, the centres host 2,000-2,500 persons, of whom some 1,500 are rejected cases. It is interesting to note that the centres host not only asylum seekers but also refugees, failed asylum seekers and persons whose status has been regularised.

Centres are open. Accommodation in the reception centres is, in principle, on a temporary basis and may not exceed two years. In some cases, an extension of a further two years may be granted. This may on an exceptional basis for serious reasons be further renewed. However, in practice, these time limits are not applied.

During recent years, NGOs in Luxembourg have consistently criticised overcrowding in some centres, inadequate attention to the mixed profile of the inhabitants of the centres, deterioration of the buildings, location of some centres in isolated areas, and lack of structured management/supervision of the centres. In 2003, the situation seems to have further deteriorated as the number of new asylum seekers increased (with some 200 asylum seekers arriving per month) and local authorities expressed greater resistance to the opening of new centres to accommodate them. In addition, the Ministry of Family has been obliged to close certain centres and places of accommodation due to their deterioration. According to the authorities, all asylum seekers are presently accommodated but the maximum capacity has been reached.³

During 2004, an agreement was reached between the Red Cross and the authorities to create a *centre de premier accueil* (a larger centre for first reception and orientation of all asylum seekers before they are allocated to CGE accommodation) with a capacity of 150. The authorities are also reported to be considering increased presence in the centres.

III. CONCLUSIONS

Based on anecdotal evidence regarding the rate at which asylum seeker's abscond,⁴ Luxembourg's reception system appears to be reasonably effective in preventing secondary movement within Europe and promoting compliance with its asylum procedures. However, as national statistics are not available it is impossible to draw definite conclusions. As compliance of rejected asylum seekers with removal orders has not been an issue in Luxembourg until recent years, there is also a lack of data in this area – for example, on how many of the rejected asylum seekers accommodation by CGE in open centres remain available for removal. It should be noted that arrival numbers had not put the Luxembourg system under any strain until 2003. This new strain is raising a number of other concerns regarding conditions of reception that prevent the CGE accommodation system from being considered a model of best practice despite its efficacy in ensuring compliance without resort to detention.

³ Information received via UNHCR RO Brussels.

⁴ Interview with Caritas Luxembourg, October 2003-March 2004.

NEPAL¹

I. DETENTION AND DOMESTIC LAW

Nepal is not a signatory to the 1951 Convention and has not enacted any national legislation pertaining to asylum seekers and refugees. UNHCR conducts individual status determination for urban asylum seekers of various nationalities whilst His Majesty's Government of Nepal, with the observatory participation of UNHCR, carries out the individual screening of Bhutanese asylum seekers. Through its implementing partner, UNHCR also conducts interviews of Tibetan new arrivals (i.e. those having entered Nepal after 31 December 1989) to ascertain their reasons for flight and declare them of concern to the organisation. Tibetan new arrivals are not, however, allowed to stay in Nepal and are only permitted to transit through safely.

Asylum seekers and refugees (other than Tibetans who arrived prior to 31 December 1989 and who therefore received refugee status from the Government of Nepal, and Bhutanese refugees) are liable to be detained as illegal immigrants according to the Nepalese Immigration Act.² Tibetan new arrivals are subject to arrest and detention, especially near the northern border with China. Until May 2003, Tibetan new arrivals were brought to the Department of Immigration in Kathmandu, which has the discretion to impose visa fees and fines for illegal entry. In a case where a forged travel document has been used, the Department of Immigration has to forward the case to the court and the sentence imposed can include a prison sentence as well as the visa fees and fines for illegal entry and stay in Nepal (on the basis of a calculation completed by the Department of Immigration). The latter also applies to urban asylum seekers. When such an asylum seeker is not in a position to pay, he or she must satisfy the amount calculated by days spent in prison at the rate of 25 rupees per day.

There is no systematic legal aid provided to detainees in Nepal, however, they can apply for a *pro bono* lawyer to be designated by the court. A local NGO also provides legal aid free of cost, including to some asylum seekers or refugees. UNHCR is given access to all refugee and asylum seeker detainees.

Refugees and asylum seekers facing criminal charges may also be detained. As at 31 December 2003, a total of 33 Bhutanese refugees and one UNHCR Mandate refugee were being detained in Eastern Nepal, Western Nepal and Kathmandu on criminal charges.

II. ALTERNATIVES TO DETENTION

A. Release into care and supervision of UNHCR

After any fine is paid, the asylum seeker is released into the care and supervision (sometimes called 'custody') of UNHCR. UNHCR gives a letter acknowledging receipt of the person from the Nepalese authorities. If recognised as a Mandate refugee and in need of resettlement, an exit permit is requested by UNHCR which will include a waiver of the visa fees and fines for illegal stay for the whole proceeding period.

Since mid-2003, and after a deportation of Tibetans in May 2003, Tibetan new arrivals are directly released from police custody upon UNHCR's intervention, without having to go through the

¹ The information presented herein is valid up to 31 March 2004.

² Immigration Act 1992, Section 9.

Department of Immigration and therefore without being fined or charged visa fees. If Tibetan new arrivals are intercepted by the police or the armed forces in a remote area under a UN security phase (which does not permit UNHCR staff to travel without delay), UNHCR requests the local authorities to allow its implementing partner, the Tibetan Welfare Office, to travel to the area, to release and to receive these Tibetans and to escort them to the Tibetan Refugee Reception Centre, near Swayambunath on the outskirts of Kathmandu. While this is not official ‘custody’, it operates as such de facto. The Centre is administered by the Tibetan Welfare Office, with UNHCR funding. The processing of Tibetans for onwards travel to a third country is carried out there.

Under this system, UNHCR is treated as an ‘alternative’ supervisor to prevent the prolonged detention of illegally present asylum seekers.

III. CONCLUSIONS

A. Export value?

UNHCR’s role as an intermediary to alleviate the impact of detention and other penalties on refugees is quite unique to this situation, yet at the same time it is similar to the role of UNHCR in Mexico. The success of such arrangements depends, in a sense, upon their pragmatic, *ad hoc* nature and the continued cooperation of the State authorities with UNHCR.

THE NETHERLANDS¹

I. DETENTION AND DOMESTIC LAW

A. Aliens refused entry to the Netherlands

Article 6 of the Aliens Act 2000² is specifically aimed at those aliens who are refused access to the Netherlands upon arrival by aircraft or boat at the border of the Schengen area (i.e. Schiphol Airport and the sea harbours of Rotterdam and Amsterdam). Such persons are required to leave the Netherlands and may be detained at the border until they can be put back on a plane or boat.

B. Asylum seekers registered at in-country application centres

Asylum seekers registered at in-country application centres ('ACs') can be instructed, on the basis of Article 55 of the Aliens Act 2000, to remain at the disposal of the Dutch decision makers and, if necessary, available for processing through an accelerated procedure. In practice, this means that their movement is restricted continuously for a maximum of five days. (They have to leave the application centre after 48 processing hours from the moment that the asylum interview starts, but the hours between 22.00 and 08.00 are not counted as processing hours.) If a case can be assessed and rejected within the 48 processing hours, it will be dealt with in an accelerated procedure at the application centre.

In 2001, the National Ombudsman requested more openness in the ACs, as it considered the situation similar to detention but without adequate legal safeguards. The government was not willing to meet this request. However, the Court of Appeal in The Hague ruled, in a judgement of 31 October 2002³, that restrictions on movement during the accelerated procedure at in-country application centres constitute 'detention' in the sense of article 5 of the ECHR, which finds no legal basis in article 55 of the Aliens Act 2000. In a first reaction to this ruling, the Minister for Immigration and Integration announced, in November 2002, that an application can no longer be rejected on the sole ground that an asylum seeker has left the application centre during the accelerated procedure.⁴ As of March 2004, the Ministry of Justice is working on several general adjustments to the accelerated procedure,⁵ but so far the nature and timing of these adjustments remains unknown.

C. Rejected asylum seekers

Administrative detention can also be used, under certain circumstances, following rejection of an asylum application.⁶ The purpose of administrative detention is to facilitate the deportation of rejected asylum seekers. Generally though such administrative detention is not ordered, unless the 28 day limit has expired within which deportation should have been effected and the person has remained in the country illegally. A decision to detain is not made earlier unless there is a

¹ The information presented herein is valid up to 31 March 2004.

² Entered into force on 1 April 2001.

³ De Vereniging asieladvocaten en-juristen Nederland (VAJN) & Het Nederlands Juristen Comité voor de Mensenrechten (NJCM) v. De Staat Der Nederlanden (Ministerie van Justitie) - Gerechtshof 's - Gravenhage (Court of Appeal, The Hague), Case No: 00/68 KG.

⁴ Ministry of Justice Press Release, quoting Mr Nawijn, released on 4 November 2002 at: www.justitie.nl/english/english/press/press_releases/archive/archive_2002/ac_procedures_remains_intact.asp.

⁵ Information received UNHCR Netherlands.

⁶ Arts. 57-59, Aliens Act 2000.

presumption, supported by individual facts, indicating that the asylum seeker will try to avoid expulsion.

A District Court considers the lawfulness of such administrative detention for the first time after ten days and from then on every 28 days.⁷ A lawyer usually assists the detainee with the hearing. The Aliens Act 2000 is likely to be amended to introduce a first judicial check within 42 days and no automatic review. However, the detainee's lawyer can present his or her client's case at any time to the court.

Since the new Aliens Act 2000 came into force in April 2001, it is also possible to detain rejected asylum seeker who possess travel documents or who will receive travel documents in due time. They can be detained for a maximum of four weeks. On 27 June 2003, the Ministry opened a removal centre near the airport in Rotterdam. A second centre has been opened in March 2004 near Schiphol Airport. These detention centres will be used for illegal aliens, including children, who can be deported quickly.

Dutch jurisprudence has ruled that detention must be terminated after six months, unless the authorities have very good reasons to extend it. According to individual circumstances, a longer or shorter maximum period of detention may be justified.⁸ In 2002, the Ministry of Justice reported that 483 failed asylum seekers were released from detention because they could not be returned to their country of origin due to a lack of documentation.⁹

II. ALTERNATIVES TO DETENTION

A. Reporting requirements for rejected asylum seekers

Article 57 of the Aliens Act 2000 provides that an asylum seeker can be required to report twice daily after a negative decision has been taken on their claim. This has the effect of restricting movement quite severely.

B. Open centres

Aside from the ACs, other centres for the reception of asylum seekers are fully open, except that movement may be restricted to the municipality in which the reception facility is located until a first decision has been taken.¹⁰

If an application is not processed through the accelerated procedure, the asylum seeker is taken from the AC and allocated to one of the reception and investigation centres ('OCs'), run by the Central Agency for the Reception of Asylum Seekers ('COA').¹¹ People are free to come and go from these reception centres, but they are still required to report to the police, usually once per week.

⁷ There have been complaints that some failed asylum seekers are unlawfully detained at Rotterdam Airport beyond the 28 day maximum period for detention without judicial review. 'Labour questions refugee detention,' *Expatica News*, 17 November 2003.

⁸ Information received from UNHCR.

⁹ Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

¹⁰ Art. 55, Aliens Act 2000.

¹¹ Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

Subsequently, the asylum seeker is transferred to a Centre for Asylum Seekers ('AZC') which is under the jurisdiction of the Ministry of Justice. If all AZCs are full, then asylum seekers may be accommodated elsewhere (e.g. hotels or boarding houses) but must report regularly to the nearest AZC.¹²

The average number of residents in an AZC is 335 and the reception and accommodation centres (OCs and AZCs) combined have 62,289 spaces.¹³ Residents must report to the centres' administration regularly, ask permission for any period of absence, and if a resident is absent for more than three days then his or her place is withdrawn and his or her asylum application considered void. Should this be the case, the person will be reported to the Immigration and Naturalisation Department ('IND') and police as having absconded.¹⁴ Permission to live in a centre other than that designated is granted only if the asylum seeker has close family members (spouse, parents or children) at another centre.

In general, asylum seekers are allowed to leave centres and move in with relatives after six months, provided they have already had their asylum interviews.¹⁵ This is called a 'self-care arrangement'. If an asylum seeker is not living in an AC, he or she may be required to report to the aliens' police located at the nearest AC each day or at least once a week in order to collect their financial support.

In practice, many Dutch municipalities have opposed this 'self-care arrangement', which they consider to be 'uncontrollable'. Since June 2002, therefore, asylum seekers are no longer allowed to move out of the reception centres. The low number of new asylum seekers means that the centres are far from full. 7,571 asylum seekers are allowed to continue to make use of the 'self-care arrangements' as they were permitted to do so before June 2002.¹⁶

C. Alternatives for separated children

Since November 2002, the reception of unaccompanied minor asylum seekers has been organised according to two alternatives: (a) an 'integration alternative' for those persons who have been granted a residence permit and (b) a 'return alternative' for children over fifteen years of age who have received a first instance negative decision. The objective of the latter is to prepare these minors for return home following a final negative decision or, if they have been granted a provisional residence permit only on the basis of their unaccompanied status and lack of possibility of return to their country of origin, until they reach eighteen years old.¹⁷

Since November 2002, separated children rejected at first instance have been received in a campus at Vught, a former army barracks with places for up to 360 children (270 boys and 90 girls). A second campus in Deelen, which can receive up to 180 children, was opened in February 2003. Both campuses are closed centres with strict regimes. The children are closely supervised and kept busy from early morning to late evening to avoid all possibilities of external contacts which could

¹² Information taken from the website of the Dutch Refugee Council (VluchtelingenWerk):

www.vluchtelingenwerk.nl/en/sections

¹³ Figure at 1 September, 2003. Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

¹⁴ UNIYA, Overview of the Netherlands' Asylum System, February 2003.

¹⁵ *Reception Standards for Asylum Seekers in the EU*, UNHCR, July 2000, p.88.

¹⁶ Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

¹⁷ Separated children who are rejected are granted a revocable three year residence permit during which time the Ministry of Justice examines what is best to do with them, but the permit is invalidated if a minor turns eighteen within those three years. The Lawyers Committee for Human Rights, *Review of States, Procedures and Practices relating to Detention of Asylum seekers*, September 2002, Final Report, p.75

favour integration, although they are allowed to leave the campuses under strict conditions. The children are also intensively prepared for return. If they express their willingness to comply, return can usually be organised within 4-6 weeks, through the collaboration of the IND, the International Organisation for Migration, the Aliens' Service and refugee organisations. Some children, however, refuse to participate in the activities and run away.

Contrary to the Parliamentary Commission for Justice, Dutch nongovernmental refugee organisations have been very critical of the campuses' regimes. In April 2003, seven such organisations went to court to challenge the two centres, arguing that there was no legal basis for them. While the court in The Hague rejected the challenge against the legality of the regimes, it did decide, *inter alia*, that an independent complaints commission must be established. Furthermore, the judge ruled that adaptations of the regimes are necessary to allow the children more free time in the evenings and on weekends. A less strict regime should be applicable to children who have not yet exhausted all appeals in the procedure.

After an evaluation of the projects in November 2003, the Minister for Immigration and Integration decided to close the campus in Deelen, but to keep the campus in Vught open for another year.

The official guardianship organization for separated children, NIDOS, is running a parallel pilot project on a small scale involving accommodating children in homes (involving 3-4 children in each home) and will compare its results to those of the above project.¹⁸

D. Proposals for return-oriented centres for adults

In mid-February 2003, a leak from the Dutch government suggested a new policy to open return-oriented centres for adults who have received a first instance negative decision. The fifteen per cent who later win their cases on appeal and gain permission to stay in the Netherlands would simply have to cope with these return-oriented conditions. Previously, the Netherlands had such a centre (Ter Apel) but it was closed for reasons of general ineffectiveness and its cost.

The Dutch Refugee Council (VluchtelingenWerk) and other critics of this leaked policy question why the government would try to re-open such centres that have been proved to be ineffective.¹⁹ They propose, as a more constructive alternative, return processes that do not attempt to force return to unstable countries and which offer some short-term financial incentives to restart life in places that have shattered economies.²⁰ They believe that more emphasis should be placed on uncooperative countries than on uncooperative rejected asylum seekers.²¹

¹⁸ Interview with Policy Section, VluchtelingenWerk (Dutch Refugee Council), 15 October 2003.

¹⁹ Interview with Policy Section, VluchtelingenWerk (Dutch Refugee Council), 15 October 2003.

²⁰ 1,537 failed asylum seekers are known to have left the Netherlands voluntarily in 2002, not all to their country of origin but also to third countries (U.S, Canada), usually with assistance from the International Organisation for Migration (IOM). Certain nationalities – Bosnians, Kosovars, Afghans and Iraqis – receive reintegration assistance if they return home. In 1997-98, there was a pilot return programme funded by the Ministries of Development Cooperation and Justice and focused on returns to Ethiopia and Angola. The idea was that the returnee could request funding for a project from which the local community to which he or she returned would also benefit. The Angolan programme could not start though due to a resumption of the civil war. The Ethiopian programme was not considered successful, as only 14 failed asylum seekers returned. Since then no such programmes have been initiated. In November 2003, the Minister for Immigration and Integration presented a paper entitled, 'Note on Return: Measures for a more effective enforcement of return policy', to the Second Chamber of Parliament. It was aimed at reducing the number of illegal aliens residing in the Netherlands. In January 2004, the Minister then announced additional measures that would promote and accelerate the return of some 26,000 persons to their countries of origin over the next three years: first offering air tickets and financial assistance, but if those incentives were not taken up, transferring the persons to a 'departure centre' for eight weeks, and if counselling there is not persuasive, ultimately relying upon the disincentive of

III. CONCLUSIONS

A. Do alternatives ensure compliance?

No comparative statistics are available by which to measure the effectiveness of the various Dutch ‘alternatives to detention’ – for example, failure to appear or failure to comply rates differentiating between those living in open centres and those living under reporting requirements. It is hoped that the parallel pilot projects regarding separated children will produce some data, but more research is needed.

All material assistance is denied to failed asylum seekers 28 days after receiving a final negative decision upon completion of a full procedure.²² This is intended to push them towards return. Only after eviction from a reception centre has taken place may certain vulnerable persons (for example, those too physically ill to travel and those from countries to which there is a current moratorium on deportations) appeal against this removal of assistance. Many do not bother at this stage, but simply live on the streets as best they can. Vluchtelingenwerk reports that failed asylum seekers usually disappear just before the 28 days expire because they do not want the humiliation of facing a police eviction,²³ but it is clear that some 75-80% of failed asylum seekers, who are thus recorded in the government’s statistics as ‘removed’, may in fact remain in the country illegally.

Municipalities complain about the number of rejected asylum seekers without any form of support, with whose illegal presence and destitution they are confronted.²⁴ The Aliens’ Police, in contrast, claim that they are hardly ever confronted with illegal former asylum seekers, suggesting there is no problem and that the policy is effective in propelling people to leave the country.²⁵ In 2002, the Central Bureau of Statistics (CBS) conducted some research on the subject and concluded that a minimum of 11,000 and a maximum of 41,000 failed asylum seekers from Afghanistan, Iraq, Iran, Somalia and the former Yugoslavia remained illegally in the Netherlands.²⁶ As a result of these findings, some policy discussion developed to consider making illegal presence a criminal offence and thereby allowing for criminal prosecution and detention for a fixed period of time instead of immigration detention with all its restrictions/safeguards.²⁷

B. Cost-effectiveness?

A place in an open reception centre costs 13,000 Euro on average per person per year. The government intends to reduce this to 11,000 Euro.²⁸ Equivalent figures for the cost of *de facto* detention at the application centres (ACs) are unavailable, but the deterrence effect of the accelerated procedure may be considered by some policy makers to be worth the cost.

detention (up to the legal maximum of six months) in order to encourage the individuals’ cooperation with re-documentation and the process of forced deportation. Of these 26,000 persons, UNHCR reports that only 3,000 have currently exhausted the asylum procedure, while others still have appeals pending and therefore should not be classed as ‘failed asylum seekers’.

²¹ Interview with Policy Section, VluchtelingenWerk (Dutch Refugee Council), 15 October 2003.

²² Asylum seekers who have been rejected via the accelerated procedure are ordered to leave the country immediately and are not given the 28 days, with continuing support, to organise their return; Article 62(3)(c) Aliens Act 2000.

²³ Interview with Policy Section, VluchtelingenWerk (Dutch Refugee Council), 15 October 2003.

²⁴ Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

²⁵ Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

²⁶ Report of the CBS, 13 March 2002.

²⁷ Information received from the Policy Department of the Dutch Refugee Council, 13 November 2003.

²⁸ Figures provided by the Dutch Refugee Council (Vluchtelingenwerk), November 2003.

NEW ZEALAND¹

I. DETENTION AND DOMESTIC LAW

Prior to September 2001, only some 5% of asylum applicants in New Zealand were detained. Section 128 of the Immigration Act 1987 allows the Immigration Service ('NZIS') or police to detain at a border (in practice, an airport) if there are 'reasonable grounds for believing' that the unauthorized arrival poses a genuine risk to national security or public order, for example, because an asylum seeker has committed a serious crime(s), is involved with terrorism or criminal organisations, or is likely to become involved with such groups. The Act further provides for the detention of failed asylum seekers, among other migrants, prior to removal.

In December 2001, an 'Operational Instruction'² was issued to NZIS officers directing them to detain a much wider group, both in the Auckland Central Remand Prison and as a 'commitment for residence at the Mangere Accommodation Centre' (see alternatives, below). Both options included release subject to conditions or release to the community without restrictions.³

Ninety-four per cent of claimants were detained under the 2001 Operational Instruction. It was later found to be unlawful by the High Court (the second highest court). The ruling, dated 27 June, 2002, found that it breached article 31(2) of the 1951 Convention which requires, *inter alia*, that restrictions on freedom of movement be no greater than necessary. Baragwanath J. found that 'necessary' in this context meant the minimum restriction required to allow the Refugee Status Branch to perform its determinations, to avoid a real risk of criminal offending or to avoid a real risk of absconding. He further ruled that claimants had the right to apply for bail.⁴

Following this decision, the Transitional Organized Crime Bill of June 2002 amended the Immigration Act to allow applications to the District Court for conditional release pending adjudication of asylum claims. It introduced the possibility of release on bail and allowed the following ('alternative') conditions to be imposed on release: (a) a date or point of expiry; (b) a location to which the person must report upon expiry; (c) a designated place of residence; (d) reporting requirements to either the police or NZIS; and (e) required attendance at refugee status determination interviews. Any breach of conditions would permit the police to make a warrantless arrest and a District Court judge would then review the release. NZIS may also, at any time, apply to a District Court judge for cancellation of the release.

On 16 April 2003, the government successfully appealed the decision of Baragwanath J.⁵ Today, a revised Operational Instruction is in use.⁶ This Instruction has very many points to recommend it. First, it clearly states its overriding principle that 'if the freedom of movement of persons claiming refugee status at the border is to be restricted at all, then it should be restricted to the least degree and for the shortest duration possible.'⁷ In light of this principle, '[i]n all cases a decision to detain in a penal institution rather than any lesser form of restriction on the freedom of movement of a

¹ The information presented herein is valid up to 31 March 2004.

² 'Operational Instruction' from Border and Investigations NZIS, issued 19 December 2001 [now withdrawn].

³ Released asylum seekers are assisted but are not permitted to work.

⁴ *Refugee Council of NZ v Attorney General* High Court Auckland M1881-AS01, 27 June 2002, Baragwanath J. and interim decision of 31 May 2002, Baragwanath J.

⁵ See, *Refugee Council and Ors v Attorney General*, Court of Appeal, 16 April 2003.

⁶ 'Operational Instruction: Exercise of Discretionary Powers under the Immigration Act 1987 in response (at the time of their arrival and subsequently) to Persons Claiming Refugee Status at the Border, issued by NZIS on 10 December 2003 and published in the NZIS Operational Manual.

⁷ S.1.2.

refugee claimant is considered only after all other alternatives have been excluded.’⁸ With an emphasis on the principle of ‘necessity’, firmly grounded in international human rights law, the Instruction sets forth a four level hierarchy of decision-making, starting with consideration as to whether the person may be released into the community without any restriction.⁹

A list of considerations that ‘may guide’ decisions as to the necessity of detention or another restriction on freedom of movement is supplied in Appendix B of the Operational Instruction. These are introduced, *inter alia*, by a reminder that ‘[t]here is no predetermined view that an asylum claimant without valid travel documents, or whose documents have been destroyed, should be treated as high risk... A critical factor...is the existence of an intention to mislead the authorities of the State in which they wish to claim asylum.’¹⁰ The list of considerations is too detailed to be fully summarised here, but in essence, it rests upon establishing the extent to which an individual presents a risk to national security, public safety or order, or a risk of absconding or criminally offending.¹¹

The question of whether actions, including the submission of the asylum claim, are ‘in good faith’ is a central consideration of the NZIS Instruction. The time at which the claim is lodged may affect determination of this point. Appendix A further states that a rejection of an asylum claim ‘may have a bearing on any review of the necessity for continued restrictions on the claimant’s freedom of movement.’¹²

One unusual and debatable consideration in Appendix B of the Operational Instruction concerns its view that unlawful arrival as part of a group, suggesting involvement with people-smugglers, may be a factor weighing in favour of detention or another restriction on freedom of movement. Though it states that ‘[s]muggled migrants must not...be automatically subject to detention’, the unevicenced presumption that a smuggled person is a greater risk to public safety, security and order¹³ may somewhat undermine the otherwise strongly stated principle of individual assessment.

Additional principles relating to children are stated in Section 4, and it is specified that ‘[a]ny restriction on the freedom of movement of an unaccompanied child or young person under 18 years of age should only occur after the Department of Child Youth and Family Services (‘CYFS’) has been involved...’¹⁴ Appendix B also requires that ‘special consideration’ be given to the treatment of other vulnerable groups, including women (especially pregnant women and adolescent girls), the elderly, the disabled and torture or trauma survivors.¹⁵ The persons are recommended as particularly likely to comply if released without restrictions into the community.

New Zealand has relatively strong safeguards for the review of decisions to detain. The Operational Instruction requires an immigration officer to reconsider the grounds justifying detention ‘as soon as practical after any new evidence or information emerges about the claimant, or at least 14 days

⁸ S.2.1.

⁹ S.3.3.

¹⁰ Appendix B, s.1.

¹¹ Of these grounds, prevention of ‘absconding’ is the one which is, in and of itself, not specified in international law or the UNHCR Guidelines as a legitimate grounds for detaining an asylum seeker, yet, as this study shows, it is a often considered indirectly but closely related to the other grounds (most notably, ensuring availability for removal) and so forms a key objective of many countries’ detention policies.

¹² Appendix A, s.1.5.

¹³ S.3.2.

¹⁴ S.4.2.

¹⁵ Appendix B, s.2.

after detention at the latest.’¹⁶ After 48 hours there is a judicial review of the necessity of detention and, after 28 days, the decision to extend detention is reviewed by a court every seven days. The Instruction makes explicit the fact that changing circumstances, including ‘the simple passage of time’, will require that the decision to detain be periodically reviewed.¹⁷ There is, however, no maximum duration of detention in New Zealand.

The decision to detain or to apply alternative measures is, as already mentioned, usually taken at the airport. An interview is conducted by NZIS Borders Investigation, with the possibility for the asylum seeker to rebut any initial view expressed by NZIS that detention is necessary. The refugee branch of NZIS is alerted and, if the person is to be detained, so is UNHCR (by fax). Asylum seekers are informed of their right to contact UNHCR and to have a legal aid lawyer appointed.

According to the Operational Instruction, not only the decision to detain, but all decisions to apply alternative measures or decisions to grant unconditional release, are to be periodically reviewed in light of any changing circumstances affecting an individual asylum seeker (see below, alternative 2).¹⁸

A. Mangere Accommodation Centre

The vast majority of asylum seekers held because of lack of identity documents (85% of cases are technically ‘detained’ during the first year) stay at Mangere Accommodation Centre near Auckland. In contrast, the remand prison tends to be used only in exceptional cases.

Mangere Accommodation Centre houses persons who are classified as ‘detainees’ under the Immigration Act. It is run by NZIS, with the help of NGOs, such as Refugee and Migrant Services (‘RMS’). In spite of it being a former army barracks, UNHCR states that there are numerous safeguards of residents’ rights and excellent conditions. Asylum seekers are given an information package when they arrive so that they know and understand their rights and duties. The Centre has electronic gates, but in practice these are used primarily to keep non-residents out.

Detainees/residents must request permission from the management if they wish to leave the centre during the daytime. In practice, this permission has never been denied, so ‘detainees’ frequently spend the day in the community. However, the management retains the right to refuse such permission. This is what makes Mangere definable as a ‘place of detention’ rather than a simple ‘alternative to detention’. Approximately 5% of asylum seekers are supervised during their visits to the community. If any condition of day release is broken by a ‘detainee’, which is very rare, then Mangere’s staff are required to notify the police according to operating instructions and to discuss with Border Investigations whether or not the breach is sufficient to require the person to be moved to a more secure place of detention (i.e., the remand prison). The option of making such a transfer administratively, rather than by court order, raises serious legal concerns over the transfer procedure. This reinforces Mangere’s status as a place of detention. As of December 2003, no one had ever been transferred from Mangere to the remand prison due to a breach of curfew or other rules.

Claims of persons in Mangere are prioritised for processing on the basis that they are ‘detainees’, so the average time spent in the centre is approximately six weeks.

¹⁶ Appendix A, s.1.3

¹⁷ S.2.3

¹⁸ Appendix A, s.1.4

One peculiarity of Mangere is that it also continues to be used for its previously sole purpose of the past ten years – to receive recognised refugees resettled to New Zealand from overseas (called ‘quota refugees’). The quota refugees and the ‘detained’ asylum seekers cohabit, with the only differences in their treatment being that (a) the quota refugees only have to notify the authorities of their departure from the Centre during the daytime, rather than ask permission, and (b) the quota refugees may stay away from the Centre overnight if they notify the management. The asylum seekers are not given the orientation programme for those who are sure to be integrating into New Zealand society, but are given English and other classes alongside the quota refugees (skills useful even if returned to their countries of origin) and they have equal access to all other services, especially the mental health workers who are available even after hours.¹⁹ The six-week programme for a quota refugee coincides in length with the average stay of an asylum seeker in Mangere, which prevents tension from arising between the two groups with different statuses.

There is only capacity to detain 28 asylum seekers at any one time at Mangere, so the number of persons requiring close supervision is limited and easily manageable. According to independent monitors, the current staff of Mangere treat asylum seekers in a professional and respectful manner. There are plans to replace the uniformed guards with more NZIS staff and there is an effective complaints mechanism. If a complaint is not resolved, there is the possibility of appealing to an ombudsman.

The large group of asylum seeking separated children who were on board the Tampa vessel in October 2001 and transferred by Australia to New Zealand were initially ‘detained’ at Mangere for 3-4 months, and were then released following swift determination (and recognition) of their claims. Only two of the children were assigned individual guardians, but the CYFS has taken care of the group as a whole. The minors, mostly 14-18 year old boys, are all now in school or jobs and are reported to be well settled in the community. In October 2003, many were reunited with their families (parents) who were resettled from Afghanistan to join them in New Zealand.

As of December 2003, out of 159 asylum seekers detained under the regime at Mangere Accommodation Centre since September 2001, only one completely absconded.²⁰ Two or three other detainees absconded just before they knew they were about to receive a final rejection of their claim.²¹ None of the Afghan children and adolescents from ‘the Tampa’ incident absconded while accommodated there. From this we can conclude that Mangere has been a highly successful and innovative form of detention in terms of ensuring compliance and reducing any risk of absconding. While not entirely an alternative to detention, it is a more humane form than closed detention centres or prisons.

II. ALTERNATIVES TO DETENTION

A. Release on conditions and unconditional release

The New Zealand system operates a sliding scale of four options, namely detention in prison, detention in Mangere Accommodation Centre, condition release, or unrestricted release.

The terms of conditional release – the amount of bail, the place of residence, or the frequency or manner of reporting requirements – must be flexibly set in proportion to the needs of the individual case. An immigration officer may at any time apply for the conditional release of a detained asylum

¹⁹ Interview with Refugee and Migrant Services in Mangere Accommodation Centre, October 2003-March 2004.

²⁰ Information supplied by NZIS to UNHCR Canberra.

²¹ Interview with Refugee and Migrant Services in Mangere Accommodation Centre, October 2003-March 2004.

seeker, and a detainee ‘may apply for release on conditions when there has been an application for extension or further extension of their detention. Release on conditions is ultimately a matter for the discretion of a District Court Judge.’²²

A District Court judge may also cancel an order for release on conditions where the asylum seeker breaches any reporting, bail or residence conditions imposed. He or she will be detained or re-detained, unless he or she can offer a ‘reasonable excuse’ for the breach.²³

III. CONCLUSIONS

A. Do alternatives ensure compliance?

The high rate of recognition in New Zealand and the lack of transit options for rejected claimants suggest that the risk of absconding is small. In addition, New Zealand is a final destination State which, above all, tends to produce compliance with asylum procedures.

B. Export value?

The fact that ‘unrestricted’ release – that is, without conditions – is explicitly stated in the Operational Instruction as an alternative measure against which all restrictions must be measured, is one of the most exemplary features of the New Zealand policy.

Despite the high level of safeguards with regard to detention and other restrictions on freedom of movement in New Zealand, and the far more restrictive detention policy of its neighbour Australia, there has been no significant rise in the number of unauthorized arrivals, by either boat or air, seeking asylum in New Zealand.

²² Operational Instruction, Appendix A, Section 2.3

²³ Operational Instruction, Appendix A, Section 2.5

NORWAY¹

I. DETENTION AND DOMESTIC LAW

Section 37(6) of the Aliens Act provides for detention of asylum seekers for the purpose of establishing identity, but it is rarely used. There is a small detention centre at the Gardermoen Airport for pre-removal detention.² In October 2003, it was announced that the old military barracks at Ullensaker will become Norway's first so-called 'asylum jail'. It will hold up to 200 asylum seekers, who have either committed crimes, absconded, or whose claims have been rejected and who are awaiting deportation.³

Any decision to detain is subjected to an independent and automatic review and a twelve-week time limit is imposed on detention of asylum seekers for purposes of establishing identity, barring exceptional circumstances. Failed asylum seekers are usually only detained for a couple of days prior to deportation, but this may change with the opening of the new facility. There is limited access to legal aid, although the court appoints a lawyer for periodic review hearings. There is no guarantee though that he or she will have asylum expertise.

II. ALTERNATIVES TO DETENTION

A. Deposit of travel documents

All asylum seekers must deposit their travel documents and papers with the authorities when they apply for asylum. Not only does this ensure easy removal should an asylum claim fail, but it also deters economic migrants from using the length of proceedings to stay and to work in Norway and subsequently to return home.

B. Reporting requirements and other orders to restrict movement

Detention is not permitted if the court is able to find an alternative. Failure to supply one's identity or suspicion of false identity are considered grounds for some restriction on one's freedom of movement and, if that is deemed insufficient, detention. The Norwegian Organization for Asylum Seekers (NOAS), however, reports that alternative measures are very rarely used. In the past four years, NOAS has not had a single case with a reporting requirement or supervision order imposed.⁴

C. Dispersal and open centres

Asylum seekers are accommodated in special transit reception centres while they are initially interviewed and registered. After spending approximately one month at a transit reception centre, the asylum seekers are relocated to the regular reception centres to await the outcome of their asylum applications.

Asylum seekers may settle anywhere if they have their own means. Most receive a temporary work permit within a few months and so are able to do so. Only those without resources are dispersed to the open centres, so this system is not conceived in any way as an alternative means of controlling asylum seekers' whereabouts. The main purpose of the system is to prevent a concentration of newcomers in the city.

¹ The information presented herein is valid up to 31 March 2004.

² In 2000, only 77 of 2,186 aliens were detained pre-removal, of whom 49 were failed asylum seekers. In 2001, 56 of 5,161 aliens deported were detained, of whom 15 were failed asylum seekers. Statistics from the Norwegian Dept of Immigration, quoted in *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, Lawyers Committee for Human Rights, p.8.

³ 'Norway establishes an asylum seeker jail', *Nettavisen*, 30 October 2003.

⁴ Interview with Norwegian Organization for Asylum Seekers (NOAS), October 2003-March 2004

However, there are two transit reception centres in Oslo – one of which is for ‘manifestly unfounded’ claims, intended to keep them easily available for deportation from Oslo (predominantly for eastern Europeans). A recent drop in arrivals is partly due to the deterrent effect of this return-oriented centre with accelerated procedures completed within 1-2 weeks. It is located in a former civil defence camp, surrounded by fences and with a gatekeeper. There are no formal restrictions on residents’ movements but the gate is watched and visitors to the centre are restricted. The guards reportedly check the rooms often and create an ‘enforcement environment’ even if it is not a detention centre. There are proposals to accelerate the procedure in this centre to only a total of 48 hours, but even the conservative media is questioning whether procedures with so few protections of due process can take place in an open centre without people fleeing from its premises.

D. Alternatives for separated children

Separated children are housed in special parts of the open reception centres and their claims are prioritised. They are appointed legal guardians by the Public Trustees Office, whose role is to protect their best interests, liaise with the authorities, attend asylum interviews and help the child adapt to their new environment. There have been rare cases where minors are detained to ensure removal.⁵

III. CONCLUSIONS

A. Do alternatives ensure compliance?

Official Norwegian statistics show that, during 2003, only some 6% of asylum seekers (1,016 out of 16,505) had their claims dismissed or withdrawn. This category would include persons who absconded during the asylum procedure. During 2002, it is estimated that some 9-10% of asylum seekers in Norway failed to complete the procedure.⁶ Current arrangements other than detention would therefore appear sufficient to ensure appearance in the overwhelming majority of cases admitted to the full determination procedure.

However, approximately 3,600 failed asylum seekers disappeared after receiving a final negative decision in 2002.⁷ Prior to October 2003, there was only limited work done to locate and detain those who absconded at this stage, since the official expectation is that they depart the country of their own accord in compliance with deportation orders. Recently, however, there has been a large investment in immigration enforcement police (223 new officers) forming a special unit (PSU) who, among other tasks, are supposed to locate absconders. As a result, it is expected that detentions and deportations of persons who failed to comply with deportation orders will increase in 2004.

B. Cost effectiveness?

The cost of running Norway’s reception centres amounts to some 1 billion NOK per year (some US \$125 million).⁸ Comparative information on the cost of the new ‘asylum jail’ at Ullensaker is not yet available, but is likely to be outweighed by the perceived benefits of deterring failed asylum seekers from disappearing and of enforcing their return.

⁵ *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, Lawyers Committee for Human Rights, p.86.

⁶ During 2002, the Norwegian government took a total of 17,853 decisions in the first instance. Of the decisions taken in the first instance, 332 (2.7%) were recognised as 1951 Convention refugees, while 2,958 (24%) persons were allowed to stay on other grounds. 5,497 cases were otherwise closed, of which 3,793 were deemed to be cases falling under the Dublin Agreement. If the remaining 1,734 cases were closed due to the claimants absconding, then only 9-10% of asylum seekers in Norway failed to complete the procedure in 2002. Statistics provided by UNHCR RO Stockholm.

⁷ At the end of 2002, 13,864 persons were accommodated in reception centres. The authorities estimate that over 3,600 persons have disappeared from the reception centres, while 2,400 are awaiting deportation.

⁸ These centres primarily house asylum seekers. Sometimes a few refugees, resettled from overseas, stay in the centres before being housed in host municipalities.

THE PHILIPPINES¹

I. DETENTION AND RESTRICTIONS ON FREEDOM OF MOVEMENT AND DOMESTIC LAW

Refugees in the Philippines are not generally subjected to any restrictions with respect to their freedom of movement. Similarly, asylum seekers whose applications are pending with the Refugee Processing Unit are granted the right to remain in the Philippines until determinations of their individual claims are made. Penalties that may otherwise apply are generally waived.² The asylum seeker is registered with the Department of Justice which issues a letter of attestation, requiring periodic renewal.

The policies and practices of the Bureau of Immigration became increasingly restrictive in 2002 and 2003, however, as a result of the international campaign against terrorism that is supported by the Government of the Philippines. Drives to reduce the number of illegal aliens in the country were intensified in 2002 while attempted or actual arrests and detention of a relatively small number of refugees were reported, both for common crimes (two cases) and charges relating to terrorism (three cases). In 2003, as a result of external pressure in the run-up to the war in Iraq, seven Iraqi refugees were included among those arrested on charges of terrorism. Three were eventually released while four remained in detention. These detainees' access to their families, legal counsel, and to judicial and administrative remedies, was ensured.³

Prolonged and continuing detention of a few asylum seekers was also reported during 2002 and 2003, with release granted only after recognition. Persons originating from South Asian and Middle Eastern countries are more likely to be detained than other asylum seekers.⁴

II. ALTERNATIVES TO DETENTION

A. Reception system based on accommodation in the community

The Philippines' system is an example of one that does not regard detention as the norm, but has managed to function well for many years on the basis of open reception arrangements. Such reception arrangements in Manila are mainly provided or organized by UNHCR's implementing partner, Community and Family Services International (CFSI), which in turn networks with a number of NGOs, charitable institutions, and government departments to provide complementary services. Legal aid clinics of two prominent law schools are available to provide legal aid to asylum seekers. There is an existing social support network among the urban refugee community that also provides assistance to asylum seekers.

B. Alternatives for separated children and other vulnerable persons

The official appointment of guardians or other representation for asylum seekers with special needs can be undertaken under regular Philippines procedures for guardianship, which require a judicial hearing. However, *de facto* guardianship and assistance may be provided through the social welfare department and by a limited number of humanitarian organizations.

¹ The information presented herein is valid up to 31 March 2004.

² E.g. fines and/or detention for an asylum seeker having entered the Philippines illegally or who are illegally present prior to application for registration.

³ Information received from UNHCR Manila.

⁴ Information received from UNHCR Manila.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

During 2003, 61 asylum applications were pending or received by the Philippine government. By the end of that year, nine claims were recognized, ten were rejected, four were closed due to the claimants having absconded, while the rest were still pending.⁵ Looking at statistics for cases closed in recent years, these statistics appear broadly typical.

B. Export value?

The Philippines has one of the most vibrant civil societies in the region, and this is reflected by the way in which multiple agencies and interests have been involved in providing reception arrangements for asylum seekers, including legal advice. These open arrangements, without restrictions on freedom of movement, have so far proven successful and have shown there is no need for routine detention in a context where the intent among refugees to transit is minimal. The new tendency towards detention of refugees and asylum seekers resulted primarily from external pressure in the international campaign against terrorism and did not necessarily apply to all nationalities and case profiles. According to UNHCR, adequate legal and judicial remedies against arbitrary arrest and detention have been made available to the affected persons.

⁵ Information received from UNHCR Manila.

POLAND¹

I. DETENTION AND DOMESTIC LAW

A. Detention at the border – pre-screening detention

The Aliens Protection Law 2003² introduced pre-screening detention of asylum seekers in Poland. An asylum seeker may be detained if he or she submits an application at the border and does not have other authorisation to enter the territory, or if, prior to submitting an application for refugee status, he or she has crossed or attempted to cross a border illegally. In such cases, the applicant shall be placed in a guarded centre or under ‘deportation arrest’ (the latter is applicable where the Border Guard establishes that it is necessary, on grounds related to the defence or security of the State or public order).

The submission of an asylum application does not prevent the aliens’ authorities from conducting deportation proceedings or issuing a decision on the deportation of an asylum seeker. However, the enforcement of such decisions is suspended until the asylum authorities have rendered a final negative decision.

B. Detention of in-country applicants

In addition to the grounds for detention applicable to asylum seekers who present their claims at the border, in-country applicants may be detained if they submit their applications while illegally present in Poland, or if, prior to filing an application, they have been served either an order to leave Poland or a deportation decision.

The rights and obligations of aliens held in a guarded centre or under deportation arrest are determined by articles 110–123 of the new Aliens Protection Law 2003.³

Whether an asylum seeker is detained in a guarded centre or under deportation arrest, he or she is not allowed to leave the facility, although applicants placed in guarded centres are subject to fewer restrictions on their freedom of movement than other forms of detention.

The placement of an applicant in a guarded centre or under deportation arrest must be decided by a court and may be ordered for a period of 30 days at a time. If an asylum application is submitted by an alien who is already in a guarded centre or under deportation arrest on the basis of a court ruling, the court shall extend the period of his or her detention by 90 days, counted from the time the application for refugee status is submitted.

If a denial of refugee status is delivered to the applicant prior to the expiry of his or her period at a guarded centre or under deportation arrest, his or her detention may be extended by the specified period of time necessary to issue a final determination on the claim and to enforce deportation. Detention at a guarded centre or under deportation arrest may not exceed a maximum of one year. A ruling on the extension of detention shall be issued, upon request by the President of the Office for Repatriation and Aliens, the Border Guard or the police, by the district court where the authority submits the request.

¹ The information presented herein is valid up to 31 March 2004.

² As of 1 September 2003, the refugee status determination procedure is regulated by the Act on Granting Protection to Aliens on the Territory of the Republic of Poland of 13 July 2003 (‘Aliens Protection Law’). This law, together with a new Aliens Law, have replaced/repealed the Aliens Act 1997.

³ These provisions partially replaced the regulations contained in the Ordinance of the Minister of Internal Affairs and Administration 1999 and the previous by-law governing sojourn in detention centres.

C. Ground for release from detention

An applicant is released from a guarded centre or from deportation arrest when, *inter alia*, he or she is granted refugee status, asylum or a permit for tolerated residence, or if the court rules that his or her continued detention could result in a danger to health or life.⁴ The President of the Office for Repatriation and Aliens may also decide the release of an applicant, *ex officio*, or upon request by the latter, if based on the evidence collected, it is likely that he or she meets the criteria of the 1951 Convention and 1967 Protocol. The President shall not order the release of the applicant if his or her stay within Polish territory constitutes a threat to the defence or security of the State, or a danger to public order, or if exclusion grounds provided for in article 1F of the 1951 Convention apply. The decision whereby the President of the Office for Repatriation and Aliens refuses to release the applicant may be appealed to a district court within three days of its delivery. The head of a guarded centre or an officer responsible for the operation of detention for purposes of deportation shall submit the appeal within two days to the court, which shall examine it immediately.

D. Access to legal advice

Applicants placed in a guarded centre or under deportation arrest may, in order to obtain legal assistance, personally contact a representative of the UNHCR or organisations statutorily dealing with refugee affairs. Exceptionally, this right may be denied if it is necessary to ensure public security and order, or to comply with internal by-laws of residence in a guarded centre or under deportation arrest. Since the introduction of pre-screening detention, NGOs have monitored detention centres with particular emphasis on access to legal advice, and have noted:⁵

- A lack or insufficiency of information on the rights of asylum seekers and available legal procedures that (according to the aforementioned acts) should be provided in the alien's language in an effective manner (that is, in writing);
- A lack or insufficiency of information about the possibility of contacting refugee-assisting NGOs in order to receive legal assistance or social benefits. In most cases the information displayed on the information board available to the detainees would only include a list of refugee and migrant-assisting NGOs (in Polish), with no information whatsoever on the scope of their activities, the free-of-charge nature of their services, etc.;
- Insufficient information about the possibility of contacting UNHCR (in most cases only the UNHCR Warsaw Office's address and phone number was available with no explanation of the Office's scope of activities and mandate).
- In some cases the detained aliens/asylum seekers also experienced difficulties in using or receiving faxes from their lawyers, and in some extreme cases had a very limited possibility of using the telephone (no incoming phone calls are accepted by the arrest authorities under deportation arrest at Wlocklawek)

E. Exceptions for unaccompanied minors and victims of violence

Unaccompanied minors and applicants who are presumed to be victims of violence, or who are disabled, may not be placed in a guarded centre or under deportation arrest. According to the new Aliens Protection Law, unaccompanied/separated children are also exempt from pre-screening or other detention.

II. ALTERNATIVES TO DETENTION

A. Designated place of residence

⁴ A pregnant woman may be held under deportation arrest until the end of the seventh month of pregnancy.

⁵ Preliminary information on such monitoring has been provided by NGOs to UNHCR Warsaw, and shared with this study.

An applicant released from a guarded centre or deportation arrest may be ordered by the President of the Office for Repatriation and Aliens to remain in a particular place of residence or at a particular location. He or she is not allowed to leave this location without the President's consent. This also applies if the applicant was not placed in detention for reasons that would pose a danger to his or her health or life.

B. Deposit of travel document

An asylum seeker must deposit any travel document he or she holds, as well as those of any family members also applying for asylum, with the President of the Office for Repatriation and Aliens, via the Commandant of the Border Guard accepting his or her application. The President of the Office for Repatriation and Aliens keeps these travel documents until the final determination on the asylum application, following which they are returned to the applicant.

C. Penalties for non-notification of address

If an asylum seeker fails to provide an address, and if it is impossible to establish one, the application will be left unacknowledged. If an official summons from the Refugee Office is not delivered successfully, this may lead to the discontinuation of the refugee status determination procedure. Polish lawyers and NGOs strongly criticise this practice, as asylum seekers may be unable to maintain a fixed abode or correspondence address for reasons beyond their own control. To avoid the risk of having their claims discontinued, asylum seekers therefore frequently use the office addresses of NGOs. If the person whose case was closed re-presents himself or herself, the Office for Repatriation and Aliens is obliged to reopen the discontinued proceedings in accordance with the Procedural Administrative Code of Poland.

D. Open centres

Asylum seekers usually receive accommodation in open reception centres. During 2003, asylum seekers were housed in reception centres in Debak, Smoszewo, Wolomin, Czerwony Bor, Lomza, Bialystok (2), Lukow, Lublin, Zakroczym and in temporary homeless shelters in Warsaw. The reception centre in Suprasl was closed at the end of May 2003.

Most applicants for refugee status are provided with governmental assistance (accommodation, medical care, clothing, food, and minimal living expenses) in these centres. They are not permitted to work.⁶ Applicants who are excluded from governmental assistance must rely upon their own resources, or assistance from a nongovernmental organisation, as supported by UNHCR.

Applicants, for whom stay at a reception centre is inadvisable due to their state of health, as confirmed by a medical report, or due to a special need to ensure their safety, are granted financial support to live independently.

Applicants placed in a reception centre must respect its regulations. They are obliged to inform the management if they leave for more than 48 hours. Breaking this rule may result in expulsion from the centre. Permission for absence may be granted for no more than 72 hours in total. In case of gross violations of a centre's by-laws by an asylum applicant, the President of the Office for Repatriation and Aliens may decide to withhold assistance, in whole or in part. Upon request of the applicant, the President may restore full assistance once. If assistance is withheld a second time, the President may restore financial support again, but only amounting to one third of the assistance

⁶ The procedure to obtain a work visa is in practice closed to them, as such visas must be issued abroad by a Polish Consul residing in the country of origin of an applicant.

granted to those persons whose stay at a reception centre is inadvisable for reasons of health or safety.⁷

In 2002, a record number of asylum seekers (1900), mostly Chechens, were accommodated in Poland's reception centres. The Office for Repatriation and Aliens, in response to this influx and the perception of possible security threats associated with Chechens, introduced close monitoring of the refugee population by internal security staff, though fortunately this did not deteriorate into a situation of *de facto* detention.⁸

E. Alternatives for separated children and other vulnerable groups

In June 2002 an ordinance on the treatment and protection of unaccompanied/separated children during the status determination procedure was finally promulgated. This ordinance, together with an ordinance on the treatment of victims of torture and traumatised refugees issued at the same time, creates a legal basis for improvement in the treatment of these vulnerable groups of asylum seekers and refugees.

In September 2003, the new Aliens Protection Law further improved the situation of unaccompanied/separated children seeking asylum in Poland. Such children are not only granted a legal guardian appointed by the family court for refugee status determination procedure matters, but also a custodian to care for the child and his or her property, which includes, in particular, supervision of accommodation, arranging activities during free time, and providing assistance in contacting national and international organisations assisting minors and refugees in the tracing of family members. The custodian should have the qualifications of a social worker, as defined by the Law on Social Assistance 1990. The custodian is appointed by the President of the Office for Repatriation and Aliens, from among officials of the Office, and is empowered until the determination procedure is completed.

According to the new Aliens Protection Law, unaccompanied children over thirteen years of age are accommodated in a special section of a refugee reception centre, while younger children are cared for in an 'emergency ward' at the State Emergency Care Centre in Warsaw. In 2003, 146 children lived in a refugee reception centre, compared to 161 in 2002. The Aliens Protection Law 2003 and the ordinance of the Ministry of Interior regulate the conditions of accommodation of unaccompanied children in the centre as well as standards of custody in such centres.

The Central Reception Centre in Debak, outside Warsaw, is responsible for accommodation of separated child asylum seekers over thirteen years of age. In 2003, the Office for Repatriation and Aliens reported 146 children housed in Polish reception centers. Of great concern is that most of these children are reported to have 'disappeared' from the reception centre during 2003, indicating that these arrangements fail to ensure the appearance of child asylum seekers until the end of the procedure, guarantee their protection from traffickers or smugglers, or ensure their availability for deportation if deemed necessary and permissible.⁹

⁷ The previous Ordinance on reception conditions for asylum seekers led to situations where asylum seekers could be evicted from the reception centres as a disciplinary measure. As a result, some asylum seekers were unable to effectively pursue their applications and UNHCR expressed the view that such a penalty was excessively severe. In this regard, the reception requirements have improved with the introduction of the Aliens Protection Law.

⁸ The introduction of pre-screening detention of asylum seekers arriving illegally in Poland in 2003, however, was in part a response to these arrivals in 2002.

⁹ Both Polish asylum and aliens legislation contain special provisions regarding the deportation of unaccompanied minors. According to article 94 of the Aliens Protection Law 2003, a decision ordering the deportation of an unaccompanied minor to his or her country of origin or another country may be enforced only if care will be provided to

In addition, the Aliens Protection Law contains special provisions for proceedings concerning applicants whose psychosocial condition permits the presumption that they are victims of violence or are disabled. Such applicants must not be subject to pre-screening detention, placed in a guarded centre or under deportation arrest. The Aliens Protection Law further provides that certain kinds of assistance in the centre where such an applicant resides may only be carried out by a person of the same sex as the applicant and one who has completed special training for work with victims of crimes or violence or with disabled persons. There are no specific figures available to determine whether such vulnerable persons comply with the asylum procedure or abscond at a significantly different rate from other asylum seekers.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

During 2002, the Polish Border Guards alone received 4,520 applications, of which 2,409 were from Chechens. Many of the other applications followed readmission under the bilateral agreement with Germany, and were therefore clearly submitted in Poland unwillingly. During the same period, 1,452 Chechens reportedly left the open reception centres and 383 individuals from this group were arrested at the Polish-German border and readmitted to Poland. In 2003, the majority of asylum seekers applied for discontinuation of their determination procedure in Poland and subsequently sought refugee status in the Czech Republic. Many persons, registered previously as asylum seekers in Poland and then the Czech Republic, later arrived illegally in Austria to file asylum claims.¹⁰ This suggests that the alternative measure of open accommodation has been unsuccessful in preventing secondary movement of a significant portion of asylum seekers during 2002-3. The high rate at which separated children continued to disappear from the Central Reception Centre in 2003 also suggests that the system is failing to protect them from traffickers, or failing them in some other respect.

B. Cost effectiveness?

The unprecedented rise in the number of asylum seekers during 2002, and the tendency of most (if not all) Chechen asylum seekers to remain in Poland for the full duration of the determination procedure, put some strain on the resources of the Ministry of the Interior. A wider range of alternatives – including homeless shelters and emergency care centres – were therefore used temporarily. No figures are available regarding the relative per capita costs of these *ad hoc* arrangements, or the costs of accommodation in the refugee reception centre, in comparison to the costs of detention in Poland, whether in a guarded centre or under deportation arrest.

C. Export value?

The only alternative measure that seems to operate without complication or drawback in Poland is the deposit of travel documents for the duration of the procedure. This is a simple measure to prevent transit migration at the minimum of expense and administrative effort and, in relation to those asylum seekers who travel with valid documentation, asylum lawyers in Poland report it to be generally effective.

him or her following return by one of his or her parents or other adults, or by the relevant juvenile welfare institutions, in keeping with the standards provided for in the Convention on the Rights of the Child 1989.

¹⁰ Reported by UNHCR Warsaw.

ROMANIA¹

I. DETENTION AND DOMESTIC LAW

Article 22 of the Refugee Law² provides for detention of aliens who apply for asylum at ‘transit zones’ at border points for up to a maximum of 20 days. Article 22 applies equally to asylum seekers whose applications may have been rejected by the National Refugee Office (‘NRO’) (first instance - administrative stage) but who have a judicial appeal pending. Asylum seekers at the border who are granted some form of protection, or who are granted access to the territory by the NRO, are released prior to the expiration of the maximum period of 20 days.

In addition, Article 93 of the Aliens Law³ stipulates the procedure for taking an alien into custody. Illegal aliens are placed into custody in Otopeni Detention Centre, which is located approximately two kilometres from Bucharest’s main Otopeni Airport, or Arad Detention Centre, in the western part of the country. UNHCR is given access to detainees in these centres, and access to lawyers has improved. The Aliens Law provides for certain legal safeguards, such as a requirement that the grounds for detention be specified and that the detainee be notified of them in writing, although practice remains inconsistent. Reports in several cases show that aliens have not been informed in a timely manner of the grounds for their detention.⁴

A maximum period of six months for detention is set by the Aliens Law, subject to specific exceptions. For example, where an alien is convicted of a crime and against whom a court has ordered expulsion, or where an alien is declared ‘undesirable persons’ for reasons of national security and public order.⁵

A decision to take an alien into custody for an initial period of 30 days is made by the Prosecutor at the proposal of the Aliens Authority. An appeal may be lodged by the alien against the Prosecutor’s decision to be reviewed by the Court of Appeal. No further challenge is possible against this decision. No free legal aid is available.

Upon expiry of the 30 days period, if the alien had not been removed from Romanian territory, the Aliens Authority may request the Court of Appeal to extend the detention for up to five months. In cases where the Court of Appeal decides to prolong custody, the alien has the right to submit another appeal against this decision.

During 2003, there were reportedly several cases of asylum seekers who entered Romania illegally, were convicted of illegal border crossing, and subsequently transferred to the Otopeni Detention Centre.⁶ Failed asylum seekers pursuing second asylum procedures may also be detained, pending deportation, until or unless their second asylum applications are deemed admissible. If this is the case, the asylum seeker is issued with documents by the NRO and released.

¹ The information presented herein is valid up to 31 March 2004.

² Ordinance No. 102 /2000 on the Status and Regime of Refugees in Romania, 31 August 2000 (entry into force 2 November 2000), as amended by Government Ordinance No. 43/2004, January 2004.

³ Government Ordinance 194, adopted in Dec. 2002, amended in July 2003.

⁴ E.g., being informed one week after being taken into custody.

⁵ See articles 84 and 85 of the Aliens Law under which asylum seekers and refugees declared ‘undesirable persons’ for reasons pertaining to national security and public order may also be detained. The decision to take them into custody is taken by the Prosecutor’s Office. While a review procedure is possible before the Court of Appeal, it does not seem to be an effective remedy, since the specific reasons for declaring an individual ‘undesirable’ in this way do not have to be disclosed by the authorities.

⁶ Information received from UNHCR Romania.

According to article 99 of the Aliens Law, corroborated by article 16(1) of the Refugee Law, a finally rejected asylum seeker who, for objective reasons,⁷ cannot leave Romania, will be granted tolerated status. Nonetheless, practice remains inconsistent and, in some cases, tolerated status was granted to such finally rejected asylum seekers only after they had been detained in custody.⁸

In practice, aliens who apply for asylum while they are in custody are normally released, in accordance with article 93(6) of the Aliens Law, if it is their first application and if they have not previously been convicted of any offence, including irregular border crossing.⁹

II. ALTERNATIVES TO DETENTION

A. Deposit of documents and registered residence

Article 13(1)(j) of the Refugee Law requires asylum seekers to hand over their border crossing permits in exchange for which they should be issued with an identity document, on which a residence visa will be stamped. These visas are not issued for standard lengths of time, but are granted until an interview is held at the NRO and are then renewed for every subsequent step in the asylum procedure. This identity document enables asylum seekers to move freely, either within Bucharest or within their registered province of residence. However, should they wish to move beyond Bucharest or their registered province, they need to request approval from the NRO. Problems arise in cases where an appeal is lodged too late as no visa will be issued in such circumstances and asylum-seekers will find themselves staying in the country illegally and no longer able to remain in the accommodation centre for asylum seekers.

B. Designated residence

According to article 23(b) of the Refugee Law, a refugee has the right “to choose his place of residence and circulate freely, under the conditions provided by the Aliens Law.” Article 9(5) of the Refugee Law provides that the NRO may ‘designate’ a place of residence for the full duration of the asylum determination procedure, including ‘accompanied transportation’ to that place, on grounds of public order, national security, protection of public health and morality, and for the protection of the rights and freedoms of others. It appears though that these provisions of ‘designated’ residence have not been implemented in any cases to date.

Asylum seekers who have served a prison term for a criminal offence and who file an asylum application while within detention may be assigned the Otopeni Detention Centre as their place of residence on the basis of the provisions in the Aliens Law described in the previous section.

C. Restrictions on residence location

In Romania, an asylum seeker may be accommodated in a reception centre if he or she cannot afford to rent a flat. If he or she chooses to rent a flat, he or she must produce the lease as proof. According to article 13(1) of the Refugee Law, asylum seekers are under obligations not to leave their locality of residence or change their address without the authorisation of the NRO, or they may

⁷ In practice, objective reasons have included no diplomatic mission in Romania, lack of a passport, or medical reasons.

⁸ Information received from UNHCR Romania.

⁹ Interview with Romanian asylum lawyers, October 2003-March 2004.

be refused re-accommodation. They may choose another place of private residence afterwards under the condition that they present a lease.

D. Alternatives for separated children

Separated asylum seeking children under the age of fourteen are appointed a guardian *ad litem* and may be accommodated in a special reception centre. There are two accommodation centres in Bucharest and one in Timisoara.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

A significant percentage of asylum seekers in Romania abscond from the determination procedure. The primary reason is a desire to transit to western Europe. However, some asylum seekers apprehended exiting the country stated that their decision was based primarily on the very low recognition rates in Romania, though the latest data shows that this rate has improved.¹⁰

Since the provisions relating to ‘designated residence’ are not implemented, it is impossible to reach any conclusions regarding their possible effectiveness, nor are there figures relating to the rate of compliance of asylum seekers in the open centres.

B. Cost effectiveness?

For such measures as ‘designated residence’ to be implemented effectively, there would have to be high policing costs and a capacity to re-detain those who fail to comply with the alternative measures.

C. Export value?

As in Poland, it appears that the compulsory deposit of documents currently serves to reduce non-appearance rates.

¹⁰ The combined recognition rate at the administrative stage of the procedures (refugee status and humanitarian status combined) amounted to only 4.4% in 2002, as compared to 4.98% in 2001. The very high number of successful appeals raises the overall recognition rate in 2002 to some 9.6%. However, the recognition rate (both in the administrative and judicial stages) was 15.2 % in 2003. Source: Information and statistics received from UNHCR Romania.

SOUTH AFRICA¹

I. DETENTION AND DOMESTIC LAW

A. General grounds for detention

The majority of asylum seekers in South Africa enjoy freedom of movement.² Detention, however, is permissible if (a) an asylum seeker fails to appear,³ (b) fails to renew his or her temporary residence permit in time, (c) contravenes conditions of that permit, or (d) if the claim is deemed manifestly unfounded or fraudulent.⁴ The conditions of a temporary residence permit may include (a) restrictions on residence to a certain Magisterial District or province, (b) periodic reporting obligations to the office where the application was lodged, and/or (c) an obligation to keep the authorities duly advised of residential address. Section 22 of the Refugee Act 1998 also states that other conditions may be determined by the Standing Committee for Refugee Affairs (the regulatory and supervisory body in the asylum system) so long as they are ‘not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.’

In South Africa there is a quota system based on countries of origin for the registration of asylum seekers. When coupled with staff shortages at the Reception Offices, this system sometimes causes new arrivals to have to wait before they may apply and receive their permits. Meanwhile they may be subject to arrest as undocumented migrants. Furthermore, the police sometimes disregard or even destroy valid permits, assuming them to be fraudulent or not recognising their validity. Asylum lawyers sometimes report that an asylum seeker may not be permitted to go home to collect his or her identity documents and permit, or to telephone others to bring them to the police station. Such detentions are partially an issue of inadequate police training and technology, and partially a matter of deficiencies in the rule of law.

Recognised refugees receive two-year renewable permits and enjoy full freedom of movement and settlement throughout South Africa. On 1 May 2001, the Department of Home Affairs started to issue identity cards to recognised refugees, as provided for in the Refugee Act 1998. These documents better protect them against arbitrary arrest by the police.

B. Means and conditions of release

If asylum seekers who fail to renew their permits in time or fail to adhere to the conditions attached are arrested and detained, UNHCR or its partners in the legal field can normally intervene to secure their release.⁵

A High Court judge must automatically review any immigration detention of over 30 days.⁶ Legal aid clinics have been established, with the support of UNHCR, which may challenge: (a) a wrongful application of the manifestly unfounded, abusive or fraudulent criteria, (b) the arrest and processing for deportation of asylum seekers before their claims have been finally adjudicated, (c) the

¹ The information presented herein is valid up to 31 March 2004.

² The Department of Home Affairs (‘DHA’) issues them temporary residence permits, which may be withdrawn or withheld if (a) the application is deemed manifestly unfounded or fraudulent, (b) conditions of the permit are contravened, (c) a rejected applicant re-enters the country, (d) the applicant leaves the country without permission during the procedure, or (e) there are grounds for exclusion or cessation. Immigration Act 2002, s. 23.

³ Refugee Regulations (Forms and Procedure) 2000, s.8(1).

⁴ Refugee Act (Act No.130) 1998, ss. 22-23 and Refugee Regulations, s.8(1).

⁵ Information received from UNHCR Pretoria.

⁶ Refugee Act (Act No.130 of 1998), §29(1).

erroneous issuance of appointment letters instead of temporary residence permits to those who approach DHA to lodge an asylum application, and (d) the erroneous issuance of temporary residence permits to recognised refugees awaiting renewal of their refugee status. Furthermore, Refugee Legal Counsellors working in the cities where Refugee Reception Offices have been established (e.g., Pretoria, Johannesburg, Cape Town, Durban and Port Elizabeth) are able to challenge instances of unlawful detention and provide legal assistance for the renewal of temporary residence permits. For example, a nongovernmental organisation called Lawyers for Human Rights ('LHR') filed a case in 2003 where the powers of immigration officers to detain foreigners under the Immigration Act 2002 were successfully challenged in the High Court in Pretoria.⁷

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

In 2002, 59 cases of arrested asylum seekers were reported to Lawyers for Human Rights in Pretoria and some 30 cases in Durban. In 2003, LHR managed to secure the release of some 584 refugees and migrants who had been wrongfully detained. Most immigration detention in South Africa concerns persons awaiting removal, including failed asylum seekers. In practice, for those undocumented migrants detained pre-removal, the only means of release is to apply for asylum, so long as they have not applied previously.

Problems of independent access to Lindela Deportation Centre, near Krugersdorp, have long existed. Those held in Lindela are supposed to be illegal migrants and failed asylum seekers, not asylum seekers awaiting decisions or refugees, but there are doubts that not everyone in detention who wishes to claim asylum is appropriately referred. The Department of Home Affairs has reported that in 2003 some 154, 000 people were deported through Lindela. Mozambicans formed the majority with some 82,000 deportees, Zimbabwe 55,000,⁸ Lesotho 7,000, Malawi 4700, Tanzania and Swaziland each with 1,000.⁹ There are some deportations of foreigners from refugee-producing countries of the Great Lakes region. Lindela itself has a capacity of over 4000 and people are detained there for an average of two weeks.

In November 1999, the Law Clinic of the University of the Witwatersrand and the South African Human Rights Commission ('SAHRC') obtained an important court decision¹⁰ that required the Lindela management to report the names of detainees to SAHRC every month in order to check their compliance with the '30-day rule',¹¹ which was rarely followed in practice.¹² SAHRC and LHR now have a joint monitoring project of Lindela. By court order, they are supposed to be given

⁷ *Lawyers for Human Rights and others v Minister of Home Affairs and others*, High Court, Pretoria, 2003.

⁸ As of September 2003, South Africa was deporting some 2,500 Zimbabweans each month, including, it is believed, critics of the governing party in Zimbabwe fleeing persecution. Many of those deported from Lindela intend to return from Zimbabwe to South Africa at the earliest opportunity, so their detention and deportation is often a futile, circular exercise.

⁹ Information received from UNHCR Pretoria.

¹⁰ *SAHRC and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd.*, Case no.28367/99, Witwatersrand High Court, November 1999.

¹¹ The Constitutional Bill of Rights, section 12, protects any person from arbitrary arrest and detention while section 35 deals specifically with limitations to arrest and detention. Under the Aliens Control Act 1991 which is now repealed, the court made a provision for review of all detainees within 30 days. Section 34(1)(d) of the Immigration Act 2002 has similar provisions, which allow review by the courts of detention made without a warrant. The SAHRC may have acted under the Aliens Control Act (which has been replaced by the Immigration Act 2002 that came into force in 2003) and in line with the Bill of Rights.

¹² In December 2000, SAHRC reported that only one detainee at Lindela had been informed of the judicial review of her case and she was not given the opportunity to make a submission to it.

the names of all detainees who are detained for over 25 days, but in fact the lawyers must go and physically collect the list, which is not always accurate.¹³

The Witwatersrand High Court has also found a failure to give effective notice of an application to extend detention to be unlawful.¹⁴

III. ALTERNATIVES TO DETENTION

A. Bail

As immigration detention is largely restricted to pre-removal detention, ‘alternatives’ such as bail¹⁵ are not really relevant in most cases. The 30-day rule (see above) is of more direct use to an undocumented migrant or failed asylum seeker who, because they can not be removed, may find themselves in prolonged detention at Lindela.¹⁶

It is notable that South Africa has followed the example of the Vera Institute for Justice in New York with regard to developing alternatives to pre-trial detention in the criminal justice field, at three pilot projects in Cape Flats, Johannesburg, and Durban. This precedent may make it particularly open to following the Vera model with regard to alternatives to immigration detention (see US section), were it deemed possible to release a percentage of those detained pre-removal into the community on bail.

B. *De facto* restriction of asylum seekers’ freedom of movement - renewal of permits

The right to freedom of movement is guaranteed by article 21 of the South African constitution. In addition, section 36(1)(e) of the Constitution provides for consideration of alternatives before resorting to any limitation of a constitutional right. The Constitution is applicable to ‘everyone’, including refugees and asylum seekers. Based on this constitutional right to freedom of movement, there is very little restriction on the movement or settlement of asylum seekers and refugees in South Africa, although certain conditions may be attached to a permit.

Permits for asylum seekers (see above) require monthly renewal at the original office of application. This may result in *de facto* restrictions on an asylum seeker’s freedom of movement. LHR has managed to gain some flexibility in the application of this rule so that asylum seekers only have to go back to the original office for asylum interviews or if they completely lose a permit.

The conditions which the Regulations allow to be attached to a permit – restricting an individual asylum seeker’s movements to one District or requiring regular reporting to the authorities – are not

¹³ Interview with Lawyers for Human Rights, October 2003-March 2004.

¹⁴ *Fei Lui v Commanding Officer*, 1999(3) SALR 996(W), Witwatersrand High Court.

¹⁵ In the criminal justice system, there are some creative initiatives relating to the setting of bail for offenders on remand. The Community Peace Program, for example, began in 1997 as part of a broader community policing initiative in post-apartheid South Africa. It uses a ‘collective, deliberative decision making process involving the people immediately affected by an incident.’, per Declan Roche, ‘Restorative Justice and the Regulatory State in South African Townships,’ 42 *Brit. J. Criminal.* 514, 515 (2002). Local residents are made participants in the decision at a bail hearing, helping the courts decide on the danger posed by an accused person, and thereby assisting the magistrate in determining the propriety and amount of bail for a given offender. Adding this democratic element to bail procedure acts as a safeguard, assuring that bail is being administered fairly.

¹⁶ It is notable, however, that the South African immigration system relies heavily on bonds, such that all Zimbabwean visitors have to pay a cash guarantee of R1000 (previously only 300,000 Zimbabwean dollars, or about R430) which is intended to ensure their subsequent departure from the country. Source: *The Financial Gazette* (Zimbabwe), 16 October, 2003.

implemented in practice, in part because of a lack of infrastructure in the police or Department of Home Affairs, and in part because such restrictions on free movement are not deemed necessary under current circumstances.

C. Proposals for collective accommodation centres

Due to the constitutional right to free movement, there have never been designated refugee settlements or camps in South Africa. Civil society is strongly opposed to proposals to detain asylum seekers in camps, however, debate continues as to whether it is possible or desirable to establish collective reception centres for asylum seekers where the restriction of liberty does not amount, in law or in fact, to detention.¹⁷ Critics of the proposals fear that collective accommodation centres will become *de facto* detention centres due to their physical geography and remoteness, and the fact that they would be run by the same private company currently managing Lindela.¹⁸

Under current reception policy, asylum seekers have no access to local social services or social grants. A technical (and perhaps temporary) right for asylum seekers to work and study immediately upon lodging their applications was secured by a High Court ruling in 2002.¹⁹ Nevertheless, many needy asylum seekers, mostly living in the city, remain dependent on charitable organisations with very limited resources.

Legislative changes would be needed to introduce a policy of general encampment, since the current Refugee Act only allows the Minister to create camps in case of a mass influx.²⁰ Most African refugee camps have been established in this context. The proposed centres might be more like collective centres in Germany, though with many additional resource and geographical constraints, routinely housing individual asylum applicants and constraining their ability to move freely around the country.

The proposals to set up centres were mentioned publicly by the Deputy Minister for Home Affairs in a Parliamentary Committee of 2000²¹ and the South African government confirmed its continuing interest in the viability of this policy at the 2003 meeting of UNHCR's Executive Committee. They have not, however, issued a policy paper on the matter, so the precise nature of their plans is currently uncertain. Rumoured proposed locations have included Kimberly and Louis Trichardt in the Northern Province.²² They could accommodate up to 5,000 asylum seekers and would replace the current reception offices in Braamfontein, Marabastad, Cape Town and Durban.²³

¹⁷ UNHCR *Discussion Document on the Proposed Reception Centres for Asylum-Seekers in South Africa*, 1999.

¹⁸ Perhaps with good reason, nongovernmental critics of the encampment proposals tend to conflate reception centres with detention centres. See, F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000.

¹⁹ *Watchenuka and another v Minister of Home Affairs and others*, case no 1486/02, Capetown High Court, 2002, reported in 2003 (1) SA 619 (C). See, however, the Supreme Court of Appeal ruling of 2003, cited at footnote 29, below.

²⁰ Immigration Act 2002, s. 35.

²¹ F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, p.10.

²² F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, p.41. The former is 970km from Cape Town and 480km from Johannesburg, while the latter is 1800km from Cape Town and 430km from Johannesburg.

²³ F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, p.36.

It seems, however, that nongovernmental agencies may be expected to cover all the social and welfare costs and services in the camps. Asylum seekers would not be allowed to work and children would not be given schooling, on the presumption that residents not stay in the centres for longer than the asylum procedure and that the procedure can always be completed within a relatively short period (less than 180 days). Nongovernmental agencies are obviously reluctant to be given this burden unless certain conditions are met. In particular, concern is raised regarding the provision of more complex services, such as access to asylum lawyers.²⁴

Lawyers for Human Rights recommends – as an alternative to these reception centres that may become *de facto* places of detention – that there might be, when necessary, greater ‘limitations on relocating’ placed upon asylum seekers, meaning that they would have to request permission for every change of address.²⁵ Such a proposal does not, of course, address the underlying but perhaps overriding policy objective of the proposed centres: deterrence of secondary movers and those making unfounded claims as a means of accessing the South African economy.

C. Reception of separated children

The law states that asylum-seeking minors may be detained only as a last resort. Indeed, separated children have not been detained but their alternative care arrangements have been far from ideal. Not only are such children often abused by smugglers, but some foster carers have also abused them. Places of accommodation may include Children’s Homes, safe houses and foster care placements, sometimes with other refugees or asylum seekers. Foster families often lack the means to care for the children, and UNHCR must often provide assistance. In past years, there have been unfortunate cases where parents or relatives chose to abandon their children to the care of UNHCR as a means of getting them accommodation, food and education.²⁶

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

The South African government does not claim that absconding is a major issue among registered asylum seekers. There is no reason why an applicant with an unfounded claim, using the asylum channel as a means of entry to South Africa’s economy, would chose to exit the procedure prior to a final refusal of their claim. Those who use South Africa as a point of transit in an irregular movement would have no need to submit an asylum application unless they were detained and sought release.

If the introduction of collective reception centres in remote locations is intended to act as a deterrent, it is perhaps a strange place to start tackling the problem of an estimated 3-5 million undocumented migrants in the country.²⁷ The resulting restrictions on asylum seekers’ freedom of movement, even if not so severe as to amount to detention, may be disproportionate to the public interest served.

²⁴ F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, p.37.

²⁵ F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, pp.41–44.

²⁶ Information received from UNHCR Pretoria.

²⁷ There is estimated to be only one asylum seeker for every fifty undocumented migrants in South Africa. F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, p.61.

Ensuring availability for removal is a more reasonable ground for limiting the free movement of failed asylum seekers. Asylum seekers rejected through the normal (non-accelerated) procedure, after having received a negative decision from the status determination officers, standing committee or Appeal Board, are given one month to leave the country on their own terms and are only detained and forcibly deported if they fail to comply with this order. Experience suggests that the majority of such rejected asylum seekers currently fail to comply.

B. Cost effectiveness?

The costs of running Lindela are reported to be twice those of a normal South African prison.²⁸ Large collective centres are also likely, despite their economies of scale, to prove cost inefficient in comparison to community-based reception (though less so if the already under-resourced charitable organisations were really expected to supply all material assistance to residents). The government might believe, however, that such high costs would be justified by their deterrent value, and ultimately repaid by lower deportation costs when the deterrent effect started to reduce the number of asylum applications from irregular movers.

The South African asylum administration suffers from a lack of both human and financial resources. Nongovernmental critics of the proposed collective centres question the costs of transferring existing refugee status determination and other trained personnel to these remote sites. They hint that many administrators would be reluctant to relocate, undermining the administrative efficiency rationale for such centres, at least in the short to medium term.

Arguments by local refugee advocates against the introduction of the open centres for asylum seekers also cite evidence that, in countries with high levels of poverty, such camps can create a perception that such asylum seekers receive privileged assistance not available to locals, even where asylum seekers have no choice but to depend on State support when they are not allowed to work legally.²⁹

C. Export value?

The current South African asylum system manages to function without the use of routine detention, either upon arrival or during the determination procedure. The law provides for detention only when an individual fails to adhere to the primary 'alternative' restriction – periodic renewal of the temporary residence permit – or fails to comply with an order to leave the country within a month. Current practice perhaps serves as a better model than any of the proposed alternatives.

²⁸ F. Jenkins & L.A. de la Hunt, *Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum Seekers in South Africa*, University of Cape Town Legal Aid Clinic, September 2000, p.4.

²⁹ In November 2003, the Supreme Court of Appeal of South Africa ruled that the Department of Home Affairs has discretion to limit the right of asylum seekers to work and study. The Department is now seeking public hearings on the issue and is very likely to reintroduce limitations on these rights of asylum seekers in the future: *Watchenuka and another v Minister of Home Affairs and others*, Case No. 10/03, Supreme Court of Appeal of South Africa, 28 November 2003

SPAIN¹

I. DETENTION AND DOMESTIC LAW

The general rule is that aliens legally present on Spanish territory enjoy freedom of movement and may freely choose their place of residence, subject to limitations provided for by law as well as measures that the Minister of the Interior may adopt on grounds of public security. This applies equally to persons in the asylum procedure.

Spanish aliens legislation provides for the detention of aliens found unlawfully in the country for a maximum period of 72 hours without judicial authority. This can be extended to 40 days in an internment centre (*Centro de Internamiento para Extranjeros* - 'CIE'), once a judge has authorised the internment of the alien. While in a CIE, any alien may apply for asylum and he or she receives legal assistance to do so. Pending a decision on the admissibility of the claim to the asylum procedure, the applicant will remain in detention at the CIE. He or she may be released before completion of the 40 days should his or her application be accepted into the asylum procedure prior to its expiry.

Aliens who are intercepted attempting to enter illegally (*via patera*), and who then submit asylum claims which are handled under the in-country admissibility procedure, may be sent to CIEs such as the ones in Fuerteventura and Lanzarote in the Canary Islands. Although persons held in the internment centres are not free to leave, these facilities are not considered to be penitentiary centres. In practice, some of these centres are severely overcrowded, and serious concerns were expressed in the past as to the conditions of detention at these facilities.²

A rejected asylum seeker who no longer has a legal basis to stay in Spain is treated just as any other illegal alien and may be detained for the purposes of deportation. In the case of a rejected asylum seeker, the Ministry must demonstrate to the court that detention is necessary to effect the deportation. In many instances, internees in CIEs are released when the government fails in their attempt to return them to their countries of origin. This is the case, for example, with regard to many sub-Saharan Africans who come to Spain undocumented and where Spain does not have readmission agreements with their countries of suspected origin.

The Asylum Law³, meanwhile, allows for asylum seekers' movements to be restricted to transit centres at border points pending a decision on their admissibility. Adequate facilities are required to be established for that purpose at border posts.⁴ Applicants may be held there for a maximum of six days. In 2000, the Constitutional Court ruled that detention of an applicant, whose claim was found to be inadmissible, in an airport transit zone beyond the otherwise general 72 hour detention deadline was not unlawful, as the person concerned was free to return to his or her country of origin, or to a third country. The Court therefore considered this kind of detention not to be a deprivation of liberty, but an administrative measure with a view to preventing aliens from entering Spanish territory after being denied admission into the Spanish asylum procedure.⁵

¹ The information presented herein is valid up to 31 March 2004.

² These concerns have been documented by, among others, Human Rights Watch and Amnesty International, as well as the National Ombudsman's Office.

³ Law 5/1984 of 26 March 1984 on the Right to Asylum and Refugee status, as amended by Law 9/1994 (henceforth "Asylum Law").

⁴ Art. 5, Law 9/1994 amending Law 5/1984.

⁵ *Tribunal Constitucional*, STC. 179/2000, 26 June 2000 (*BOE núm. 180, de 28 de julio*); see also the decision of the Constitutional Court of 27 February 2002.

The vast majority of applications at the border are registered at Madrid International Airport, where adequate facilities for the accommodation of applicants exist, having recently been renovated. Similar facilities have been set up at the international airports of Barcelona and Las Palmas in the Canary Islands.

Stowaways, likewise, have access to the asylum procedure and are subject to border admissibility procedures. Once they are admitted to the asylum procedure, they are allowed to disembark and move freely.

Leaflets given to persons held at a border or in an internment centre include information about the asylum procedure and appeals against non-admission but they do not contain information about how to challenge expulsion orders or detention. A person in a CIE is considered to be under administrative detention, which cannot be challenged in any case. Persons housed in the CIEs have access to legal assistance and *pro bono* lawyers, provided by the Bar associations, are expected to advise them on their rights. The Aliens Act requires the authorities *ex officio* to notify those detained pre-removal or ‘who have entered an internment centre of a non-penal character of their right to free legal aid. The Spanish non-governmental organisation CEAR reports that this is often not done in practice.’⁶

II. ALTERNATIVES TO DETENTION

A. Exceptional restrictions on freedom of movement

The Minister of the Interior may temporarily adopt restrictions on free movement on the basis of national security or public health.⁷ The Minister has to provide reasons to justify the adoption of any such restrictions. These powers are exceptionally exercised.

The Asylum Law 9/1994 also expressly authorizes the Minister of the Interior to impose compulsory residence (a restriction on freedom of movement, not detention) for the duration of the asylum procedure for applicants who do not possess the documents required to reside in Spain. Again, this measure is rarely used in practice.⁸

B. Open centres or monthly housing allowances

The general reception arrangements for asylum seekers in Spain are examined in this annex solely in order to consider whether they provide an alternative means of meeting State objectives (such as controlling the whereabouts of asylum seekers) that might be met by broader resort to detention in another country. It is acknowledged that they do not operate as ‘alternatives to detention’. There is no basis for a direct trade-off between the two under Spanish law: that is, asylum seekers in detention at ports can not be released to an open centre prior to a decision on their admissibility and asylum seekers admitted to the procedure, as explained above, are not liable to be detained except in exceptional situations (for example, if they are involved in criminal activities and detained under the criminal law).

⁶ HRW Report, *Discretion Without Bounds: The Arbitrary Application of Spanish Immigration Law*, July 2002, Vol.14, No.6, p.4.

⁷ Art. 18(2), Implementing Decree 203/95 and art. 5(1), Asylum Law 1984 (as amended).

⁸ Art. 4(3), Asylum Law and art. 14, Asylum Regulations, as approved by Royal Decree No. 203/1995

Asylum seekers admitted to the procedure may stay at an open centre (*Centro de Acogida para Refugiados* or ‘CAR’). It is not compulsory, but it is the main form of assistance for those without resources. Once admitted to the asylum procedure, asylum seekers confined to a border post (such as the one at Madrid International Airport) are released and usually referred to an open reception centre.

Allocation to the centres in Madrid is based on individual needs and is managed by IMSERSO (*Instituto de Migraciones y Servicios Sociales*, part of the Ministry of Labour and Social Affairs), through social workers assigned to the Office for Asylum and Refuge (‘OAR’). Outside Madrid, allocation is usually co-ordinated between OAR and the Spanish Red Cross. In the past there have been problems with some vulnerable cases, who were transferred to hostels or provided with cash allowances.

There are four reception centres run directly by IMSERSO and they have a total capacity of 396. Services include counselling by an in-house social worker and psychologists. Persons with severe mental disorders or contagious diseases are not admitted⁹ and are found other alternatives more suitable for their specific needs.

In other centres run by nongovernmental organisations (CEAR, the Red Cross and ACCEM), the total capacity is 443 places. The general rule is that single asylum seekers may stay for six months, with a possible extension of three months, while families may stay for up to one year. If an asylum seeker moves out of the centre or loses contact, they are not re-admitted. The overall capacity of open reception centres in Spain (government- or NGO- run) is 839.

The alternative to residence in a reception centre is a monthly housing allowance from the Red Cross, however, this is exceptional. This underlines, however, the fact that these reception centres are not intended as any form of supervision or enforcement measure.

There are no centres exclusively for asylum seeking separated children but there are many centres for child migrants in general which are run by NGOs. OAR has registered only three applications of separated minors during 2003.¹⁰ A centre, managed by a religious congregation in Madrid, was created in 1987 to accommodate and provide specialised assistance to both asylum seekers’ and immigrants’ children.

C. Renewal of identity cards

Another alternative to detention, in terms of alternative administrative means of controlling asylum seekers’ whereabouts, is an asylum seeker’s obligation to regularly renew his or her identity card. This serves as a *de facto* reporting requirement.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

Almost all asylum seekers stay in the Spanish asylum procedure until its conclusion. The nongovernmental organisation ACCEM attributes this to the fact that those who wish to transit Spain illegally are seldom detained and so do not need to claim asylum as a means of either evading

⁹ According to an IMSERSO resolution of July 1998.

¹⁰ There are no reliable statistics regarding the number of asylum seeking separated minors in Spain.

detention or delaying deportation.¹¹ The national reception system means that asylum seekers can live in Spain for almost one year, receiving pocket money and being entitled to work after six months. As a consequence, there is little reason why they should wish to abscond before the completion of the procedure.

Failed asylum seekers in-country have fifteen days to leave Spain or to lodge an appeal, however, there is no monitoring of their compliance with these orders and the police currently have limited capacity or incentive to find those who may not comply.

¹¹ Interview with ACCEM, October 2003-March 2004.

SWEDEN¹

I. DETENTION AND DOMESTIC LAW

Asylum seekers may be detained upon arrival, especially if they fall into the accelerated ‘safe country of asylum’ or ‘manifestly unfounded’ categories. In such cases, they may be detained for the entire duration of their stay in Sweden. The decision to detain must be made or confirmed after six hours by the Immigration Board (‘SIB’), the Aliens Appeal Board (‘AAB’) or the Ministry of Foreign Affairs.

Chapter 6 of the Aliens Act imposes specific time limits on detention. An alien may be detained initially for up to 48 hours in order to check his or her status. If there are grounds to believe that deportation will occur or if there are serious doubts about the person’s identity or nationality, he or she may be detained for up to fourteen days. With regard to the fourteen-day/likelihood of deportation category, there must also be a risk that the person will abscond, or reasons to suspect that he or she will participate in criminal activity.

Detention orders related to ‘refusal of entry’² or an expulsion order must be reviewed within two months. The County Administrative Courts must thereafter review all orders periodically. Appeal against all types of detention is possible to the local court and subsequently to the AAB. However, failed asylum seekers who cannot be returned sometimes face lengthy or indefinite detention. Legal aid is available to detainees, except those in an accelerated procedure.

Aliens under 16 years of age can be detained under the Special Control of Aliens Act if (a) there is an expulsion decision according to this law; (b) it is likely that such a decision will be rendered and there is reason to assume that the alien will remain in hiding or commit crimes; or (c) his or her identity is unclear and there are exceptional reasons for detention. Situations of imminent deportation are considered such exceptional reasons.

The possibility to place a separated asylum-seeking child in detention is very limited. The only situation when the Swedish authorities have the right to place a minor in detention is when, at a previous attempt to enforce expulsion, the measure of supervision has proven to be insufficient. The possibility of placing a separated child in detention in these exceptional cases is considered to constitute protection of the child from potential abduction by traffickers or others whose intentions are not in the child’s best interests.

Both asylum seekers and recognised refugees, like other foreigners in Sweden, may be subject to detention in preparation for expulsion from the territory under the Special Control of Aliens Act, on the grounds of protecting national security and combating terrorism. Both the UN Committee against Torture³ and the Committee on the Elimination of all Forms of Racial Discrimination⁴ have criticised Sweden for, *inter alia*, failing to provide a right of appeal to such persons. No ‘alternatives’ have been proposed with regard to such cases, with advocates instead concentrating on the need for greater legal safeguards in order to avoid the risk of discrimination against certain nationalities and, if expulsion is implemented in the case of an asylum seeker or refugee, the risk of *refoulement*.

¹ The information presented herein is valid up to 31 March 2004.

² According to the Aliens Act, Chapter 6 section 2, an alien may be detained when his or her identity cannot be verified or when he or she will most likely be rejected or expelled according to provisions contained in Chapter 4.

³ Conclusions and Recommendations of the Committee against Torture: Sweden, Twenty-eighth session, UN document: CAT/C/XXVIII.CONCL.1 of 6 May 2002 at paras 6(b) and 7(b).

⁴ Concluding observations of the Committee on the Elimination of all Forms of Racial Discrimination: Sweden, UN document: CERD/C/64/CO/8 of 12 March 2004 at para 15.

Around 100 asylum seekers are detained in Sweden each month.⁵

II. ALTERNATIVES TO DETENTION

A. Supervised release, reporting obligations, etc.

Asylum seekers may be granted supervised release from detention on a case-by-case basis as part of a review of the necessity of their detention. This review takes into account whether supervision may be sufficient to achieve the stated purpose. Under supervised release, an asylum seeker may be required to report to the police once or twice a week, or to surrender his or her passport or other identity documents, or to meet other special conditions. The conditions for placing an alien in detention or keeping him or her under supervision are all part of a single structure of considerations under section 5 of Chapter 6 of the Aliens Act. The starting point in any determination is that the authorities should take the least restrictive measures necessary in an individual case.⁶ In practice, it has been reported that the measure of supervision (in lieu of detention) is not resorted to at the same rate by all regions of the Migration Board.⁷

B. Open centres or own housing arrangements

Asylum seekers are detained in ‘investigation’ centres for the first few weeks after their arrival. They are issued with an identity card (the ‘SIV card’), which is valid for the entire duration of the procedure. During ‘investigation detention’ an asylum seeker’s right to be released into the community is considered. If release is approved, the asylum seeker is dispersed to a reception centre, overseen by the SIB, although residence within such a centre is not compulsory. There are furnished self-catering flats (‘group homes’⁸) for families or for groups of single asylum seekers. Financial assistance is conditional upon participation in training courses but not upon residence in a centre. Asylum seekers may make their own housing arrangements, particularly if they have close relatives or family already residing in Sweden, and many choose to do so. Comparative statistics on the compliance rates of these two groups of asylum seekers – those living in centres and those living independently – are not available.

The Swedish Immigration Board faces difficulties in finding municipalities willing to host new reception centres for asylum seekers. The situation is especially difficult in the south of Sweden. The trend of increasing numbers of asylum seekers, combined with a severe shortage of available accommodation has in some instances obliged the SIB to use other forms of shelter, such as tourist, hotel and conference facilities.⁹

C. Alternatives for families

Agencies in Sweden find that, in most cases, parents who are given a choice opt to split the family rather than have their child or children remain in detention. In cases where there is only a father and

⁵ During the year 2002, spontaneous arrivals of asylum seekers to Sweden totalled 33,016 persons, which represented an approx. 40% increase from the previous year (23,515 in 2001).

⁶ This follows the pattern of the Swedish criminal justice system, which is similarly open to non-custodial alternatives wherever possible. Swedish nationals who are offenders sentenced to prison for up to three months (for example, many drink driving offenders) may be placed under a home curfew, with electronic tagging. It ought to be noted that this is used only as a support device in an intensive programme of supervision. Completion rates of over 90% have been achieved. J. Shackman, *Criminal Treatment: The Imprisonment of Asylum Seekers*, The Prison Reform Trust, 2002.

⁷ Information received from UNHCR Stockholm.

⁸ Note that ‘group homes’ are commonly used in other areas of Swedish social policy, e.g., for the disabled, drug rehabilitation, juvenile justice and for children and mothers released from prison.

⁹ Information received from UNHCR Stockholm.

child, and for extreme reasons the father will not be released, the child will normally be released into a group home for unaccompanied children with regular access to the father.¹⁰

Families are usually released into family accommodation at the Carlslund Refugee Reception Centre, subject to daily reporting requirements to the Immigration Department.

D. Alternatives for promoting return?

The Swedish authorities have been developing a number of innovative approaches to handling the problems of failed asylum seekers who have received a final refusal. Through a series of counselling efforts that may involve the applicant's legal counsel and other relevant actors, the Swedish authorities are trying to help asylum seekers reach their own decision that it may be best to consent to leave Sweden. This approach, although resource intensive, is resulting in positive outcomes with a larger percentage of failed asylum seekers choosing to depart Sweden in such a manner. As a consequence, such persons are spending proportionately less time in detention.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

Between January and September 2003, 23,507 asylum claims were received by Sweden, and 22,314 cases processed, with 2,810 'annulled'.¹¹ This latter figure represents the upper limit on the number of asylum seekers who could have absconded during the course of the procedure, however, other causes such as voluntary return may be included in this figure.

No comparative statistical analysis has been undertaken regarding the different rates of appearance of those under supervised release and those who are released without reporting requirements or other conditions.

In October 2003, a report by Migrationsverket was published regarding children disappearing in Sweden. It found that, in 2002, as many as 103 children disappeared. Most were between fifteen and eighteen years of age and 70% went missing before receiving a final decision on their claim.

B. Cost effectiveness?

Asylum seekers who must wait for several months for a decision are granted permission to work and, if they then receive wages, they have to pay for food and accommodation in their reception centre. This not only makes their time in Sweden more productive but contributes towards making a cheaper-than-detention solution even more cost-effective for the State.

C. Export value?

Sweden is very often held up as 'best practice' thanks to the clarity of its legislation with regard to detention and alternatives to detention. A next step would be to study the implementation of this legislation in greater detail, to produce evidence of the alternative measures' effectiveness and on how adjudicators consider alternatives systematically before ordering detention. Meanwhile, with regard to its alternatives for protecting separated children, Sweden is as much in need of 'imported' ideas as many other European countries.

¹⁰ G. Mitchell, *The Swedish Model of Detention*, Asylum Seeker Project, Refugee Council of Australia.

¹¹ Migrationsverket, Swedish Migration Board, Statistical Section.

SWITZERLAND¹

I. DETENTION AND DOMESTIC LAW

The legal basis for ‘coercive measures’, including detention, in the Swiss legislation on asylum and immigration, is primarily the Federal Law on the Sojourn and Settlement of Aliens (‘LSSA’).² The relevant articles 13a to 13e were adopted in their current form by the Swiss Parliament and approved by a referendum in 1994; they entered into force in February 1995. Revisions of certain clauses entered into force in April 2004, as explained below.

The LSSA provides for two forms of detention. Both intend to ensure the execution of a deportation procedure, as foreseen in article 5(1)(f) of the European Convention on Human Rights and Fundamental Freedoms 1950 (‘ECHR’). Both also require the legal and factual possibility of implementing a deportation. One form of detention can be ordered before a decision on deportation is taken and can therefore take place during the asylum procedure (‘preparatory detention’). The other form is applicable after a deportation or expulsion order has been notified, for example, after the rejection of an application for asylum (‘deportation detention’). Both forms of detention must meet certain specific criteria, some of which are common to both,³ others specific to each form of detention.

A. Preparatory detention (art. 13a LSSA)

The grounds for a preparatory detention order, listed exhaustively, are if an alien (i) refuses to disclose his or her identity during the asylum or deportation procedure, submits several asylum applications under different identities or repeatedly ignores a summons without good reason, (ii) leaves the area to which he or she has been designated under article 13e or enters an area prohibited to him or her,⁴ (iii) enters Switzerland despite being barred from entry and cannot immediately be deported, (iv) submits an asylum application after the expulsion order has become final⁵ or after an unconditional expulsion from the country, or (e) has made grave threats towards or endangered life and limb of other persons and is therefore being prosecuted or has been convicted.

The maximum length of the preparatory detention is three months. As for deportation detention (see below), preparatory detention may come to an earlier end whenever the reason for detention no longer applies.⁶ The legality and appropriateness of the detention are to be examined after no more than 96 hours by a judicial authority in oral proceedings.

B. Deportation detention (art. 13b LSSA)

If a deportation or expulsion order has been notified at the first instance, the responsible Canton⁷ can, to ensure the execution of that order, (i) continue to detain the foreigner, should he or she already be in detention pursuant to article 13a, (ii) detain the foreigner if there are grounds to do so under article 13a(b), (c) or (e), or (iii) detain the foreigner if there are concrete indications that he or she intends to avoid deportation, in particular because his or her previous behaviour leads to the

¹ The information presented herein is valid up to 31 March 2004.

² *Loi fédérale sur le séjour et l'établissement des étrangers.*

³ See art. 13b(1)(b), LSSA that refers to art. 13a(a), (b) and (e), LSSA.

⁴ An ‘alternative’ measure – see below for further details.

⁵ By virtue of art. 10(1)(a) or (b), LSSA.

⁶ Article 13c(5)(a), LSSA.

⁷ Switzerland is divided into 26 Cantons.

conclusion that he or she defies orders given by the authorities.⁸ Under the latter, according to revisions that entered into force on 1 April, 2004, detention is permitted where the Federal Office has dismissed an application without entering into the substance of the claim because they deemed it to be ‘manifestly unfounded’.⁹ Article 13f of LSSA, another new revision, stipulates the duty of aliens to cooperate, notably by providing (i) correct and complete information of relevant facts regarding their sojourn, (ii) all necessary evidence without delay, and (iii) identity documentation.

It should be noted, therefore, that detention of an asylum seeker admitted to the full asylum procedure, prior to an initial decision on his or her claim, simply on grounds that he or she may be considered likely to abscond, is nowhere permitted under Swiss law. Once a deportation or expulsion order has been issued, however, following a first rejection of a claim but while an appeal may be pending, the individual can be detained on the grounds of a likelihood of resisting his or her removal from the territory, based on evidence of earlier actions and earlier levels of cooperation with the authorities. The Federal Council noted in March 2002 that this likelihood of an alien failing to remain available for removal was the most frequently invoked ground for deportation detention, indicated in approximately two-thirds of all cases where that form of detention was ordered.¹⁰

The duration of deportation detention must not exceed three months. Extensions may be permitted up to six months¹¹ to a total of nine months only if special obstacles should hinder execution of the deportation order (without making it impossible). Uninterrupted detention (from preparatory to deportation) is possible so long as the grounds are consecutively met.¹² The duration of detention is tested against the proportionality principle, which is part of Swiss constitutional and administrative law (see below).

Detained asylum seekers may submit a petition for release from detention to the local Canton’s judicial authority one month after the initial review of their detention. They may then continue to appeal the decision, if negative, every month if in ‘preparatory detention’ and every two months if in ‘deportation detention’.¹³

C. Legal aid

Free legal advice is generally ruled by cantonal legislation.¹⁴ The principle as such is contained in article 29(3) of the Swiss Constitution. According to this provision, ‘every person lacking the necessary means has the right to free legal assistance, unless the case appears to be without any chance of success. The person has moreover the right to free legal representation, to the extent that this is necessary to protect the person’s rights.’ Relevant factors include the complexity of the case as well as the individual situation of the applicant, for example his or her ability to understand and follow the procedure.¹⁵ With regard to administrative detention, the Federal Court held that when it

⁸ In particular because he or she does not abide by his or her duty to cooperate, pursuant to art. 13f of the LSSA and art. 8(1)(a) or (4), Asylum Act.

⁹ Pursuant to art. 32(2)(a) – (c) or art. 33, Asylum Act.

¹⁰ Message by the Federal Council on the Federal Aliens Law, of 8 March 2002, based on findings of the Federal Office for Refugees’ Survey on the Application of Coercive Measures.

¹¹ Art. 13b(2), LSSA.

¹² Art. 13b(1)(a), LSSA.

¹³ Art. 13c(2) to (4), LSSA.

¹⁴ For the conditions of free legal advice, see the article by *Andreas Zünd*, *Zwangsmassnahmen im Ausländerrecht: Verfahrensfragen und Rechtsschutz*, AJP/PJA 1995, p. 854 (856).

¹⁵ See, Federal Court judgment, BGE 120 Ia 46 E.3a.

comes to prolonging deportation detention beyond three months¹⁶ legal aid should not be denied.¹⁷ At the first examination of the legality of detention, legal aid must only be granted if the case is particularly complex (which is usually not deemed to be the case).¹⁸

D. Future amendments of the LSSA

Article 13b will be further amended,¹⁹ such that the responsible cantonal authority can, if a deportation or expulsion order has been notified at the first instance, and in order to ensure the execution of that order, detain the concerned person so long as (i) there are grounds to do so under article 72(1)(b), (c) or (g),²⁰ (ii) the responsible federal office has reached a decision of non-admissibility,²¹ (iii) there are concrete indications that the person concerned intends to avoid deportation, in particular because he or she has failed to fulfil his or her duties of cooperation,²² or (iv) his or her previous behaviour leads to the conclusion that he or she defies orders given by the authorities.

UNHCR has raised concerns about two of these new detention grounds. First, while, in general, non-admissibility decisions, as well as administrative detention, both pursue the aim of combating abuse of the asylum system, not all reasons for a non-admissibility decision may justify detention.²³ Second, the sanction of detention in the context of non-cooperation with the asylum procedure, is not limited to deliberate, gross violations²⁴ and may, therefore, be disproportionate in particular cases.²⁵

E. Detention at airports

Applicants for asylum arriving by plane at an airport may have no authorization to enter the country. According to article 23 of the Asylum Act, if entry is not authorized at the airport, the authorities may remove the asylum seeker as a precautionary measure if his or her further journey to a third country is admissible, reasonable and possible.²⁶

This decision must be delivered within fifteen days of filing an asylum application. Should proceedings take longer, the authorities will authorize entry to Swiss territory. In the event that the applicant is ordered to leave the country, he or she may not be held at the airport for longer than seven days. This does not include a 24-hour deadline in order to file an appeal for the restoration of

¹⁶ Art. 13b (2), LSSA.

¹⁷ See, Federal Court judgment, BGE 122 I 53 E.2c/cc.

¹⁸ See, Federal Court judgment, BGE 122 I 276 E.3b.

¹⁹ According to draft art. 73 (replacing art. 13b(1)(b)).

²⁰ Previously art. 13a.

²¹ Based on art. 32(2)(a) – (c) or art. 33, Asylum Act.

²² Under art. 85(1)(c) of LSSA, as well as art. 8(1)(a) or (4), Asylum Act.

²³ See the expert opinion of Prof. Dr. Walter Kälin commissioned by the UNHCR Liaison Service for Switzerland: *Rechtsfragen im Zusammenhang mit der geplanten Revision des Asylgesetzes* (13. September 2001) in: ASYL 2001, p. 3 (15). See also the position of SFH/OSAR (*Organisations Suisse d'Aide aux Réfugiés*): *Entwurf des Bundesgesetzes für Ausländerinnen und Ausländer (AuG), Stellungnahme der Schweizerischen Flüchtlingshilfe (SFH) zu asylrelevanten Punkten*, Bern 28. Mai 2002, p. 10.

²⁴ As is art. 32(2)(c), Asylum Act.

²⁵ *Ibid.* For a further comment on the legislative projects, see also Philip Grant, *Mesures de contrainte: quelle(s) évolution(s)? Réflexions sur les différents projets en cours d'élaboration*, SFH/OSAR, 7 septembre 2001, available at www.sfh-osar.ch, under 'asile' 'publications'.

²⁶ That is, if (a) another country is bound by a treaty to process his or her asylum application, (b) he or she had stayed there before and can return there and apply for protection, (c) he or she is in possession of a valid visa for a third country; or (d) near relatives or other persons with whom he or she has a close relationship live there.

suspensive effect, upon which the Asylum Appeals Commission has to decide in 48 hours.²⁷ After this maximum duration of 25 days of detention in the airport transit zone, the rejected asylum seeker may be transferred into deportation detention,²⁸ including the 96-hour deadline for a mandatory examination by a judicial authority.²⁹

According to the current version of a new draft Asylum Act, draft article 22(5) provides that an asylum seeker may be kept at the airport or, in exceptional circumstances, at another place for a maximum of 60 days. During this time, a first instance decision of non-admissibility may be taken, particularly in ‘manifestly unfounded’ cases. Should the procedure take longer, applicants will be referred to a Canton and the normal legal regime will apply. After a deportation or expulsion order has been notified, continued detention may take place in a deportation prison.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

In a survey conducted by the Federal Office for Refugees,³⁰ it was stated that preparatory detention was of little numerical importance and amounts to less than 2% of all administrative detention cases. Preparatory detention was ordered in a minimum of 32 and a maximum of 102³¹ cases yearly throughout Switzerland between 1995 and 2000. The average duration of detention was less than twenty days, well below the legal maximum duration of 3 months.³²

In the same Federal Office for Refugees survey, it was reported that deportation detention was ordered in a minimum of 5,500 cases and a maximum of 7,000 cases annually throughout Switzerland between 1995 and 2000. The average duration of detention was less than 23 days. An extension of deportation detention beyond 3 months was necessary in five to ten per cent of all cases. Thirty-eight persons were released after having been detained for the maximum possible duration of 9 months. Deportation was subsequently enforced in approximately 80% of cases held in deportation detention. Around 100 asylum applications were lodged from deportation detention, that is, one and a half to two per cent of all deportation cases.³³

Practice varies from one Canton to the other, which is linked to various objective but also political factors, such as the number of asylum seekers, location at a national border, rural or urban character, and the politics of the cantonal government.

III. ALTERNATIVES TO DETENTION

A. The proportionality principle and alternatives in cantonal legislation

Proportionality is a fundamental constitutional and administrative principle in Switzerland.³⁴ Each coercive measure, in particular detention, needs to be proportionate with regard to the aim

²⁷ Art. 112, Asylum Act.

²⁸ On the basis of art. 13b, LSSA.

²⁹ Art. 13c(2), LSSA.

³⁰ The Federal Office for Refugees conducted this survey with data from 1995 to 2000. A summary is published in the Swiss Official Journal, *Bundesblatt* or *Feuille Fédérale*.

³¹ Information from the cantons based only on rough estimates was not considered.

³² See, message by the Federal Council on the Federal Aliens Law of 8 March 2002 in: *Bundesblatt* (BBl) Nr. 20 2002, S. 3709 (3766), *Feuille Fédérale* (FF) No. 20 2002, p. 3469 (3524).

³³ *Ibid.*

³⁴ Arts. 5(2) and 36(3), Federal Constitution. In the specific context of detention of asylum seekers, during the procedure or after rejection, it also derives from article 5(1)(f), ECHR.

pursued.³⁵ In this respect, article 13b(3) of the LSSA requires necessary measures for the execution of the deportation or expulsion to be taken without delay. In consequence, detention may become unlawful if this principle is violated.³⁶ Proportionality is also a principle that must be considered when applying any alternative measures.

The Federal Court has not yet developed significant jurisprudence with regard to reporting obligations or release on bail as possible alternatives to detention.³⁷ One reason for this may well be that they are not explicitly mentioned in the LSSA but have their legal bases only in cantonal law.

B. Restrictions on freedom of movement ('containment' and 'exclusion')

Under article 13e of the LSSA, the responsible cantonal authority can impose a condition on a foreigner, without a stay or residence permit and who disturbs or endangers public security and order, in particular by involvement in illegal dealing in narcotics, not to leave an area designated to him or her (containment) or not to enter a certain area ('exclusion'). According to the intention of the legislators, the notion of public security and order should not be interpreted narrowly. Moreover, non-compliance with an order under article 13e may have the consequence of detention, in so far as both 'preparatory detention' and 'deportation detention' may be applied, *inter alia*, to asylum seekers who leave an assigned area or entered a restricted area.³⁸

Measures taken under article 13e still need to be in conformity with the proportionality principle, that is, restrictions to one's freedom of movement need to be necessary for the aim pursued.³⁹

The above-mentioned survey of the Federal Office for Refugees stated that containment and exclusion were ordered far less frequently than deportation detention. In 1994, such measures were ordered in 184 cases. The number of such orders reached its peak in 1998, with 1,348. These developments go back to specific police operations targeting well-known drug scenes, and often the restrictions referred to a town centre or particular public place, such as a park or railway station. The urban centres of Zurich, Basel and Bern are primarily affected. An asylum seeker will be given a colour-coded card that indicates which parts of the city he or she may not enter. In recent years, the number of containments and exclusions has become stable at a somewhat lower level (1,033 orders in 2000). The number of punishments meted out due to the violation of containments and exclusions ranged between nine (1995) and 79 (1997).⁴⁰ While suspicion of involvement in activities threatening public order (in practice, drug-dealing) should not be the sole basis, without evidence, of a major restriction on a foreigner's freedom of movement, and while such orders should always be applied to an individual and never to a group or on any discriminatory basis, it

³⁵ See, explicitly, Federal Court, BGE 119 Ib 198 E.c.

³⁶ Based on the old law, the Federal Court ruled that the authorities must be actively pursuing removal of a rejected asylum seeker for it to be lawful detention, see BGE 119 Ib 425 E.4. For a recent Swiss case where forced deportation was deemed impossible (due to lack of cooperation by the rejected asylum-seeker and the country of origin) and detention therefore illegal, see Federal Court decision of 30 January 2004, 2A.611/2003.

³⁷ See in this regard *Thomas Hugi Yar*, *Zwangsmassnahmen im Ausländerrecht*, in: Uebersax, Münch, Geiser, Arnold (ed.), *Ausländerrecht*, p. 300, referring to unpublished judgments of the Federal Court.

³⁸ Pursuant to arts. 13a (b) or 13b(1)(b), LSSA or, if deportation is not possible (art. 13c(5), LSSA) pursuant to art. 23a, LSSA.

³⁹ See, on the application of containment and exclusion, the Circular by the Federal Office for Refugees and the Federal Office for Aliens of 31 January 1995: *Lettre circulaire du 31 janvier 1995 sur l'application de la loi fédérale sur les mesures de contrainte en matière de droit des étrangers*. On the proportionality principle regarding containment and exclusion see, for instance, *Walter Kälin*, *Zwangsmassnahmen im Ausländerrecht: Materielles Recht*, *AJP/PJA* 1995, p. 835 (852) with further references.

⁴⁰ See, the message by the Federal Council on the Federal Aliens Law of 8 March 2002 in: *Bundesblatt (BBl) Nr. 20 2002*, S. 3709 (3767), *Feuille Fédérale (FF) No. 20 2002*, p. 3469 (3524).

cannot be excluded that, as some Swiss NGOs argue, such orders have at times been based solely upon suspicions.

Some Cantons in Switzerland call for a wider range of legal measures by which to control the freedoms of asylum seekers and failed asylum seekers. In response, they have been asked to demonstrate that the above measures are not working effectively, but have so far failed to do so.

C. Dispersal and open centres

All in-country applicants in Switzerland are dispersed for registration purposes to semi-open reception/registration centres where they must obtain a permit to leave the premises and where there is a night curfew.

After registration, they are dispersed to individual Cantons. Accommodation methods vary, but usually they are housed in collective, open, State-run accommodation centres. Financial support is conditional upon residence in such centres, but this means that those who can support themselves with the help of friends or family may live elsewhere. The only *de facto* restriction on freedom of movement in these accommodation centres is the requirement to be present to collect their assistance if they wish to keep their place, and the risk that if they travel away from the centre for too long they may miss their notification of a decision from the Federal authorities and may also consequently miss the deadline for appealing against a rejection (30 days or in some cases 24 hours).⁴¹

This national system, which incorporates the vast majority of asylum seekers, means that the authorities can easily locate most asylum seekers at the centres throughout the determination procedure. Such reception arrangements are obviously not a direct alternative to the grounds for detention as defined by Swiss law (the LSSA). However, from a wider policy perspective, the highly-organised system of collective centres and the provision of social assistance to all who require it are likely factors in reducing the incidence of absconding in the earlier stages of the asylum procedure and, by that means, they reduce the Swiss authorities' need to legislate for detention to achieve this policy objective. Furthermore, in individual cases, non-cooperative actions described under article 13a(a), or leaving the centre without a forwarding address, may be taken as evidence that the person is likely to resist deportation at a later stage.

As of 1 April 2004, rejected asylum seekers who have received a decision of non-admissibility are excluded from automatic social assistance. However, these persons' basic socio-economic rights remain protected by article 12 of the Federal Constitution which provides that 'persons in distress and incapable of looking after themselves have the right to be helped and assisted, and to receive the means that are indispensable for leading a life in human dignity.'⁴²

⁴¹ The legal basis of the four initial reception centres (*Empfangsstellen/ centres d'enregistrement*) is article 26 of the Asylum Act. All other accommodation centres have their legal basis in article 28 of the Asylum Act. According to this provision, 'the Federal Office or the cantonal authorities may allocate asylum seekers to a place to stay. They may allocate asylum seekers to accommodation, in particular, to collective housing.' With regard to the conditions in such centres, the Swiss Conference on Social Aid has elaborated guidelines that Cantons are free to adopt. The majority have integrated these guidelines into their legislation or apply them in practice.

⁴² The future article 73(1)(b)(2) shall allow detention in cases of a decision of non-admissibility, and those who are not detained will be assigned to a Canton but deprived of automatic social assistance. Cantons may prefer to detain such non-admissible cases, if they have the capacity to do so, solely to avoid the social and hence political problem of having destitute foreigners on their streets. Such persons, however, must be released from detention if in fact they cannot be deported.

Those whose claims are rejected under the full asylum procedure, if not detained, and if deportation proves impossible, are provided with social assistance if necessary, and housed in an open centre which will be somewhat better equipped than most such centres, given the possible need for long-term stay there.

Certain political figures in Switzerland have called for the introduction of open collective centres for refractory failed asylum seekers who refuse to cooperate with re-documentation and return or are otherwise considered to be abusing the system, but who cannot lawfully be detained beyond the maximum period. The proposed centres would provide only very basic assistance and their regimes would be designed to encourage the residents to self-deport or to comply with the requests of the deporting authorities. One such centre was constructed in the Canton of Tessin (Italian: Ticino), for example, but its use was abandoned for financial reasons and because questions were raised as to its legality. It was proposed to allow its residents to leave the premises during the day (e.g. 8a.m. – 10p.m.), returning before a night curfew. It was, however, also foreseen that broader restrictions on the movements of residents, limiting them to vicinity of the centre, would also be imposed. In the absence of a direct threat to public security or order, which would have permitted restrictions under article 13e of the LSSA, there is no legal basis for such restrictions. The Federal authorities have further emphasized that, on the basis of a recent survey, such centres and related restrictions are not required to achieve the stated aim of an efficient system of mandatory return.⁴³

With regard to promotion of mandatory return, it should be noted that Switzerland has a highly developed network of ‘Returnees Counselling Offices’ (‘RCOs’) where counselling in favour of mandatory return with consent is offered to failed asylum seekers, as an alternative to their detention and forcible deportation. These projects, however, are not ‘alternative to detentions’ within the scope of the present study, but rather an alternative to forcible deportation.

D. Alternatives proposed by *Organisation Suisse d’Aide aux Réfugiés* (‘OSAR’)⁴⁴

In response to calls by certain Cantons and right-wing parties for a wider use of detention and a wider range of legal restrictions on asylum seekers, the nongovernmental organization OSAR has proposed several ideas, to be understood strictly in the sense of being preferable alternatives to any expanded use of detention. They suggest that the same regime as used in the registration centres – whereby a permit must be sought to leave the centre – could be imposed on an individual basis within the long-term accommodation centres, but only where there was evidence that the person was particularly likely to abscond. They recommend that, in the case of families, the head of household (or heads of household in turn) could be subject to such a regime, but not their children or other dependents.

As a strict alternative to any expanded use of detention, OSAR also suggested to this study that the existing measure for restriction of foreigners’ movements⁴⁵ could be applied where there is evidence of a likelihood of absconding, rather than only in drug-related situations as at present. Finally, they propose that an asylum seeker could be asked to report to the police every day if he or she were assessed to be at high risk of absconding. At present, local police do sometimes tell a failed asylum seeker to report to them, but there is no basis for this practice in Swiss Federal law.

⁴³ Message by the Federal Council on the Federal Aliens Law of 8 March 2002, Survey on the application of coercive measures (Conclusions).

⁴⁴ This information is based on an interview with staff of OSAR, October 2003-March 2004; it does not reflect the official views of the organisation.

⁴⁵ Art. 13e, LSSA.

IV. CONCLUSIONS

Articles 13*a* and 13*b* of the LSSA precisely and exhaustively define the permissible grounds for detention (unlike the general clause, for instance, in paragraph 57 of the German Aliens Law).⁴⁶ Moreover, with article 13*e* of the LSSA, there exists a useful alternative to detention which is being applied with some frequency, although critics would say sometimes without sufficient evidence in every individual case.

Swiss legislation expressly endorses the proportionality principle. The Federal law could benefit from explicitly incorporating other alternatives to detention, apart from containment and exclusion, as already included in certain pieces of cantonal legislation such as, reporting requirements or release on bail. These alternatives to detention could then be considered in each case to ensure full respect for the proportionality principle, and the Federal Court would certainly have an important role to play in determining harmonized practice among the Cantons.

Any establishment of semi-open centres with curfews, as a substitute deterrent in place of indefinite detention, and intended to compel failed asylum seekers into cooperation with the authorities, would require extremely careful assessment to determine whether or not they were *de facto* places of detention and, even if not, whether they were in compliance with other basic human rights obligations.⁴⁷ There is currently no legal basis for such restrictions on freedom of movement, short of detention, unless there is an additional element of a threat to public security or order. Furthermore, a recent national survey by the Federal Government concluded that such centres are unnecessary to achieve the efficient removal of those who can, in fact, be removed.

⁴⁶ Point made by *Walter Kälin*, *Zwangsmassnahmen im Ausländerrecht: Materielles Recht*, AJP/PJA 1995, p. 835 (843).

⁴⁷ The question of whether such semi-open centres would conform to the analogous standards (relating to respect for dignity, privacy, family life, etc.) applicable to non-custodial alternatives in the criminal field (that is, The Tokyo Rules) may be indicative. See section II.F of the main Study on Alternatives to Detention regarding “Analogous standards for non-custodial measures in the criminal justice field”.

THAILAND¹

I. DETENTION AND DOMESTIC LAW

According to the Thai Immigration Act 1979, as amended in 1992, all illegal aliens, including asylum seekers and refugees who are not distinguished from other aliens by the law, may be detained on criminal charges. They can face a sentence of two months to two years for an offence such as the falsification of documents. In practice, illegal migrants are often detained until they are deported or until they self-deport. There is no independent and/or automatic or periodic review of the administrative detention decision and no appeal rights.

Any alien without proper travel documents or a visa is subject to detention, and detention of recognized refugees with UNHCR certificates or asylum seekers with UNHCR protection/registration letters² in hand is also not uncommon. As of 31 October 2003, for example, fifteen recognized refugees were reported to be held in the Immigration Detention Centre ('IDC') in Bangkok, the largest site of immigration detention in Thailand. Most were not charged with any criminal offence other than violations of the Immigration Act.³

UNHCR protection/registration letters issued to asylum seekers have never been enough to protect the holder from arrest. Since September 2001, asylum seekers are much more likely to be arrested due to an increased number of road checks and closer monitoring of foreign populations/visitors. As of 31 October 2003, there were 23 asylum seekers, a further 37 asylum seekers who had received a first rejection, and 12 failed asylum seekers in the IDC.⁴

Asylum seekers are also detained at Bangkok International Airport. Airline companies are responsible under Thai law (and under the Chicago Convention) for paying the costs of detaining any illegal alien whom they bring in (and are charged close to US\$ 25 per day for food and accommodation for this detention). The airlines therefore commonly attempt to return the person and sometimes 'orbit' situations can develop as a result. Much depends in practice on which airline company is involved. If the person cannot be returned, however, and if he or she asks to seek asylum, the airline should refer him or her (by fax) to the notice of UNHCR. During the time that UNHCR expeditiously processes his or her claim, with the aim of completion within one week, he or she may either continue to be detained in a room of the airport, or he or she may be transferred to the 'Special Detention Centre' ('SDC') at Bang Kaen run by the Special Branch Police (rather than the Immigration Bureau, like the IDC). Transfer to this Special Detention Centre means that he or she is not technically 'admitted' to Thai territory, though this has little practical impact upon his or her situation. The most significant effect of this legal distinction is that the detainee may not apply for bail.

A. Conditions of release: bail or bond, reporting and supervision requirements

Bail rights are a very limited remedy to immigration detention in Thailand because of the prohibitively large amounts of money demanded (minimum bail money is 50,000 baht, which is equivalent to approximately US\$1,250). In some cases, smugglers bail out their clients, but many detainees including refugees and asylum seekers are unable to make bail applications because they

¹ The information presented herein is valid up to 31 March 2004.

² Thailand is not a party to the 1951 Convention and does not have national asylum procedures. UNHCR conducts individual status determinations.

³ Statistics derived from information supplied by UNHCR Bangkok in December 2003.

⁴ Statistics derived from information supplied by UNHCR Bangkok in December 2003.

do not have access to the sums required. There is also a lot of red tape, with around seven or eight officers in the IDC and at higher levels of the Immigration Bureau having to sign the approval for each release.

At the original prosecution, where bail may be set, the detainee is likely to have no legal representation but the court generally provides interpreters. Nongovernmental organisations try to assist in filling the gap, but they are not always able to gain access.⁵

Bail is not a possibility for those detained at the Special Detention Centre or for asylum seekers prior to recognition. For those recognized refugees denied bail, the only other means of being released from detention are either self-deportation to another country or resettlement overseas.

Thailand's current immigration bail provisions have recently been threatened with cancellation, in order to demonstrate the Thai government's hard-line approach to illegal migration in the context of the war against terrorism and transnational crime. Since the APEC Summit in Thailand in October 2003, applications for bail, including UNHCR-supported applications (see below), have been more often refused. The Thai government claims that some of the refugees requesting bail are likely to participate in 'problematic' political activities if they were released (e.g., Falun Gong activists).

Article 17 of the Immigration Act gives the Ministry of the Interior, by the consent of the Cabinet, power to permit the stay of any individual 'under special circumstances'. The Thai Cabinet's approval in February 2004 authorised the right to stay of 1,834 individually recognised Myanmar refugees in border camps. This means that any detainee in the IDC or the SDC, identified to be among the 1,834, would be eligible for release and transfer to the border camps (see below).

B. Encampment Policy

Thailand allows, and increasingly applies pressure to, members of some Burmese ethnic minorities (e.g., the Karen and Karenni) to reside in large refugee camps on its borders. The Shan refugees in Chiang Mai are exempted from this policy.⁶

Since the late 1990s the government has ordered Burmese refugees in Bangkok to move to these camps. The Thai authorities also began restricting the freedom of movement of residents in and out of the camps, as well as restricting opportunities to work outside the camps despite their need to complement their basic rations and other necessities. Following the siege of the Burmese Embassy in October 1999 and the hostage taking in Rajburi Hospital in January 2000, the Thai government began to regard the Bangkok Burmese as a national security threat and the Maneeloy Camp, west of Bangkok, was closed in 2001. Some 400 residents who could not be resettled overseas in time were transferred to a Karen border camp named Tham Hin. Camp commanders in Tak Province permitted some freedom of movement to camp residents during 2001, but this has now been restricted.

As of late 2003, the Burmese camps would seem to be *de facto* open-air detention based on the 'substantial curtailment of the movements of those inside.'⁷ For this reason, this discussion falls

⁵ Interview with Jesuit Refugee Service (JRS) Bangkok, October 2003-March 2004.

⁶ Legally, the Shan living in their own unofficial camps in the north are regarded as merely illegal migrants. 'World Refugee Survey 2002', US Committee for Refugees, p.137. Ironically, in view of the increasing closure of the Karen and Karenni camps, the Shan may be relatively better off, in terms of freedom of movement, though without State assistance.

⁷ See, definition of detention in UNHCR Guidelines on Detention.

under 'Detention and Domestic Law', rather than 'Alternatives to Detention'. It is more difficult than before for camp residents to travel to Bangkok for work or other private reasons; they may only leave the camp parameters with permission and for particular purposes, such as urgent or sophisticated health care that is unavailable inside the camp. Those who break camp rules and leave without the permission of the Camp Commander are at risk of arrest and even summary deportation, requiring frequent UNHCR intervention with the authorities on such cases.

Today, if a Burmese asylum seeker tries to apply for asylum individually in Bangkok, the case will be registered, pending the screening mechanism to be agreed by the Thai government. Negotiations regarding this policy are ongoing.⁸ Following Cabinet approval in February 2004, the Thai government is expected to begin transferring 1,834 individually recognised Myanmar refugees to the camps during the first half of 2004. After this policy is implemented, any Burmese refugee trying to remain in the city will be at even greater risk of arrest and deportation. UNHCR policy has been to support such transfers, unless the applicant can show a fear of persecution in the camps, since there is at least greater freedom of movement and better material conditions in the border camps than in an overcrowded cell at the IDC. The encampment policy is also preferable to 'fast track deportation' of Burmese refugees after detention at the IDC.⁹

The Thai government's response to criticisms of the closed nature of the camps is that it is a national security necessity and a precondition for continuing to host very large numbers of Burmese refugees on its territory.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

The IDC in Bangkok has a high turnover of detainees but there are also cases of prolonged detention, mainly involving unclear nationality and stateless persons. Those detained are reported to be mostly African or Middle Eastern, but also include Vietnamese, Cambodians and Indonesians. In 2001, there were an estimated 200,000 persons, migrants, overstayers, asylum seekers, and refugees, arrested in Thailand for illegal presence.

The IDC is visited by an on-site UNHCR Field Officer responsible for detention issues and by the Jesuit Refugee Service. Asylum seekers' refugee status determination may be conducted in detention, and in 2001 there were a total of 61 such cases. In a snapshot statistic on 31 October 2003, as stated above, there were a total of 59 persons whose claims were still under determination being detained in the IDC. As of the same date, there were also reported to be two recognized refugees, four asylum seekers and one rejected asylum seeker detained at the Bangkok airport; and twenty refugees and some thirteen asylum seekers (including those to have already received a first rejection), mostly Burmese nationals, held at the Special Detention Centre.¹⁰ In addition, there were

⁸ Previously, UNHCR was able to conduct individual refugee status determinations for Burmese applicants in Thai cities, but this was halted on 1 January, 2004, with the understanding that the existing urban Burmese caseload (approx. 4,000 persons) shall be screened for resettlement to the United States.

⁹ There are two ways in which Burmese refugees may be deported from Thailand: either they are left across the border in Burma (large numbers every month) or they are subject to 'official or fast track deportation' directly into the hands of the Burmese authorities. Some 400 persons per month are subject to the latter. For an unregistered refugee (considered an illegal alien) to avoid 'official deportation' and claim asylum, they must self-identify themselves to UNHCR at the IDC, in front of Thai police and fellow detainees, which can carry risks of its own and ultimately may lead only to transfer to the SDC.

¹⁰ By way of comparison, at the end of 2001, UNHCR recorded that 38 recognized refugees were in detention (ten in the IDC, two at the airport and eight in the SDC).

a number of individuals held in Thai prisons, the majority on remand or serving sentences for non-immigration-related crimes, but listed as persons of concern to UNHCR.¹¹

III. ALTERNATIVES TO DETENTION

A. Interventions by UNHCR/Assistance with bail applications

Since 2001, UNHCR Bangkok has been trying to prevent recognized refugees from being arrested in the first place by writing to request visa renewals on their behalf.

The Office has also established a dedicated ‘hotline’ that registered asylum seekers and refugees can call if they are arrested. If UNHCR is able to intervene within 24 hours of an arrest then they are usually successful in negotiating release, but after 48 hours of detention the person has been prosecuted and become a ‘permanent detainee’.¹²

After this point, since early 2002, UNHCR has been permitted to assist recognized refugees with their bail applications. During 2002-2003, UNHCR succeeded in securing the release on bail of some recognized refugees detained at the IDC, so long as they were not members of certain political groups. This is not a generalized policy but is considered on a case-by-case basis and on the understanding that all refugees will be submitted for resettlement to third countries. So far none of these persons released on bail have absconded while awaiting resettlement. Those released are informally considered to be under UNHCR’s supervision or ‘custody’, and they must report at least once a month (every 30 days) so as to have their bail extended. UNHCR staff may escort them to these appointments and must report to the Thai authorities with information on the individuals’ whereabouts and current means of support.¹³ In 2002, seven refugees were released on bail to UNHCR and six have since been resettled. In 2003, seven were again released and four have already been resettled. Release on bail can in principle only be extended for a maximum of eight months in total, giving some urgency to the resettlement process.¹⁴ In December 2003, the immigration authorities refused to extend the bail of one Afghan refugee (who had been on bail for 18 months) on the ground that he had failed to be resettled.

For an asylum seeker, if release cannot be secured, his or her claim will be processed swiftly by UNHCR so that he or she, if recognized, may become eligible for release on bail or for resettlement.

B. JRS ‘Release Programme’

The Jesuit Refugee Service ‘Release Programme’ is a voluntary repatriation programme to facilitate the return of failed asylum seekers, migrants and refugees who decide that return to their home country is less of a risk to their health and well-being than indefinite detention in the IDC. Recently, for example, many Iraqi refugees decided to head home via Amman rather than remain in Thai detention centres or jails. A number of Liberians also opted to self-deport.

¹¹ Statistics derived from information supplied by UNHCR Bangkok in December 2003. Prisons for which UNHCR has statistics include: Bangkwang Central Prison, Nonthaburi Province; Thanyaburi Central Prison, Pratumthanee Province; Cholburi Central Prison; Rachaburi Central Prison; Phitsanuloke Central Prison; Klong Pai Central Prison; Central Women’s Correctional Institution; Thonburi Remand Prison, Bangkok; Bangkok Remand Prison; and the Bangkok Central Prison.

¹² Interview with JRS Bangkok and with UNHCR Bangkok, October 2003-March 2004.

¹³ Those released receive financial assistance (a basic monthly stipend) from UNHCR, delivered via UNHCR’s implementing partner, The Bangkok Refugee Centre (‘BRC’).

¹⁴ Statistics and information received from UNHCR Bangkok in December 2003.

The level of government co-operation is very high because the programme aids the Thai immigration authorities, that is, it saves them the costs of detention and deportation (JRS pays the return travel costs) and frees detention space for newer arrivals.

C. Release of children and other vulnerable persons

JRS also runs a 'Medical Programme' where there is a slim possibility of release on medical grounds, but only in the most severe cases. Some HIV cases are released to the custody of a hospital, though more commonly they are just placed together in a crowded room within the IDC, alongside other detainees with mental illnesses or other psychological trauma, tuberculosis, and any 'troublemakers'.

Children and women are routinely detained. NGOs have an office at the IDC, which provides some mitigation of detention conditions, but cannot secure their release. In 2001, however, six children detained with their parents were successfully released to Bann Kred Trakarn, a safe house run by the Public Welfare Department whilst their parents remained in detention.¹⁵ The National Catholic Commission for Migration runs a shelter for children, families and other illegal aliens but this 'alternative' is only partially tolerated by the authorities. In mid-August 2003, an urban sweep for illegal migrants by the Thai police included a raid on this shelter one evening. Its residents were detained and then, after some negotiation, re-released.

In 2002, Human Rights Watch called for the protection of former child soldiers (deserters) on Thai territory, who they found to be a particularly vulnerable group among the undocumented Burmese population in Thailand. The NGO called for their release from detention and detention-like conditions, and for UNICEF to establish a programme for both their rehabilitation and their family reunification.¹⁶

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

Deterrence and national security concerns are the primary motives behind the Thai detention policy, with the government wanting to visibly crackdown on illegal migrants and potential terrorist/smuggling groups. Nonetheless, it is notable that asylum applicants in Thailand recently have a higher rate of compliance with the procedure than in other Asian transit countries. Of 1,854 claims that were either pending or received by UNHCR as at the end of March 2003, 256 were listed as 'otherwise closed' by the same date. That is, 14% as opposed to the 25% listed as closed (for a variety of reasons, including absconding) in Malaysia during the same period.¹⁷ On the other hand, the picture of statistics averaged over January 1999-October 2003, shows that approximately 24% of applicants in Thailand were 'no shows' – a figure which reflects Thailand's continuing role as a transit country during these years.

¹⁵ Information received from UNHCR Bangkok.

¹⁶ *'My Gun Was as Tall as Me,'* Human Rights Watch report, 2003.

¹⁷ Trends in Refugee Status Determination, UNHCR, 4 July 2003. Note that this high rate of compliance occurred despite the fact that twice as many claims were rejected as recognized by UNHCR Bangkok during the first three months of 2003. The larger number of applicants processed whilst in detention in Thailand does not explain this difference between Thailand and Malaysia of more than 10%.

B. Cost effectiveness?

Basic needs are not met in Thai detention centres and conditions are inhumane. For example, 100 persons are typically held in a single cell and given insufficient food and fresh water. It is, therefore, difficult to talk in terms of per capita costs, when these can be reduced simply by means of increased neglect. As the Thai State provides no assistance whatsoever to asylum seekers or refugees living without legal status outside of detention, it is incontestable that release, even release with reporting requirements and supervision, would be a cheaper option for the State budget than detention. The Thai government weighs this, however, against perceived political costs.

C. Export value?

Due to the deplorable conditions in most Thai prisons and centres where recognized refugees are held, UNHCR has played a more active role in helping to secure their release than it has in most countries. This arrangement should be commended in the absence of wider reforms by the Thai government to protect asylum seekers or recognized refugees from arrest and prosecution. It is not, unfortunately, an arrangement that the UN agency (or its resettlement partners) can afford to export broadly to other countries, but it should be noted as a possible model of action in similarly difficult situations.

UGANDA¹

I. OVERVIEW OF LAW AND PRACTICE

A. Designated settlements

Sudanese *prima facie* refugees in Uganda are subject to restrictions on their freedom of residence and movement under the Control of Aliens Act 1960 ('CARA') by the fact that they must by law reside in designated 'settlements' and in which they are provided with residential and agricultural land. If a refugee is found outside a designated refugee settlement without a permit from the settlement/camp commandant, he or she risks imprisonment for up to three months. It is also an offence to harbour a refugee outside any of the settlements. These latter provisions of CARA, however, are rarely enforced.

The official position of the Ugandan government is that the settlements/camps are 'closed', but in most districts in which such settlements are located, refugees may move freely within a wide area and authorisation to travel beyond these areas is normally granted by the settlement/camp commandants or Refugee Desk Officers.

Most refugees settled on agricultural land have taken up farming and are engaged in food production. Many are involved in trading or other income generating activities. Important numbers are employed by aid agencies operating in the settlements/camps. While the Control of Aliens Act does not permit refugees to work, they are in practice engaged in gainful employment both in the formal and informal sectors.

B. Permitted/tolerated residence in urban areas

The Government of Uganda has permitted many refugees to reside in urban areas, particularly Kampala.² For example, refugees who require medical attention not available in the settlements, refugees attending educational institutions, those with security/protection problems in the settlements, or those who are able to attain self-sufficiency in the cities, may receive such authorisation.³ With regard to the latter group, the refugee in question simply declares that he or she will attain self-sufficiency in order to be permitted to reside in an urban area.⁴

C. Issuance of identity cards to urban refugees

Identity cards and documents, without expiry date, are issued by the Ugandan government to recognised refugees who are permitted to reside outside the designated refugee settlement areas. During 2002, these documents were issued to each head of household and to all those over the age of eighteen years. UNHCR no longer issues identification letters since the Government of Uganda began issuing identification documents. It has been observed that law enforcement and other officials respect the government-issued documents.

¹ The information presented herein is valid up to 31 March 2004.

² There are an estimated 5,000 urban refugees in Uganda. This figure is only an estimate, as urban refugees were not included in the last, 2001 re-registration exercise.

³ These exemptions are not provided by law but are based on an administrative policy of the Directorate of Refugees, within the Office of the Prime Minister.

⁴ Information received from UNHCR Kampala.

D. Asylum seekers in Kampala

Asylum seekers in Kampala must also be registered at the Old Kampala Police Station. Most are registered within the first month of their arrival, on the basis of an interview, and in general the Ugandan police do recognize and respect this registration and thereafter refrain from detaining them as illegal aliens.

II. CONCLUSIONS

The use of settlements has maintained public order in the face of mass influx, without resorting to closed camps amounting to *de facto* detention. While urban refugees in Kampala face a host of other protection problems, the risk of arbitrary detention (and the related vulnerability to extortion and forced return) is avoided by an effective registration and identification system.

A. Export value?

The Ugandan example is very much a compromise ‘alternative’ that has export value only to States where the prolonged reception of a mass influx of refugees currently involves closed camps analogous to detention, or where urban refugees are unregistered and at risk of detention for illegal presence.

UNITED KINGDOM¹

I. DETENTION AND DOMESTIC LAW AND PRACTICE

A. Grounds for detention

Detention of asylum seekers in the UK is not mandatory, however, an immigration officer, usually at a port of entry, may order the detention of an asylum seeker in accordance with internal Home Office guidelines (see below). Detention is further used to ensure the removal of failed asylum seekers who have not been granted status or any other 'leave to remain'.

The Immigration Service Instructions on Detention² include a checklist for immigration officers regarding when detention may be necessary. Questions relate to the asylum seeker's previous compliance with immigration law, record of absconding, illegal entry or the use of false documentation, expectations regarding the outcome of the claim, the likelihood and ease of removal, family ties in the UK, compassionate circumstances and whether there are 'factors which afford an incentive for him [or her] to keep in touch with the port'. In relation to the latter, it is not explained what, apart from a belief in one's own need for protection, such factors might be. Immigration officers most commonly tick 'liable to abscond' as the ground for detention. In practice, the decision to detain will often rest arbitrarily upon whether the detention coordinating office tells the immigration officer at the port that there is detention space currently available. Independent researchers interviewed UK immigration officers and found inconsistent interpretation of the Service Instructions, such that some viewed illegal entry as an unavoidable norm and thus not evidence of an asylum seeker's likely future non-compliance with immigration law, whereas others found illegal entry directly equivalent to a high risk of absconding.³

The UK Immigration Service uses 'special exercise' detention when they decide they need to detain an asylum seeker who enters with his or her own passport and valid documentation. Research has revealed evidence of instructions to detain particular nationalities (for example, all Chinese asylum seekers at a certain time) in order to deter rising arrivals for a specific group.⁴

The Service Instructions state that detention should only be used when non-custodial alternatives are unavailable or have proven insufficient. Similarly, the UK's Operational Enforcement Manual⁵ states that alternatives are to be used 'wherever possible' so that detention should be only a measure of 'last resort'. The UN Human Rights Committee has observed that, in practice, alternatives to detention are applied only when detention space is unavailable, and that detention is frequently used for mere administrative convenience.⁶

Those whose claims are considered 'manifestly unfounded' are detained at Oakington Detention Centre near Cambridge, where they undergo a fast track determination procedure. If the case cannot be decided within seven days, the asylum seeker is supposed to be transferred or released, though sometimes this is not strictly observed. Nongovernmental critics have accused the immigration

¹ The information presented herein is valid up to 31 March 2004.

² IDI January 1997, Ch 31, Section 1.

³ L. Weber & L. Gelsthorpe, *Deciding to Detain: How decisions to detain asylum seekers are made at ports of entry*, Cambridge Institute of Criminology, 2000.

⁴ Weber and Gelsthorpe, *ibid.*, 2000, p.21.

⁵ As disclosed July 2001, Chapter 38.1. This Manual is apparently being rewritten now, but this edition remains valid in 2003 as far as legal representatives in the UK are aware.

⁶ Concluding Observations of the HR Committee: United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/CO/73/UK and CCPR/CO/73/UKOT (Dec 6, 2001).

service of sending regular asylum cases to Oakington.⁷ In September 2001, the High Court found that the detention of three Iraqi Kurds at Oakington Detention Centre violated article 5(1) of the ECHR as they were detained solely for administrative convenience. This decision was overturned in October 2001 by the Court of Appeals.⁸ The case then went to the House of Lords,⁹ which held that detention at the Oakington Reception Centre was not *per se* unlawful as it fell within the article 5(1)(f) ECHR exception: ‘detention of a person to prevent his [or her] effecting an unauthorised entry into the country’. It was significant, however, that the House of Lords applied a test of proportionality to measure the necessity of the detention.

There is no automatic independent review of a decision to detain, and there is no maximum period for detention under Immigration Act powers.

In November 2001, the Anti-Terrorism, Crime and Security Act was passed, along with a notification of derogation from article 5 of the ECHR. As of March 2004, the House of Lords was reviewing the legality of this Act and its related derogation. Under its provisions, the government’s Special Immigration Appeals Commission (‘SIAC’) holds hearings to determine whether a particular detention order on national security grounds is ‘reasonable’. There is, in other words, a distinct bail regime applied to cases involving an alleged threat to national security. As of August 2003, fifteen people had been detained under these powers, most of whom were asylum seekers held in high security prisons.¹⁰

Asylum seekers have also been criminally prosecuted for their mode of entry or transit. For example, Mr and Mrs B (Kosovars) were asylum seekers in transit to Canada via the UK in 1999 who were prosecuted in the UK for ‘obtaining services by deception’ because they were travelling without valid documents. However, the High Court ruled that such arrests were a violation of article 31 of the 1951 Convention, and Mr and Mrs B were awarded compensation of £130,600 for wrongful arrest. Some 500-1000 asylum seekers were prosecuted between 1994-1999 in a similar fashion and are now presumably eligible for compensation.¹¹

In late November 2003, the British government announced its intention to make destruction of travel documents en route to the UK, failure to produce travel documents without good reason, or refusal to cooperate with the authorities issuing replacement documents, criminal offences punishable by a two year prison sentence.¹² The proposed Asylum and Immigration (Treatment of Claimants) Act 2004 would amend the Immigration Act 1971 not only in this regard but it would further allow the Secretary of State to re-detain an alien to be deported, even if previously bailed by a court.

B. Means and conditions of release

There are five methods of obtaining release from immigration detention in the UK:

⁷ *Immigration Detention in the UK*, Bail for Immigration Detainees (‘BID’), September 2002.

⁸ *Saadi, Maged, Osman and Mohammed v Sec of State for the Home Dept*. EWCA Civ. 1512 (Q.B. Case no. C2001/2021), 19 October 2001.

⁹ *R (Saadi) v Secretary of State for the Home Department* (2002) UKHL 41

¹⁰ In a high profile case in April 2004, SIAC released one such Algerian detainee ‘G’ for mental health reasons, though imposing stringent reporting and home curfew conditions. The UK government, in response, announced plans to amend and curtail SIAC’s powers to examine bail applications.

¹¹ *The Guardian* (UK), 2 October, 2003.

¹² First reported in *The Telegraph* (UK), 28 October, 2003 and subsequently announced in The Queen’s Speech, November 2003.

- (1) 'Temporary Admission'¹³ - release without bail but dependent on having a place of residence, with a prohibition on employment and a requirement to re-appear on a specified date. Such relatively unconditional release is entirely discretionary, and decisions are based on paperwork alone. An immigration officer or the Secretary of State may, as a condition of Temporary Admission, impose reporting restrictions.
- (2) Bail directly from the UK Immigration Service (otherwise known as 'Chief Immigration Officer bail' or 'CIO bail'). There is guidance that 'each case should be assessed on its individual merits but a figure of between £2,000 and £5,000 per surety will normally be appropriate'.¹⁴ Sureties should not be requested at all unless necessary to ensure compliance.¹⁵
- (3) Bail from an adjudicator or the Immigration Appeals Tribunal¹⁶
- (4) *Habeas corpus*
- (5) Judicial review

The last two methods provide the most rigorous oversight of detention but these are rarely used due to the time and costs entailed and because the detention must be proven unlawful. A bail application before the Immigration Appellate Authority ('IAA') is therefore the only independent oversight that is readily accessible to most detained asylum seekers in the UK. It does not require a challenge to the lawfulness of the detention.

A bail hearing may be requested after six days, and repeatedly requested thereafter, but asylum seekers do not have a statutory right to such a hearing. Bail is granted subject to other conditions, usually residence and reporting requirements. Procedural rules and bail application forms both require names and addresses of two potential sureties, even though there is no statutory requirement for this.¹⁷ An application made to the Immigration Appellate Authority or Tribunal (independent bodies)¹⁸ has a much higher chance of resulting in release, and is likely to require smaller sureties, than an application for Chief Immigration Officer bail. As a CIO bail decision is essentially a decision by the detaining authority, however, where it is in favour of release it will be more quickly implemented without challenge.

For those detainees who pass a means test, legal aid is available. However, legal representatives funded by the Legal Services Commissions are not required to present bail applications for their asylum clients. In fact, legal representatives are discouraged by an overly strict merits test, since they often – rightly or wrongly – view their chances of success as being 'less than 50%' (disqualifying the case for legal aid) unless the asylum seeker has two good sureties willing to offer substantial monies.¹⁹ In fact, British solicitors may be subject to a professional disciplinary mechanism if they submit bail applications without sureties, or which do not show a change of circumstances since the previous application (other than extended length of the detention). The result of all these constraints on legal representatives is that the majority of detainees without access to wealthy sureties are denied judicial scrutiny of their detention.²⁰

¹³ Immigration Act 1971 Sch 2 paras 21 & 22; Nationality Immigration and Asylum Act s.62(3) & (4). Not to be confused with the temporary protection statuses in other host countries.

¹⁴ Operational Enforcement Manual, 39.5.1.

¹⁵ Guidance Notes for Adjudicators, May 2003, para 2.2.2.

¹⁶ A March 2002 draft Guidance Note for Adjudicators emphasised the requirement for sureties offering substantial amounts of recognisance and, at paragraph 2.4.2, specifically warned adjudicators not to accept nominal amounts.

¹⁷ *BID Submission to the UNWGAD: Immigration Detention in the United Kingdom*, September 2002, p.29.

¹⁸ Asylum seekers detained under anti-terrorist powers are eligible to apply for release on bail to the Special Immigration Appeals Commission ('SIAC') rather than the IAT.

¹⁹ *BID Submission to the UNWGAD: Immigration Detention in the United Kingdom*, September 2002, p.30.

²⁰ *BID Submission to the UNWGAD: Immigration Detention in the United Kingdom*, September 2002 p.31.

There are also problems reported regarding detainees' access to information about their bail rights, particularly where they are held in prisons, and the vast majority of immigration detainees remain unrepresented or poorly represented. Lack of interpretation services mean that non-English speakers are severely disadvantaged in terms of understanding their right to apply for bail and the reasons for their detention.²¹

In a bail hearing, despite the presumption of liberty being a fundamental feature of British common law, the burden of proof is in practice placed on the asylum seeker. He or she must show that he or she will not abscond if released, rather than the UK government having to show why there is a high likelihood that he or she will do so. Immigration service bail summaries have been criticized by the High Court as inadequate and lacking in balance.²² One group of legal advocates, Bail for Immigration Detainees ('BID' – see below for a description of their work), reports that in their experience it is extremely rare for the Immigration Service to support allegations regarding the likelihood of an individual absconding with documentary evidence, and that frequently the grounds for detention are only disclosed on the day before the hearing, leaving inadequate time to prepare a rebuttal of the allegations. BID furthermore reports that very few bail summaries presented at hearings include consideration as to the possible sufficiency of alternatives to detention.²³ Adjudicators are not in fact required to provide written reasons for a refusal to grant bail, let alone reasons referring to the insufficiency of alternatives, so such refusals are almost impossible to challenge.

Provisions of the Immigration and Asylum Act 1999 introduced automatic bail hearings after seven and later 35 days, but the relevant provisions were never brought into force and were then repealed by the Nationality, Immigration and Asylum Act 2002. In relation to new proposals to expand the UK's detention capacity (see below), the government has argued that the 1999 provisions would impose too great an administrative burden.²⁴ This failure to provide automatic bail hearings accepts, in effect, an untargeted, and some would say arbitrary, use of the UK's detention space.

Recently, the amount of legal aid provided to asylum seekers has been cut from a maximum 100 hours per week to just five, with a further four hours to prepare an appeal. If the asylum seeker is in detention, they may receive up to fourteen hours of legal aid (that is, an additional nine hours in comparison to applicants who are not detained), but of course they have many additional difficulties in accessing legal representation of any sort. Many UK solicitors' firms are already being forced to pull out of legal aid work in the immigration field, as shown by the fact that the Detention Advice Service ('DAS') rota of solicitors used to contain 21 firms but now contains around seven. Increasingly, DAS is reliant on *pro bono* lawyers to assist the detainees it identifies as requiring urgent assistance with bail and/or asylum applications.²⁵

It should be noted that the Chief Immigration Officer is more likely than the Adjudicator or IAT to impose other alternative restrictions, such as reporting requirements, as a condition of granting bail. The most stringent cases of which DAS is aware are daily reporting to the police as well as weekly reporting to a new 'reporting centre' (see below).²⁶ If an asylum seeker misses even one 'sign on' or

²¹ J. Shackman, *Criminal Treatment: The Imprisonment of Asylum Seekers*, The Prison Reform Trust, 2002.

²² Ex Parte AKB (CO/2053/96).

²³ *BID Submission to the UNWGAD*, p.13-14.

²⁴ Estimates of the number of bail hearings which would arise confirms NGO estimates that some 60% of those detained do not gain access to bail procedures.

²⁵ Interview with Detention Advice Service staff, October 2003-March 2004.

²⁶ Interview with Detention Advice Service staff, October 2003-March 2004.

hearing, he or she can be categorised as an absconder and may be re-detained. BID has had clients in hospital to whom this has happened and who have had to apply to re-open their cases. One study documented a case where a woman was detained because her asylum case was dismissed *in absentia* when the Home Office sent the papers to the wrong address, even though she was living at an address provided for her by another UK government agency, the National Asylum Support Service (NASS).²⁷

C. Pre-removal detention

British case law confirms the principle that pre-removal detention should only continue for the period reasonably necessary to effect the removal or deportation.²⁸

The British government's stated intention during 2002 was to shift the use of detention further towards the end of the asylum process, following refusal and in preparation for removal. Several detention centres were thus renamed 'removal centres'. However, there is much anecdotal evidence from NGO visitor groups that, as of May 2002, around half of the detainees in such centres continue to be new applicants or still in the process of appealing.²⁹ The government has not yet produced statistics on how many of those in the removal centres may have initial decisions or appeals pending.³⁰

D. Detention of families

The Operation Enforcement Manual³¹ states that the head of family may be detained where it would be disproportionate to detain the entire family, but recently UK policy has shifted toward the routine detention of families with children, on the same grounds as single adults,³² at both Dungavel Removal Centre in Lanarkshire³³ and Harmondsworth near Heathrow Airport. The average length of detention at Dungavel is three weeks, but some cases remain there for significantly longer. This policy shift has occurred regardless of nongovernmental evidence that families with children are extremely unlikely to abscond and without Home Office evidence to the contrary (see below Conclusions and UK Research Findings).³⁴ BID reports, for example, a case where a family with

²⁷ J. Mcleish, S. Cutler & C. Stancer, *A Crying Shame: Pregnant asylum seekers and their babies in detention*, September 2002, p.8.

²⁸ *Wasfi Mahmud* [1995] Imm AR 311.

²⁹ Lawyers Committee for Human Rights, *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, p.114.

³⁰ As of end of June 2003, 1,355 persons were detained under Immigration Act powers, excluding those in police cells. Home Office Asylum Statistics, 2nd Quarter 2003. As of 14 August, 2003, 130 asylum seekers were detained under the Immigration Act in prisons. The recent fall in detention figures is due solely to operational constraints such as the fire at Yarl's Wood (a detention centre only recently reopened) and the need to fireproof and remodel Harmondsworth Detention Centre.

³¹ S. 38.1.

³² '[F]amilies would be detained only after consideration of each individual case and where this was considered necessary in order to prevent unauthorised entry (i.e. whilst their identities and claims were being established and/or where there were reasonable grounds for believing that they would abscond if given temporary admission or release) or to effect removal.' Home Office letter, October 25, 2001, quoted in Lawyers Committee for Human Rights, *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, p.119.

³³ The European Commissioner for Human Rights has been asked to look into the situation of children detained at Dungavel.

³⁴ It is sometimes argued that the right to family life is best served by detaining the whole family. While there were severe obstacles to maintaining family life when families were split, with the head of household often in a detention centre in the south of England and the rest of the family sent to dispersal accommodation in the north and Scotland, depriving the whole family of its liberty is also a serious restriction and possible violation of their rights. If detention is

young children was detained for four months even though there was no imminent prospect of removal and the family had always kept in touch with the authorities.³⁵ Some of those advocating for the release of families make elaborate proposals for new ‘alternative accommodations’ and ‘safe refuges’ to house them, overlooking the fact that most were living at fixed addresses in the community prior to their detention, in almost all cases complying with conditions and appearing for appointments.

E. Detention of vulnerable persons

The Operation Enforcement Manual³⁶ states that the detention of pregnant women, those suffering from serious medical conditions or the mentally ill, and those for whom there is evidence that they are torture survivors, should occur ‘in only very exceptional circumstances.’ A small qualitative study of pregnant and new mothers, however, could not ascertain what allegedly exceptional circumstances could have led to their prolonged detention – indeed, one woman was released after four and a half months without any change in her circumstances, which the authors of the study suggest should cast doubt on the legitimacy of the original decision to detain.³⁷

The Medical Foundation for the Care of Victims of Torture also conducted a small-scale research study between 1 January 1999 and 23 June 2000 regarding seventeen of its torture-survivor clients who were detained. This study found no indication that medical evidence of torture was properly considered in the decision as to whether to extend detention or grant release.³⁸ New rules that became effective in April 2001 require medical practitioners in detention centres to report persons identified as torture survivors to management, but it is not clear that these rules are being implemented.

Generally, mental health concerns, documented by psychological reports, are rarely taken into consideration at bail hearings. A recent academic study documented instances of bail being opposed for those with mental health problems clearly acknowledged by the Immigration Service, and even one case where a suicide attempt was taken as evidence, bizarrely, that there was a risk of absconding. At one hearing, the argument was made by the government that the best available psychiatric help was to be found inside the detention centre (Tinsley House).³⁹ In April 2003, an inquiry report into the death of a Lithuanian asylum seeker at Harmondsworth highlighted general problems with detention procedures relating to identifying risk of suicide and self-harm.⁴⁰

II. ALTERNATIVES TO DETENTION

A. Alternatives for separated children

Separated or unaccompanied children continue to be granted ‘temporary admission’ as soon as they are identified as minors. The main controversy surrounds cases where the age of the asylum seeker

deemed necessary by the government, parents themselves should be able to choose whether they prefer to preserve family unity or release one parent to care for the children in the community.

³⁵ *BID Submission to the UNWGAD: Immigration Detention in the United Kingdom*, September 2002, p.40.

³⁶ S. 38.8.

³⁷ J. Mcleish, S. Cutler & C. Stancer, *A Crying Shame: Pregnant asylum seekers and their babies in detention*, September 2002, p.11.

³⁸ S. Dell and M. Salinsky, *Protection Not Prison: Torture survivors detained in the UK*, Medical Foundation for the Care of Victims of Torture, 2001.

³⁹ I. Bruegel & E. Natamba, *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* Social Science Research Paper No.16, South Bank University, London, June 2002.

⁴⁰ LIBERTY press release, ‘Official Investigation condemns care of suicidal asylum detainee’, 8 April, 2003.

is in dispute, with the Children's Unit of the British Refugee Council estimating that some fifteen to twenty per cent of all cases they deal with were originally wrongly assessed.⁴¹ Those recognised as minors are the statutory responsibility of social services in the local government authority where they apply (or are referred on a rota basis to a London local authority by the Children's Unit). They are generally appointed a legal adviser and a guardian, though there are not enough guardians *ad litem* available for every separated child arriving.⁴² In some cases, referrals are not properly made. For example, a fourteen year old Angolan girl recently lodged an asylum claim but was permitted to leave the Immigration Service office with neither a legal representative, guardian or contact address recorded on her application form. She has since failed to appear for appointments and her whereabouts are presently unknown.⁴³

Separated asylum seeking children continue to disappear from care in the UK, sometimes into the hands of traffickers. UK social services had previously established a safe house in south-eastern England for children who were trafficked, mainly from West Africa, apparently for the purpose of prostitution. Adults were present 24 hours per day and children were chaperoned whenever they went out. Education was provided in-house and video cameras were located outside the premises. These supervision measures were explained to the children as being protective and as in their best interests – for example, through meetings with former victims of traffickers. The quality and motivations of staff prevented this safe house from becoming a correctional or punitive environment. This very expensive project was closed, however, in favour of placing such children in foster care or 'supported lodgings' (a cheaper version of foster care intended for sixteen and seventeen year olds, with host families receiving lesser subsidies).⁴⁴

B. Dispersal, reporting requirements, accommodation centres, biometric identity cards

In the late 1990s, pressure from overburdened local authorities in London and the southeast led to the introduction of an *ad hoc* and then, in April 2001, a centralized scheme for the dispersal of asylum seekers to other parts of the country. The National Asylum Support Service ('NASS'), a branch of the Home Office, was established to manage the allocation of asylum seekers to accommodation provided by local authorities, housing associations and private landlords, mostly in so-called 'cluster areas' in northern cities. Such restriction of asylum seekers' choice of residence was therefore originally conceived as a cost-sharing measure, not as an alternative to detention nor a means of ensuring greater compliance with the asylum determination system.⁴⁵ Asylum seekers who have the means or community ties to support themselves may still reside outside this dispersal system.

Part Two of the Nationality, Immigration and Asylum Act 2002 has now put into place a legislative framework for new accommodation centres, as described by the government in its 2002 White Paper.⁴⁶ The government intends to house approximately 3,000 asylum seekers, from the initial

⁴¹ Interview with Children's Unit of the British Refugee Council, October 2003-March 2004, which is fully funded by the British Government (Home Office) to act as advocates for separated children and assist them with access to services.

⁴² F. Brennan, *Tampering with Asylum*, University of Queensland Press, 2003, p.116.

⁴³ Interview with representative at the Children's Unit of the British Refugee Council in December 2003.

⁴⁴ S. 20, Children's Act 1989 (c.41).

⁴⁵ By locating asylum seekers in the north, the dispersal policy also hoped to spread the settlement of recognised refugees more evenly throughout the country (the falling birth rate in Scotland, for example, means they are encouraging newcomers).

⁴⁶ One by Migrant Helpline at Dover, a second in Yorkshire, and a third is soon to be opened by the Refugee Arrivals Project ('RAP') in west London, near the major London airports. Home Office White Paper: *Secure Borders, Save Haven* – Cm 5387 HMSO, February 2002.

application through to final appeal, in collective centres, with all services provided on site. Asylum seekers who wish to receive State support of any kind will be required to reside in one of these centres. The non-urban locations proposed for such centres would create a *de facto* restriction on the free movement of residents. During parliamentary debates, however, the government gave assurances that residence conditions imposed upon asylum seekers in these centres would not amount to situations of *de facto* detention. Residents will be free to come and go during the daytime, but will have to report to the administration office once a day and leave only with permission during set curfew hours.

No such centres have yet been built or opened. Plans to do so have run into public opposition in each local area, though the government has recently overruled local planning authorities and offered tenders for the first centre in Bicester, scheduled to open around November 2003. The curfew provisions seem partially designed to allay public anxiety about large numbers of asylum seekers living, without work or other occupation, near their towns.

So far, several 'Induction Centres' have been established, based on existing services.⁴⁷ These first reception centres conduct screening, health checks and rights orientation during seven days prior to dispersal.⁴⁸

[*Note on health screening:* At present, screening for serious infectious diseases is carried out at the induction centres, such as that now open at Dover. In January 2003, the British government announced the formation of a working group to look into the issue of imported infections and immigration, with a view to possibly introducing compulsory screening of all asylum seekers for diseases such as HIV/AIDS and active tuberculosis. However, one recent survey of medical research by a British centre-left think-tank, the Institute for Public Policy Research, concluded that '[t]he evidence base to support the use of detention as a tool in the public health armamentarium is limited.'⁴⁹ It also concluded that coercive/compulsory screening of all asylum seekers for HIV and TB was not warranted by the epidemiological evidence (they are not a high-risk category amongst travellers in general) and likely to prove counterproductive, discouraging infected persons from coming forward to the immigration authorities, for example. This study cited evidence that the current non-compulsory system in the UK was working adequately. Of 41,470 asylum seekers screened at Heathrow Airport between 1995-1999, 100 were found with active TB, only 24 in its infectious form, and only two persons absconded before further investigations could be

⁴⁷ Currently, when asylum seekers fly into a southeast airport, if they are destitute, they are referred to RAP. They are meant to stay with them for no more than seven days, but some cases have now been with RAP for up to a year because NASS could not find placements for people with special needs (for example, torture survivors as there are no torture trauma counselling organisations outside of London, or large families of ten or more, or nationalities who do not have a community 'clusters').

⁴⁸ Prior to the opening of the west London induction centre, RAP is using a hotel near Heathrow to house new arrivals. Residents must be there for meals and have no money, so their freedom of movement is *de facto* very limited. If they are not back at the hotel by 10pm at night then it is assumed they have left. Some people leave the NASS system with official notification after RAP helps them to trace and contact friends or family in London. Occasionally, at the airports, asylum seekers disappear in between the point at which they declare themselves to immigration officers as asylum seekers without community ties and therefore in need of NASS support and the point at which they are released to be collected by RAP at a desk in the arrivals hall. This is presumably because some new arrivals do not wish to give the names of friends and family living illegally in the UK. Though they have 'absconded' from the NASS system in such cases, saving the government the cost of their maintenance, they may not abandon the asylum procedure itself and may later supply an independent contact address to Immigration.

⁴⁹ R. Coker, *Migration, Public Health and Compulsory Screening for TB and HIV*, Asylum and Migration Working Paper No. 1, Institute for Public Policy Research, 20 November 2003.

concluded.⁵⁰ While having a reliable contact address for infected asylum seekers once they enter the UK was considered vital, and while having some form of non-coercive ‘welcome screening’ was recommended, quarantine detention was considered unnecessary in the case of HIV/AIDS and beyond the initial weeks required for treatment of TB. (See main study for summary of the UN position and other reflections on this issue.)]

Eight ‘Reporting Centres’ have also been established around the country, to which asylum seekers living independently within a 25 mile or 90 minute radius are now required to report regularly. They are not places of accommodation. As with the planned accommodation centres, failure to comply with reporting requirements may disqualify an asylum seeker from receiving State benefits. One significant problem of these new reporting requirements is that the 2002 Act provisions regarding payment of fares to travel to the reporting centres have not been implemented, so destitute asylum seekers are in many cases walking long distances in order to comply. Families, in particular, have problems either obtaining the fares or finding a place to safely leave their children while they report.⁵¹ Partly in response to this issue, the government stated in October 2002, ‘Contact management will be further enhanced by the use of a mobile reporting centre, by immigration staff using specified police stations for reporting and by visiting asylum seekers at their accommodation.’⁵²

The same 2002 White Paper that announced the proposal of collective accommodation centres also announced a doubling in detention space (to 4,000 places).⁵³ Thus it must be questioned whether the new general restrictions on freedom of movement, by means of accommodation and reporting centres, will form legitimate alternatives to detention. The government promoted the new requirements in parliament in terms of their benefits for tracking people’s whereabouts and thereby reducing absconding rates and increasing administrative efficiency. Similar reasons were also cited for the introduction of biometric identity cards (‘smart cards’). The Application Registration Cards (‘ARC’) with photographs and biometric data were introduced as identity documents for asylum seekers, replacing standard letters. These cards enable asylum seekers to collect their NASS cash support at a local post office.⁵⁴

It remains to be seen whether the new reception arrangements (dispersal, reporting requirements, accommodation centres, biometric identity cards) will be efficient enough at monitoring asylum seeker’s whereabouts to allow for the decommissioning of detention facilities. Many refugee advocates suspect that once the additional detention spaces are constructed there will be an inherent pressure to justify their costs by keeping them full to capacity. They oppose the introduction of generalized restrictions on freedom of movement as unnecessary because the government has not produced evidence that they are a proportionate response to high rates of absconding, identity fraud or any other public interest issue.

⁵⁰ Callister et al. 2002, in Thorax 57, pp.152-5. Cited by R. Coker, *Migration, Public Health and Compulsory Screening for TB and HIV*, Asylum and Migration Working Paper No. 1, Institute for Public Policy Research, 20 November 2003.

⁵¹ Interviews with British Refugee Council and Refugee Action, October 2003-March 2004.

⁵² Parliamentary Questions, Beverley Hughes, October 2002.

⁵³ The rise in immigration detention is mirrored by Britain’s much higher rate of incarceration than ten years ago. Today around 13,000 people are currently held in prison on remand. In contrast to the immigration field, however, there have been many initiatives to promote the use of alternatives to detention on remand. See, e.g., an inquiry currently being conducted by Lord Coulsfield (to report in Summer 2004). *Exploring Alternatives to Prison* – www.rethinking.org.uk.

⁵⁴ 150,000 asylum seekers have been issued with identity cards including fingerprints and iris-scans. In some ways this is a pilot project for the possible future introduction of nationwide identity cards which has recently been under discussion in the British cabinet, but will not be introduced for some years to come.

Traditionally, legislative or administrative restrictions on the free movement of asylum seekers in the UK have been few.⁵⁵ Those temporarily admitted immediately upon entry are required to have a permanent contact address and may be required to report periodically to a local police station. The Secretary of State has wider powers that may be applied to a specific individual in exceptional circumstances.⁵⁶ Recognized refugees and those with exceptional leave to remain have full freedom of movement, though they must be registered, like all non-Commonwealth aliens, with the police.⁵⁷

C. Electronic monitoring

In late November 2003, the British government announced its intention to introduce electronic tagging, including satellite tracking, to the immigration field in order to monitor the whereabouts of failed asylum seekers liable for removal. This was presented as a cost-saving alternative to secure removal (detention) centres.⁵⁸ It has stated that, in line with human rights obligations, the least restrictive and onerous form of monitoring (voice recognition technology for long-distance reporting as opposed to tagging or satellite tracking) will be imposed wherever sufficient in the individual case. The proposal is currently included in the draft Asylum and Immigration (Treatment of Claimants) Act 2004, whereby such monitoring would be applied to persons over eighteen years of age only. No provisions are made concerning the resolution of age disputes in such cases.

The UK was the first country to experiment with electronic monitoring in the criminal justice field in 1989,⁵⁹ and today it operates the largest such scheme of any European country. One Home Office evaluation in 2001 found that 90% of Home Detention Curfews were satisfied successfully. The study looked at the first sixteen months of the scheme and found that only five per cent were recalled to prison because of a breakdown in their curfew. Breaches of curfew were considered to include not only absences, but also any threat or attack on a monitoring officer or any damage done to the monitoring equipment.⁶⁰ A breach does not automatically lead to a revocation of the order, however. If the order is infringed, the nature and seriousness of the breach, and any mitigating circumstances, are considered. This is an important point of good practice.

While two thirds of electronic monitoring in the UK is used under the Home Detention Curfew scheme, it is also used to monitor juveniles (aged twelve to sixteen) on bail and local authority remand. Firstly, checks are made that their home is suitable. The usual curfew is 7pm-7am to allow

⁵⁵ The 2002 Act provisions are more in the historical tradition of Britain's Poor Laws than that of its past laws controlling aliens, such as the first Aliens Act of Great Britain in 1793 which included provision for the registration of non-citizens or the war-time Aliens Restriction Act 1914.

⁵⁶ The Asylum and Immigration Act 1991 gave the Secretary of State the power to assign an asylum seeker to a certain place of residence, impose a curfew or to prohibit him or her from leaving a certain area. Ministers stated that this power would be used to prevent public order problems. UNHCR London reports that it is not aware of any cases when this power was invoked.

⁵⁷ The Aliens Order 1953 abolished restrictions on the movement of aliens but still required non-Commonwealth nationals to register with the police.

⁵⁸ 'Asylum seekers to be tracked by satellite', *The Times (UK)*, 28 November, 2003.

⁵⁹ During the first six-month trial, three courts released people on bail with ankle devices who had to be home for curfews, but only fifty people were monitored. This study had disappointing results. Eleven committed another offence while being monitored and eighteen broke the conditions of their bail in other ways. The system also proved extremely expensive and suffered frequent failures of technology, leading to unnecessary police alerts. Problems included tampering with the device, technological failures, and signal interference caused by electromagnetic fields from electrical appliances. It was also very difficult for those released to find or keep jobs, though that was mainly due to the long period in curfew. The systems have since been improved and today electronic monitoring is widely and successfully applied. For full evaluations see, www.probation.homeoffice.gov.uk - section on electronic monitoring.

⁶⁰ K. Dodgson et al., *Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew*, Home Office Research Series, March 2001, at www.probation.homeoffice.gov.uk.

people to work or to attend educational facilities, as well as so that it does not conflict with a person's religious practices. The maximum length of a curfew order is six months (or three months for minors aged ten to fifteen years of age). Contractor companies do the monitoring, unless there is also a community sentence or some wider probation supervision requirement imposed. This occurs only in 26% of cases, but evaluations suggest that the electronic monitoring system works best in combination with such an element of human supervision by a probation officer.⁶¹

The only notable complaints from those in the criminal justice schemes are the enforced togetherness imposed upon families of offenders during the curfew, and the sense of shame felt when the device is seen in public.⁶² The latter stigmatisation would be particularly acute for failed asylum seekers who have committed no criminal offence. This would be especially true if monitoring was applied not as a condition of release for high flight-risk cases but rather as an additional penalty and control imposed upon individuals who would otherwise have been released into the community. Even among persons who have received a final rejection of their asylum claim and are liable for removal, there will be many cases who pose little risk of absconding, for example, families with young children (see above), and for whom tagging would therefore fail the test of 'necessity'.

The Home Office calculates that an average 45-day curfew under the electronic monitoring scheme for remand prisoners costs approximately £1,300. It would therefore be – while more cost-effective than long-term incarceration of failed asylum seekers – a very expensive way to raise the compliance of a pre-removal caseload whom one British study has found to abscond at no more than a rate of 20% when released under ordinary bail conditions.⁶³

Finally, it should be noted that electronic monitoring involving a conventional 'tag' (as opposed to reporting involving voice recognition technology) depends upon those monitored having a fixed private home address, with a phone line. A minority of failed asylum seekers in the UK who would meet this requirement would likely be those most easily found for removal in any case, and those most likely to have citizen or resident family members able to vouch for them. In this sense, the debate surrounding electronic monitoring in the UK immigration field may be informed by the pilot projects currently running in the United States and the problems and limitations associated with them in Miami (see US section). In both cases, it may be argued that the measure fails to meet the test of necessity and proportionality required by any restriction on freedom of movement under international law, though the UK may perhaps have a stronger argument that the measure did so than the US government, which is now tagging some asylum seekers whom they admit to be low flight risks, prior to determination of their claims.

D. British Refugee Council proposal for community-based reception

While the above plans for collective accommodation centres of up to 750 beds certainly provide economies of scale, European research on best practice in the field of refugee reception suggests that, for accommodation of more than a few months, smaller accommodation centres are most successful.⁶⁴ If larger centres are easier for asylum seekers to abandon than smaller centres, or if the communal living standards and remote locations of the larger centres push asylum seekers to exit them and abscond, economies of scale may prove to be false economies.

⁶¹ *Briefing on Electronic Monitoring*, Prison Reform Trust, March 2003.

⁶² *Briefing on Electronic Monitoring*, Prison Reform Trust, March 2003.

⁶³ I. Bruegel & E. Natamba, *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* Social Science Research Paper No.16, South Bank University, London, June 2002.

⁶⁴ *Reception Standards for Asylum Seekers in the EU*, UNHCR, July 2000.

The British Refugee Council proposed a smaller, urban cluster-type model to the UK government.⁶⁵ It is not an ‘alternative to detention’ in so far as there is no suggestion that all destitute asylum seekers in the UK would otherwise be detained, but it does claim to meet the same concerns, regarding compliance and efficiency, as both detention and the above White Paper plans for large centres. It claims to do so at lower cost to both the State and asylum seekers.⁶⁶ While the proposals are not financially costed in detail, they are based upon previous experience of the British Refugee Council’s member agencies with emergency settlement schemes of Vietnamese, Bosnian and Kosovar refugees, and such costs were relatively low.

The proposal is based on networks of centres, each with no more than 50-100 beds, housing 300-600 asylum seekers in all. The centres should be within easy distance of a ‘central services core’ and in or near diverse urban areas. Every resident would benefit from an individual casework management plan. This would include an ‘appraisal element, including recording the client’s compliance with the requirements of their residence in the hostel/centre.’⁶⁷

The Refugee Council proposes that their model will avoid: high capital costs (including high security costs); high management risks (including high insurance costs); local opposition; excessive staff emphasis on control; the likelihood that residents/clients will become institutionalised; isolation from local services, especially local schools for children (which would also save costs); the likelihood of bullying and exploitation in large-scale centres; difficulties ensuring safety and child protection within large-scale centres; and unnecessary disruption of the reception-to-integration continuum for those ultimately allowed to remain in Britain. It is argued that smaller centres would reduce the financial and social impact of the new reception system on any single local government authority. The social costs for asylum seekers themselves would be reduced by virtue of the supportive case-management structure. Further to this point, the proposal quotes the expert view of the Medical Foundation for the Care of Victims of Torture that large collective centres are inappropriate for torture survivors.⁶⁸

E. Bail for Immigration Detainees (‘BID’) and The Bail Circle

BID, with offices in London, Portsmouth and Oxford, is an organization that exists to provide a dedicated free bail service to immigration detainees.⁶⁹ As such, it exists for those asylum seekers who may fail the merits test of State-funded legal aid. It also advocates for greater access to bail for asylum seekers and migrants, raises awareness of detention issues and the effectiveness of the UK bail system,⁷⁰ as well as offering relevant training to solicitors.

⁶⁵ A. Griggs, *Asylum Seeker Accommodation Process – Refugee Council proposal for a community-based pilot*, May 2002.

⁶⁶ The stated objectives include: closer contact between the asylum seekers and the relevant authorities; efficiency of the procedure; to reduce illegal working; to reduce financial and housing fraud; to reduce community tension; to improve the integration of those granted status; to improve the rate of returns of those refused asylum. A. Griggs, *Asylum Seeker Accommodation Process – Refugee Council proposal for a community-based pilot*, May 2002, p.2.

⁶⁷ A. Griggs, *Asylum Seeker Accommodation Process – Refugee Council proposal for a community-based pilot*, May 2002, p.8.

⁶⁸ A. Griggs, *Asylum Seeker Accommodation Process – Refugee Council proposal for a community-based pilot*, May 2002, p.8.

⁶⁹ It was set up in 1998 by three nongovernmental organisations: the London Detainee Support Group, the Joint Council for the Welfare of Immigrants and the Churches Commission for Racial Justice.

⁷⁰ BID has documented numerous cases where the alternative of release on bail was not applied despite compelling grounds for release. See, for example, the four compelling cases outlined in BID’s ‘Briefing for Committee Stage NIA Bill – House of Lords – bail and detention’.

BID publishes a 48-page handbook for detainees or others preparing their bail applications, entitled 'Notebook on Bail'. BID's legal representatives are overwhelmed with cases, therefore, BID does not systematically advertise its services inside detention centres, though detention visitors' groups often refer people to BID. They are only able to assist a tiny proportion of the total population of asylum-seeking detainees in the UK.

The Bail Circle, run by the Churches Commission for Racial Justice, is a register of some 175 volunteer sureties. It too is overwhelmed by the number of asylum seekers who require help to gain release, and reports that it has no means of meeting the increased demand when the UK's detention capacity will be doubled to 4,000.

Neither organization is an 'alternative to detention' but both strive to make the bail system, the UK's primary means of release, both more equitable and available.

III. CONCLUSIONS

A. Do alternatives ensure compliance?

Most asylum seekers in the UK are not detained. Some 2,000 were held in detention in 2003, a significant rise since the early 1990s, but some 70-80,000 asylum seekers currently remain in the community at any one time.⁷¹ The British government states that it detains only one and a half per cent of those asylum seekers liable to be detained and justifies the expansion of detention capacity on these grounds.⁷²

There is no Home Office evidence that asylum seekers living in the community commonly abscond before completing the asylum procedure, despite that risk being the most common grounds for detention orders. The UK Immigration Service has not commissioned any research or pilot studies on either alternatives to detention or appearance/compliance rates in the past twelve years.⁷³ As a result, adjudicators are making decisions at bail hearings without any sense of what a 'normal risk' of absconding may be, though they are supposed to refuse bail only where there is a 'materially greater than normal risk of the appellant absconding.'⁷⁴

Crude data from British ports of entry regarding the non-appearance of those granted temporary admission finds a rate of between three to twelve per cent depending on the port.⁷⁵ These relatively low rates suggest that other, deterrent concerns lie behind the policy of routine detention during the asylum procedure.

One independent study by South Bank University⁷⁶ traced the actions of 98 detained asylum seekers subsequently released on bail between July 2000 and October 2001.⁷⁷ It found that 90% satisfied

⁷¹ As of 27 December 2003, the Home Office reported 1,285 persons were in detention who had claimed asylum at some stage (approx. 80% of all immigration detainees). Home Office Asylum Statistics, 4th Quarter, 2003.

⁷² Quoted in Lawyers Committee for Human Rights, *Review of States Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, September 2002, p.115.

⁷³ *BID Submission to the UNWGAD*, quotes a letter from the Home Office Research and Development Statistics section to BID, May 2002, p.43.

⁷⁴ Guidance Notes for Adjudicators from the Chief Adjudicator, His Honour Judge Henry Hodge, Revised January 2002, Issued March 2002, p.11.

⁷⁵ L. Weber & L. Gelsthorpe, 'Deciding to Detain: How decisions to detain asylum seekers are made at ports of entry', Cambridge Institute of Criminology, 2000, p.43.

⁷⁶ I. Bruegel & E. Natamba, *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?*, Social Science Research Paper No.16, South Bank University, London, June 2002.

the conditions of their bail, including reporting and attendance at hearings, despite the fact that they had been originally detained because of an allegedly high risk of absconding.⁷⁸ At most, eight to nine per cent of asylum seekers who were granted bail subsequently attempted to abscond, and of the fifteen per cent who were bailed while awaiting removal, 80% still complied.

The fact that so few of those studied absconded prevented the researchers from doing a 'risk/probability analysis' and drawing conclusions regarding which factors may predispose people to abscond. However, it is true that the absconders were more likely to have had a removal order issued than to be awaiting a final decision.

The 90% or higher compliance rate was achieved with a group where the median amount of sureties was only £250 in total. The average for the few who absconded was higher, at £420 (though ranging from £1 to £1700), but this merely correlates to the fact that a greater proportion of them were awaiting removal.⁷⁹ The group as a whole had very standard conditions attached to bail, involving regular reporting to the local police station and the requirement of a formal application for permission to change address. The only other factor that the absconders had in common was that many were individuals under particular personal stress.⁸⁰

Another research study by BID documented the reasons why families with children in the UK are even less likely to abscond.⁸¹ It found that receiving and understanding information about conditions of 'temporary admission' was crucial in raising the level of compliance.⁸² It also collected testimony that the educational and health care needs of children are a key incentive preventing families from absconding. Non-compliance is simply not an option for a woman with a new baby and no money. The study recommended that the Home Office should recognize these natural incentives and disincentives, and so refrain from ordering detention of families with children.⁸³

The explanation for the low (3-12%) rates of absconding, even for single adults, are several: the UK is not a transit country; decisions on asylum claims of those not detained for accelerated processing may take months before a final decision, but State support is provided throughout; more than half of current asylum seekers are ultimately permitted to remain in the country, either recognized as refugees or given leave to remain; and legal aid is available to assist destitute asylum seekers submit claims.

Recent cuts in legal aid have been described, by the Immigration Law Practitioners' Association and LIBERTY as likely to raise the rates of absconding: 'Should an asylum-seeker be unable to obtain effective legal advice, he or she is far more likely to decide that the best way not to lose at

⁷⁷ The sample had been previously detained in a range of centres, and originated from a wide range of countries.

⁷⁸ They were BID clients, whose release was opposed by the Home Office on grounds that they would abscond, not on grounds of unverified identity, though fewer than one in five of those studied had a copy of the form setting out the reasons for their detention.

⁷⁹ Like the Vera AAP research in the United States, this research did not monitor failed asylum seeker's compliance with removal – just rates of appearance during procedure.

⁸⁰ E.g., the wife of one man had committed suicide during his stay; one woman was a rape victim, etc.

⁸¹ E.K.H. Cole, *A Few Families Too Many: the detention of asylum seeking families in the UK*, BID, March 2003.

⁸² E.K.H. Cole, *A Few Families Too Many: the detention of asylum seeking families in the UK*, BID, March 2003, p.27.

⁸³ E.K.H. Cole, *A Few Families Too Many: the detention of asylum seeking families in the UK*, BID, March 2003, p.29. Another less obvious incentive this study identified was that remaining in the system allowed relatives in countries of origin to contact the asylum seekers. It gave the example of a case where a woman's husband had been removed, leaving her and her two children behind in the UK. She had been unable to contact him, but the chance that he might be able to contact her created a clear incentive for her to stay in the system.

the hands of the system is to avoid it completely.’⁸⁴ One UK academic researcher found that the strongest factors encouraging asylum seekers to abscond were a sense that their claims would be unjustly rejected and a subjective fear of return to the country of origin remaining among failed asylum seekers.⁸⁵

B. Do alternatives ensure availability for removal?

The Home Office White Paper⁸⁶ refers to the ‘recurrent problem of not being able to locate a failed asylum seeker’ and ‘a high level of absconding on receipt of the determination.’ The Greater London Authority estimates that some 75,000 rejected asylum seekers (or 100,000 including dependents) are residing illegally in London.⁸⁷ Efficient removal of rejected asylum seekers is therefore a primary policy concern of the UK Immigration and Nationality Department, which is spending an estimated £5 million per day on achieving this objective.

The few independent studies on absconding in the UK acknowledge the possible need to detain people who have exhausted all appeals, though only after travel documents are secured and removal is imminent.⁸⁸ As described above, evidence suggests that alternatives to detention, such as reporting requirements, are almost always sufficient to ensure the availability of asylum seekers right up to receipt of a final rejection. Projects geared towards encouraging failed asylum to examine their choices and return voluntarily, such as that run by the nongovernmental agency Refugee Action, can reduce the frequency of pre-removal detention during the period when travel documentation is being obtained.

Researchers also recommend that there is a need to track the rate at which failed asylum seekers depart the UK voluntarily, without assistance and without notifying the Immigration Service. It is believed that this would show many ‘absconded’ failed asylum seekers have in fact gone home.

C. Do alternatives deter abusive claimants?

There are ‘alternative deterrents’, less expensive than detention, employed by the British government. In July 2002, an asylum seeker’s right to meet his or her basic needs was threatened by the repeal of the right to work after a six month waiting period, and by the fact that income support was maintained at 70% of that provided to citizens. Section 55 of the Nationality, Immigration and Asylum Act removed State benefits from asylum seekers who had failed to apply at the earliest opportunity after their arrival (that is, at a port of entry). Ironically, some asylum seekers may be deterred from doing precisely this because they fear that they will be detained.⁸⁹ A legal challenge of these provisions found them in violation of article 3 of the ECHR. However, a government

⁸⁴ LIBERTY, August 2003 response to the Lord Chancellor’s Department Consultation Paper ‘Proposed Changes to Publicly Funded Immigration and Asylum Work’, para 31.

⁸⁵ L. Weber, ‘Detention of Asylum Seekers on Arrival in the UK, Part One’, in *Tolley’s Immigration, Asylum and Nationality Law*, Vol. 15, no.3, 2002, pp.188-194.

⁸⁶ Home Office White Paper: *Secure Borders, Save Haven* – Cm 5387 HMSO Feb 2002.

⁸⁷ Quoted in M.J. Gibney & R. Hansen, *Deportation and the Liberal State: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom*, UNHCR Working Paper No.77, New Issues in Refugee Research, February 2003.

⁸⁸ I. Bruegel & E. Natamba, *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* Social Science Research Paper No.16, South Bank University, London, June 2002.

⁸⁹ It may well be that detention deters people from pursuing or even lodging asylum claims, but it does not stop them from coming to or staying in Britain. They are rather diverted into clandestine channels, preferring to risk apprehension and detention while living illegally, rather than volunteer for such detention at the outset by making a claim at a port.

appeal against this ruling in September 2003⁹⁰ was successful, and in November 2003 the government proposed to remove all benefits from families denied asylum (and take their children into care) if they refuse to accept the offer of a paid flight home.

Neither detention nor this denial of socio-economic rights, however, seems to have been effective as a deterrent. 85,865 applications were lodged in the UK in 2002, (representing approx. 110,700 persons), which was an increase of 20% over 2001 figures (80,600). It is perhaps this deterrence failure of domestic policy that has propelled the UK government towards considering extra-territorial processing of claims in countries of transit (and which has prompted the Tory opposition party to call for off-shore 'application centres' which would be mandatory detention centres for all asylum seekers, located on unspecified British islands.⁹¹)

The denial of benefits to asylum seekers has in fact led to a new category of asylum seekers in detention, according to the Detention Advice Service ('DAS').⁹² Its professional visitors have noted a recent rise in low-level criminality among asylum seekers, leading to a greater number imprisoned on criminal charges. DAS believes that this is also partly caused by the compulsory NASS dispersal policy, from which some asylum seekers drop out and turn to petty theft or begging. DAS also reports that it is currently finding some six to ten cases per month of failed asylum seekers who are arrested by police while trying to leave Britain on the basis that they were 'obtaining services [from the carriers] by deception'. This exit regime is linked to the carriers' liability legislation. The person in question is usually detained for several months and then, ironically, deported at State expense. The policy is based on a concept of reciprocal good neighbourliness within the European Union, as illegal exit from the UK often means illegal transit through or entry into another EU State.

D. Cost effectiveness?

Taking Haslar Removal Centre's weekly costs as the measure,⁹³ the independent research by South Bank University, which monitored 98 asylum seekers, would suggest that the Home Office spent some £430,000 detaining 73 people who would have complied anyway under alternative restrictions (reporting requirements to the police, etc.).⁹⁴

It has long been acknowledged that the UK detention regime is extremely expensive (the planned extension which would add another 44 places for single men to the Dungavel Reception Centre is expected to cost £3 million in capital costs alone), but centralized reception systems that – intentionally or incidentally – track asylum seekers' whereabouts in the community, are not cheap either. The UK government spent over £1 billion in 2002 on the National Asylum Support Service (serving over 100,000 asylum seekers).

The government considers both sets of costs worthwhile, compared to cheaper community-based reception or the provision of direct benefits to asylum seekers living independently, so long as

⁹⁰ *Case of T v Secretary of State for the Home Department*, Court of Appeal, 23 September 2003 [2003 EWCA Civ 1285]

⁹¹ Oliver Letwin MP (the former Tory opposition party leader) also proposed that *all* visitors to the UK, whether tourists or asylum seekers, should post a bond to ensure their later exit. Quoted in *The Guardian* (UK), October 7, 2003.

⁹² DAS is funded by private trusts, but the London prisons are now also funding it to employ one professional visitor per prison. In the prisons, DAS estimates that its visits are 60% to asylum seekers and 40% to aliens arrested under criminal code. It sees some 1500 people per year and makes some 4500 visits.

⁹³ Weekly costs per detention place in 2001 ranged from £364 in Haslar to £1620 at Oakington. House of Commons debate, 25 October 2001, C 333 W.

⁹⁴ I. Bruegel & E. Natamba, *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* Social Science Research Paper No.16, South Bank University, London, June 2002.

detention and dispersal are perceived by the British public to be ‘managing’ a threat to public order and deterring an unspecified number of future arrivals.

Finally, as already mentioned, the costs of electronic monitoring may be slightly less than detention (the Home Office calculates that an average 45-day curfew under the electronic monitoring scheme for remand prisoners costs approximately £1,300) but it will not be a cost-effective measure unless it meets the test of necessity in relation to the individuals to whom it is applied.

E. Export value?

Above all, the UK experience demonstrates clear limitations on bail as a fair and efficient means of release and as an alternative to detention. Many detained asylum seekers do not have access to bail and hence do not have access to independent oversight of their detention order. Even fewer would have access were it not for the existence of nongovernmental organizations such as BID, DAS, visitors’ groups and The Bail Circle. A number of these obstacles to access would be removed if legal aid for bail hearings was not subject to such a strict merits test, if detention decisions and refusals of bail were written and properly substantiated with reference to the individual concerned, and if the provisions regarding automatic bail hearings in the 1999 Act were re-introduced. Countries thinking of utilizing bail or bond as a primary ‘alternative to detention’ should consider similar safeguards if they want the use of immigration detention to be targeted and fair.

The UK is also an interesting case study of a country with a traditionally *laissez-faire*, community-based approach to reception which is moving step-by-step towards a more continental (particularly Germanic and Scandinavian) model involving dispersal and collective centres. Such provisions should really be seen as ‘alternatives to direct welfare benefits’ and as alternatives to release into the community upon own recognizance, rather than as alternatives to detention, yet their effective implementation may in the future provide the political confidence to reduce the proportion of asylum seekers the UK detains to the point where it is more in line with the rest of the EU. Any system founded on open accommodation centres can be conceptualised as an alternative to detention in the sense that it is a policy of moderation in the face of calls for mandatory detention by certain political parties. It is notable, however, that concern with increased control through reception is only applied to those asylum seekers without their own means of support.

The growing body of independent research in the UK, by universities and advocates, on the issue of appearance/absconding is also of export value to other ‘destination’ countries. It highlights the Home Office’s lack of such research and statistics in this area. Such government research, if conducted, might not only demonstrate that the widespread perception of frequent absconding is exaggerated, at least prior to the receipt of a removal order, but it might also identify more positive incentives (such as transparent decision-making and continued welfare provisions for children) which are just as effective as disincentives/penalties in ensuring that asylum seekers comply with the UK procedures until they are completed.

UNITED STATES OF AMERICA¹

I. DETENTION AND DOMESTIC LAW

A. Detention upon entry for those without valid documents and possibilities of release

Under 1997 amendments to the Immigration and Nationality Act 1980 ('INA'),² an individual who arrives at a port of entry without valid documents is placed in 'expedited removal' proceedings. If the individual expresses a fear of persecution or the desire to apply for asylum, he or she must be detained pending an initial screening interview to determine if he or she has a 'credible fear of persecution' (a 'credible fear interview').³

US Immigration and Customs Enforcement ('ICE'), a sub-entity within the Department of Homeland Security ('DHS'), and formerly the Immigration and Nationality Service ('INS'), has the authority to 'parole' (release) individuals found to have a 'credible fear', pending a hearing on the substance of their asylum claim before an Immigration Judge. The nature of this parole authority is defined by regulations and policy guidelines.

In 1990, the Asylum Pre-Screening Officer ('APSO') Parole Program was initiated which aimed to ensure that parole decisions were based on each individual asylum seeker's credibility and proof of identity, and on whether they had a place to live, means of support and a legal representative. The policy goal was to better identify those persons most likely to abscond and reserve continued detention for them. The APSO Program became permanent in 1992, yet UNHCR and others documented the government's failure to adequately implement it throughout the 1990s.⁴

DHS (formerly INS) Regulations instruct that parole may only be 'justified' for certain groups of aliens 'on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit", provided the aliens present neither a security risk nor a risk of absconding...'⁵ In spite of this, DHS has also issued policy memoranda identifying preferred groups for parole. For example, in December 1997, an INS memorandum reminded District Directors that: 'Parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.'⁶ These documents suggest a conflict between using detention except where justified under specific criteria under the former as opposed to promoting parole under the latter.

¹ The information presented herein is valid up to 31 March 2004.

² The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the Immigration and Nationality Act 1980 ('INA') (amendments entered into effect in April 1997).

³ INA, s. 235(b)(1)(B)(iii)(IV). 'Credible fear of persecution' is defined by statute as 'a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208' of the INA.

⁴ See, for example, letter from UNHCR Representative to INS Commissioner Doris Meissner, 4 March, 1993.

⁵ ICE's parole authority is set out in INA, s. 212(d)(5)(A). The five groups considered eligible for parole in the Regulations are: (1) Aliens who have serious medical conditions in which continued detention would not be appropriate; (2) Women who have been medically certified as pregnant; (3) Juvenile aliens (see section regarding detention and release of asylum seeking minors); (4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the US; and (5) Aliens whose continued detention is not in the public interest (as defined by the detaining authorities). For full details, see: 8 Code of Federal Regulations (CFR) 212.5(b).

⁶ Memorandum from INS Executive Associate Commissioner for Field Operations, 'Expedited Removal: Additional Policy Guidelines', 30 December, 1997. See, also, Memorandum from INS Executive Associate Commissioner for Field Operations, 'Detention Guidelines Effective October 9, 1998', 7 October, 1998.

Until late 2001, undocumented Haitians were granted virtually automatic parole from the Miami District. In December 2001, however, a grounded boatload of Haitian asylum seekers attracted negative public attention, after which discretion was removed from District Directors to grant parole to such arrivals except in the most urgent humanitarian cases. The INS Miami District's Chief of Staff stated to Florida asylum advocates that the District Director had decided not to release any Haitian asylum seekers from detention for reasons that included deterrence of future arrivals from Haiti. In November 2002, a policy announcement stated that 'all individuals who arrive illegally by sea will be placed in expedited removal proceedings and during their legal process will remain in detention at the discretion of the INS [now ICE] and Department of Justice.'⁷ This policy shift had the further effect of removing parole powers from Immigration Judges, who some would argue were more inclined to grant parole.

Anecdotal evidence suggests that parole rates among different Field Offices vary widely.⁸ Human Rights First (formerly the Lawyers Committee for Human Rights) has, for example, documented numerous cases of parole being denied without clear reasons, even to persons with US citizen sponsors.⁹

There is no possibility of appealing a denial of parole to an independent or judicial authority, although *habeas corpus* petitions to the Federal Court are permitted (see below section on *habeas corpus*). Parole may in some cases involve the payment of a bond or surety, and usually involves regular reporting requirements.

In practice, for many asylum seekers who make their claim at a port of entry, release from detention will come only with a grant of asylum or *non-refoulement* protection.¹⁰ ICE reports that, in fiscal year (FY) 2002, 65% of 'defensive' asylum seekers (that is, those who claim asylum only after having been apprehended, as opposed to 'affirmative' asylum seekers who lodge their claims without being apprehended for illegal presence and whose claims are therefore adjudicated administratively) were detained for 90 days or less.¹¹

B. Mandatory detention for convicted felons or suspected terrorists and possibilities of release

Under the 1996 amendments to the INA, ICE is required to detain individuals convicted of certain crimes¹² or who are suspected terrorists.¹³ Many individuals currently in such custody, having been formerly convicted of crimes, entered the US either seeking asylum or another form of protection, such as 'withholding of removal'. Under the law, such individuals are not eligible for release unless they are granted refugee protection or otherwise allowed to remain, or they have been held for more

⁷ Notice Designating Aliens Subject to Expedited Removal under Section 235(b)(1)(A)(iii) of the INA. 2002 Federal Register of Notices.

⁸ See analysis of INS data in: Arthur Helton, 'A Rational Release Policy for Refugees: Reinvigorating the APSO Program' 75 *Interpreter Releases* 685 (May 18, 1998). See also data in: US Immigration and Customs Enforcement Report to Congress: Detained Asylum Seekers, Fiscal Year 2002.

⁹ Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, August 1999.

¹⁰ Protection against refoulement is granted through a status called 'withholding of removal', which does not give the alien the right to leave and re-enter the US, or to apply for permanent residence, but which will indefinitely suspend the threat of removal to the country where persecution is feared. See INA § 241(b)(3).

¹¹ U.S. Immigration and Customs Enforcement Report to Congress: Detained Asylum Seekers, Fiscal Year 2002.

¹² INA, s. 237. The crimes for which a person may be subject to mandatory detention include: an aggravated felony (which includes many minor offences), a crime involving moral turpitude (unless an exception applies), a controlled substance offence, a drug trafficking offence, prostitution, or a commercialised vice offence.

¹³ INA, s. 236(c).

than 90 days after a final order of removal has been issued. To be released, the individual is required to establish by clear and convincing evidence that he or she is not a danger to the community and is likely to comply with the removal order when it can be carried out. He or she is allowed to present evidence orally and/or in writing. If the individual cannot be removed within 90 days, which applies to many aliens whose countries of origin do not have diplomatic relations with the US or which do not cooperate in the return of their own nationals, the case must be reviewed by the local ICE Field Officer (formerly District Director) for possible release.¹⁴ In practice, many convicted felons whose criminal sentences have expired, are detained indefinitely as they are not able to return to their countries of origin. They are referred to as ‘lifers’.¹⁵ In June 2001, the US Supreme Court ruled that such persons can no longer be detained indefinitely simply because the US government has nowhere to put them.¹⁶

C. Detention of non-citizens already in the US and release on ‘bond’ or own recognizance

Non-citizens who have already entered the US, either lawfully or unlawfully, but who do not have a valid visa or other status to remain in the US, may also be detained. DHS makes an initial decision whether they are to be held in custody or to be released on bond. They are eligible for release if they establish that they are not a threat to national security and are unlikely to abscond.¹⁷ DHS decisions take into account the following factors: local family ties; prior arrests, convictions, appearances at hearings; manner of entry and length of time in the US; immoral acts or participation in ‘subversive activities’; and financial ability to post bond.¹⁸ In some Districts, asylum seekers apprehended within the territory are released on a bond of between \$1,500 and \$5,000, or, in some instances, on their own recognizance. Usually such release requires a sponsor to offer financial sureties and a place of accommodation. Such a sponsor is supposed to keep track of the former detainee’s whereabouts and ensure appearance for all appointments and hearings. This includes ensuring compliance with any reporting requirements, which usually form a condition of release on bond.

Detainees, not subject to mandatory detention (see above),¹⁹ can also apply to an Immigration Judge for release on bond, or for their bond amount to be lowered. Immigration Judges are part of the

¹⁴ The District Director’s release authority for long-term detainees is set forth in a 3 February 1999 memorandum from INS Executive Associate Commissioner Michael Pearson to Regional Directors, entitled *Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable*, and a 30 April 1999 statement issued by INS Commissioner Doris Meissner. Under the 30 April 1999 statement by Commissioner Meissner, the District Director must review an individual’s detention status before the 90-day removal period expires and every 6 months thereafter.

¹⁵ ‘Lifers’ (to use the lexicon of US immigration officers) include six categories of persons:

- (1) those from countries without diplomatic relations with the US;
- (2) stateless persons;
- (3) countries refusing to accept back their own nationals;
- (4) countries experiencing immense upheaval or with no functioning government;
- (5) persons whose country of nationality refuses to accept them back in particular;
- (6) persons entitled to protection under the Convention Against Torture.

Source: ‘Throwing away the key: Lifers in INS Custody’ Donald M Kerwin, *Interpreter Releases*, May 11, 1998.

¹⁶ On 28 June 2001, the Supreme Court ruled that aliens who have received final orders of removal may not be detained for a period beyond that necessary to carry out the removal – presumptively six months. See, *Zadvydas v. Davis*, 533 US 678, 121 S. Ct. 2491, (2001).

¹⁷ *Matter of Patel*, 15 I & N Dec. 666 (BIA 1976).

¹⁸ *Matter of Patel*, 15 I & N Dec. 666 (BIA 1976); *Barbour v. INS*, 491 F.2d 573 (5th Cir.), cert. denied, 419 US 873 (1974).

¹⁹ The US Supreme Court has held in *Demore v. Kim*, 538 U.S. 510 (2003) that, when a non-citizen is deportable on certain criminal grounds, the US Constitution does not prohibit his mandatory detention ‘for the limited period of his removal proceedings.’

Executive Office for Immigration Review ('EOIR'), a government agency separate from ICE. Bond decisions by an Immigration Judge can be appealed to the Board of Immigration Appeals ('BIA'). An Immigration Judge may make a later bond re-determination if it is demonstrated that the individual's circumstances have changed materially since the prior determination.

To be released on bond, an individual must demonstrate that he or she 'would not pose a danger to property or persons and that [he or she] is likely to appear for any future proceedings.'²⁰ Other factors to be considered include, for example, family ties in the US; ties to the community; work history; criminal record; or failure to appear for criminal or immigration court proceedings.

D. Habeas Corpus

The United States' Constitution and statutory law provide that detained persons may challenge the lawfulness of their detention by means of a writ of *habeas corpus*.²¹ Such writs are brought before a federal district court, which may be appealed to higher federal appellate courts. Such writs are generally an ineffective remedy because proceedings can be lengthy, expensive and complicated for detainees without legal advice.

E. Detention of rejected asylum seekers pending removal

Rejected asylum seekers may also be detained pending removal, although subject to the June 2001 Supreme Court ruling (see above under 'Mandatory detention of convicted felons and suspected terrorists') they may not be detained for a period beyond that reasonably necessary to carry out their removal. The Supreme Court held that six months is a presumptively reasonable period.²² The US government, however, has taken the position that this ruling does not apply to individuals who were originally apprehended upon attempting to enter the US without authorisation.²³

F. Detention and conditions of release for separated or unaccompanied minors

The basis for custodial care of separated minors in the US is a 1997 consent decree known as the *Flores v Reno Settlement Agreement* ('*Flores*').²⁴ In short, it provides that detaining authorities must release children without unnecessary delay unless their detention is required to secure the child's appearance in court or to ensure their safety or the safety of others.²⁵ *Flores* lists the parties to whom a child may be released, in order of preference: (1) a parent; (2) a legal guardian; (3) an adult relative; (4) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the child; (5) a licensed program willing to accept custody (which can include 'non-secure' shelter facilities, which are places of 'soft detention'); or (6), at the discretion of the Office for Refugee Resettlement,²⁶ an adult or entity seeking custody when there appears to be no likely alternative to long-term detention and family reunification does not appear to be reasonably possible.²⁷

²⁰ 8 Code of Federal Regulations ('CFR'), s. 236.1(c)(3).

²¹ U.S. Constitution, Art. I, Sect. 9, cl. 2; 28 U.S.C. § 2241.

²² *Zadvydas v. Davis*, 533 US 678, 121 S. Ct. 2491, (2001).

²³ This issue is now under consideration by the US Supreme Court in two cases.

²⁴ *Reno v Flores*, 507 U.S. 292 (1993). The settlement was reached in April 1997.

²⁵ *Flores*, para 14. Exceptions include children the state authorities believe to be over 18 years of age; and an emergency situation of mass influx (originally defined as over 130 arrivals, but this figure is now out of date given the existence of a much greater reception capacity).

²⁶ Previously at the discretion of the INS. 8 CFR, s. 236.3(b)(1).

²⁷ If a minor has identified an adult family member who is in INS (now ICE) custody, the INS/ICE must consider releasing the minor and the adult simultaneously. 8 CFR, s. 236.3(b)(2). If a parent or guardian is in INS/ICE custody

Flores has not, however, been consistently applied in practice. One problem was that, in making a recommendation to release, INS and later DHS demanded that undocumented parents come forward to claim their child, and then, once the parents presented themselves, they were placed in removal proceedings. NGOs reported that if the parents remained in hiding, the authorities did not release the child to any documented guardian further down the list of preferences but instead retained them in detention in the hope that it would force the parents to come forward eventually.²⁸

In May 2002, the Women's Commission for Refugee Women and Children ('WCRWC') reported that the INS took some 5000 children into its custody each year.²⁹ Less than half were represented by legal counsel and there was no systematic appointment of guardians *ad litem* who could protect the best interests of the child.

Under new arrangements, the Office for Refugee Resettlement ('ORR'), within the US Department of Health and Human Resources, is now responsible for assessing whether a separated or unaccompanied asylum-seeking child should be released and if so, recommending their placement. ICE remains responsible for implementing the release, however, and refugee advocates report the agency is sometimes slow to follow ORR's recommendations.

As of the time of writing, there were a dozen 'shelters' for unaccompanied asylum-seeking minors around the country, some as large as 60 beds. These so-called shelters are in fact places of 'soft detention' rather than alternatives to detention. Technically, the children remain in custody. NGOs have consistently expressed the view that those shelters run by social service agencies (such as those in Miami and Houston) provide a better environment than those run by enforcement agencies. Human Rights Watch and Amnesty International have strongly criticized conditions in some shelters, such as the shelter care linked to a secure detention wing in Berks County Youth Center. Children are monitored 24 hours a day, educated on site and only allowed to exit the premises with a chaperone. Doors are typically alarmed and security cameras and fences secure the premises. Discipline is enforced with the threat (and practice) of sending children who misbehave to a juvenile detention centre.³⁰

Under *Flores*, a minor may be held in or transferred to a county juvenile detention centre or a 'secure' detention centre if it is determined that the minor has committed a crime, has been adjudicated delinquent, has committed or threatens to commit a 'violent or malicious act', has engaged in disruptive behaviour in a 'non-secure' facility (i.e. a shelter), is an escape risk, or if the detention is for the minor's own safety (such as when there is reason to believe that a smuggler would abduct the minor). Minors may seek judicial review of such a placement determination in a US federal court.

or outside of the US, he or she may designate a person to whom the minor may be released. The designated person must execute an agreement to care for the minor and ensure his or her presence at all future hearings. 8 CFR, s. 236.3(b)(3). A minor may refuse to be released to the custody of his or her parent and be afforded the opportunity to present the reasons for such a refusal. 8 CFR, s. 236.3(e). If the parents are currently residing in the US, they must be notified if the minor is seeking a form of relief that could harm the parent-child relationship.

²⁸ Women's Commission for Refugee Women and Children (WCRWC), *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children*, May 2002, p21.

²⁹ WCRWC, *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children*, May 2002, Senate Testimony of INS official, quoted on p.1.

³⁰ Human Rights Watch, *Detained and Deprived of Rights*, Vol.10, No.4(G), December 1998; Amnesty International, *Unaccompanied Children in Immigration Detention*, 2003.

II. EXTENT OF DETENTION AND LIKELIHOOD OF RELEASE

In FY2002, the government reported that 9,027 of 10,844 ‘defensive’ asylum seekers were detained and 163 of 80,097 ‘affirmative’ applicants were detained. All ‘credible fear’ cases (9,749) were detained at least initially, as required by law.³¹ Taken together, these statistics suggest that some 19% of all asylum seekers in the US were detained at some time.³²

INS statistics from 2000 showed that 34% of children held in INS custody were confined to secure facilities. Of these 1,933 instances of secure detention, 277 were justified on grounds of flight risk, while the rest were justified on the exceptional grounds of a so-called ‘influx’³³ overwhelming reception capacity or in relation to individual behavioural problems. In May 2002, the San Francisco INS juvenile coordinator told the WCRWC that it is the policy of the district to deem any child who has been issued a final order of removal a flight risk and move him or her to a secure facility, unless the child is very young. She conceded, however, that only one child in the custody of the District had ever absconded from (non-secure) shelter care.³⁴

The national average parole or release rate for asylum seekers is disputed, but was estimated in 1999 to range between 10-27%.³⁵ Since September 11, 2001, refugee advocates report that parole rates have dropped steeply from this already low level. In the New York City area, as of November 2003, legal representatives reported to this study that the only parolees they were seeing were pregnant women or people with serious physical illnesses.

An apparent obstacle to the parole of asylum seekers is that ICE often seems to believe that Asylum Officers grant ‘credible fear’ too liberally. Therefore, ICE tends to disregard this factor when making a parole decision regarding an asylum seeker, moving immediately on to consideration of the other pertinent criteria (a fixed address, community ties, etc).

Another reason for ICE reluctance to grant parole is the deterrent purpose which many refugee advocates fear lies behind US detention policy and practices. For example, at a hearing on detention before the US Congress in December 2001, New York District Director Edward McElroy stated in his testimony that he pursued a restrictive release policy so as to reduce the number of asylum seekers seeking entry in his District. Mr. McElroy further indicated that the more liberal parole policy in New York during the early 1990s, along with more liberal employment authorization rules, were ‘magnets to attract people.’³⁶

In November 2003, legal representatives reported cases where an asylum seeker’s identity had been fully authenticated by the US authorities but he or she continued to be denied parole on identity-

Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004), and *Suarez Martinez v. Ashcroft*, No. 03-35053 (9th Cir. Aug. 18, 2003), cert. granted, 124 S. Ct. 1507 (2004).

³¹ The published statistics (see below, footnote 32) reportedly contain an error when they suggest that not every ‘credible fear’ case was detained.

³² See, US Immigration and Customs Enforcement, Report to Congress: *Detained Asylum Seekers*, Fiscal Year 2002. Details on the detained asylum seekers’ countries of origin, gender, locations and average durations of detention were also reported to Congress.

³³ Under *Flores*, INS/ICE may place a child in any kind of facility with space in the event of an ‘emergency’ or in an ‘influx’ of children WCRWC, *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children*, May 2002, p.25.

³⁴ WCRWC, *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children*, May 2002, p.25.

³⁵ Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, August 1999, p.15.

³⁶ Oversight Hearing on a Review of Department of Justice Immigration Detention Policies, December 19, 2001. See www.house.gov/judiciary/immigration.htm.

related grounds. They also reported cases where the ‘manner of entry’ alone was taken as evidence of flight risk, even in one instance where the asylum seeker entered on a valid passport and a US-issued visa. The fact that the man claimed asylum upon arrival was viewed by ICE as invalidating his visa, as he was entering for a reason other than that stated on the visa, making him automatically an unlawful entrant who therefore, ICE argues, would be likely to abscond.³⁷ This indicates that ICE may regard any asylum seeker, regardless of manner of entry, as a flight risk.

Faced with these policies, refugee and human rights organizations have repeatedly called for the parole policy and practices of the US to be reformed. Human Rights First has recommended that parole decisions should be made by specially trained officers, such as asylum officers, and should be challengeable in a ‘meaningful, independent and timely appeal process’. They furthermore recognize that ‘adequate resources must be allocated to the parole determination process’ if it is to function on a truly individualized basis. As overall policy, they propose greater use of non-custodial alternatives including accommodation centers, group homes, supervised release, release to a guarantor or release on bond.³⁸

Human Rights Watch has recommended that detention of asylum seekers in the US should be used only ‘when an asylum seeker has a history of repeated or unjustified failures to comply with reporting requirements imposed by the INS [now ICE] or the immigration court, or has failed to leave the country following the exhaustion of all appeal procedures.’ Another recommendation urges greater use of non-custodial alternatives of all kinds, including ‘secure shelter care, group homes or individual sponsorship by nongovernmental organizations.’ It calls for INS [now ICE] districts with low parole rates to have their policy reviewed, and emphasises that where someone is detained under immigration powers as a threat to national security then he or she should have an opportunity to rebut any evidence against him or her.³⁹

III. ALTERNATIVES TO DETENTION

A. Supervision programmes

1. The Vera Institute of Justice Appearance Assistance Program⁴⁰

The Vera Institute for Justice in New York ran the Appearance Assistance Program (‘AAP’), a pilot project funded by the INS, from February 1997 to March 2000 (though it involved asylum seekers for just two years out of the three). The INS had reported that in 1996 only half of non-citizens released from detention appeared for their hearings and only eleven per cent of non-detained aliens with final removal orders complied with such orders.⁴¹ The AAP was, therefore, introduced as a means of increasing the compliance and appearance rates of parolees.

³⁷ Interview with legal representative from Lawyers Committee for Human Rights (now Human Rights First), October 2003.

³⁸ Human Rights First, *In Liberty’s Shadow*, 2004, p.48; Lawyers Committee for Human Rights, *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, August 1999.

³⁹ Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, Vol.10, No.1(G), September 1998.

⁴⁰ For a full description and self-evaluation of the Appearance Assistance Program (AAP), see, Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August, 2000.

⁴¹ One of the most interesting findings of the AAP was that the INS was underestimating ‘natural’ appearance rates and underreporting the number of departures from the US. The former AAP Director regretted a ‘tremendous looseness’ in the INS statistics and a tendency to conflate rates of appearance for immigration court hearings with appearance

The project involved over 500 participants of three types: (1) asylum seekers arriving at ports of entry, (2) aliens convicted of crimes and awaiting removal, and (3) undocumented migrants.⁴² This summary focuses only on the findings related to asylum seekers arriving at ports of entry, however there were impressive results for the other groups that are also instructive regarding what makes an ‘alternative to detention’ successful.⁴³

To qualify for the AAP, participating asylum seekers had to pose no threat to the public, have a verified residence in the New York metropolitan area, and have strong ties (e.g., family) in the community, including an individual sponsor or guarantor who promised to maintain regular contact with both the participant and the AAP staff. They also needed a good record of past compliance if they were not newly arrived in the US. If an asylum seeker did not have family in the New York area, Vera arranged for a local immigrant organization to act as their ‘designated sponsor’ in a moral, though not legal or financial, sense.

Vera did not attempt to weigh the strength of the asylum claim in deciding whether to accept a potential participant, but accepted the ‘credible fear’ test as sufficient screening. They only excluded an asylum seeker from participation if he or she was excluded from a grant of asylum as defined under US immigration law,⁴⁴ or if he or she had committed a criminal offence in the US.⁴⁵ Most asylum seekers had been detained for one or two months before participating in the AAP.

The AAP had two different sets of participants: (a) voluntary participants who would in any case have been released by the INS on their own recognizance, based on humanitarian grounds (e.g., pregnant women, families with children, people with poor health, etc.); and (b) participants who would otherwise have been detained, but who were released directly into the AAP’s supervision. There were 83 asylum seekers in group (a) and 24 asylum seekers in group (b). Finally, there were 222 asylum seekers in various comparison groups. These were individuals recommended for participation by Vera intake interviewers, but not allowed to participate in the Program by the INS, though later released from detention.⁴⁶

Group (a) was given ‘regular’ supervision, which was in fact mostly support and assistance, such as reminders of court dates by telephone and letter, legal assistance and referral, and access to a Resource Center which provided information about the US asylum system, about country of origin conditions, referrals to language classes, food pantries, health clinics and other available social services.

In comparison, group (b) received ‘intensive’ supervision, involving the same offers of assistance and referral, but also including mandatory reporting requirements to the AAP, both in person (once every two weeks) and by telephone (twice weekly); unannounced visits to their home address by

for/compliance with removal. When Vera talked to US Immigration Judges, the impression was that asylum seekers are generally very compliant and law abiding – so long as there is any hope of them receiving legal status in the US.

⁴² While asylum seekers might also fall into groups (2) and (3), those included in the AAP were not reported as so doing.

⁴³ AAP found that 91% of people who received intensive supervision (in all categories, not just asylum seekers) attended all required hearings, compared to 71% of people who were simply released on bond or parole. AAP supervision also virtually doubled the rate of compliance with final removal orders when looking across all three categories of participants.

⁴⁴ The US ‘exclusion’ criteria appear in several sections of the INA: ss. 101(a)(42)(B), 208(b) and 241(b)(3)(B).

⁴⁵ Interview with former Director of the AAP, October 2003-March 2004.

⁴⁶ INS officials at the Wackenhut Detention Center did not refer approximately 20% of the newly arrived asylum seekers who were eligible and whom Vera wished to supervise.

AAP staff and other frequent checks on their whereabouts; and close monitoring to evaluate any changes in potential flight risk. These participants faced the penalty of re-detention if they failed to comply with their obligations under the AAP (or if, like other asylum seekers, they failed to attend any of their scheduled interviews or hearings).

Results

84% of those asylum seeker participants under regular supervision (group a) appeared for all their hearings, compared to 62% of non-participant asylum seekers released on humanitarian parole. An intensive level of supervision, however, was found to make very little statistical difference to those asylum seekers' (group b) rate of appearance. It must be noted that most of the asylum cases were still pending by the time the pilot project finished, so these were only partial results and were inconclusive regarding the compliance rate of failed asylum seekers with deportation orders.⁴⁷ The AAP staff suspect that intensive supervision might have raised rates of appearance amongst asylum seekers in the latter stages of their claims or pre-removal, had the AAP continued to see them through, since they confirmed that the risk of flight increases dramatically once someone is ordered removed by an Immigration Judge.⁴⁸

The pilot project found that one subgroup of the studied comparison group (of non-participants who were released on humanitarian parole) absconded at a high rate because they had the clear intention of transiting to Canada. If this group were subtracted from the calculation, the comparison group's appearance rates increased significantly to almost match those achieved under the regular supervision of the AAP (group a). This suggests that the AAP had little independent impact on the behaviour of asylum seekers with equivalent community ties in the US: the majority would never have absconded in any case. The impact of AAP supervision was much more significant for those groups (the undocumented workers and criminal aliens) who had fewer natural incentives to comply than those seeking protection, of whom the majority were likely to be allowed to remain in the US.⁴⁹

The AAP also concluded that the average cost of supervision is 55% less than detention. It estimated that it cost only US\$3,300 to supervise each asylum seeker as compared to US\$7,300 to detain them over the same period.⁵⁰ (See below regarding future costing calculations.)

Factors contributing to results

According to Vera 'the most consistent factors [in ensuring appearances at hearings] are having community and family ties in the United States, and being represented by counsel...' They decided

⁴⁷ Of the 61 participants and comparison group members who were given removal orders when they appeared in court, only three had required departure dates before 31 March, 2000 and all three departed. Of the remaining 58, 45 were appealing the Judge's decision to the Board of Immigration Appeals or Federal Courts, and thirteen were awaiting a 'deportation surrender date' from the INS.

⁴⁸ Interview with former AAP Director, October 2003-March 2004.

⁴⁹ Over half the asylum seekers who received decisions before the end of the AAP were granted asylum or some other form of relief (48% of intensively supervised participants and 57% of the regular group). By way of comparison, only 40% of those asylum seekers who were released on humanitarian parole and did not receive supervision under the AAP were allowed to remain. The key factor here was most likely the number who had legal representation, since all the AAP participants were referred to competent asylum lawyers.

⁵⁰ The daily cost of supervision was budgeted to be US\$12 per day (including staff, rent/utilities, technology, vehicles and other equipment, and interpreter services). The staff to participant ratio was 1 to 23 and there was an average of 3.5 hours of staff time per participant expected on a monthly basis. Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August, 2000, p.65.

that, for asylum seekers, the single most decisive factor in Vera's high appearance rates was Vera's effectiveness at screening for community ties.⁵¹

The AAP worked with a very diverse demographic group, and its evaluation determined that neither age, nationality nor gender were significant factors affecting an adult's likelihood of appearance. 'While it seemed that nationality was affecting successful completion, it turned out that the underlying factor was the strength of family and community ties...'⁵²

The AAP ensured that participants were making truly informed decisions, and its staff believes that this contributed to their increased appearance rates. They found that almost half of those asylum seekers interviewed when they entered the AAP did not understand that they would have to appear before a Judge. They had been given misinformation by smugglers or other detainees and lacked basic knowledge about the way the system worked.⁵³ The AAP could not give legal advice but it could correct misinformation. Even though every asylum seeker would be informed that their non-appearance would lead to being removed *in absentia*, very few seemed to understand what this really meant, perhaps due to the language gap or an overly legalistic manner of communication when the information was read aloud in court while they were nervous and disoriented. Sometimes the information was merely given on a sheet of paper, or they were notified verbally but then had the information repeatedly contradicted and erased by misinformed members of their communities following their release. Vera concluded that it was not only vital to tell people their obligations but to check that the obligations were understood.

The fact that the asylum seekers mostly had lawyers, or were able to find *pro bono* lawyers with the assistance of Vera, was highly significant and lessened their dependence on the AAP staff. The asylum seekers did, however, still need AAP assistance with a range of practicalities, such as making free international telephone calls, accessing free interpretation services, or finding out how and when to request documentation from their home countries.⁵⁴

When asked about their reasons for appearing consistently, some AAP participants mentioned quite subjective factors, such as their unwillingness to disappoint the AAP staff who had treated them with respect and consideration. For the asylum seekers (in group b) who were released directly from detention into Vera's supervision, facilitating that release was perceived as the primary purpose of the AAP. Some participants therefore expressed a sense of obligation about complying in order to preserve the opportunity of release for future detainees. Two people interviewed in the evaluation, for example, said that they understood 'their performance in the program could help other detainees get released in the future.'⁵⁵

An important component of the AAP, affecting other categories of participants more than asylum seekers, but still relevant, was departure planning and verification. Vera helped those ordered to

⁵¹ "Participants and comparison group members with equivalent community ties in the United States attended their hearings at about the same rate. Participant asylum seekers achieved a higher appearance rate than those released on parole because the program more effectively screened for community ties." Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August, 2000, p.7.

⁵² Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.22.

⁵³ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.55.

⁵⁴ Interview with former Director of the AAP, October 2003-March 2004.

⁵⁵ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August, 2000, p.59.

depart the US with obtaining travel documents and buying tickets, and went to witness their departure.⁵⁶ Participants received explanations on how to confirm their departures to the INS and, if required to pay a bond, how to get their money returned when they left.⁵⁷

The AAP concluded that the role of ‘designated guarantors’ in addition to the supervision of their own staff was ‘definitely helpful’ because the guarantors usually had the same language and culture as the asylum seeker and could act as an extra point of contact. It was not always easy to find volunteers to be guarantors and sometimes there were problems regarding how much the guarantors from community-based organizations had really ‘bought into the program’s supervision and enforcement aspects’.⁵⁸ Nonetheless, this aspect of the AAP proved that it is possible for an agency to artificially create community ties for detainees who have none of their own but are otherwise suitable for release.

Constraints on the AAP

The disincentive component of re-detention for failure to comply with AAP obligations was not successfully implemented, through no fault of the Vera Institute but due to some non-cooperation on the part of local district INS staff with the pilot project. The authorities acted upon only eleven of Vera’s 52 recommendations for re-detention.⁵⁹ In the 41 cases where Vera recommended re-detention and were ignored by the INS, those participants absconded soon afterwards.⁶⁰

The AAP Director observed that, in his experience, the INS worked with the defeatist attitude that if someone was released from detention then they were ‘as good as gone’. He was unable, for example, to get the New York authorities to re-detain someone who had broken the terms of his or her parole except with very great effort, even when the person was sitting in the Director’s own office awaiting the police.⁶¹

Conclusions of the AAP

Vera concluded that: ‘Asylum seekers do not need to be detained to appear for their hearings. They also do not seem to need intensive supervision. Detention of asylum seekers is particularly unnecessary and unfair since they are so willing to attend their hearings...’⁶²

The significant impact of intensive supervision on the appearance rates of those with fewer incentives to appear than asylum seekers suggests that this form of ‘alternative to detention’ may be more suitable for asylum seekers who are in the final stages of appealing against a negative decision or for failed asylum seekers. The AAP findings, however, suggest caution about trying to use

⁵⁶ An interesting statistical point was that, by these means, the AAP was able to confirm the departure of five participants whom the INS classified as ‘absconders’.

⁵⁷ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August, 2000, p.16. Lawful departure was important to the undocumented migrants, in particular, because they wanted to preserve the possibility of returning legally to the US in the future.

⁵⁸ Interview with former AAP Director.

⁵⁹ To ensure the highest level of accountability, every decision to re-detain was reviewed by the highest level by the AAP Director. Source: Interview with former AAP Director, October 2003-March 2004.

⁶⁰ Interview with former AAP Director, October 2003-March 2004.

⁶¹ Interview with former AAP Director, October 2003-March 2004.

⁶² Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.31-2.

community supervision to enforce orders to leave a country.⁶³ As already stated, the results regarding rejected asylum seekers were inconclusive because most cases were still pending, but the project's evaluators acknowledged that forced return to a dangerous or underdeveloped home country was likely to carry more weight than any US penalty such as a forfeited bond.⁶⁴

The AAP model shows that the question is not what level of supervision of asylum seekers is required for 100% compliance, but rather what level is required for compliance at an acceptable level.⁶⁵ The Vera staff noted that, even if a person under any AAP-style programme did abscond, it would be a great deal easier to trace and re-detain them (were there the will to do so) because of all the information and contacts with friends and family obtained during the course of the programme.⁶⁶

Export value of the AAP?

There are a number of specifics that made the AAP successful and which may not exist in another context, limiting the replicability of the programme:

- More than half the asylum seekers came into the AAP with a legal representative and Vera was able to find *pro bono* attorneys for those without one. Results from other US 'alternative to detention' projects described below suggest that access to a legal representative may be the single best way to ensure compliance, yet there are of course many places within the US, let alone in other countries, without either State-funded legal aid, trained asylum lawyers or *pro bono* legal resources.
- The above point raises questions about whether an AAP-style programme could be run by the detaining authorities of the state, since they would then have to refer clients to legal advisers and provide impartial information that asylum seekers could use to prepare their cases. This was one of several reasons why the AAP evaluation was in favour of such supervision programmes being run by nongovernmental entities, although there were efficiency arguments on both sides.⁶⁷ The Vera Institute for Justice, while not unique, is a rare example of an impartial entity in the immigration field. The former AAP Director was of the opinion that it would be 'very difficult' for a real refugee advocacy organization to run a programme like Vera's, both because they would have to work so closely with the government and because they would have to have a willingness to request the re-detention of participants. This would be difficult both in terms of organizational mission and in terms of ensuring the commitment of staff to the work.
- The length of proceedings in the US suited the style of assistance and supervision provided under the AAP; asylum seekers in much more accelerated procedures would not need to

⁶³ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.71.

⁶⁴ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.62.

⁶⁵ By way of comparison, in 1996, 78% of felony defendants in the US who were released before their trials complied with their bail conditions. [Source: US Department of Justice Statistics, *Felony Defendants in Large Urban Counties 1996, 1999*.] A 2002 US Bureau of Justice study found that 42% of criminal parolees in a managed programme successfully completed their term of supervision, while 10% completely absconded. [Source: US Department of Justice, *Re-entry trends in the US: Success Rates for State Parolees*, 2002.] Both these figures are lower than the rate of appearance achieved by AAP as well as lower than that achieved by asylum seekers with equivalent community ties but without the AAP's supervision. The asylum appearance levels discovered and produced by the Vera Institute may thus be regarded as 'acceptable levels'.

⁶⁶ Interview with former AAP Director, October 2003-March 2004.

⁶⁷ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.74.

have their long-term appearance ensured in the way the programme offered, but might also have a greater reason to abandon the procedure.

- The US legal provision that, if an asylum seeker misses a hearing, he or she automatically loses his or her case is an absolutely key variable in the high appearance rates. An order of deportation *in absentia* can be reopened if the asylum seeker can convince an adjudicator that he or she had reasonable grounds for his or her absence. The courts have, however, been quite restrictive when considering such motions to reopen. There have certainly been cases where an asylum claim was dismissed because the applicant was stuck in traffic or lost wandering inside the courthouse and the attorney was later unable to get the case reopened.
- There is virtually no nationality or culture unrepresented in the New York metropolitan area, so it was relatively easy for Vera to find interpreters, multiethnic staff, and community contacts willing to be housing providers and act as ‘designated guarantors’.

The AAP is a ‘best practice’ model in terms of tracking its results and evaluating them rigorously. This evaluation included, notably, comments from participants themselves regarding their experiences. Some stated, for example, that they had found the supervision overbearing and intrusive, while others said that it had been a positive experience and regarded their supervisors more as counsellors. Participants told evaluators that AAP supervisors accompanying them to their court hearings or other appointments had been very reassuring and helpful.⁶⁸ This beneficial effect of the programme may be regarded as inherently valuable, regardless of its impact on appearance rates.

Some critics question the value of the AAP results with regard to asylum seekers, since they argue that all those released to the Program should have been paroled anyway, were the INS to properly follow its own procedural guidelines. It is clear, however, that those detainees released directly into the AAP (group b) would likely have been held by the INS if the AAP had not been pushing for their release, and in particular if the AAP had not created ‘designated guarantors’ for cases where there were no family or other ties.

In either case, perhaps the most significant AAP results for asylum seekers were those relating to the control group because these results showed that the vast majority of asylum seekers (virtually all except the group who absconded to Canada) complied with the US procedure of their own accord and that the INS officials’ estimates exaggerated the problems of non-compliance, at least prior to final refusal of claims.⁶⁹

2. The Lutheran Immigration and Refugee Service (‘LIRS’) proposed model, and experience with ‘The Ullin 22’,⁷⁰

The Lutheran Immigration and Refugee Service (‘LIRS’) identifies detainees who are in need of alternatives to detention as (a) asylum seekers without sponsors for parole and (b) people whose removal orders are over ninety days old and who pose no danger to the community.⁷¹ It argues that organisations with expertise in the settlement of refugees and immigrants are best suited to

⁶⁸ Vera Institute of Justice, *Testing Community Supervision for the INS: An evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, 1 August 2000, p.57.

⁶⁹ Again, see Conclusions for Department of Justice figures confirming a high rate of compliance.

⁷⁰ ‘The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention,’ Detention Watch Network News, Issue 16, Aug-Sept 2000. All information relating to this project is based on this article and interviews with LIRS staff, October 2003-March 2004.

⁷¹ Lutheran Immigration and Refugee Service, *Proposed Alternatives to Detention and Legal Orientation*, 2001, unpublished document provided to the author on 16 September 2003.

implement alternatives to detention, and as evidence they refer to the success of several past and present NGO alternatives, including a programme run by Catholic Charities in New Orleans (see below), and a LIRS programme which managed a specific group of 25 Chinese asylum seekers released from detention in the remote location of Ullin, Illinois, in 1999. At the request of the government, LIRS managed the dispersal of these asylum seekers to open shelters around the country, mainly in Chicago, and ensured that they were referred to attorneys. The locations were not publicly disclosed, due to trafficking concerns. The INS paid the travel and lodging costs for a dozen attorneys to go to Ullin to give a legal rights presentation to 33 Chinese, followed by individual interviews, and several charities donated the transport costs to the shelters of those who were released. For several months after they were released, LIRS coordinated conference calls every two weeks with legal representatives and shelter managers, to monitor the cases and address any problems. Frequent updates were sent to the government by LIRS.

Of the 25 released, two moved from the shelters to live with family members and one disappeared, but the remaining 22 appeared consistently for INS check-ins and court dates. This small initiative, therefore, had a 96% appearance rate. LIRS also believes that the asylum seekers achieved a higher than expected asylum grant rate because they were better able to present their claims than if they had been left detained and/or unrepresented. The costs of detaining the 22 for a year, at an average of \$63 per night per person, would have totalled close to \$500,000, whereas the shelters cost far less. One reported that their cost per resident per night was only \$2 – at which rate a year's housing for all 22 people was less than \$16,000 (some 3% of the cost of detention).⁷²

The alternative to detention model currently proposed by LIRS would involve:

Step One: Group legal orientations for detainees, followed by individual interviews. They note that in the case of the Chinese asylum seekers, information gathered at the interviews following an initial orientation proved vital in evaluating release options.

Step Two: Individual screening of those to be released, including checks on whether their family ties should supersede use of an NGO sponsor for parole.

Step Three: Provision of integrated services, that is, legal, social, medical, mental health and job placement. LIRS notes that work authorization for the parolees would be essential so that they could support themselves and cover the costs of their accommodation. LIRS makes the pointed observation that '[i]t takes a good deal of work to find out what legal, social and pastoral services a person needs, and to help them to access them... Merely giving released individuals a list of available services is not sufficient.' Above all, facilitating referral to good legal representatives is assessed as a critical factor: 'Locating quality representation was a time-consuming process, and was only possible because of the long-established relationships that the nonprofit agencies had with bar associations, law firms and the *pro bono* legal community.' Even after an attorney was found, the nonprofit agency played a key role in liaison and communication between clients and lawyers.

Step Four: Ongoing assistance, monitoring and provision of information, including explanations of the consequences of not attending a court hearing. LIRS argues that it is important that this information should come from a 'neutral party'. In the case of the Ullin parolees, they were actually accompanied by shelter staff to their hearings.

⁷² Detention Watch Network Newsletter, Issue 16, Aug-Sept 2000.

Step Five: Enforcement of final deportation orders. It is noted that fewer people are likely to receive such orders because evidence demonstrates higher chances of recognition for asylum seekers with representation (around six times that of those unrepresented). LIRS is thus willing to play a referral role when it comes to enforcement.

If applied to some 2,500 people eligible for release, at a cost of \$7.3 million, LIRS predicts that there would be a cost saving of at least \$11.6 million under their proposed model.

3. New federal government funding for ‘alternatives’: the Intensive Supervision Appearance Program (‘ISAP’)

In response to the success of the Vera programme, Congress appropriated US\$3 million to fund alternatives to detention in FY2002-2004. However, in FY2002, most of these funds were spent on a shelter care detention facility for families that was acknowledged to be more an alternative, softer form of detention than an alternative to it (see below). The latter appropriations were spent on several pilot projects involving electronic monitoring of asylum seekers (again, see below). These pilot projects were perceived, by advocates in the three sites where implemented, as raising rather than lowering restrictions on asylum seekers.

In FY2003, appropriators clarified that the funds should be spent on alternatives to detention, that is, on an Intensive Supervision Appearance Program (‘ISAP’). The DHS issued a solicitation for projects to be established in eight cities, namely Baltimore, Denver, Kansas City, Miami, Philadelphia, Portland, San Francisco and St Paul. Detention and removal operations (‘DRO’) within ICE, a sub-entity of the DHS, will retain sole authority over deciding whom to release, and the implementing partner agency will only be paid *per capita* for each supervised person who appears for all appointments throughout the procedure and possible removal. According to a DHS announcement launching ISAP: ‘To be eligible for this pilot program, an alien must be an adult with a confirmed identity who does not pose a threat to the community or national security. Additionally, it will be available only to aliens who are not subject to mandatory detention, who are pending immigration court proceedings or awaiting removal on a final order of removal and who will be residing within the managed area.’⁷³

In May 2003, non-profit organisations in the Detention Watch Network wrote to the DHS to re-state their reasons for believing that community-based options are preferable to enforcement models.⁷⁴ Community-based options are defined as those that facilitate ties in the community, in combination with the provision of good asylum lawyers and the meeting of basic needs. The Network believes that such conditions should be sufficient to make the overwhelming majority of asylum seekers compliant with US asylum procedures. They base these assertions in large part upon the findings of the Vera Institute’s AAP (described above).

The DHS solicitation’s terms, however, require that those running ISAP projects play a significant enforcement role on behalf of the Department – meaning that the agencies must be willing to recommend re-detention or present someone for forced removal if so required. In particular, the DHS solicitation requires that all projects should be willing and capable of using electronic monitoring as a component in their supervision regime, at least in certain cases.⁷⁵ Several community-based organizations were therefore deterred, on principle, from applying for the funds.

⁷³ ICE Media Advisory, 21 June 2004.

⁷⁴ Comment Letter on ‘Intensive Supervision Appearance Program’ from the Detention Watch Network to the Bureau of Citizenship, 29 May 2003.

⁷⁵ ISAP, SF 1449, Section I, p.24.

The Vera Institute's bid to replicate the AAP project in six of the eight proposed sites was not accepted. It would have been interesting, if both Vera and the private prison/probation companies had been awarded contracts, to compare their effectiveness and quantify the impact of Vera's rights-supportive environment as opposed to a more enforcement-oriented approach.

Another non-profit organization that made a bid for the ISAP funds was the Volunteers of America in Minneapolis/St Paul.⁷⁶ This is a local charter affiliate of a national social service agency that has been in operation for 107 years, but which has no previous experience with refugees or asylum seekers. It does have previous experience in the criminal justice/probation field and, in fact, manages a 'soft', rehabilitative jail for women in St Paul. Their bid included an element of electronic monitoring, and as a direct result of this feature, all the asylum seekers they proposed to assist would have resided in the private homes of sponsors, usually family members. This fact suggests that the Volunteers of America project would have provided an alternative to detention only to those who would be eligible for parole in any case, even without the additional imposition of supervision.

The agency offered to provide a low staff to caseload ratio of 1:16 or 1:18, for 200 people over the course of five years. Participants were expected to be drawn from local jails in the seven counties of the Minneapolis/St Paul metropolitan area, or indeed from anywhere in the US so long as the person had a sponsor resident in the twin cities. The agency had no intention to 'create' a community sponsor for anyone who did not already have one, so would not have widened the pool of potential parolees by that means. They state that they had proposed to specialize in assistance to women who may be former victims of trafficking, to utilize local services – including a torture counselling centre and *pro bono* lawyers – in order to assist the asylum seekers, and to open an office storefront.

As of March 2004, however, it is reported that the ISAP funding for projects in all eight locations will go to a private company named Behavioral Interventions, Inc. ('BI') of Boulder Colorado, which has a history of implementing electronic monitoring in the criminal justice field.⁷⁷ They are to launch ISAP, involving the use of electronic monitoring but also supervision by home and work visits and reporting by telephone, in the eight pilot cities on 21 June 2004.⁷⁸

It is expected that a further US\$11 million will be granted to ICE for spending on 'alternatives to detention' in the FY2005 budget. It is understood that this is likely to be spent on replicating and expanding electronic monitoring and ISAP projects throughout the country (see below for further details on electronic monitoring pilot projects).

B. NGO projects to maximise the release of asylum seekers on bond and parole

Throughout the US, a wide variety of local and national nongovernmental organisations, mainly legal advice projects, advocate to make release on bond or humanitarian parole a more accessible option for asylum seekers and other persons in immigration detention. In some cases, their staff will pro-actively seek sponsors for vulnerable individuals, help to find them a fixed address at which to stay, or sometimes informally vouch for the appearance of the person released. A number of

⁷⁶ All information based on an interview with the proposed manager for this project at Volunteers of America, October 2003-March 2004.

⁷⁷ See www.bi.com for further information on this company, which declined to comment to this study on their plans for ISAP in accordance with instructions from the Department of Homeland Security.

⁷⁸ ICE Media Advisory, 21 June 2004.

examples of such work are therefore included here as ‘alternatives’, though that is not their sole or primary purpose. Information regarding the many benefits of free legal advice are also included.

1. The Florence Immigrant and Refugee Rights Project, Arizona

Since 1989, this nongovernmental agency has been permitted entry to immigration detention facilities (Florence INS Service Processing Center) to give daily legal rights presentations to between 20-40 detainees at a time prior to their first hearing before an Immigration Judge. The presentations assist detainees in evaluating whether to go forward with their case, increasing the efficiency of the immigration court process and reducing the overall costs of detention. The group orientations are followed by individual interviews with those who request them. The Project also provides instructions for writing supporting/bond letters for parole hearings and directly represents a portion of those applicants at their bond hearings.⁷⁹

In 1998, based on the success of the Florence Project, the US government (administered via EOIR) funded legal orientation projects in three different sites, with three different agencies, for three months each. The Department of Justice’s findings from these pilot projects were that providing such rights information to immigration detainees made the immigration proceedings more efficient and reduced overall bed days in detention by 4.2 days per detainee. Such legal orientations have now been funded nationwide.⁸⁰ At an estimated cost of detention of \$65.61 per day, such orientations should lead to a \$12.8 million saving. If the legal orientations cost \$2.8 million, the government will still save \$10 million.⁸¹

2. Catholic Charities, New Orleans

In New Orleans, Catholic Charities has helped paroled asylum seekers since 1999 to find legal representation and housing. The project does not receive government funding but believes that its work has saved the government substantial costs by providing a fixed office address through which asylum seekers can be contacted and thereby providing a practical alternative to their detention. The project acts as more than simply a ‘mailbox’ for their clients however, as they also informally monitor their whereabouts and appearance, though they are not formally responsible as sponsors or sureties. They have 1.25 staff members who have assisted and monitored the compliance of 42 released asylum seekers (as well as 57 criminal aliens, including refugees, with removal orders older than ninety days). None of these cases had any legally present family members or other contacts in the US at the time of their release, though sometimes such persons surfaced later. They were all released on parole, with no bond or surety required.

Of the 42 asylum seekers released to the project, only one person has ever disappeared during the asylum procedure, to go to Canada. It should be noted, however, that these clients were only tracked by the Catholic Charities project to the point when their asylum decisions were delivered, not to the point of removal if their asylum claims were rejected.

⁷⁹ C. Nugent, ‘Strengthening access to justice: Pre-hearing rights presentations for detained respondents’, *Interpreter Releases*, Vol.76, no.27, 19 July 1999.

⁸⁰ During FY2002-04, Congress appropriated \$US1 million annually to fund legal orientation programs for immigration detainees. With the FY2002 funding, six sites were contracted to give legal orientation programs, which were expected to reach over 21,000 detainees.

⁸¹ Source: Florence Immigrant and Refugee Rights Project and LIRS, *Legal Orientation for Immigration Detainees: Program Implementation Plan*, unpublished document provided to the author on 16 September 2003.

Most of their clients find beds in ordinary homeless shelters, but even these applicants have had almost perfect appearance rates, suggesting that quality of accommodation is not a decisive factor in ensuring appearance. The manager of the project believes the decisive factor has been referrals to diligent attorneys who remind their clients of dates and deadlines. Another key factor, simply in terms of making the project financially viable, was the agreement of INS to grant all those released to the supervision of Catholic Charities an early work authorization, commencing from the day of their release rather than after six months. This was based on discretion granted to local District Directors in cases of parole. Catholic Charities reports that this kind of concession was only achievable thanks to the constructive dialogue they have established in quarterly meetings with the local INS (now ICE) in Louisiana. Since 2001, however, due to the drop in the number of persons paroled by DHS, the project has not had any asylum seekers released to its supervision. It is aware of only two Cuban asylum seekers paroled in the District in January 2002.⁸²

3. Pennsylvania Immigration Resource Center ('PIRC')⁸³

PIRC provides legal services to detainees in York, Pennsylvania, including a special programme to encourage self-identification of torture survivors. They give legal rights orientations, in conjunction with local law schools, at York Detention Center (900 beds). However, grants of parole remain extremely rare, even if PIRC helps find a sponsor and fixed address of accommodation to submit to ICE. If an asylum seeker is paroled, PIRC tries to refer the applicant to a lawyer who can pursue the claim and will network with other local NGOs (e.g., the Pennsylvania Immigration and Citizenship Coalition) to ensure that basic needs are met.⁸⁴ According to PIRC, the only detainees currently being paroled in its area are pregnant women or separated children and families with young children, though not in all cases.⁸⁵

4. Florida Immigrants Advocacy Centre ('FIAC')

FIAC's proposals for community-based 'alternatives to detention' in Florida emerged as a result of a scandal at Krome Detention Center several years ago. Female detainees in Krome made serious allegations of sexual abuse, which prompted an investigation by the Department of Justice and the FBI. While the abusive staff members were not removed from the Center, the victims were removed to a maximum security jail (Turner Guilford Knight Correctional Center) in downtown Miami. NGOs complained that this was grossly inappropriate and, as a result, the women were transferred to Broward County Detention Facility, which at the same time was given \$1 million of monies appropriated by Congress for implementing alternatives to detention, though Broward is clearly a place of (soft) detention. Later some of these vulnerable women were released with a requirement to report every 30 days.⁸⁶

FIAC does not provide accommodation to asylum seekers, but has a staff of 45 who supply free legal services to them. Though it does not have the capacity to track the precise rate of compliance

⁸² There are some 200-250 immigration detainees in Louisiana at any point in time, with an estimated 20-30 being asylum seekers without criminal convictions. Interview with manager of Catholic Charities, New Orleans, October 2003-March 2004.

⁸³ Interview with PIRC, October 2003-March 2004.

⁸⁴ Families who are released on bonds can live at whatever address they supply, without supervision. Those who are released to live with relatives or other bondspersons sometimes face problems when hospitality wears thin before the end of the asylum procedure, at which point PIRC may have to help find them emergency housing (see below section on shelters).

⁸⁵ The latter two categories are detained not at York but in Berks County.

⁸⁶ Women's Commission for Refugee Women and Children, *Innocents in Jail: INS Moves Refugee Women from Krome to Turner Guilford Knight Correctional Center, Miami*, June 2001.

of its non-detained clients, it reports that most do comply and confirms the view that legal representation is the single best guarantee of compliance, if only because it promotes understanding that non-appearance will lead to the court issuing a deportation order *in absentia*.⁸⁷ Most of FIAC's clients in Miami have relatives or friends to stay with, but in those cases where emergency housing needs arise, this can be very difficult to secure. FIAC's proposed alternatives to detention, especially in cases such as the vulnerable women described above, are open shelters and community-based assistance programmes. Though it has not cost these alternatives, FIAC asserts with confidence that it would be cheaper than the current use of electronic monitoring on released asylum seekers in Florida (see below).

C. Shelters for accommodation of asylum seekers released on bond or parole

A number of nongovernmental and state-funded shelters offer themselves as accommodation addresses in applications for release on bond or parole. Though these two means of release are legally separate, they are related in so far as both require a fixed address and an element of reporting to the authorities. The following are examples of shelters that specialise in assisting released detainees with meeting such conditions. Often they cooperate with legal services organisations such as those named above.

1. International Friendship House, Pennsylvania⁸⁸

International Friendship House is an emergency housing resource available in York, Pennsylvania. It is funded through donations and government funds for emergency housing, and can accommodate seventeen adult residents at one time. It accepts former detainees from York and Berks Counties, as well as from other Districts as far afield as New Jersey and Illinois. Since 2001 such releases have slowed down to a trickle. Twice, in difficult parole cases, the manager of the House has personally signed an affidavit of support, meaning a commitment to support the person financially over 40 quarters (10 years). Even so, both cases were refused parole.

The House only accepts those seeking refugee protection, or who have been denied such protection but cannot be removed. The detainee cannot have a criminal record, and must be willing to agree to a set of written House rules as a pre-condition of their stay. The staff of the House report constructive relations with the local detention managers who allow them to visit detainees inside the facility and interview them prior to release. Representatives of the House, including interns from local colleges, usually visit the nearby facility four days per week.

The House operates a case management model, with a trilingual case manager who first does an 'intake' – a review of all psychological health issues, the underlying claim for refuge (either by talking to their attorney or finding them an attorney if they do not already have one), the need for language classes, high-school entry or other training, and their immediate needs for clothing and other basic supplies. To meet all these needs, the project depends on a tight informal network of attorneys, NGOs, churches and mosques in the local area.

If eligible to work, the case manager helps the asylum seeker to find a job in the local area and afterwards the House will charge them rent of \$25 per week (two thirds of which is refunded if they later move to their own apartment). If not permitted to work for income, they are required by the

⁸⁷ The manager mentioned the example of a sixteen year old Haitian boy who was recognized as a refugee but then had the finding reversed. He reported for his last appointment although fully aware that he was to be detained and deported. Interview with FIAC, October 2003-March 2004.

⁸⁸ Information based on an interview with International Friendship House, October 2003-March 2004.

management of the House to do volunteer work in the community as a gesture of thanks for their free room and board. This is one of the rules of the House to which they must agree, by signing a contract, before they are released into its care. Other House rules include an 11pm curfew, with preference for everyone to be back before 10pm unless they have to work a late shift; and no alcohol and no smoking. In the rare cases where the rules are broken, the resident may be expelled from the House but they will always be referred to another homeless shelter or charitable rescue mission. There has only been one case in the past four years (approximately 100 residents in total) where a resident has disappeared and cut contact.

The manager of the House also runs a community 'circle' which has housed 45 parolees over the past five years, providing an address or sponsor necessary for their release when they do not have family or friends in the US. Instinctive trust of the detainee is the only selection criteria for this highly informal alternative, and there is admitted to be a natural limit on its potential scale since only trusted friends of the Coordinator, not strangers, are invited to become involved. For example, the Coordinator once hosted a family of five sisters from the Democratic Republic of Congo where the eldest girl was over eighteen and therefore the family was not considered eligible for foster care. A wider network of volunteer sponsors would create a heavy responsibility to pre-screen host households.

Parolees stay in these host households for varying periods of time, ranging from one night to fifteen months. If they move out to their own private accommodation they do so with the Coordinator's cooperation, requesting permission from the authorities for a change of address. None of the 45 former detainees hosted by the circle has ever disappeared or failed to appear for their asylum hearings.

2. Freedom House, Detroit⁸⁹

This shelter of 37 places accommodates asylum seekers and recognised refugees. As of November 2003, ICE was not paroling any asylum seekers to its care, but it is the kind of place that would happily receive and supervise them if ICE were willing to grant parole to those without community ties. Since 1983, Freedom House has provided support services and transitional housing to recognised refugees released when, and its own in-house legal department visits the two county jails in Michigan on a regular basis. They give group legal orientations and assist detainees with applications for asylum. Funds for the House come from federal, state and local government grants for homelessness, as well as some twenty private foundations and donors.

3. Refugee Immigration Ministries ('RIM'), Boston

RIM, with two full-time staff, three part-time staff and interns, currently organises seven 'cluster groups' made up of church congregation members and other volunteers to support an individual parolee. The clusters provide host homes necessary for parole to be granted. They then work on a case management model to ensure that each asylum seeker is provided with whatever he or she needs (based on *pro bono* arrangements with attorneys, Boston Medical Centre and local community organisations). There is a strict non-proselytising policy, to ensure that applicants' own spiritual beliefs are respected by the church volunteers. The case management structure is also needed to ensure that the asylum applicants are allowed to become self-sufficient in the longer term.

⁸⁹ Information based on an interview with an attorney for Freedom House, October 2003-March 2004.

Potential parolees are identified by RIM-organised volunteer visitors to detention centres. The training programme for these visitors is funded by ICE. Those selected to be offered a placement in a cluster group have sufficiently strong asylum claims to attract a *pro bono* attorney. RIM considers there to be far more detainees deserving of parole than cluster placements, so they try to select the most urgent cases. In the past three years, RIM has assisted 45 people and it is currently assisting seventeen or eighteen people. What is striking is that, of the 45, only one asylum seeker did not receive refugee status. None absconded or failed to comply with the procedure in which they had confidence of recognition, though the one rejected applicant did abscond to Canada the day before his deportation.⁹⁰

Since September 2001, RIM has not been successful in assisting a single asylum seeker to be paroled into their care, though they continue to assist asylum seekers paroled to family members who later find that they need to move out of the relative's home. This is partly due to an overall drop during 2002-2003 in the number of asylum seekers in the expedited removal process in the Boston area, but equally it appears to reflect DHS' greater unwillingness to release asylum seekers from detention since late 2001.⁹¹

The total costs of the RIM project are approximately \$2800 per client per cluster, with nine times that amount of donated time (valued at \$15.39 per hour) and additional donations in kind. At this rate, even without knowing the precise costs of detention in Boston, it is clear that, for the government, this is an extremely cost-effective alternative.

D. Alternatives for separated minors and other vulnerable persons

1. Alternatives for separated minors

As already mentioned, the Office for Refugee Resettlement ('ORR') is now responsible for the release of separated asylum-seeking children from detention (see earlier introduction on the rules governing detention and release of asylum seeking children in the US). If a child is released to foster care – in practice, the single true 'alternative to detention' arrangement operating in the US – ORR remains responsible for their care.

ORR is expanding the use of foster care, instead of 'shelters' (soft, or non-secure detention facilities), and foster placements rose some 200% in the six months prior to March 2003. Juvenile jails have been identified for closure, and other positive placements are being explored, including in cases where there may be a risk of abduction. The proposed Unaccompanied Alien Child Protection Act includes several promising provisions that would promote such children's access to legal counsel, give ORR the power to conduct age determinations, and codify the status of appointed guardians *ad litem*. It is hoped that this Act will be passed in 2004.

ORR is also in the process of contracting a pilot project with the Women's Commission for Refugee Women and Children, in conjunction the Heartland Alliance in Chicago, which aims to test the benefits of legal guardianship for minors who have been released.⁹² One corollary benefit of this

⁹⁰ Interview with manager of RIM, October 2003-March 2004.

⁹¹ This inexplicable decrease in numbers is confirmed by the Political Asylum/Immigration Representation Project ('PAIR'), Boston.

⁹² Interview with representative of the Women's Commission for Refugee Women and Children, October 2003-March 2004.

project, relevant to the present study, is that a legal representative, based near the minor's foster family, can help to ensure that the child appears for all his or her proceedings.⁹³

2. Alternatives for other vulnerable cases

Several NGOs reported to this study that particularly vulnerable adults, such as those with serious medical problems or pregnant women, have been paroled, primarily to reduce a state's healthcare costs and the potential liability of the detaining authorities/companies. Managers of shelters have sometimes recognised that they have leverage in such cases where the ICE has contacted them in search of a sponsor. In such cases this leverage has sometimes been used to obtain early work authorisation for the parolee. Without the possibility of earning income such persons would have to live in a general homeless shelter where their health or, in the case of a pregnant woman, the health of a baby might be at risk.

The LIRS Detainee Torture Survivor Legal Support Program operates in conjunction with several of the above-described legal services projects in New York, New Jersey, York Pennsylvania, New Orleans, Arizona and Miami. Ten different groups provide legal orientations to detainees in these areas, and part of this orientation is promoting the self-identification of torture survivors by informing them of available services. Psychological reports may be submitted as part of an individual's parole petition, but LIRS reports very little success with release on these humanitarian medical grounds. Trauma from torture is considered a relevant factor, but other criteria for release must also be established. This is particularly evident since September 2001 and the subsequent decline in parole rates in several districts. One of the objectives of the LIRS Program is to promote better cooperation between lawyers, psychologists and the authorities, so that release on psychological grounds can be more often achieved.

To submit a psychological assessment in a parole petition, an NGO or family member must be willing to pay for the expert's time or find an expert willing to do an assessment *pro bono*. In many detention facilities, the conditions for conducting an assessment will be far from ideal, for example, a guard may be required to remain in the room or a lack of privacy for the physical examination of scars. Some jails may not allow an outside physician to conduct examinations. Access and the conditions of an examination depend very much upon the local advocate's relationship with the facility management.

For those torture survivors who are paroled, usually with a family sponsor, they receive treatment at centres or programmes with funding from the government (i.e., ORR), through LIRS or some depend entirely on *pro bono* work by medical practitioners. Finding enough appropriate psychologists in New Orleans is especially difficult, and it is rare to get *pro bono* assistance in Miami and Los Angeles. In New York this is easier because there is an alliance with a supportive medical association.⁹⁴

E. Electronic monitoring as an alternative to detention?

As explained above, the new government monies appropriated to fund alternatives to detention of asylum seekers are being spent on projects ('ISAP') that are required to include at least some

⁹³ Note that at present the US government does collect data (marked with a J for juvenile) to track appearance rates of minors, though the data is unavailable. EOIR attributes this to the fact that the courts do not always input such data consistently.

⁹⁴ Interview with Coordinator of the LIRS Detainee Torture Survivor Legal Support Program, October 2003-March 2004.

capacity for electronic monitoring. There are already pilot projects running to test such monitoring in several locations of the US. For example, since August 2003, ICE has introduced 'Electronic Monitoring Devices' ('EMDs') as a parole condition for 'low risk' parolees, mostly asylum seekers, in Miami and other parolees in Anchorage, Seattle and Detroit. Those released from Krome Detention Center in West Miami-Dade County are on a six-month trial.⁹⁵

There are two types of EMD pilot projects underway: (1) electronic ankle-bracelets (or 'tags') and (2) voice recognition technology ('VRT'). A third type of electronic monitoring by means of global positioning ('GPS') devices, also worn as bracelets, has not yet been piloted in the US.

The electronic tag looks like a large black watch worn on the ankle and sends a signal to a receiver placed in the parolee's home. By calling into this receiver it is possible to check whether the asylum seeker is near to the home between certain hours of each day. In Miami, most tagged asylum seekers are only allowed to leave their homes between 9am-2pm Sunday to Friday, and not at all on Saturday. After a period of consistent compliance, this may be relaxed to a 12-hour curfew between Sunday and Friday. A Deportation Officer is responsible for monitoring each case, and is in charge of deciding whether the conditions of the curfew should be relaxed or restricted.

Voice recognition technology, on the other hand, requires no 'set-up' effort or cost but only that the person should call in at certain times, usually once a month. It is mainly being used in relation to persons with final removal orders who cannot be removed to their home country, as an alternative to indefinite detention. It has been tested in the cities of Seattle and Portland.

In the US criminal justice system, electronic monitoring is classified as a form of custody, and there are certainly many who would regard the form involving ankle-bracelets and home curfew as 'detention'. DHS officials responsible for such monitoring of asylum seekers in Miami, for example, have explained to refugee advocates that they do not make exceptions to the curfew in cases where a detainee would not be temporarily released from detention – for example, to attend a funeral. On the other hand, there is also no question that many asylum seekers in detention would regard electronic monitoring as a form of 'release', albeit a restriction on their free movement, allowing them to live with their relatives in a private home.

The crux of the debate is whether electronic monitoring is used for asylum seekers and other aliens who are considered real flight risks and who would otherwise be in detention, or whether it is applied to those who would otherwise have been allowed to reside in the community without supervision or any other serious restrictions on their freedom of movement. To date, in the Miami pilot project, NGOs believe it has been used in the latter manner, and this is what provokes them to condemn the policy as a 'dramatic step backward' and an 'unnecessary and ineffective use of resources' because 'it is an expansion of detention for a population that used to benefit from a rational parole policy [in Miami].'⁹⁶

Advocates in Florida note that, in practice, the long curfew hours are obstructing the ability of asylum seekers to work, practise religion, visit family and meet with their lawyers – especially where the asylum seeker lives outside the city and is dependent on public transport. (Again, access to lawyers is comparatively easier than while in detention, but those in the scheme are considered by their lawyers to be those who, before August, would have been paroled without a curfew.) While curfew hours may be relaxed over time based on an individual's behaviour, advocates in Miami

⁹⁵ 'Pilot Program Frees Detainees', *Miami Herald*, 27 September 2003.

⁹⁶ Letter from the Women's Commission for Refugee Women and Children to the Secretary of Homeland Security, 22 August 2003.

believe that the initial hours of free movement for some participants of 9am-2pm Sunday-Friday are overly restrictive

There have been concerns raised regarding inflexible implementation of the EMD project's rules. FIAC cites the example of a Haitian asylum seeker who went to immigration court for a scheduled hearing during a time when he was supposed to be at home, not understanding that his presence was not required. He was re-detained on the ground of a breach of his curfew conditions, even when the explanation was provided. ICE, however, states that while it has the authority to re-detain a monitored person at any time, it has a flexible policy with regard to justifiable violations of EMD release (such as failure to return home in time due to traffic, a child accidentally unplugging the phone, etc.) and that it will look for a pattern of violations before deciding to re-detain. When the Board of Immigration Appeals confirms an asylum seeker's removal order, he or she will usually be re-detained on the very same day. Refugee advocates have asked for release with an EMD to be treated more formally as release from detention in the sense that alleged violations be documented and provided to the participant and his or her attorney so that there is an opportunity to respond and challenge any decision to re-detain.

The other major complaint from Miami is that the conditions of EMD release, though now always supposed to be provided to the monitored person in writing, are often not explained in a language the asylum seeker understands, relying instead on his or her often faulty understanding of English.⁹⁷ Changes in conditions – for example in curfew hours – do not have to be provided in writing. Lawyers report that their clients are often confused, and have sometimes been too scared to even go into their own back yards for fear of violating the terms of their release. There have also been phone calls to the home receivers at all hours of the night, which wakes the whole household, including children. People in the house cannot make long phone calls in case the Deportation Officer is unable to get through and considers this non-contact to be a violation.

There have not been any reports of similar complaints from other pilot project locations (Detroit, Seattle or Anchorage). NGOs in at least two of the pilot sites face strict parole policies and would actually like to have asylum seekers released using bracelets. They feel it would be better than continued detention.

The stigmatising impact of an electronic ankle bracelet that may make the asylum seeker look like a criminal released on remand is often criticized. This feeling of stigmatisation is somewhat subjective – while some asylum seekers may indeed be traumatised or at least feel demeaned by wearing the device, others emphasise that it is far less stigmatising, traumatising and demeaning than remaining in detention. The more important human rights' argument is whether the restriction on freedom of movement involved in home curfew is proportionate and necessary in each individual case. One appropriate question might be whether reporting requirements (by means, perhaps, of voice recognition technology) or any other less restrictive alternative have been tried or even considered in the individual case.⁹⁸ Evidence regarding the statistical non-appearance rates for released asylum seekers and rejected asylum seekers of different profiles is essential in answering

⁹⁷ Those on EMD release must sign a consent form, allowing access to the home for installation of the receiver, and promising to pay the phone bill. This form does not contain the conditions of their release.

⁹⁸ Unfortunately, at present such voice recognition systems, as tested in Seattle and Portland, have one serious difficulty with regard to the immigration field in that they do not recognise accents. Source: *The Seattle Times*, 26 February 2004. The same article quotes a field Director of the Detention and Removal Operations of ICE saying that electronic monitoring is only suitable for those with strong community ties and who are a low flight risk – confirming the assessments of some NGOs who argue that these cases can safely be released on parole or bond, without the intrusive application of home curfew.

such questions at a broader policy level; no statistics that are currently available support the view that a blanket policy of electronic monitoring for all or even most released asylum seekers is necessary to improve appearance rates anywhere in the US. Furthermore, advocates in Miami point out that, as of March 2004, in the cases of electronically monitored persons who were later re-detained for violations in the conditions of their release, none of the said violations related to a failure to attend an immigration appointment or court hearing. This may be assumed to indicate that electronic monitoring works well, but such a statement is untested against a control group of a similar case profile released without monitoring.

In Florida, the stated aim is to release up to 200 parolees with EMDs within the next few months. Advocates are trying to shift the project to criminal aliens now held in indefinite detention, and away from asylum seekers who could, they argue, safely continue to be released without curfews and without such devices.

EMDs have also been given to immigration parolees (not asylum seekers) in Detroit, where the devices are known as ‘tethers’. ICE uses a matrix of eligibility criteria to decide who is suitable. It contains a check list with numerical scores matching the answers to questions regarding the type of alien (with asylum seekers a preferred category), their prior record, their supervision history, the possibility of a history of substance abuse, the suitability of their home address and phone line, and lastly their attitude. These scores are totalled to decide whether the person should be classed as ‘desirable’ / ‘acceptable’ / ‘undesirable’ / ‘unacceptable’ for the programme.⁹⁹

ICE has approached Freedom House in Detroit (see above) to enquire whether they would accommodate paroled asylum seekers with EMDs. Freedom House did not feel that they could have ‘tethered’ residents mixed amongst others who were unconditionally released and did not wish to change the House’s ‘environment of sanctuary’ such that the police or ICE officers could enter without a warrant and at any time to re-detain those who may have breached EMD conditions.¹⁰⁰ The practical difficulties faced by Freedom House indicate a key limitation on the use of electronic monitoring: it can only be efficiently applied to asylum seekers who have family or community ties willing to accept the receivers into their homes. For those without such ties, currently assisted by NGOs, a new shelter designed to suit the technology would have to be built and this would reduce the cost savings to be gained by the use of EMDs. ICE has proposed that asylum seekers who are living alone should be tethered, but with a volunteer worker of Freedom House living with each asylum seeker as well. The organization did not agree to this proposal on both principled and practical grounds.

As already mentioned, a large budget is likely to be allocated to ICE for expansion and replication of these EMD release projects throughout the United States and the private company Behavioral Interventions Inc. has won the contract to implement such projects in eight cities.

⁹⁹ INS Alternative to Secure Detention Program – Title of example form provided by ICE to NGOs considering cooperation with electronic monitoring release. Unpublished report.

¹⁰⁰ Freedom House did offer, however, to take one ‘tethered’ applicant whose receiver unit would be located within the staff office, for a limited period and under a number of other conditions including refusal to assume civil, criminal or administrative liability. Reply from Freedom House to Roy M. Bailey, ICE, 7 September 2003.

IV. CONCLUSIONS

A. Do alternatives ensure compliance?

Statistics as to the appearance rates of released or non-detained asylum seekers in the US are difficult to obtain, but several evaluations have produced data suggesting that these rates have, during various time periods since the late 1990s and in various locations, ranged between 75%-95%. In general, therefore, as one would expect in a major destination country, these rates have been consistently high.

The US Department of Justice has supplied this study with national statistics which show that 15% of 'released' and 'never detained' asylum seekers (grouped together to represent all asylum seekers non-detained at the point in time when they received a decision from an Immigration Judge) failed to appear for their hearings in US immigration courts during FY2003.¹⁰¹ With regard to this 85% appearance rate, it should be noted that this figure does not include 'affirmative' asylum claims, lodged in-country by persons who are not apprehended for illegal presence, which are adjudicated administratively. This latter group, given their profile, would likely have an even higher rate of appearance for their interviews and appointments during the asylum procedure, raising the overall national figure for 'compliance with the asylum procedure' higher than 85%.

In September 2000, a US government report found that between April 1997 and September 1999 5,320 'aliens' (asylum seekers who passed the 'credible fear' test), were released from detention. Of these, 2,351 had received an Immigration Judge's decision and of this number, 1,000 (approximately 42%) did not appear for their hearing and so were ordered removed *in absentia*. However, the report goes on to explain that this figure was exaggerated because 2,969 of those released had not yet had their merits hearings, so that, for example, by August 2000, the figure had dropped to 34% and was predicted to fall as low as 25% when all 5,320 cases had been heard. The final appearance rate for the 29-month period in question was therefore expected to be around 75%. The recommendation of the report was that the (then) INS should analyse the characteristics of those aliens who appeared and those who did not, in order to make more informed decisions as to who should be released in the future.¹⁰²

In April 1990, the 'INS Pilot Parole Project' (later to become the Asylum Pre-Screening Officer Parole Program or 'APSO'),¹⁰³ released on parole 647 (32% of 2016) asylum seekers who had

¹⁰¹ That is, 9,705 non-detained asylum seekers failed to appear, out of a total 63,611 non-detained asylum seekers whose cases were completed within FY2003. 'Failed to appear' here includes cases ordered deported *in absentia* and those closed administratively due to the absence of the applicant at the time of the hearing. Of cases completed in the courts in FY2003, there were 8,910 'released' asylum applicants, of whom 521 received deportation orders *in absentia* and another 122 had their cases closed. There were 54,701 asylum seekers who were 'never detained' – that is, either released from detention before the proceedings began, or literally never detained – of whom 7,542 received deportation orders *in absentia* and another 2,265 had their cases closed. More broadly, EOIR also reports to this study that there was a total of 252,822 immigration proceedings completed in the courts in FY2003, of whom 68,215 were asylum applications – including detainees. Of that subgroup there were 9,804 failures to appear. The difference between this figure of 9,804 and the 9,705 figure from which the above '15%' is derived can be explained by the fact that 102 detainees were recorded as having failed to appear. This fact is explained either by data entry errors or, in 69 cases, the authorities being unable to locate the detainee or present the asylum seeker for his or her hearing. Source: Data received from EOIR, Department of Justice Bureau of Statistics, via emails on file with author.

¹⁰² US General Accounting Office Report to Congressional Committees, *Illegal Aliens – Opportunities Exist to Improve the Expedited Removal Process*, 1 September 2000, (2000 WL 1408947 F.D.C.H.).

¹⁰³ This pilot project began as a result of collaboration between UNHCR, the INS, the Lawyer's Committee for Human Rights, and church and community groups. The New York, Miami, San Francisco and LA districts were chosen to participate in the project, as they are the main ports of entry for undocumented asylum seekers.

passed the credible fear test, based on certain criteria.¹⁰⁴ Of those released in New York (127) and Miami (52), it was found that 95% had appeared for their hearings and appointments, based on data collected through August 1991 when only 24 of these persons still had un-adjudicated claims.¹⁰⁵ Only one individual failed to appear for deportation. The then INS Commissioner had been willing to consider the project worthwhile if the quarterly compliance rates were anything above 80%, so the project's much higher results led to the establishment of a permanent release authority in the US in 1992. ICE might now argue that the original Pilot's impressive compliance rate was only achieved because 68% remained in detention, but another pertinent conclusion might be that the 32% released did not require intensive supervision, such as a traditional curfew or electronic monitoring, in order to comply. Mere reporting requirements and the support of guarantors and legal representatives proved sufficient.

The current compliance and appearance rates reported by all the nongovernmental 'alternatives to detention' projects described above are all above 80%, and in most cases above 95%. The most carefully evaluated 'alternative' programme, that of the Vera Institute, achieved an appearance rate of 86% for asylum seekers it assisted and supervised non-intensively, even though its caseload included some people without pre-existing community sponsors. Factors common to the NGO projects, and which are considered to be decisive by those who manage or evaluate them, include:

- (a) Initial selection of participants with strong asylum claims or clear vulnerabilities;
- (b) Provision of competent legal counsel ensuring that applicants understand their rights and duties and remember their appointments;
- (c) Ensuring that applicants understand, in particular, the very serious legal consequences of non-appearance (that is, an order of deportation *in absentia*).

In the rare instances when an asylum seeker disappeared from the accommodation and supervision projects described above, they were primarily known to be persons intent on transiting to Canada for the purposes of family reunion. In the course of the Vera Institute's Appearance Assistance Programme, they monitored a comparison group of non-participant asylum seekers also released from detention by the INS, without special supervision, and discovered that if the persons intent on transiting to Canada were removed from that group, the appearance rate was close to the 84% appearance rate achieved by their Programme. This is some 10% higher than the 75% rate suggested by the GAO report, as interpreted by EOIR, in September 2000 (see above). The reasons for this discrepancy are not clear, though the GAO report presumably included some persons intent on transit to Canada among those it tracked and if they were subtracted from the calculation, the figures may possibly become closer. The 10% discrepancy in the opposite direction, when comparing Vera's appearance rate with that reported nationally for FY2003 (94%), is also impossible to explain with certainty, but may relate to the increasing reluctance of DHS to grant parole and a higher threshold as to 'flight risk' applied since late 2001.

¹⁰⁴ Eligibility criteria for parole included: (1) an application for parole after 1 May 1990; (2) established and verified identity; (3) a *prima facie* case for recognition as a refugee; (4) not subject to any exclusions from refugee protection nor otherwise present a threat to public safety. All those released had to be represented by attorneys, have a fixed address at which to live, a means to support themselves and the ability to post a bond of between \$500-\$2,500. They were required to report on a monthly basis, in person (or by mail if so allowed by INS) and required to report for removal if ultimately their claim was rejected.

¹⁰⁵ A.C. Helton, 'Reforming Alien Detention Policy in the United States', in *Protection or Punishment?* Dr. Mary Crock (ed.) (The Federation Press, Australia, 1993).

No statistics supplied by the various US ‘alternatives’, however, allow firm conclusions to be drawn about their effectiveness in ensuring compliance of rejected asylum seekers with final deportation orders. There are currently said to be 400,000 active cases nationwide involving migrants (not solely rejected asylum seekers) who have absconded after being issued deportation orders.¹⁰⁶ This is a major policy concern for the US government who argue that removals must be effected to preserve the integrity of the asylum procedure and deter unfounded claims. It has motivated, for example, the ‘Hartford Pilot Project’ involving increased use of detention in Connecticut, where *all* persons issued with removal orders are detained when they receive their deportation orders in court, until their removal.¹⁰⁷ Attorneys in Connecticut, however, have argued that such a system merely encourages their clients to abscond earlier and fail to appear for receipt of the final decision if they fear it will be negative. It is a system where a removal order is automatically equated with a likelihood to fail to comply, regardless of individual evidence or circumstances. In March 2004, ICE announced that it is expanding this pilot project to the cities of Atlanta and Denver.¹⁰⁸

B. Cost effectiveness?

The Vera AAP final report, in late 2002, stated the average cost of detention was US\$78 per day. This means that the average cost of detaining an asylum seeker up to the point when they receive their initial decision will be US\$7,259. Based on current numbers of applicants, therefore, detention of asylum seekers in the US is costing at least US\$42.7 million per year.¹⁰⁹

The Vera model included a labour-intensive reporting requirement that was found, in the final evaluation, not to contribute to the appearance rate of asylum seekers. If this cost were removed it has been estimated that the cost of providing the other support services which Vera provided to parolees would amount to US\$710,000 for each of the eight sites currently proposed by the Department of Homeland Security (that is, approximately US\$7.1 million for 2,500 people). An additional US\$200,000 might be required to run a national coordinating centre to conduct training and maintain quality control in all the different sites. Alternatives could thus be delivered at a total of \$7.3 million.

Based on these estimates, the cost of community alternatives, including the cost of detention applied briefly at the point of arrival and the cost of possible re-detention immediately prior to removal, has been totalled as an average of US\$2,626 per capita (compared to the US\$7,259 cost for detention). It is noted that even greater savings would be achieved in the cases of unremovable rejected asylum seekers who might otherwise be detained indefinitely. However, in the absence of clear statistics relating to such cases, the above estimate is based conservatively upon asylum seekers in procedure and who can be removed within a reasonable period.¹¹⁰

ICE in Miami has reported significant cost-savings through the use of electronic monitoring instead of detention in that District. Release on EMD costs only US\$10-20 per person per day if the cost of the monitoring staff (Deportation Officers) is included,¹¹¹ as contrasted to an average of US\$70-80 per person per day for detention.

¹⁰⁶ Source: Chris Bentley, US Bureau of Immigration and Customs Enforcement.

¹⁰⁷ The Associated Press, 16 September 2003.

¹⁰⁸ DHS News Release, ‘ICE Expands Pilot Project to Detain Deportable Aliens’, 26 March 2004.

¹⁰⁹ Costing information supplied to the Vera Institute by the then INS.

¹¹⁰ Comment Letter on ‘Intensive Supervision Appearance Program’ from the Detention Watch Network to the Bureau of Citizenship, 29 May 2003.

¹¹¹ Figures mentioned in conversation between ICE and local refugee advocates in February 2004.

The limited usefulness of this clear evidence of cost-efficiency in terms of shaping policy should, however, be acknowledged. One limitation is that there are certain parties who profit from the maximum use of detention, and these profits are sometimes realised to the benefit of local communities. Local jails (which, as mentioned above, hold 60% of immigration detainees) were found to charge the INS between \$35 and \$100 per day per detainee in 1998, though the actual cost per detainee was lower. As a result, in some US states, 'local taxes have been eliminated due to the profit made through housing the INS's detainees.'¹¹² York County, Pennsylvania revenue from the INS in 1998 was \$6 million, of which \$2 million was profit. Euless City Jail in Texas lowered its per diem rate from \$68 to \$55 in order to receive more immigration detainees and 'be more competitive.'¹¹³ Less materially, large immigration detention facilities can become vested interests for those who work there, and facility managers can have a career interest in ensuring that their facilities are always kept filled to capacity.

Another potential limitation to the cost argument is the (unquantifiable) deterrent impact of the US detention policy. An expanded use of alternatives could, arguably, result in the arrival of more asylum seekers and subsequently an increase in costs, both financial and political. Periodic declines in the numbers applying for asylum in the US since 1993 might be seen as evidence that the expedited removal and detention policy has worked as an effective deterrent, saving untold asylum processing and removal costs. However, many other variables during the same period, not only in the causes and sources of refugee flight and migration, but also in US law and policy (such as the elimination of the right to work from most asylum seekers until asylum is granted or until at least 180 days have passed), can probably explain the declining arrival numbers. Detention does not, in any case, deter only those with unfounded claims but also many *bona fide* refugees in need of protection, giving rise to fundamental questions about international responsibility-sharing. Nonetheless, the deterrent motive is probably the single greatest reason why cost-savings arguments in favor of alternatives will have limited appeal to certain policy makers and constituents.

C. Export value?

The US experience of experimenting with alternatives, particularly with regard to electronic monitoring in recent years, shows that great care must be taken to ensure that alternative restrictions are only applied to those who would otherwise be detained and not to asylum seekers eligible for parole in any case and who have demonstrated very little propensity to abscond. How this can be ensured is a complex question, however, the clearest indicator would be a measurable rise in the asylum applicant parole rate of a district that implemented an alternative to detention project. Another method of ensuring that alternatives to detention are genuinely deserving of that name may be to demonstrate a clear transfer of federal and local resources *from* detention *to* the alternative projects (that is, treating the budget for detention and its alternatives as a 'fixed pot'). With regard to the use of electronic monitoring, another way to ensure its proper use for those individual cases who pose a significant flight risk may be to require that a parole decision be reached in each case *prior to* a decision as to whether release with an electronic tag and home curfew is required.

In the current counter-terrorism environment, US advocates concede that some initial period of detention for the purposes of establishing identity may be required, but they believe that this can be accomplished in a few hours in some cases and within several days or weeks at most in others. There will always be exceptions that take longer, but much depends on the standards of verification

¹¹² Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, Vol.10, No.1(G), September 1998, p.4.

¹¹³ Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, Vol.10, No.1(G), September 1998, pp.16-17.

required, administrative efficiency, and whether a common sense, flexible approach is taken to this verification.

The key lesson from the US experience, despite the fact that there is no State-funded legal aid for asylum seekers, is that legal representation is a vital guarantee of appearance and compliance.¹¹⁴ In the US context, where most asylum seekers are without social support and without work authorisation for at least 180 days, they often move regularly between accommodations. The US government is not always able to promptly input notifications of change of address, so the system itself loses people, even if the asylum seeker acquits himself or herself of all duties of notification. Lawyers, however, tend to know where to contact their clients and may make efforts to do so that the immigration authorities can or do not make.¹¹⁵ They also ensure that people understand their rights and duties, particularly the crucial fact that their case will be automatically dismissed if they fail to appear at a hearing in a US immigration court. Where absconding is the stated government concern, investment in the training and funding of legal advice for asylum seekers must therefore be viewed as a legitimate and highly effective factor contributing to the success of alternatives to detention.

¹¹⁴ This is just one argument amongst many in favour of increased access to legal representation. An estimated 90% of non-citizens in removal proceedings are currently unrepresented, curtailing their ability to challenge their detention and pursue a possible asylum claim. With regard to the latter point, it was estimated in 2000 that a represented asylum seeker in the US is six times more likely to be granted asylum than an unrepresented claimant. Source: Memorandum from Andrew Schoenholtz, Institute for the Study of International Migration, Georgetown University, 12 September 2000.

¹¹⁵ One advocate and shelter manager explained that he had an ingeniously simple method of keeping track of his own clients when they moved elsewhere: he simply taught them, if they did not already know, how to use a 'Hotmail' account and explained all the places where, in the US, one can get free internet access (public libraries etc.). He sent them important informational messages often enough to ensure that they would keep opening up their email account. By this method, he can keep track of people even when they leave the state to visit relatives, for example.

ZAMBIA¹

I. OVERVIEW OF LAW AND PRACTICE

A. Encampment and designated settlements

The Refugee (Control) Act 1970 ('RCA') provides for restrictions on freedom of movement and residence, on the grounds of protecting public order.² Such restrictions were placed upon refugees from Angola and the Democratic Republic of Congo ('DRC') as a result of Zambia's 'creeping emergency' influx of refugees during 1999 and 2000. The restrictions are designed, in particular, to segregate ex-combatants from civilians.³ According to a Memorandum of Understanding signed between the Government of Zambia, UNHCR and IOM in November 2000, former combatants are sent to a special camp, Ukwimi, in the Eastern Province. Ukwimi was initially designed to cater for the 350 former combatants who had arrived from Angola in Mwinilunga. Soon after this first group moved to Ukwimi, both UNHCR and the Government of Zambia decided to transfer more former combatants, as well as persons benefiting from past amnesties, to this site. Hutus and Tutsis are restricted to two separate camps in order to prevent conflict between these rival ethnic groups.

Asylum seekers arriving singly are required by the RCA⁴ to obtain a permit from a formal border entry point within seven days of arrival in order to remain lawfully in Zambia and to avoid arrest. The asylum seeker is issued with an Immigration Report Order⁵ and asked to re-appear before an Immigration Officer within a specified period of time. The Immigration Officer will in turn refer the individual to the Office of the Commissioner for Refugees where they undergo refugee status determination.

B. Exceptions for urban refugees

The Zambian policy states that all refugees, once recognised individually or on a group basis, must reside in the designated refugee centres/camps unless they obtain specific dispensation in writing from the Commissioner for Refugees. A government committee (subcommittee of the National Eligibility Committee⁶) meets twice weekly to hear applications for urban residency based upon set criteria. A refugee is only permitted to stay outside refugee the camps and settlements when she has: (a) a work permit either for self-employment or formal employment;⁷ (b) a study permit; (c) a

¹ The information presented herein is valid up to 31 March 2004.

² Cap. 120 Laws of Zambia, s.12. At the time of writing, the Ministry of Home Affairs is in the process of presenting a Bill to the Zambian Parliament aimed at amending this Act.

³ In the refugee impacted border districts, District and Provincial Joint Operations Committees have been established to receive and screen asylum seekers. New asylum seekers are brought from the border to a centre where they can be screened. Most refugees screened by these Committees are accorded refugee status on a *prima facie* basis under the 1969 OAU Convention. These Committees are therefore primarily pre-occupied with the question of security. The Committees identify those refugees who should be separated from the mainstream refugee population. This includes combatants, former combatants, and persons benefiting from past amnesties. Historically, the Committees' role did not extend to the determination of the status under the 1951 Refugee Convention. They now screen in some 1951 Convention refugees while referring most such cases to the Commissioner for Refugees office in Lusaka.

⁴ Section 11(1)(a).

⁵ The Report Orders are documents accorded the same value as entry permits and which should, in theory, guarantee protection from arrest during refugee status determination procedures.

⁶ UNHCR and one of its implementing partners have observer status on this Committee.

⁷ Zambia has made reservations to the 1951 Convention with regards to Article 17(2) according refugees the right to paid employment. While refugees may take up paid or self-employment, the government has greatly restricted this right. Refugees seeking paid or self-employment must first obtain an employment permit from the Office of Immigration.

refugee camp/settlement gate pass;⁸ or (d) a Report Order while awaiting determination of status by the National Eligibility Committee.

Despite the fact that refugees in the camps generally have access to community services such as education⁹ and medical treatment, refugees are also permitted to move to or remain in Lusaka or other cities in Zambia if they need medical care not available in the camps, have special security problems, are elderly, have family already in a city, are enrolled in a school in a city, or are awaiting resettlement to a third country.

Urban refugees must seek permission from the Commissioner for Refugees to travel both within and outside the country.

Refugees who are found by the urban residency committee not to be eligible for exemption from encampment are assisted by the YMCA (a UNHCR implementing partner) with transportation to relocate to one of the six designated camps and settlements.

C. Detention for failing to have appropriate documentation

As a result of the legislated restrictions on freedom of movement, a refugee may be detained for moving or residing outside the camps and settlements without authorisation. Anyone failing to show the requisite local travel documents and registration cards needed to travel internally may be taken into custody, pending deportation. UNHCR is often informed about the detention of refugees and asylum seekers by immigration authorities, nongovernmental organisations, or other refugees, or finds such persons in detention during routine prison visits. The reasons for their detention vary from having committed a crime to a lack of identity documentation. Most of the detentions affect individuals who have relocated to or resided in urban areas without authorisation.

The Zambian law gives the Immigration Department wide powers to detain refugees pending investigation of their identity or status. It is often the case that asylum seekers awaiting determination of their claims by the Eligibility Committee spend their time in Lusaka as vagrants, either sleeping in trailers and old unused cars at the YMCA Refugee Project or at bus and train stations where they risk being detained despite the fact that they have Report Orders and other documents.

The Jesuit Refugee Service ('JRS') is involved with reducing the incidence of arbitrary detention through the Christian Initiative for Refugees in Prison (CIRP) in Lusaka and other cities. This is a programme that includes visits to prison and regular assessment of cases, mediation before the authorities, weekly follow-up on every case, and collaboration with partners in each location where refugees are detained without criminal charges.¹⁰

⁸ In refugee settlements and camps, the Refugee Officer issues gate passes to anyone authorized to move outside of the settlements. These passes are not valid for travel to border areas.

⁹ While Zambia has made reservation to Article 22(1) and does not consider itself bound to provide elementary education as is provided to nationals, refugee children residing in designated areas attend primary schools with Zambian children.

¹⁰ Interview with JRS Zambia, October 2003-March 2004.

D. Registration/regularisation programme

The principal means of protecting urban refugees from arbitrary detention remains the programme, established in 2000, to provide selected refugees with un-forgable documentation of their urban residency status.

Electronic identity cards are issued to all eligible urban refugees, and these documents have greatly reduced the quantity of arbitrary and otherwise impermissible detention of refugees and asylum seekers over the past three years.¹¹ Those in the cities with authorisation are generally protected from detention by their identity cards or very swiftly released if mistakenly detained. Previously, identity cards issued to refugees were often forged or copied and therefore lost credibility with the police and immigration officials. Now the electronic cards cannot be copied or forged. All details are stored on a database, which includes everything from biometric data to information on the case and assistance received. The cards themselves contain photographs and a statement of the reason why the person is exempt from encampment.

Although many refugees have come forward to register with the committee on residency status, a number are unwilling to do so because either they know they do not meet the criteria for urban refugee status and prefer to remain underground and/or because they have been residing in Lusaka under the immigration provisions and do not wish to be considered as refugees but rather as migrant workers.

The registration and documentation of rural refugees has been somewhat more complicated, since refugees from the DRC and Angola were granted refugee status on a *prima facie* basis and because substantial numbers settled spontaneously along the borders. Registration was extended to all designated settlements during 2002. The database created may be used to issue all adult refugees with picture identity cards similar to those issued to urban refugees. It assists UNHCR in finding durable solutions, including the management of voluntary repatriation, and protects refugees who exit the designated settlements against arbitrary arrests and detention.

II. CONCLUSIONS

The 'export value' of the Zambian system is its clear demonstration that the regularisation/registration of urban refugees, using an effective electronic system, can reduce the incidence of detention (while at the same time meeting State objectives such as tracking of irregular movers and promoting orderly repatriation).

On the other hand, the confinement of those who fail to qualify for urban residency to the camps and settlements is a severe restriction on their freedom of movement. While provided for by law, and justified as proportionate to the scale of the refugee arrivals and to the threat they have posed to public order and national security, especially with regard to former combatants, these restrictions should not be: (a) maintained indefinitely, (b) applied discriminately, or (c) allowed to interfere with other basic civil and political rights of the refugees involved. The current system does not fully afford the refugees the rights enshrined in the international refugee conventions – Zambia has, for example, entered a reservation regarding article 26 of the 1951 Refugee Convention so that it can not be found in breach of that provision.

¹¹ Reports received from UNHCR.