

## **LEGAL AND PROTECTION POLICY RESEARCH SERIES**

### **Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants**

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**DIVISION OF INTERNATIONAL PROTECTION**

**PPLA/2011/01.Rev.1  
April 2011**

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This background paper was prepared for the Global Roundtable on Alternatives to Detention, to be held 11-12 May 2011.

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## Executive Summary

The widespread and growing use of immigration detention has come under considerable scrutiny in recent years on pragmatic (practical and functional) as well as human rights/legal grounds. This study articulates the current state of international law governing detention and its alternatives, and provides a critical overview of existing and possible alternatives to detention (A2Ds) options drawn from empirical research. Research visits were conducted to five countries, namely Australia, Belgium, Canada, Hong Kong, and the United Kingdom. This study contributes to the body of work of the United Nations High Commissioner for Refugees (UNHCR) against the detention of refugees, asylum-seekers and stateless persons, and forms one of the background papers for the global roundtable on the same subject.

Pragmatically, no empirical evidence is available to give credence to the assumption that the threat of being detained deters irregular migration, or more specifically, discourages persons from seeking asylum. Global migration statistics have been rising regardless of increasingly harsh governmental policies on detention. Except in specific individual cases, detention is largely an extremely blunt instrument to counter irregular migration, not least owing to the heterogeneous character of migration flows. Critically, threats to life or freedom in an individual's country of origin are likely to be a greater push factor for a refugee than any disincentive created by detention policies in countries of transit or destination. More particularly, this research found that less than 10 per cent of asylum applicants abscond when released to proper supervision and facilities (or in other words, up to 90 per cent comply with the conditions of their release). Moreover, alternatives are a significantly cheaper option than detention both in the short and longer term.

The legality of the use of detention in the asylum (as well as the broader immigration) context has been tested in various international, regional and national courts. A significant number of cases have reiterated to governments their responsibilities to protect individuals' human rights against unlawful deprivations of liberty and other restrictions on freedom of movement. Courts have held, for example, indefinite or prolonged detention or the mandatory and unreviewable detention of asylum-seekers (and other migrants) to be unlawful. Failure to respect established procedural safeguards has also been found to render detention unlawful. The deleterious effects of detention on the health and well-being of detainees, such as psychological damage, has in turn given rise to myriad human rights claims; and the detention of children has been particularly criticized. In relation to alternatives to detention specifically, international case law has affirmed the obligation on states to institute guarantees against arbitrariness, without which detention is likely to be unlawful. Such guarantees necessarily include the availability of less coercive alternatives to detention (or A2Ds), otherwise the principles of proportionality, necessity and reasonableness cannot be tested or met. These principles must be read as requiring detention to be an exceptional measure of last resort; and in this regard, states must show that there were not less intrusive means of achieving the same objective. The ultimate A2D would be no detention at all, or release without conditions. This study

argues that the failure of governments to even trial A2Ds, or to systematise them, puts their detention policies and practices into direct conflict with international law.<sup>1</sup>

International law confirms that seeking asylum is not an unlawful act and, therefore, that one cannot be detained for the sole reason of being an asylum-seeker. In addition, there are specific international legal guarantees against penalization for illegal entry or stay, which would include penalties in the form of detention. Detention must therefore be used only as a last resort and only according to a justified purpose other than the status of being an asylum-seeker. Likewise, for *de jure* as well as *de facto* stateless persons, their lack of legal status or documentation means that they risk being held indefinitely, which is unlawful under international law. Statelessness cannot be a bar to release, and using the lack of any nationality as an automatic ground for detention would run afoul of non-discrimination principles.

Many states have legislated for A2D or require that the ‘availability, effectiveness and appropriateness of alternatives to detention must be considered.’<sup>2</sup> There is a range of A2Ds in operation, including reporting or residency requirements, guarantees, sureties or bail, community supervision or case management, electronic monitoring, and home curfew. The ultimate A2D is liberty. Various human rights and other bodies have warned states that any alternatives developed must not function as alternative forms of detention. Many alternatives restrict movement or deprive liberty to greater or lesser degrees in practice and, as such they are regulated also by the prohibition on arbitrary deprivations of liberty, they must only be imposed where they are necessary and proportionate to the objectives in question. In order to satisfy these requirements, the least intrusive alternative must be taken in each individual case.

A number of A2Ds are described and examined in Part C of this study. While acknowledging that these alternatives have been designed and tailored to the particular economic, legal, political, and social context in which they operate, and are therefore to some extent *sui generis*, the study attempts to identify some shared elements or features that could be replicated or modified to other national contexts, and which account for their success or workability. The findings concur with Field and Edwards’ 2006 conclusions that ‘[refugees or] 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.’<sup>3</sup> In fact, the same conclusion is found to apply to rejected asylum-seekers while awaiting deportation or another legal status. A growing body of evidence calls into question the purpose and effectiveness of detention as a policy aimed at deterring irregular migration, preventing absconding, or ensuring persons are available for removal. The policy motivations of governments for detention increasingly fail to map onto the empirical evidence.<sup>4</sup> As already noted, the research found several examples where 90 per cent or more of asylum applicants (as well as persons pending deportation)

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<sup>1</sup> International law has generated a variety of standards on the issue of immigration detention, outlined in detail in Part B of this study.

<sup>2</sup> See, e.g., *Sahin v. Canada (Minister of Citizenship and Immigration)* [1995] 1 F.C. 214 (T.D.) (Canadian Federal Court) as cited in Immigration and Refugee Board of Canada, Guideline 2, *Guidelines on Detention*, Ottawa, Canada, 12 March 1998, p. 4.

<sup>3</sup> O. Field and A. Edwards, *Study on Alternatives to Detention*, UNHCR, Legal and Protection Policy Research Series, POLAS/2006/03, 2006, p. 50.

<sup>4</sup> This study does not deal with the political motivations for why governments pursue detention policies (e.g. issues of control).

comply with release conditions. Much of the evidence presented herein may appear at first to be counter-intuitive, at least in so far as it contradicts assumptions made by many governments about the need for detention. It thus calls on governments to look at the empirical evidence as a basis for policy-making, rather than to base policy decisions on false, albeit long-standing, assumptions about migrant behaviour.

Overall, a number of common elements were identified in the pilots and programmes researched that appear to account for higher compliance or cooperation rates, which included:

- the treatment of refugees, asylum-seekers, stateless persons and other migrants with dignity, humanity and respect throughout the relevant immigration procedure;
- the provision of clear and concise information about rights and duties under the A2D and consequences of non-compliance;
- referral to legal advice, including advice on all legal avenues to stay, especially starting at an early state in the relevant procedure and continuing throughout;
- access to adequate material support, accommodation and other reception conditions; and
- individualised ‘coaching’ or case management services.

While the Field and Edwards’ study identified community or family ties as a factor in improving compliance rates, this study suggests that a lack of community or family ties does not necessarily lower compliance rates if an individual is released to proper supervision and support. The study also notes that properly-functioning A2Ds can lead to knock-on improvements in asylum, reception and migration management systems.



## Acknowledgements

This study was commissioned by UNHCR. It was undertaken and completed when I was Lecturer in International Refugee and Human Rights Law, Refugee Studies Centre, University of Oxford. Its content is valid as at December 2010. It could not have been completed without the generosity of the time and wisdom of a wide number of persons. Many are listed here, but some also preferred to remain anonymous.

In particular I wish to thank Alexander Beck, Anja Klug, Janice Marshall, Jane Rasmussen and Kees Wouters at UNHCR Geneva for the guidance and coordination of this project, as well as my research assistants at the University of Oxford, Vicky Goodban and Marina Sharpe.

On Australia, thank you to Colin Briton (Australian Red Cross); Amanda Paxton, Julian Warner, Jennifer Clarke, Justin Green (Australian Department of Immigration and Citizenship, Melbourne); Josef Szwarc (Foundation for Survivors of Torture); and Caz Coleman (Hotham Mission).

On Belgium, thank you to Carmen Dupont (Amnesty International Vlaanderen); Tristan Wibault (CBAR); Christophe Renders (JRS); Pieter Stockmans (VwV); the coaching staff at Tubize: Ms. Florence Jacquemin, coordinator, and Ms. Isabelle Dessart and Mr. Youcef Boughrif; Directrice Ms. Isabelle Plumet from FEDASIL; and Frances Nicholson, Madeleine Garlick, Thomas Pauwels, and Blanche Tax (UNHCR).

On Canada, thank you to Gloria Natzfiger (Amnesty International Toronto); Reg Williams and Tina Karsakis (Canadian Border Service Agency, Toronto); Perez Oyugi (Canadian Red Cross); Shannon Collins (Legal Aid Office, Refugee Law Program, Canada); Lina Anani and Sheliza Suchak (legal practitioners); Dave Scott (Toronto Bail Program); Fred Franklin (TRAC); and Rana Khan (UNHCR Toronto).

On United Kingdom, thank you to Clare Tudor (Scottish Refugee Council); Steve Thomson (UK Border Agency); Catherine Grant (social workers coordinator Glasgow City Council); John Short (IOM Scotland and Northern Ireland); Ryan Nelson (Refugee Action, Liverpool).

On Hong Kong, thank you to Brian Barbour (Hong Kong Refugee Advice Centre); Richard Yiu Cheong Tsoi (Society for Community Organization); Mark Daly (Barnes & Daly); Wing Hang Chow and Phidias Tam (The Government of Hong Kong's Special Administrative Region Security Bureau); Adrielle M. Pañares and her staff (International Social Service); Letitia Tan (student, University of Hong Kong); Kelly Loper (University of Hong Kong); Charlotte Sum, Choosin Ngaothepitak and Reuben Liew (UNHCR).

I would like to thank several persons who have provided very helpful feedback and comments on this study: Grant Mitchell (International Detention Coalition); Robyn Sampson (La Trobe University, Melbourne); Jerome Phelps (London Detainee Support); Michelle Brané (Women's Commission); Philip Amaral (JRS-Europe);

Amal de Chickera and Stephanie Grant (Equal Rights Trust, London); Adriano Silvestri (European Agency for Fundamental Rights); and Leslie Vélez (Lutheran Immigration and Refugee Service, US).

## A. Introduction

*Is it a crime to be a foreigner? We do not think so.*<sup>1</sup>

*It is a gross injustice to deprive of his liberty for significant periods of time a person who has committed no crime and does not intend to do so. No civilised country should willingly tolerate such injustices.*<sup>2</sup>

*Cats and dogs enjoy a dedicated statute, right of appeal to an independent board and specific provisions regulating decisions which vary length of detention ... cats and dogs have more protection ... than refugees...*<sup>3</sup>

The widespread and increasing use of immigration detention (defined below) has come under considerable scrutiny in recent years. As a means of controlling entry to the territory as well as a form of deterrence, immigration detention is increasingly being questioned on practical and functional, as well as human rights/legal grounds. Politically, too, many countries are facing growing civil opposition to the practice of immigration detention. Pragmatically, there is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum.<sup>4</sup> In fact, as the detention of migrants and asylum-seekers has increased in a number of countries, the number of individuals seeking to enter such territories has also risen, or has remained constant.<sup>5</sup> Globally, migration has been increasing regardless of governmental policies on detention.<sup>6</sup> Except in specific individual cases, detention is generally an extremely blunt instrument of government policy-making on immigration. This may be explained by the complexity of the

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<sup>1</sup> *Saadi v. United Kingdom*, ECtHR, Applic. No. 13229/03, 29 January 2008, per joint partly dissenting opinion of judges Rozakis, Tulkens, Hajiyeve, Spielman and Hirvelä (no page or paragraph number).

<sup>2</sup> Lord T. Bingham, *The Rule of Law* (London: Allen Lane, 2010), p. 73.

<sup>3</sup> M. Daly, 'Refugee Law in Hong Kong: Building the Legal Infrastructure', (2009) 9 *Hong Kong Lawyer* 14, p. 15.

<sup>4</sup> Any reduction in global asylum numbers have been associated with non-entrée policies, including containment in regions of origin and interception/interdiction measures, or can be attributed to large-scale repatriation programmes.

<sup>5</sup> For example, Council of Europe Member States have 'significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants': see, Parliamentary Assembly, Council of Europe, Doc. 12105, 11 January 2010, *The detention of asylum seekers and irregular migrants in Europe*, Rapporteur Mrs Ana Catarina Mendonça, para. 1 (referring in particular to the UK, France and Italy), yet migration into Europe has also surged: European migration figures have increased from an estimated 49 million in 1990 to 58 million in 2000 to 70 million in 2010: United Nations, Department of Economic and Social Affairs, Population Division (2009). *Trends in International Migrant Stock: The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008), available at: <http://esa.un.org/migration/index.asp?panel=1>.

<sup>6</sup> According to the United Nations, the global migration 'stock' has been increasing as follows: between 1990-1995 (+1.3%); 1995-2000 (+1.5%); 2000-2005 (+1.8%); and 2005-2010 (+1.8%): In 1990, there was an estimated global migrant 'stock' of 155 million; in 2000, it was estimated to be 178 million and in 2010, this is estimated to be 214 million, constituting 3.1 per cent of the global population: United Nations, Department of Economic and Social Affairs, Population Division (2009). *Trends in International Migrant Stock: The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008), available at: <http://esa.un.org/migration/index.asp?panel=1>.

choices and the mixed motivations of many migrants, which likely have little to do with the final destination country's migration policies.<sup>7</sup>

For refugees, threats to life or freedom in countries of origin are likely to be a greater push factor than any disincentive created by detention policies in countries of destination.<sup>8</sup> The prospect of being detained in one country may however influence an individual's final destination choice, the timing of one's movement, or the route or manner of entry; and it points to the need, at a minimum, to regionalise standards on this issue.<sup>9</sup> Meanwhile there is evidence to show that less than ten per cent of asylum applicants as well as persons awaiting deportation<sup>10</sup> disappear when they are released to proper supervision and facilities.<sup>11</sup> In other words, 90 per cent and more of persons regularly comply with all legal requirements relating to their cases. Furthermore, alternative options present significant cost savings to governments,<sup>12</sup> whereas some governments have paid out millions of dollars in compensation or face unpredictable compensation bills for their unlawful detention policies.<sup>13</sup>

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<sup>7</sup> See, e.g., S. Castles, 'Towards a Sociology of Forced Migration and Social Transformation' (2003) 77(1) *Sociology* 13-34, at p. 12: 'Migration policies fail because policy makers refuse to see migration as a dynamic social process linked to broader patterns of social transformation. Ministers and bureaucrats still see migration as something that [can] be turned on and off like a tap through laws and policies.'

<sup>8</sup> For example, despite Australia's policy of mandatory detention (introduced in 1997), asylum-seekers continued to arrive throughout the 1990s and 2000s. Only with the introduction of comprehensive interception measures in the early-mid-2000s did the numbers of asylum-seekers fall markedly.

<sup>9</sup> Belgium, for example, recorded an increase in asylum applications at the border since it began permitting families with children arriving this way to be housed in the community: Verbauwhede, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, a discussion paper for EU Asylum Conference 13-14 September 2010, p.2. It is nonetheless too simplistic to attribute this increase to a more generous alternative to detention regime, as asylum application rates have been increasing overall in Belgium. There was no statistical breakdown for asylum applications submitted at the border visa-à-vis those submitted on the territory available at the time of writing. If there are more applications being submitted at the border, this may be a positive development, if it means more persons opting to announce their intention to apply for asylum at the border, rather than to enter Belgium clandestinely and to apply for asylum later, including only after having been arrested for illegal entry or stay. Any increase may also be attributable to altering asylum practices in neighbouring countries (e.g., according to Amnesty International, The Netherlands 'puts aliens in detention more frequently and for longer periods of time', *Harcopy Trouw*, 5 November 2010), and this points to the need for an EU-wide discussion on A2D.

<sup>10</sup> The term 'deportation' is used synonymously with 'removal' and 'expulsion' for the purposes of this study, unless otherwise indicated. It is noted that the terms may have different usages and meanings in various national and international laws.

<sup>11</sup> See, *infra*. See, also, O. Field and A. Edwards, *Study on Alternatives to Detention*, UNHCR, Legal and Protection Policy Research Series, POLAS/2006/03, 2006.

<sup>12</sup> See, *infra*.

<sup>13</sup> The UK, for example, has paid out at least £2 million to 112 individuals over the last three years where it has been proved that immigrants have been wrongly held: see, Medical Justice, 'Review into ending the detention of children for immigration purposes: Response by Medical Justice', July 2010. According to Medical Justice, the £2 million does not include the costs of legal advice, court costs, etc. Successful litigation in Hong Kong that forced the Hong Kong Government to change its detention policy (discussed *infra*) has, for example, given rise to over 200 pending compensation claims: Interview, Barnes and Daly, Lawyers, Hong Kong, 15 September 2010. South Africa's Lawyers for Human Rights has also lodged 90 separate reviews of detention in South Africa: Statement, K. Ramjatham-Keogh, LHR, 17 November 2010. For some of the cases, see LHR, *Monitoring Immigration Detention in South Africa*, Annex, September 2010.

The limits on the permissible uses of detention in the immigration context have also been tested in various international, regional and national courts, leading in many cases to states being directed to release asylum-seekers and other migrants from detention.<sup>14</sup> A leading case held, ‘States’ legitimate concerns to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers [and others] of the protection afforded by [human rights law],’<sup>15</sup> a position that is mirrored by many other decisions. The mandatory and unreviewable detention of asylum-seekers, for example, has been ruled unlawful under international law, as has indefinite detention.<sup>16</sup> Meanwhile, the prolonged detention of failed asylum-seekers and other migrants who have no right to remain in the territory but who cannot be returned home within a reasonable timeframe has also been held to render detention arbitrary.<sup>17</sup> Detention has consistently been criticised as having deleterious effects on the health and well-being of migrants, causing psychological damage, among other things.<sup>18</sup> This has in turn given rise to myriad human rights claims.<sup>19</sup> Meanwhile, the detention of children has given rise to several successful human rights cases, including finding that detaining children alongside unrelated adults violates their rights to dignity and security of person.<sup>20</sup> At a minimum, there is an obligation on states to institute guarantees against arbitrariness, without which detention is likely to be unlawful. This would necessarily include the availability of alternative non-custodial options to detention (discussed *infra*).

It is a well-established principle of international law that a state’s discretion in controlling entry to its territory is subject to limits stemming from international human rights guarantees.<sup>21</sup> These limits include, *inter alia*, the right to seek and enjoy asylum, the non-penalisation of asylum-seekers and refugees for illegal entry or stay, and the issue of humane reception conditions. In addition, the right to liberty and security of person and the prohibition on arbitrary deprivations of liberty is a fundamental human right that also applies, outlined in detail in Part B. International legal principles of reasonableness, proportionality and necessity require that states justify their use of detention in each case by showing that there were not less intrusive means of achieving the same objective.<sup>22</sup> The principle of proportionality must also be read as requiring detention to be a measure of last resort.<sup>23</sup> The failure of many governments to offer any alternatives to detention, or to fail to pilot them or to systematise them, puts their detention policies and practices into direct conflict with international law. Similarly, in failing to systematize an assessment of the necessity to detain for each individual, the detaining government fails to comply with international

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<sup>14</sup> See, *infra*.

<sup>15</sup> *Amuur v. France*, ECtHR, Applic. No. 19776/92, 25 June 1996, para. 43.

<sup>16</sup> See, *infra*.

<sup>17</sup> See, *infra*.

<sup>18</sup> See, *infra*.

<sup>19</sup> See, *infra*.

<sup>20</sup> See, *infra*.

<sup>21</sup> See, e.g., *Nationality Decrees issued in Tunis and Morocco – Advisory Opinion*, 1922 PCIJ Ser. B No. 2, para. 24, in which the Permanent Court of International Justice held, for example, that even the regulation of nationality, which falls within the ‘reserved domain’ of states, must be consistent with the rules and obligations of international law. See, further, A. Edwards and C. Ferstman, ‘Humanizing Non-Citizens: The Convergence of Human Rights and Human Security’, in A. Edwards and C. Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2010), ch. 1.

<sup>22</sup> See, *infra*.

<sup>23</sup> WGAD, Report of the WGAD to 15<sup>th</sup> Session, A/HRC/13/130, 15 January 2010, para. 59.

law. International law has generated a comprehensive set of standards on the issue of immigration detention, outlined in detail in Part B, but these have not always filtered into national asylum or return systems.

This conflict with international law, coupled with the increasing criticism of the use of immigration detention worldwide, including its high costs, has led in recent years to growing interest in alternatives to detention (A2Ds). The United States announced in 2009 its plan to ‘take substantial steps, effective immediately, to overhaul the immigration detention system’<sup>24</sup> and has indicated that it will develop a nationwide A2D program and a related individual risk assessment tool.<sup>25</sup> The United Kingdom’s coalition government announced in 2010 its commitment to end the detention of children<sup>26</sup> and has largely done so. Likewise, the government of Japan has taken steps to end the detention of unaccompanied migrant children as well as those in prolonged detention.<sup>27</sup> Following growing public disapproval of the mandatory and indefinite detention of unauthorised entrants to Australia, the Australian government introduced ‘bridging visas’ for those who, despite their cooperation with the authorities, could not be removed.<sup>28</sup> Alongside conditional release, there are a number of community supervision or case management programmes in operation in Australia.<sup>29</sup> The current government has further committed itself to releasing ‘children and vulnerable families’ from the Christmas Island detention facilities to ‘community housing’.<sup>30</sup> Under pressure from a decision of the European Court of Human Rights (ECtHR) that found Belgium’s detention of children unlawful, Belgium has instituted a programme of ‘return houses’ for families with specialised ‘coaching’ services.<sup>31</sup> Likewise, further to a number of national court decisions finding Hong Kong’s detention practices unlawful, it has instituted a system of release on recognizance supported by social and community services.<sup>32</sup>

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<sup>24</sup> US Immigration and Customs Enforcement (ICE), *2009 Immigration Detention Reform*, available at: [http://www.ice.gov/pi/news/factsheets/2009\\_immigration\\_detention\\_reforms.htm](http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm).

<sup>25</sup> US ICE, *Immigration Detention Overview and Recommendations*, by Dr. Dora Schriro, 6 October 2009, p. 20. The individual risk assessment tool is discussed in Part C.

<sup>26</sup> *The Coalition: Our Programme for Government – Freedom, Fairness, Responsibility*, May 2010, 17: Immigration, p. 21, available at: <http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf>.

<sup>27</sup> On prolonged detention, the Japanese government has issued a statement that ‘from now on’ persons in prolonged detention will have their cases regularly considered under bail, and regardless of whether an application for bail has been made, their cases will be reviewed, see Ministry of Japan, Immigration Control Department, ‘Re: Bail consideration process for immigration detainees under removal order’, 30 July 2010, available at: [http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri09\\_00006.html](http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri09_00006.html). Translation supplied by the International Detention Coalition, email 11 October 2010 (on file with the author).

<sup>28</sup> Australian Department of Immigration and Citizenship, Fact Sheet 85: Removal Pending Bridging Visa, available at: <http://www.immi.gov.au/media/fact-sheets/85removalpending.htm>. The visas were introduced on 11 May 2005. The visa is however completely discretionary at the hands of the minister. Meanwhile, Australia continues to detain mandatorily other unauthorised entrants. Discussed in Part C.

<sup>29</sup> Discussed in Part C.

<sup>30</sup> ‘PM softens detention stance’, *The Australian*, 19 October 2010; Joint Statement of the Prime Minister and the Minister for Immigration and Citizenship, ‘Government to move children and vulnerable families into community-based accommodation’, 18 October 2010, available at: <http://www.minister.immi.gov.au/media/media-releases/2010/cb10071.htm>. The families and children will remain ‘detained’ for the purposes of the Migration Act, but will be moved to community housing. Other restrictions may be imposed, such as reporting requirements, etc. In the same press briefing, the government announced an expansion of mainland detention facilities.

<sup>31</sup> Discussed in Part C.

<sup>32</sup> Discussed in Part C.

Meanwhile, many other countries either do not detain asylum applicants at all,<sup>33</sup> or operate long-standing and successful A2Ds.<sup>34</sup> The practices of these states beg the question of how some states can continue to justify the detention of asylum-seekers (and other migrants, such as failed asylum-seekers), while others are able to manage migration and respect the rights to seek asylum and to liberty and security of person, *without* recourse to detention. While immigration detention is certainly not limited as a practice to industrialised countries, it is however more commonly a routine feature of their migration management and border control strategies. This study therefore speaks broadly to all countries, but more particularly to those countries that employ detention as a dominant component of their asylum or migration management systems.

The question of immigration detention and potential alternatives is also now firmly on the international human rights agenda. The United Nations Human Rights Council (UN-HRC) (then Commission) extended the mandate of its Working Group on Arbitrary Detention (WGAD) to include immigration detention in 1997.<sup>35</sup> The Working Group has since produced various reports on the issue.<sup>36</sup> In 2007, it recommended that the UN-HRC conduct ‘an in-depth and urgent deliberation to seek effective alternatives to prevent violations of rights of the large numbers of asylum-seekers and irregular migrants in detention around the world.’<sup>37</sup> The recommendation is still pending. In 2009, the WGAD indicated that immigration detention would be one of its main priorities in 2010.<sup>38</sup> The UN Special Rapporteur on the Human Rights of Migrants has likewise examined the issue of alternatives to administrative detention generally,<sup>39</sup> as well as relating to children.<sup>40</sup> The UN High Commissioner for Human Rights has made the detention of migrants a priority issue and in that regard, hosted a panel discussion on the issue in 2009.<sup>41</sup> The Parliamentary Assembly of the Council of Europe and its Special Rapporteur on the Detention of Asylum-Seekers and Irregular Migrants in Europe issued a report, resolution and recommendations in early 2010, in which she called for, *inter alia*, more empirical research into A2Ds.<sup>42</sup> The European Union Agency for Fundamental Rights

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<sup>33</sup> E.g., Brazil, the Philippines and South Africa. Other countries detain asylum-seekers only for minimal periods and have a general policy objective to release asylum-seekers as soon as possible from detention: e.g. Canada, Sweden, and the United Kingdom (the exception here is persons undergoing accelerated processes in which detention is automatic).

<sup>34</sup> See, e.g., Canada’s Toronto Bail Program, discussed *infra*.

<sup>35</sup> Human Rights Commission res.1997/5 (15 April 1997).

<sup>36</sup> UN Docs. E/CN.4/1999/63 (1998), E/CN.4/2004/3 (2003), E/CN.4/2006/7 (2005) and A/HRC/10/21 (2008).

<sup>37</sup> WGAD, Report to the 10<sup>th</sup> Session of the Human Rights Council, A/HRC/10/21, 16 February 2009, para. 80(a).

<sup>38</sup> *Ibid.*, para. 51.

<sup>39</sup> See, Special Rapporteur on the Human Rights of Migrants, Ms. Gabriela Rodríguez Pizarro, Report to the 54<sup>th</sup> Session of the Commission on Human Rights, UN Doc. E/CN.4/2003/85, 30 December 2003.

<sup>40</sup> See, Special Rapporteur on the Human Rights of Migrants, Mr. Jorge Bustamante, Report to the 11<sup>th</sup> Session of the Human Rights Council, UN Doc. A/HRC/11/7, 14 May 2009, paras. 24, 27 and 43 (on children in detention).

<sup>41</sup> See, <http://www.ohchr.org/EN/NEWSEVENTS/Pages/MigrationPanel.aspx>.

<sup>42</sup> See, Parliamentary Assembly, Council of Europe, Doc. 12105, 11 January 2010, *The detention of asylum seekers and irregular migrants in Europe*, Rapporteur Mrs Ana Catarina Mendonça (CoE Special Rapporteur, *Report on Detention*), available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm>.

(EU-FRA) recently released a conference edition of a study on state practices in relation to returns, which includes a chapter on detention and A2Ds in that context.<sup>43</sup>

With its specific mandate for asylum-seekers, refugees and stateless persons, the UNHCR has long had an interest in A2Ds. Most recently, it organised a side meeting of its Executive Committee (ExCom) on A2D in 2009, which 30 governments attended,<sup>44</sup> and the organisation is in the process of updating its 1999 ‘Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers’. It also conducted an East Asian roundtable in May 2010 with the governments of Australia, Hong Kong, Japan, New Zealand and the Republic of South Korea, alongside non-governmental organisations working in those countries. Further regional roundtables are previewed. The ExCom has on many occasions, dating back to 1977, raised concern about detention practices and has recommended that any reception arrangements put in place by states parties must respect human dignity and applicable human rights standards.<sup>45</sup> The *Agenda for Protection* also calls on states to ‘more concertedly [-] explore alternatives to detention of asylums-seekers and refugees.’<sup>46</sup>

This study contributes to UNHCR’s body of work on detention and alternatives to detention. It articulates the current state of international law governing detention and its alternatives and provides a critical overview of existing and possible A2D options drawn from empirical research. It is one of the background papers for the joint UNHCR-OHCHR Global Roundtable on Alternatives to Immigration Detention held in May 2011 in Geneva.

#### A. *Structure and content*

This paper is divided into two main parts. The first part outlines the general international legal framework relating to deprivations of liberty and other restrictions on freedom of movement for refugees, asylum-seekers, stateless persons and other migrants (such as rejected asylum-seekers). It addresses both the substantive and procedural guarantees against arbitrary detention. It examines international and regional standards in turn, as well as special measures that need to be taken in relation to specific groups of persons. It does not provide an overview of the international standards relating to care and conditions of treatment within detention.<sup>47</sup> For the purposes of this study, the conditions of detention are relevant only in so far as poor

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<sup>43</sup> European Union Agency for Fundamental Rights (EU-FRA), *Detention of Third Country Nationals in Return Procedures*, 10 November 2010, available at: [http://fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/pub\\_detention\\_en.htm](http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_detention_en.htm).

<sup>44</sup> See, <http://idcoalition.org/alternatives-to-immigration-detention-side-meeting-geneva-2010/>.

<sup>45</sup> See, UNHCR, *Thematic Compilation of Executive Committee Conclusions (4<sup>th</sup> edition)*, 2009, pp. 136-140. See, in particular, ExCom Conclusion Nos. 7 (XXVIII) (1977) on custody prior to execution of expulsion order, para. (c), 44 (XXXVII) (1986) on Detention of Refugees and Asylum-Seekers, and 93 (LIII) (2002), on reception of asylum-seekers in individual asylum systems, para. (b)(i).

<sup>46</sup> UNHCR, *Agenda for Protection*, UN Doc. EC/52/SC/CRP.9/Rev.1, 26 June 2002, Part II, Goal 1, Point 9.

<sup>47</sup> A number of human rights provisions are specifically relevant to conditions in detention, such as Articles 7 (prohibition against torture and cruel, inhuman or degrading treatment), 10 (right to humane conditions in detention) and 17 (right to family life and privacy) of the *International Covenant on Civil and Political Rights* (ICCPR). See, also, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA res. 43/173 (9 December 1988).

or inadequate conditions render the detention itself unlawful or arbitrary (discussed in Part B). Rather, the study focuses on the legal framework relating to obligations to provide for A2Ds.

The second part of the study explores state practice regarding A2Ds from a practical or functional standpoint. It examines these practices via *types* of alternatives, drawing on specific examples from actual country practices. Empirical research visits were conducted to five countries for the purposes of this study and they, alongside secondary literature, inform the analysis.<sup>48</sup> While noting that the examples studied are in many senses *sui generis*, tailored to the particular economic, legal, political and social system in question, and therefore they may not be replicable in their existing forms, several features are drawn from these examples to form a list of possible content of alternative arrangements. In this regard, the paper also highlights a number of risks associated with A2Ds if they are pursued without careful planning, proper regulation, and subsequent monitoring and oversight.

The paper is particularly interested in A2Ds for asylum-seekers, refugees and stateless persons; however, it also draws on a range of case law, legal standards and practices relating to immigration detention more generally, and in the context of return or deportation. This is because much of the latest international jurisprudence revolves around detention in the return context, rather than upon entry; and several alternative projects that are studied here are either return-oriented or combine asylum and broader migration processes. The case law and practices in the returns context are, therefore, instructive. While asylum-seekers, refugees and stateless persons benefit from rights protection of a number of specific legal instruments, and these are set out in Part B, the right to liberty and security of person and against arbitrary detention is a fundamental human right and applies to all, regardless of immigration or other legal status (or lack thereof).

The study does not specifically cover camp confinement<sup>49</sup> or the detention of migrants in relation to criminality or threats of terrorism (explained under *Terminology* below).

#### B. *Methodological caveats*

This study did not interview individuals (or the direct clients or beneficiaries) released to the various alternatives described. This study cannot therefore speak for the participants in these programmes as to why they complied, what motivated them to cooperate, etc. Had such interviews been possible, it would certainly have added an important dimension to the study; and this aspect certainly warrants further investigation. Nonetheless, interviews were conducted with a wide range of stakeholders in the five countries and each of the various alternative programmes were visited on site.

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<sup>48</sup> The countries visited were Australia, Belgium, Canada, Hong Kong and the United Kingdom (Scotland) over the period from May to September 2010.

<sup>49</sup> See, instead, A. Edwards, 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 *International and Comparative Law Quarterly*, p. 789-825, which includes a section dealing with the legal arguments around camp confinement policies amounting to a deprivation of liberty.

### C. Terminology

This paper uses the term **‘immigration detention’** to refer to the detention of refugees, asylum-seekers, stateless persons and other migrants, either upon seeking entry to a territory (front-end detention) or pending deportation, removal or return (back-end detention) from a territory. It refers primarily to detention that is administratively authorised, but it also covers judicially sanctioned detention. ‘Immigration detention’ is to be distinguished from ‘criminal detention’ and ‘security detention’, which refer respectively to detention or other restrictions on liberty of nationals or non-nationals on the grounds of having committed a criminal offence, or for national security or terrorism-related reasons.<sup>50</sup>

In the immigration context, there have emerged various **‘definitions of ‘detention’**.<sup>51</sup> Essentially, detention involves the deprivation of liberty in a confined place, such as a prison or a purpose-built closed reception or holding centre. It is at the extreme end of the spectrum of deprivations of liberty, yet this does not mean that measures short of detention do not implicate guarantees against arbitrary detention. International law is as much concerned with lesser deprivations and other restrictions on movement as it is with total confinement in a closed space. This will be a question of degree, as explained in Part B.

Many **‘alternatives to detention’** involve some form of restriction on movement or deprive an individual of some of his or her liberty and must therefore be subject to human rights safeguards. All restrictions on liberty – whether full deprivations via confinement in a closed location or lesser restrictions involving reporting requirements or a designated residence – are subject to human rights oversight. This paper positions various A2D practices along a continuum from ‘liberty’ to ‘restrictions or deprivations on liberty’ to ‘detention’. They are plotted along this continuum in Part C (see Figure 1). The further along the continuum (or, in other words, the greater the loss of or interference with liberty), the more human rights

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<sup>50</sup> The Equal Rights Trust study on stateless persons contains sections on both these forms of detention: see, ERT, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London, July 2010.

<sup>51</sup> UNHCR has, for example, defined detention as: ‘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.’ (UNHCR, *Guidelines on Detention of Asylum-Seekers and Refugees*, 1999). The Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) defines ‘place of detention’ as: ‘where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’ (Article 4(1)). The OPCAT also defines ‘deprivation of liberty’ as: ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority’ (Article 4(2)). The emphasis in relation to the OPCAT is on the physical location of detention, rather than deprivation of liberty *per se*. The European Union Reception Directive, discussed *infra*, defines ‘detention’ as ‘confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement’. The Inter-American Commission on Human Rights (I-ACmHR) has defined ‘deprivation of liberty’ as ‘Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority ...’ (I-ACmHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, approved by the Commission during its 131<sup>st</sup> regular period of sessions, 3-14 March 2008, General Provision).

safeguards must be put in place to guard against executive excess, arbitrariness and unfair punishment. As already stated above, the emphasis for asylum-seekers and refugees must, therefore, be on the right to seek asylum, non-penalization for illegal entry or stay, humane reception conditions, and the right to liberty and security of person and freedom of movement. Justifications for any restrictions on liberty are secondary, and must be strictly circumscribed given the non-criminal and non-judicial context in which most immigration detention occurs. In many countries, this currently operates in reverse order.<sup>52</sup> The ultimate A2D is no detention at all.

Labels can be misleading. Calling a particular practice an ‘alternative to detention’ does not remove it from the ambit of international human rights law. As the judgment in *Amuur v. France* reminds us, it doesn’t matter what an area of detention is called – whether an ‘international zone’ or otherwise – human rights continue to apply.<sup>53</sup> Field and Edwards cautioned in their 2006 study, ‘Sometimes what is called an alternative to detention may in fact be an alternative form of detention.’<sup>54</sup> It is important that each example is assessed as to its factual reality.

Case law supports this approach. A US immigration decision found, for example, that ankle monitors ‘cause a great loss of liberty and require[-] confinement in a specific place, i.e., the Respondent’s home between the hours of 7 p.m. and 7 a.m. everyday’, thus amounting to ‘custody’ and implicating *habeas* guarantees; although subsequent cases have distinguished between ‘custody’ and ‘detention’ for US domestic purposes.<sup>55</sup> The United Kingdom’s House of Lords similarly held that restrictions that

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<sup>52</sup> See, Council of Europe, Parliamentary Assembly Committee on Migration, Refugees and Population, *The Detention of Asylum-Seekers and Irregular Migrants in Europe*, Doc. 12105, 11 Jan. 2010, Rapporteur: Ms Ana Catarina Mendonça.

<sup>53</sup> *Amuur v. France*, para. 52: ‘Despite its name, the international zone does not have extraterritorial status.’ Here France argued unsuccessfully that because the asylum-seekers had passed via Syria on their way to France, they were free to return there and were therefore not in detention. This was rejected, as the European Court of Human Rights (ECtHR) argued that the ability to leave detention must be a real possibility and not merely theoretical. A Dutch decision has also held that holding someone in the transit zone of an airport constitutes a deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights (ECHR): *Shokuh v. The Netherlands*, Hoge Raad der Nederlanden (Netherlands Supreme Court), 9 December 1988, *Revue du droit des étrangers* (RDDE), No. 52, January-February 1989, p. 16, as referred to in G. Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 185, n 83.

<sup>54</sup> Field and Edwards, *Study on Alternatives to Detention*, p. 4.

<sup>55</sup> Executive Office for Immigration Review, Immigration Court, Los Angeles, USA, 5-18-08, 18 May 2008, parties are not named, before Bass L.J., available at: <http://www.bibdaily.com/pdfs/Bass%20IJ%205-18-08%20electronic%20bracelet%20bond%20decision.pdf> (on file with the author). Case distinguished *Nguyen v. B.I. Incorporated*, 435 F.Supp.2d 1109 (D. Oregon 2006), in which the use of an ankle bracelet for someone pending deportation was not deemed to be ‘custody’. Identical decision taken in *X v. Department of Homeland Security*, US Immigration Court, Orlando, Florida, FL 03/06/09, 6 March 2009, available at: <http://drop.io/BondVictoryOrlando06Mar2009>. These cases are to be compared to *Matter of Jose Aguilar-Aquino*, 24 I&N Dec. 747 (Board of Immigration Appeals 2009), File A095 748 786 (Los Angeles, California), 12 March 2009, in which a distinction was made between ‘detention’ and ‘custody’. Persons released on parole and those still incarcerated were considered to be in ‘custody’, whereas ‘detention’ referred to ‘actual physical restraint or confinement in a given space’ (referring to *Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990)). Thus ‘... whilst a person in custody is not necessarily in detention, one who is in detention is necessarily in custody’. Custody means ‘actual physical restraint or confinement in a given space’ (p.6). The reason for distinguishing between the two

amounted to an 18-hour curfew deprived the subject of his liberty.<sup>56</sup> Likewise, the European Court of Human Rights (ECtHR) ruled that confinement to a remote island off the coast of Sardinia, where the applicant lived for 16 months in a small hamlet of 2.5 square kilometres, with daily reporting and a curfew, fell within the parameters of Article 5 of the European Convention on Human Rights (ECHR).<sup>57</sup> It has also found that confinement of a mentally ill patient to a mental hospital that was ‘open’ (i.e. unlocked) invoked Article 5 protections.<sup>58</sup>

Furthermore, some national ‘detention’ arrangements could be classified as A2Ds, even though the particular national legal framework may necessitate their characterisation as ‘detention’ under law.<sup>59</sup> Likewise, other national legal arrangements have not classified particular individuals as being *de jure* detained, yet they may have no ability to exercise their right to freedom of movement and are therefore, for all intents and purposes, *de facto* detained.<sup>60</sup> A distinction may also need to be drawn between a physical ‘place’ of detention compared with a ‘status’ of being detained. What is most important to this paper (and under international law) is the question of whether someone has been deprived of their liberty, rather than the name given to it. In many respects, this paper is about humane reception conditions, of which non-custodial A2Ds are but one component.<sup>61</sup>

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terms was relevant as far as it permitted the immigration judge to vary the conditions of ‘custody’ or ‘release’.

<sup>56</sup> *Secretary of State for the Home Department v. JJ and others* [2007] UKHL 45, [2008] 1 AC 385, however, it found shorter curfews of 10-12 hours and less rigorous restrictions in other cases to be compatible with Article 5 of the ECHR (*Secretary of State for the Home Department v. AF* [2007] UKHL 46, [2008] 1 AC 440; *Secretary of State for the Home Department v. E and another* [2007] UKHL 47, [2008] 1 AC 499). Note that each of these cases involved terrorism suspects who were found to pose a threat to national security, which is not normally the case with asylum applicants.

<sup>57</sup> *Guzzardi v. Italy*, ECtHR, Applic. No. 7367/76, 6 November 1980, p. 33, paras. 92 and 93.

<sup>58</sup> See, *Ashingdane v. United Kingdom*, ECtHR, Applic. No. 8225/78, 28 May 1985.

<sup>59</sup> Here I have in mind the Australian system of ‘community detention’, in which families with children are permitted to reside in the community in unguarded houses, and are free to come and go as they please. For the purposes of Australian domestic law, they remain ‘in detention’ as they have no lawful status; however, for the purposes of this study, this may well constitute an ‘alternative to detention’. Other ‘community detention’ practices in Australia, however, have involved restrictions on freedom of movement, such as being accompanied at all times and being confined to guarded houses in the community, and this would not be similarly classified: see, further, Parliament of the Commonwealth of Australia, *Immigration Detention in Australia: Community-based Alternatives to Detention*, Second report of the inquiry into immigration detention in Australia, Joint Standing Committee on Migration, Canberra, May 2009.

<sup>60</sup> Here I refer to the Canadian practice of confining parents with children to immigration holding facilities. As their children are not technically subject to the detention order, they are not considered to be ‘in detention’ *de jure* under Canadian law, yet they are as equally confined as their parents and, for all practical purposes, they are not free to come and go: Interview and visit, Canadian Citizenship and Immigration, Immigration Holding Centre, Toronto, May 2010.

<sup>61</sup> A singular focus on alternatives can overlook other important human rights issues arising from alternative practice. In Australia, for example, there is a serious issue around destitution of some released asylum-seekers or persons pending removal owing to their lack of eligibility for social services [and in the past, the right to work]. So while they may be released from detention, they may face other human rights concerns: see, Hotham Mission Asylum Seeker Project, *Australia’s Hidden Homeless: Community-based Approaches to Asylum Seeker Homelessness*, August 2010. This indicates that. Discussed further in Part C.

## B. The International Legal Framework

### 1. The right to seek and to enjoy asylum, open and humane reception conditions, non-penalisation and freedom of movement

#### 1.1 The right to seek and enjoy asylum, open and humane reception conditions, and the prohibition on penalisation for illegal entry or stay

Apart from the general principles elaborated below in relation to the right to liberty of person, there are some specific safeguards against arbitrary detention or other restrictions on movement relevant to refugees and asylum-seekers contained in the 1951 Convention. While states at the international level are generally considered not to have an obligation 'to grant' asylum, increasingly there *are* obligations to grant asylum at the regional level.<sup>62</sup> At a minimum, the seeking of asylum is not an unlawful act. This compels governments to institute open and humane reception conditions, including safe, dignified and human rights-compatible treatment.<sup>63</sup>

In addition, Article 31(1) of the 1951 Convention stipulates that refugees having come directly should not be penalised for their illegal entry or stay if they present themselves to the authorities without delay and show good cause for their illegal entry or stay. Depriving asylum-seekers or refugees of their liberty for the mere reason of having entered or stayed illegally, would amount to a penalty under Article 31(1)<sup>64</sup> [and is, in any event, contrary to the right to liberty and security of person, explained *infra*]. Article 31(1) should also be interpreted to mean that the act of entering a country for the purposes of seeking asylum should not be considered an unlawful act. Automatically detaining asylum-seekers or stateless persons for the sole reason of their status as such would amount to an arbitrary deprivation of liberty.<sup>65</sup> The UN Working Group on Arbitrary Detention (WGAD) has stated, for example, that

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<sup>62</sup> E.g., Article 22(7) of the American Convention on Human Rights 1969 (ACHR) provides: 'Every person has the right to seek and be granted asylum in a foreign country, in accordance with the legislation of the state and international conventions ...'; Article 12(3) of the African Charter of Human and Peoples' Rights 1981 (ACHPR) provides: 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions'; Article 13 of the EU Qualifications Directive provides: 'Member States shall grant refugee status to a third country national or a stateless person ...' See, also, *M.S.S. v. Belgium and Greece*, in which the European Court of Human Rights noted that the 1951 Convention 'defines the circumstances in which a State *must grant* refugee status to those who request it, as well as the rights and duties of such persons.' *M.S.S. v. Belgium and Greece*, ECtHR, Applic. No. 30696/09, 21 January 2011, para. 54 (my emphasis)

<sup>63</sup> See, in particular, ExCom Conclusion No. 93 (LIII), 2002, Reception of Asylum-Seekers in the Context of Individual Asylum Systems.

<sup>64</sup> See, e.g., Noll who argues, for example, that where the detention of a refugee fails the necessity test of Article 31(2), it may be punitive, and therefore proscribed by Article 31(1): G. Noll, 'Article 31(Refugees lawfully in the country of refuge/Réfugiés en situation irrégulière dans le pays d'accueil)', in A. Zimmermann (ed.), *Commentary on the 1951 Convention relating to the Status of Refugees* (Oxford: Oxford University Press, 2011), 1243, at para. 96 *et seq.* Grahl-Madsen explicitly identified detention as amounting to a penalty in his treatise: A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (1972), p. 209 (footnote omitted).

<sup>65</sup> See, *infra*.

‘criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.’<sup>66</sup>

Moreover, Article 31(2) addresses the specific question of detention of those refugees having entered or stayed illegally. The provision permits states to apply some restrictions on the movement of such refugees. However, any restrictions must be ‘necessary and [they] shall only be applied until their status in the country is regularized or they obtain admission into another country’.<sup>67</sup> Article 31(2) thus shares the necessity criterion applied in relation to Article 9 of the International Covenant on Civil and Political Rights 1966 (ICCPR) (explained further below). Accepting that ‘detention should normally be avoided’, and that it is thus an exceptional measure, the ExCom has set down a limited number of circumstances in which detention or other restrictions on movement may be considered necessary in an individual case:

... in view of the hardship which it involves, detention should normally be avoided. *If necessary*, detention may be resorted to only on grounds prescribed by law 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 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.<sup>68</sup> [Emphasis added.]

UNHCR’s 1999 *Guidelines on Detention* reiterates these same reasons.<sup>69</sup>

In each of these situations, any recourse to detention must be indicated in the individual case and must not amount to a blanket policy to detain. Decisions to detain on national security grounds, for example, must be taken only in individual cases and subject to judicial oversight.<sup>70</sup> Decisions to detain on public order grounds might include initial screening for identity, documentation or health reasons, or exceptionally, in the context of mass influx and in the latter situation, only until order has been restored. In terms of a right of states to detain persons in order to assess the elements of their asylum claim, this applies only to an initial screening, and not generally during a full refugee status determination unless necessary in the individual case.<sup>71</sup>

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<sup>66</sup> WGAD, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/Add.1, 10 January 2008, para. 53.

<sup>67</sup> Article 31(2), 1951 Convention.

<sup>68</sup> ExCom Conclusion No. 44 (XXXVII) (1986) on Detention of Refugees and Asylum-Seekers, para. (b). See, also, *Saadi v. United Kingdom*, Written Submissions on behalf of the United Nations High Commissioner for Refugees, 30 March 2007, ECtHR, Applic. No. 13299/03, paras. 26, in which it was argued that ‘There is “general agreement” that “every State was fully entitled to investigate the case of each refugee who clandestinely crossed its frontier, and to ascertain whether he met the necessary entry requirements ... Art. 31(2) therefore authorizes necessary restrictions on movement for the purposes of investigation of identity, the circumstances of arrival, the basic elements of the claim and security concerns.’

<sup>69</sup> UNHCR, *Guidelines on Detention*, Guideline 3.

<sup>70</sup> See, e.g., *A and others v. Secretary of State for the Home Department* [2004] UKHL 56 (‘Belmarsh Detainees’ case).

<sup>71</sup> An increasing number of countries are resorting to detention of asylum-seekers during the initial stages of asylum procedures for expediency reasons (e.g., the United Kingdom’s ‘fast-track detention

The ExCom has further noted that ‘fair and expeditious [refugee status determination] procedures’ can safeguard against prolonged detention and that any such detention should be subject to administrative or judicial review.<sup>72</sup> Moreover, it has been found that the right to due process in asylum proceedings can be compromised while in detention.<sup>73</sup> In particular, the right of detainees to access UNHCR has also been accepted by the ExCom<sup>74</sup> and is reflected in states’ obligations to cooperate with UNHCR in Article 35 of the 1951 Convention.<sup>75</sup>

## 1.2 Article 26, 1951 Convention

The other relevant provision in the 1951 Convention specific to the right to liberty of refugees and asylum-seekers is Article 26. Article 26 of the 1951 Convention (and an identical provision in Article 26 of the 1954 Statelessness Convention) provides:

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

There are two limitations on the application of this provision. The first is that it applies only to refugees who are ‘lawfully in’ the territory; and second, the standard to be applied is that of restrictions applied to ‘aliens generally in the same circumstances’ (the lowest standard contained in the two conventions).

### 1.2.1 ‘Lawfully in’ the territory

Rights under the 1951 Convention are structured via a system of ‘gradations of treatment’, based on notions such as ‘physical presence’, ‘lawful presence’, ‘lawful stay’ and ‘habitual stay’.<sup>76</sup> Article 26 corresponds to the second of these: lawful presence. The same standard of ‘lawful presence’ (or ‘lawfully in’) applies to Article 12 of the ICCPR (discussed *infra*) as well as protections against expulsion in Article 13(1) of the ICCPR and Article 32 of the 1951 Convention. While it is clear that recognized refugees fall within these provisions, it is asserted that asylum-seekers must also benefit from these protections; otherwise it would render the protection meaningless. As Hathaway opines, it cannot be reasonably concluded that asylum-

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procedures’, Austria, Hungary, Slovakia, and others), which would not be lawful *per se*, and like all other forms of detention, would need to be justified. Administrative convenience might justify an initial period of detention of up to 7 days, but it must not be automatic and must be indicated in each individual case: see below discussion on *Saadi v. UK*.

<sup>72</sup> ExCom Conclusion No. 44, para. c. See, further, Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised, Geneva Expert Roundtable, 8-9 November 2001, available at: <http://www.safecom.org.au/pdfs/roundtable-summaries.pdf>.

<sup>73</sup> Discussed *supra*.

<sup>74</sup> ExCom Conclusion No. 85 (XLIX), 1998, on International Protection.

<sup>75</sup> See, Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees’, p. 225.

<sup>76</sup> Goodwin-Gill distinguishes the four categories as: simple presence, lawful presence, lawful residence, and habitual residence: G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2<sup>nd</sup> ed.) (Oxford: Oxford University Press, 1996), pp. 305-307.

seekers who submit an application for refugee status are not ‘lawfully present’.<sup>77</sup> This is partly rationalised by the absence of any obligation to verify status, which ‘would allow States to indefinitely deny refugees their Convention rights simply by refusing to verify their status.’<sup>78</sup> The UNHCR has also adopted this approach, noting that ‘... once the domestic law formalities for access into determination procedures have been complied with, status is regularized if the other criteria in Art. 31 are met, and Art. 26 governs the position.’<sup>79</sup>

An alternative approach taken in respect of whether asylum-seekers are ‘lawfully in’ the territory for the purposes of these provisions, yet one reaching the same result, is that of Marx. He distinguishes how the term ‘lawfully in’ has been applied in some cases relevant to Article 12 of the ICCPR (and other human rights instruments) and Article 26 of the 1951 Convention. In particular, he argues that a refugee (and persons seeking refugee status) ought to be considered to be lawfully within the territory as soon as he or she *is present in* the territory, compared with other migrants who may have some additional requirements imposed on their right of entry or stay. Marx argues that ‘the term “lawfully within a territory” according to refugee law cannot simply be regarded as a matter of domestic law, rather its ordinary meaning follows from the object and purpose of the 1951 Convention.’<sup>80</sup>

Notably the applicable standard of Article 26 (and also Article 12, ICCPR) is not as high as that of ‘lawful stay’, which applies to other provisions in the 1951 Convention and/or 1954 Statelessness Convention. This conforms with the decision of the UN Human Rights Committee (HRC) in *Celepi v. Sweden*, in which an individual subject to a deportation order but who could not be removed was considered to be ‘lawfully in the territory of Sweden’ for the purposes of Article 12.<sup>81</sup>

The criterion of ‘lawfully in’ in Article 26 of the 1951 Convention corresponds to that in Article 12 of the ICCPR governing freedom of movement, which is discussed below. According to the Human Rights Committee:

The question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, *provided* they are in compliance with the State’s international obligations.<sup>82</sup>

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<sup>77</sup> Hathaway, *The Rights of Refugees under International Law*, Ch. 3.1.2.

<sup>78</sup> Hathaway, *ibid.* See, also, A. Edwards, ‘Human Rights, Refugees and the Right to “Enjoy” Asylum’ (2005) 17 *International Journal of Refugee Law* 297-330.

<sup>79</sup> *Saadi v. United Kingdom*, Written Submissions on behalf of the United Nations High Commissioner for Refugees, *supra*, para. 27.

<sup>80</sup> R. Marx, ‘Article 26 (Freedom of Movement/Liberté de Circulation)’, in Zimmermann (ed.), *Commentary on the 1951 Convention relating to the Status of Refugees* (Oxford University Press, 2011), 1147, at para. 49.

<sup>81</sup> *Celepi v. Sweden*, para. 9.2. Celepi was a Turkish national of Kurdish origin who was subject to a deportation order on the grounds of suspicion of involvement in terrorist activities. The deportation order was not enforced because it was believed that he (and his fellow suspects) would be exposed to political persecution in Turkey if returned. Sweden granted them permission to stay, which was held to amount to be ‘lawfully within’ for the purposes of Article 12. Sweden justified its restrictions on movement on ground of national security under Article 12(3), which was accepted by the HRC.

<sup>82</sup> HRC, General Comment No. 27: Freedom of Movement, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, para. 4 (emphasis added).

The HRC went on to find nonetheless that ‘an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12.’<sup>83</sup> Under this view, recognised refugees would be considered lawfully in the territory for the purposes of Article 12. This would be the case regardless of the status determination procedure applied, i.e., whether individual or group or *prima facie* recognition.<sup>84</sup> Registered asylum-seekers would also be ‘lawfully within’ the territory under this interpretation.<sup>85</sup> Any period in which someone is not yet lawfully in the territory would fall under Article 9 of the ICCPR (see *infra*).

### 1.2.2 Standard of treatment: ‘aliens generally’

Many states operate legal distinctions between those ‘in the territory’ and those considered to have not yet entered (*i.e.*, being unlawfully in the territory). These distinctions are also regularly at work in relation to immigration detention regimes.<sup>86</sup> Despite these legal distinctions, human rights guarantees continue to apply.<sup>87</sup> Therefore, once a person is ‘lawfully within’ a state as understood above, any restrictions on freedom of movement or choice of residence must be judged according to the ‘aliens generally’ standard. Any restrictions imposed on ‘aliens generally’ would need to conform with international law. Article 12(1) of the ICCPR provides,

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<sup>83</sup> *Ibid.*, para. 4.

<sup>84</sup> See. *Karker v. France*, HRC Comm. No. 833/1998, 26 October 2000, in which Article 12 was automatically considered to apply because he was a recognised refugee. Karker was a Tunisian national and a recognised refugee in France who was placed under an expulsion order on account of suspicion of his active support of a ‘terrorist organisation’ (language of the communication) that used violent methods. The expulsion order was unenforceable owing to his refugee status so that he could not be returned to Tunisia. Karker was required to live in a particular French district, and was moved intermittently. He was also required to report to the police daily. The HRC found no violation of Article 12 of the ICCPR on grounds of national security. The HRC thus accepted that he was lawfully in France owing to his refugee status – there was no issue raised in this case. The case further held that the arguments under Article 9 were inadmissible *ratione materiae*, ‘since the measures to which Mr. Karker is being subjected do not amount to deprivation of liberty such as contemplated by Article 9 of the Covenant.’ The area in which he was required to live was ‘a comparatively wide area’ and he was free to move within that community (para. 9.2). He was also eligible to leave the area with permission. The communication did not specifically deal with the question about daily reporting requirements and whether alone or in combination these constituted a deprivation of liberty within the context of Article 9, rather than Article 12.

<sup>85</sup> Arguably, asylum-seekers permitted to enter the territory and required to reside in a particular designated region continue to be ‘lawfully in’ the territory even if they do not abide by the terms of this designation. An application for asylum is to the state as a whole, not to a particular administrative district. How states deal with asylum-seekers who refuse to remain in a designated location is a separate question. Cf., *Omwenyeki v. Germany*, ECtHR, Applic. No. 44294/04, 20 November 2007, in which an alien was provisionally admitted to a certain district of the territory of a state, pending proceedings to determine whether or not he was entitled to a residence permit under the relevant provisions of domestic law. According to the ECtHR, he remained ‘lawfully in’ Germany as long as he continued to comply with the conditions to which his admission and stay were authorised: see, further, Marx, ‘Article 26 (Freedom of Movement/Liberté de Circulation)’. Note that Article 12 of the ICCPR and Article 26 of the 1951 Convention [and 1954 Statelessness Convention] do not prohibit restrictions on freedom of movement; however, they require any restrictions to be justified.

<sup>86</sup> For example, in Belgium, persons who have entered the territory unlawfully are not subject to detention as Belgium has no ground under the ECHR to detain them (because they have already effected an unlawful entry); whereas those attempting to make an unlawful entry who arrive at the border are generally subject to detention.

<sup>87</sup> *Amuur v. France*.

for example, an exhaustive list of justifications for differential treatment in Article 12(3).<sup>88</sup>

According to Hathaway (and restated by Marx), the drafters of the 1951 Convention (and by analogy the 1954 Convention) were ‘firmly committed to the view that once lawfully in the territory of a state party, refugees [and stateless persons] should be subject only to whatever restrictions govern the freedom of internal movement and residence of other non-citizens.’<sup>89</sup> Few restrictions on freedom of movement and choice of residence were imposed on ‘other non-citizens’ at the time of drafting Article 26 (here referring to foreign labour workers, many of whom were present in the territory under pre- and post-war labour immigration schemes). At a minimum, Article 26 guarantees that a Contracting State may not impose restrictions that are applicable only to refugees or stateless persons. In other words, special restrictions vis-à-vis refugees and stateless persons are not permitted.<sup>90</sup>

## 2. Stateless Persons

Stateless persons benefit from the same rights to liberty and security of person as other human beings, yet they are often at greater risk of unlawful or arbitrary detention. Many *de jure* stateless persons who reside in their countries of habitual residence are at risk of arbitrary detention on account of a combination of lack of legal documentation or status and racism and ethnic discrimination. Many *de facto* stateless persons outside their country of habitual residence are also at risk of detention, especially if they do not possess identity or travel documents and their state of nationality or former habitual residence refuses to cooperate in their repatriation. Such persons face particular risks of indefinite detention.<sup>91</sup> Both groups are subject to the same human rights guarantees outlined in this paper. In addition, under the *1954 Convention relating to the Status of Stateless Persons*, prompt and efficient status determination procedures must be carried out.<sup>92</sup>

The UN Committee on the Elimination of Racial Discrimination (CERD Committee) has held that ‘[t]he security of non-citizens – including the stateless – must be ensured with regard to arbitrary detention.’<sup>93</sup> UNHCR’s *Guidelines on Detention* further specify that ‘Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release.’<sup>94</sup> It further calls on states to:

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<sup>88</sup> HRC, General Comment No. 27: Art. 12: Freedom of Movement, UN Doc. A/55/40 Vol. I (2000), para. 4.

<sup>89</sup> Hathaway, *The Rights of Refugees under International Law*, p. 705; restated in Marx, ‘Article 26 (Freedom of Movement/Liberté de Circulation)’.

<sup>90</sup> Marx, *ibid.*

<sup>91</sup> See, e.g., *Al-Nashif v. Bulgaria*, ECtHR, Applic. No. 50963/99, 20 June 2002: the applicant was a stateless person of Palestinian origin.

<sup>92</sup> See, also, Article 11, 1961 Convention on the Reduction of Statelessness. See, further, UNHCR, Summary Conclusions: Statelessness Determination Procedures and the Status of Stateless Persons, Expert Meeting convened by UNHCR and Open Society Institute, Geneva, 6-7 December 2010, available at: <http://www.unhcr.org/4d919a436.html>.

<sup>93</sup> CERD, General Recommendation No. 30: Discrimination against Non-Citizens, 1 October 2004, para. 19.

<sup>94</sup> UNHCR *Guidelines on Detention*, Guideline 9.

make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.<sup>95</sup>

Article 26 of the 1954 Statelessness Convention (on freedom of movement) is also relevant, and is identical to that in the same provision in the 1951 Convention, discussed above. If stateless persons are living in their place of habitual residence, yet have no nationality in that country, Article 26 accords those lawfully present freedom of movement and residence. Because of the unique situation of stateless persons (who have no other country in which they may regularise their situation), they must be considered 'lawfully in' the countries where they are habitually resident. To argue the contrary would permit restrictions on movement of such persons solely on the basis of their lack of any nationality, and thus would amount to a double penalty. If a stateless person is outside his or her country of habitual residence, and he or she has registered with the authorities, including for the purposes of status determination, the same arguments as were applied above to asylum-seekers would apply to purported stateless persons.

There is, however, no provision equivalent to Article 31 of the 1951 Convention in respect of stateless persons. 'Stateless refugees' would nonetheless obtain the benefit of Article 31. Like the 1951 Convention, however, exceptional measures of detention against a stateless person must not be applied solely on account of the individual's statelessness or former nationality;<sup>96</sup> and, further, any provisional measures taken on national security grounds can only continue until the individual's status as a stateless persons is determined, and such measures must be necessary in the individual case.<sup>97</sup>

### **3. The right to liberty and security of person under international law**

The right to liberty and security of person is a fundamental human right and an essential component of legal systems enjoying the rule of law.<sup>98</sup> Like all human rights, it applies in principle to all human beings, regardless of immigration or other status.<sup>99</sup> The right is found in two provisions of the Universal Declaration of Human Rights 1948 (UDHR): 'Everyone has the right to life, liberty and security of person' (Article 3) and 'No one shall be subjected to arbitrary arrest, detention or exile' (Article 9). These were subsequently transferred into Article 9 of the ICCPR, which guarantees liberty and security of person and prohibits arbitrary deprivation of such liberty. Article 12 of the same instrument, which deals with restrictions on freedom of

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<sup>95</sup> *Ibid.*

<sup>96</sup> Article 8, 1954 Convention relating to the Status of Stateless Persons.

<sup>97</sup> Article 9, 1954 Convention relating to the Status of Stateless Persons.

<sup>98</sup> See, Bingham, *The Rule of Law*, referring to a range of historical bases for habeas corpus: 'The writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he has been against law deprived of it.' (per *Bushell's Case* (1670), Vaughan C.J. at 135, 136). The US Supreme Court has likewise consistently recognised the principle that '[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' (per *Foucha v. Louisiana*, 504 U.S. 71, p. 80 (1992)).

<sup>99</sup> HRC, General Comment No. 18: Non-discrimination, 11 October 1989, para. 1; HRC, General Comment No. 15: The position of aliens under the Covenant, para. 1.

movement and choice of residence for those lawfully in the territory, is also applicable, and is dealt with separately below.

It is not relevant *where* the deprivation of liberty is carried out – for example, whether on islands<sup>100</sup> or boats<sup>101</sup> – nor *whether* it is described as detention (as explained above).

### 3.1 Right to liberty and security of person under Article 9, ICCPR

Article 9(1) provides:

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 liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9 expresses the general principle of liberty and security of person. Article 9 applies to all deprivations of liberty, including detention for the purposes of immigration control.<sup>102</sup> Any deprivations of liberty must thus be in accordance with the terms set out in Article 9, as developed by relevant human rights jurisprudence. Article 9 does not prohibit immigration detention, nor is the right to liberty and security of person absolute;<sup>103</sup> rather it is a substantive guarantee against *unlawful* as

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<sup>100</sup> See, e.g., *Guzzardi v. Italy*. See, also, the litigation around habeas corpus guarantees at Guantanamo Bay in relation to the foreign terror suspects detained there, discussed *infra*. In fact, the use of islands as a means of detention has a long history. The impeachment of the Earl of Clarendon occurred because of his unlawful exercise of executive power by his practice of dispatching prisoners to outlying parts of what was then the United Kingdom ('to islands, garrisons, and other places') for the very reason that in those places the writ of habeas corpus did not apply (see, *Clarendon* (1668) 6 St Tr 291, at 291, 330, 296, as referred to in Bingham, *The Rule of Law*, p. 22). Clarendon's practice is not unfamiliar to today's strategies of some governments to send asylum-seekers and other migrants to other countries, including island-nations, where the laws of the sending state do not apply, and thus they may be deprived of their right to habeas corpus if this is not part of the receiving country's legal framework.

<sup>101</sup> See, e.g., *Medvedyev v. France*, ECtHR, Applic. No. 3394/03, 29 March 2010, which involved the interception by the French of a Cambodian vessel in international waters for being suspected drug traffickers and the subsequent detention of its crew for 13 days below deck and the control over their route. It was held that this amounted to deprivation of liberty in violation of Article 5, ECHR. The French had not possessed 'clearly defined and foreseeable legal grounds' to detain them in this way. See, also, *J.H.A. v. Spain*, UN Committee against Torture (CAT), Comm. No. 323/2007, 21 November 2008, in which the CAT noted that Spain had exercised control over the migrants from the time of their rescue and throughout their detention in Mauritania. Cf. *Ruddock v. Vadarlis*, [2001] FCA 1329, an Australian High Court judgment which did not accept that the writ of habeas corpus applied to 433 asylum-seekers who had been rescued by the Norwegian container vessel, the MV Tampa, as the actions of the Australian government in sending troops to take control of the ship and its passengers and refusing to disembark them were 'incidental to' preventing the rescued asylum-seekers from landing on Australian territory (see, though, dissent of Chief Justice Black, paras. 69 and 80).

<sup>102</sup> HRC General Comment No. 8 (1982) on Article 9 (Right to liberty and security of person), UN Doc. HRI/GEN/1/Rev.7, para. 1.

<sup>103</sup> Article 9 may be derogated from in a public emergency subject to being 'strictly required by the exigencies of the situation' and 'provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination ...' (Article 4, ICCPR). Any measures adopted pursuant to a derogation are still subject to an assessment that they are necessary (including questions of proportionality) and cease as soon as the state of emergency no longer exists. See, *Belmarsh Detainees* case, in which the UK House of Lords accepted that the current situation of

well as *arbitrary* detention. The next section details the five criteria to determine if a deprivation of liberty is either lawful and/or arbitrary as a matter of international law. The procedural guarantees included in sub-paragraphs (2), (4) and (5) are dealt with separately below.

Similar provisions are found in other international and regional human rights instruments.<sup>104</sup>

### 3.1.1 Detention must be in accordance with and authorised by law

First, any detention or deprivation must be in accordance with and authorised by law. Any deprivation of liberty that is not in conformity with national law would be unlawful – as a matter of national as well as international law – and therefore in breach of Article 9(1). Moreover, domestic legislation which permits the use of detention but which is not in conformity with international human rights standards would also be in violation of Article 9(1). For example, mandatory detention of asylum-seekers has been held to be unlawful *per se* as a matter of international law,<sup>105</sup> regardless of the existence of national legislation sanctioning the practice.<sup>106</sup>

The foreseeability and predictability of the law and the legal consequences of particular actions also informs whether the detention will be considered unlawful. The law permitting detention may not, for example, be of retroactive effect.<sup>107</sup> Unlike Article 5 of the European Convention on Human Rights (ECHR) (dealt with under a separate section below), Article 9 does not provide an exhaustive list of grounds upon which detention may be resorted to by states (what is sometimes referred to as the ‘power to detain’); rather it prohibits any unlawful and arbitrary form of detention.<sup>108</sup> The standard of ‘lawfulness’ requires that all law be ‘sufficiently precise to allow the citizen [or other person subject to such measures] – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences that

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terrorism was an acceptable basis for derogation, but that indefinite detention of foreign alleged terror suspects, who could not be returned to their countries of nationality owing to threats of torture, would be disproportionate and discriminatory and therefore in violation of Articles 5 and 14 of the ECHR. Also, *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, found no basis to suggest that detention of asylum-seekers was prohibited as a matter of customary international law (at para. 9.3).

<sup>104</sup> Article 16, International Convention on the Rights of All Migrant Workers and Members of their Families (MWC); Article 37, Convention on the Rights of the Child (CRC). On regional instruments, see *infra*.

<sup>105</sup> *A v. Australia; C v. Australia*, HRC, Comm. No. 900/2000, 13 November 2002. The Working Group on Arbitrary Detention has also stated that mandatory detention is arbitrary in the context of deportation, as it is a disproportionate response: WGAD, *Civil and Political Rights, Including the Question of: Torture and Detention*, UN Doc. E/CN.4/2000/4 (1999) Annex 2.

<sup>106</sup> See, Australian decision in *Al-Kateb v. Godwin*, [2004] HCA 37, in which the High Court of Australia held that section 189 of the *Migration Act 1958* (Cth), which requires mandatory and non-reviewable detention until either an individual obtained refugee status or is removed, was not unconstitutional.

<sup>107</sup> *Amuur v. France*, para. 53.

<sup>108</sup> See discussions in the 3<sup>rd</sup> Committee of the UN General Assembly, UN Doc. A/4045, paras. 43ff, in M. J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, (Boston: M. Nijhoff, 1987), p. 199.

a given action might entail.<sup>109</sup> That is, there must be a degree of legal certainty.<sup>110</sup> This is also required for any functioning legal system based on the rule of law.

This would require, for example, that if a person is released on bond or their own recognizance, they are made aware of the consequences of non-appearance, including possibilities of being re-detained.<sup>111</sup> It might also require that the grounds for detention be explicitly provided for in legislation<sup>112</sup> together with the a range of factors that are to be taken into account in making an assessment as to whether the detention is necessary, proportionate and reasonable (see below). This latter requirement also corresponds to Article 9(2) (reasons for arrest or detention) (see below), although it also relates more broadly to the argument that the grounds upon which detention may be authorised be set out in national legislation, or be otherwise transparent. Furthermore, insufficient guarantees in law to protect against arbitrary detention, such as no limits on the period of detention or no access to an effective remedy to contest it, would call into question the legal validity of any detention.<sup>113</sup> Where a statutory provision is ambiguous or unclear, a restrictive interpretation of that provision would be called for, owing to the elementary nature of the right to liberty.<sup>114</sup>

### 3.1.2 Detention must not be arbitrary

The second criterion of Article 9 is that any deprivation of liberty must not be arbitrary. This criterion necessarily imports concepts of reasonableness, necessity, proportionality and non-discrimination. The HRC has clarified that:

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<sup>109</sup> *H.L. v. United Kingdom*, ECtHR, Applic. No. 45508/99, 5 October 2004, para. 114. See, also, *Dougoz v. Greece*, ECtHR, Applic. No. 40907/98, 6 March 2001: the law must be ‘sufficiently accessible and precise, in order to avoid all risk of arbitrariness’ (para. 55).

<sup>110</sup> *Bozano v. France*, ECtHR, Applic. No. 9990/82, 18 Dec. 1986, para. 54. See, too, *Shum Kwok-sheer v. Hong Kong SAR* [2002] 5 HKCFAR 318 and ‘A’ v. *Director of Immigration* [2008] HKCU 1109, 18 July 2008 (HK Court of Appeal), which found that Article 5 of the Hong Kong Bill of Rights mandates legal certainty and accessibility in connection with detention. A violation of both legal certainty and accessibility was found because there was no policy statement setting out how the power of detention was to be exercised. Despite the HK government adopting two documents, a later case found that two notices and two further documents were also inadequate: see, *Hashimi Habib Halim v. Director of Immigration* [2008] HKCU 1576 (HK Court of First Instance).

<sup>111</sup> There was heavy criticism by NGOs of the United States, for example, when it released a large number of detainees without informing them of any obligations to report in order to make space for new detainees. A predictably high rate of absconding resulted. See: Lutheran Immigration and Refugee Service, ‘Alternatives to Detention Programs: An International Perspective’ (Baltimore: LIRS, 2009).

<sup>112</sup> This is the recommendation of the WGAD, see *infra* under section 5, Procedural Guarantees. See, further, *Attorney-General v. Refugee Council of New Zealand Inc.* [2003] 2 NZLR 577 (New Zealand), para. 259, in which Justice Baragwanath held that: ‘The word “necessary” in my view limits both the extent of any restrictions imposed and the reasons for such restrictions.’

<sup>113</sup> *Massoud v. Malta*, ECtHR, Applic. No. 24340/08, 27 July 2010.

<sup>114</sup> See, e.g., Judge Dukada in *Hooman Hassani and Hootan Hassani v. The Minister for Home Affairs and Two Others* (10/01187) [2010] SGHC (5 February 2010) (South Gauteng High Court (Johannesburg), in which he stated that the ‘flaw in the [Akwen] judgment is that the court ignored its obligation to give a restrictive interpretation to the subsection because it interferes with the liberty of an individual’ (para. 27). Cf. *Akwen v. Minister for Home Affairs* (46875/07) [2007] TPD (High Court of South Africa (Transvaal Provincial District, Pretoria)). See, too, judgment in *AS and Eight Others v. Minister of Home Affairs and Three Others* (2010/101) [2010] SGHC (12 February 2010) (South Gauteng High Court (Johannesburg)): courts should ‘opt for an interpretation of [statutory provisions] which avoids harshness and injustice [and does not interfere with elementary rights]’ (p.11).

“Arbitrariness” is not to be equated [only] 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 *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.<sup>115</sup>

... the element of proportionality becomes relevant in this context ...<sup>116</sup>

### **a) Reasonableness, necessity and proportionality**

According to UNHCR, detention of asylum-seekers and refugees must be a measure of last resort.<sup>117</sup> This is not merely a policy statement, but is predicated on the legal principle that detention must be *necessary in all the circumstances* assessed against the facts of the individual case at hand. An individual assessment is required to ensure that incarcerating an individual is necessary in every case and over time, which in turn invokes the question of proportionality. This position is further based on general principles of international law establishing that seeking asylum is not an unlawful act and that refugees shall not be penalised for illegal entry or stay, outlined above. Additionally, even in the context of irregular migration, there is a general view that migrants opting to travel illegally through the use of smugglers should not be prosecuted.<sup>118</sup> As seeking asylum is a human right, it is inherent that any restrictions on liberty imposed on persons exercising this right be carefully circumscribed. As already noted, although states have the right to control the entry to and stay of persons on their territory, this discretion is limited by human rights guarantees. For governments that use detention to regulate migration, any failure to systematize a standard assessment of necessity to detain for each individual undermines this well-recognized legal principle.

In assessing whether detention is necessary and reasonable in all the circumstances, the standard of proportionality is applied.<sup>119</sup> The general principle of proportionality requires that a balance be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the public policy objectives of limiting or denying the right in question.<sup>120</sup> In essence, a government should not take any action that exceeds that which is necessary to achieve the pursued objective. This necessitates a conservative approach to restrictions on liberty.

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<sup>115</sup> *Van Alphen v. The Netherlands*, HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8.

<sup>116</sup> *A v. Australia*, paras. 9.2.-9.4.

<sup>117</sup> UNHCR, *Guidelines on Detention*, para. 3 (note that these are in the process of being updated). See, too, p. 4 of same guidelines, ‘In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved.’

<sup>118</sup> Article 5, United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Organised Transnational Crime (Smuggling Protocol).

<sup>119</sup> *A v. Australia*, para. 9.2.

<sup>120</sup> *Vasileva v. Denmark*, ECtHR Applic. No. 52792/99 (25 September 2003), para. 37. Of course, proportionality arguments are not relevant to absolute rights, such as torture.

Mandatory detention and presumptions in favour of detention have been held to be unlawful on this basis.<sup>121</sup> As already clarified, it is also unlawful to detain an individual for the sole reason of being an asylum-seeker.<sup>122</sup> A study conducted by the European Union Agency for Fundamental Rights (EU-FRA) has found that (at least) in almost half of EU Member States, proportionality is a factor that must be weighed by administrative and judicial bodies to balance the interests of the state with the individual's right to liberty and security of person.<sup>123</sup>

In the returns context, for example, it has been held to be disproportionate to continue to detain someone where there is no 'real and tangible'<sup>124</sup> or 'reasonably foreseeable'<sup>125</sup> prospect of removal. The inability to return the individual may be for any reason, such as statelessness,<sup>126</sup> risk of torture,<sup>127</sup> or because the individual or country of origin refuses to cooperate with the return.<sup>128</sup> It would also therefore be disproportionate to continue to detain someone where there is no safe route home or because he or she lacks the necessary documentation to return.<sup>129</sup> If detention based on lack of documentation is considered a disproportionate response over time in the return context, it would be equally disproportionate to continue to detain someone in the same predicament who is seeking asylum, unless they do not cooperate or show bad faith (see next section). Such situations technically amount to indefinite detention, which is unlawful *per se*. In order to meet the proportionality test, states must have recourse to alternative means to achieve their objectives other than detention (see below).

Some governments have developed various 'balancing tests' or lists of factors (needs and risk assessments) that may be relevant to determining whether the detention remains proportionate to the legitimate aim in question. These are discussed in section 9 of Part C of this study.

## **b) Reasons for immigration detention**

As noted above, the ICCPR does not contain an exhaustive list of accepted grounds for detention. Rather, each and every detention must be justified and assessed on its merits. The HRC has held, however, that accepted reasons for detention include a likelihood of absconding and a lack of cooperation.<sup>130</sup> The HRC has nonetheless

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<sup>121</sup> See, e.g., *A v. Australia*; *C v. Australia*; *N (Kenya) v. Secretary for State for Home Department and Ulde v. Minister of Home Affairs* (discussed *supra*).

<sup>122</sup> Article 31, 1951 Convention.

<sup>123</sup> EU-FRA, *Detention of Third-Country Nationals in Return Procedures*, p. 18.

<sup>124</sup> See, Report of Working Group on Arbitrary Detention, 13<sup>th</sup> Session of the UN Human Rights Council, UN Doc. A/HRC/13/30, 15 January 2010, para. 64.

<sup>125</sup> Language used in the Australian High Court judgment in *Al-Kateb*.

<sup>126</sup> See, WGAD, Opinion 45/2006, UN Doc. A/HRC/7/4/Add.1, para. 10.

<sup>127</sup> See, e.g., *Belmarsh Detainees* case: Indefinite detention was considered disproportionate and therefore in violation of Article 5 of the ECHR for nine terror suspects, even while recognising a derogation owing to 'public emergency threatening the life of the nation'.

<sup>128</sup> See, e.g., *Mikolenko v. Estonia*, ECtHR Applic. No. 10664/05, 8 January 2010.

<sup>129</sup> *The Queen on the Application of Abdi Ahmed Abdillahi v. The Secretary of State for the Home Department* [2010] EWHC 808, *R. (Khadir) v. Secretary of State for the Home Department* [2005] UKHL 39, *Mohamad Aziz Ibrahim and Aran Omer v. Secretary of State for the Home Department* [2010] EWHC 746.

<sup>130</sup> *A. v. Australia*, para. 9.4.

clarified that ‘without such factors detention may be considered arbitrary, even if entry was illegal.’<sup>131</sup> In other words, illegal entry does not give the state an automatic power to detain under Article 9 without additional factors that portend that detention is necessary in the individual case. As already indicated above, it has also been argued that in order for the necessity of detention to be properly assessed, lawful purposes must be made explicitly clear in domestic legislation. In at least one jurisdiction where grounds for detention are included only in policy guidance (rather than in legislation), the failure to have regard to this policy guidance nonetheless has been held to give rise to a legal challenge under administrative law.<sup>132</sup>

The position under Article 9 is to be contrasted with the ECHR, which sets out two exhaustive heads of power for the state to detain in Article 5(1)(f) and which seems, on its face, to disregard the necessity of detention (discussed below).

### c) Length and extensions of detention

Proportionality applies in relation to both the initial order of detention as well as its extension. The length of detention can render an otherwise lawful decision to detain arbitrary. As explained by the HRC, ‘...detention should not continue beyond the period for which the State can provide appropriate justification.’<sup>133</sup> At one end of the spectrum, seven days for initial asylum clearance appears to be acceptable.<sup>134</sup> At the other end, indefinite detention is not.<sup>135</sup> As each individual case must be examined on its merits, and periodically reviewed, it is not possible to identify a standard acceptable period of detention. On the other hand, maximum periods in detention ought to be set to guard against arbitrariness.

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<sup>131</sup> *Ibid.*

<sup>132</sup> See, e.g., *R v. SSHD ex p. Khan* [1985] 1 All ER 40 (United Kingdom). Failure to follow Detention Centre Rules may not, however, render the detention unlawful: see, *SK (Zimbabwe) v SSHD* [2008] EWCA Civ 1204 (UK Court of Appeal). For more on the UK return system and detention, see A. Edwards, *Thematic National Legal Study on Rights of Irregular Migrants in Voluntary and Involuntary Return Procedures: The United Kingdom* (Nottingham, United Kingdom, September 2009), prepared for the EU-FRA (unpublished paper; on file with the author).

<sup>133</sup> *A v. Australia*, para. 9.4. See, too, judgment of Justice Meyer in *Kanyo Aruforse v. Minister of Home Affairs and Two Others* (2010/1189) [2010] SGHC (25 January 2010) (South Gauteng High Court (Johannesburg): ‘A detained person has an absolute right not to be deprived of his freedom for a second longer than necessary by an official who cannot justify his detention’ (para. 18).

<sup>134</sup> See, *Saadi v. UK*.

<sup>135</sup> See, *A v. Australia*, para. 9.2; *van Alphen v. The Netherlands*, para. 5.8; *Spakmo v. Norway*, HRC Comm. No. 631/1995, 5 November 1999, para. 6.3; *Mukong v. Cameroon*, HRC Comm. No. 458/1991, 21 July 1994, para. 9.8. See, too, *R v. Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704, in which it was held that the detention of foreign nationals who are deportable owing to being not conducive to the public good can only be detained for a reasonable time, not indefinitely. See, also, *Hooman Hassani and Hootan Hassani* (10/01187) [2010] SGHC (5 February 2010) (South Gauteng High Court (Johannesburg)), in which it was held that permitting continuous extensions of detention by immigration officials would be an unreasonable interpretation of the statutory provision in question, which set an initial 30 day limit which may be extended ‘for an adequate period not exceeding 90 calendar days’, as it could lead to indeterminate detention and thus make it impossible for the courts to protect detainees by way of review. The maximum limit intended was 120 days. See, further, WGAD, Mission to Angola, A/HRC/7/4/Add.4, 29 February 2008, para. 97: ‘It has to be recalled that detention of illegal immigrants must be the exception, not the rule, and indefinite detention is clearly in violation of applicable international human rights instruments governing deprivation of liberty’.

On maximum periods, the EU has indicated that 6 months is the maximum for persons detained pending removal (subject to two exceptional grounds for extension up to a further 12 months). This time frame has however been extensively criticised,<sup>136</sup> not least because a preponderance of EU Member States impose far shorter timeframes<sup>137</sup> and thus it does not generally reflect state practice. In France, for example, the limit on detention in administrative detention centres is 32 days (up from 12 days since 2003) and 20 days in waiting zones.<sup>138</sup> The US Supreme Court has ruled that the government may detain aliens subject to final removal orders, but must release them after six months if ‘there is no significant likelihood of removal in the reasonably foreseeable future.’<sup>139</sup> It is also now a generally accepted principle of law in common law countries that even where a statute does not impose an express maximum limit on the length of detention, it is nonetheless subject to limitations, and that the period in detention must be reasonable.<sup>140</sup> Furthermore, it has been held in the context of deportation proceedings that the failure on the part of the authorities to exercise due diligence in such proceedings rendered the initially lawful decision to detain unlawful.<sup>141</sup> These same arguments as to unlawfulness are applicable in relation to a failure to exercise due diligence in asylum procedures, especially if an individual is detained for the duration.

While there is no universally accepted maximum period of immigration detention, establishing one has been encouraged as a guarantee against arbitrariness. WGAD, for example, has stated, ‘Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released.’<sup>142</sup> Without maximum periods, detention may become prolonged, and in some cases indefinite, especially for stateless persons or sylum-seekers without documentation whose identities cannot be verified or where asylum proceedings are delayed, or for other migrants whose expulsion cannot be

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<sup>136</sup> See, e.g., UNHCR, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 16 June 2008, available at: <http://www.unhcr.org/refworld/pdfid/4856322c2.pdf>; European Council on Refugees and Exiles (ECRE), *Returns Directive: EU Fails to Uphold Human Rights*, Press Release, Brussels, 18 June 2008, available at: <http://www.ecre.org/files/ECRE%20press%20release%20Returns%20Dir.pdf>. As at June 2008, 17 EU Member States had maximum periods in pre-removal detention at or below 18 months; whereas seven had no fixed maximum period indicated in law: ECRE, *Returns Directive: EU Fails to Uphold Human Rights*.

<sup>137</sup> According to Blachier and Melander, two-thirds of EU Member States have lengths of detention significantly under the six months period foreseen in the EU Returns Directive: G. Blachier and I. Melander, *Union Européenne: les pays africains condamnent la ‘directive retour’*, Reuters, 10 July 2008. As at June 2008, 17 EU Member States had maximum periods in pre-removal detention at or below 18 months; whereas seven had no fixed maximum period indicated in law: ECRE, *Returns Directive: EU Fails to Uphold Human Rights*.

<sup>138</sup> See, E. Lambert Abdelgawad *et al.*, ‘French Law on the Detention and Return of Irregular Migrants and the European Directive’ (2010) 4 *European Human Rights Law Review* 384-395.

<sup>139</sup> *Zadvydas v. Davis*, US Supreme Court, 533 US 678 (2001), para. 701.

<sup>140</sup> See, e.g., *Sahin v. Canada (Minister of Citizenship and Immigration)* [1995] 1 F.C. 214 (T.D.) (Canadian Federal Court) and *R v. Governor of Durham Prison, ex p. Singh* [1984] 1 All E.R. 983 (Q.B.), per Woolf J.

<sup>141</sup> See, e.g., *Mikolenko v. Estonia*, ECtHR, Applic. No. 10664/05, 8 December 2009; *Massoud v. Malta*.

<sup>142</sup> UN WGAD, Report to the 13<sup>th</sup> Session of the Human Rights Council, 18 January 2010, para. 61; see, too, Principle 7, UN Doc. E/CN.4/2000/4, 28 December 2009. See, too, *Massoud v. Malta*.

carried out for legal or practical reasons.<sup>143</sup> As noted above and below, indefinite detention in such circumstances is highly likely to be arbitrary.<sup>144</sup>

**d) Obligation to consider less invasive means of achieving the same objective**

The principles of reasonableness, necessity and proportionality require further that states consider that there were not other ways they could achieve their objectives without interfering with the right to liberty and security of person. The HRC has stated that Article 9 of the ICCPR requires states to show that ‘in light of the author’s particular circumstances, there were not less invasive means of achieving the same ends ...’<sup>145</sup> This position is also relevant in the returns context such that where the possibility of deportation is considered unrealistic, there is an obligation on the state to explore measures in lieu of detention:

Where the chances of removal within a reasonable delay are remote, the Government’s obligation to seek for alternatives to detention becomes all the more pressing.<sup>146</sup>

Many states have legislated for A2Ds,<sup>147</sup> or require that the ‘availability, effectiveness and appropriateness of alternatives to detention must be considered.’<sup>148</sup> The EU in its Returns Directive, discussed below, similarly subjects its rules on detention to consideration of ‘other sufficient but less coercive measures [that] can be applied effectively in a specific case...’<sup>149</sup> These practices and principles conform with the starting point of this analysis that there is a fundamental human right to liberty and security of person, which must only be interfered with in justified circumstances and then to the least extent possible. The HRC has referred to various other ways to achieve immigration control, including reporting requirements, sureties or other conditions that take account of the particular circumstances of the individual concerned.<sup>150</sup> UNHCR has also listed various alternatives, including reporting or residency requirements, guarantees, sureties or bail.<sup>151</sup> Similarly, the Sub-Commission on the Promotion and Protection of Human Rights encouraged ‘States to adopt alternatives to detention such as those enumerated in the Guidelines on the Applicable

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<sup>143</sup> WGAD 2010 Report, para. 62.

<sup>144</sup> *Ibid.*, para. 63. The WGAD indicates that such detention would be arbitrary if the consular representation of the country of origin does not cooperate, where there is no transportation to the country in question or where the expulsion order cannot be carried out owing to the principle of *non-refoulement*.

<sup>145</sup> *C v. Australia*, para. 8.2.

<sup>146</sup> WGAD, *Opinion No. 45/2006*, UN Doc. A/HRC/7/4/Add.1, 16 January 2008, para. 25.

<sup>147</sup> The legislation of several countries provides for alternatives to administrative detention, such as release on bail, release on parole, home detention, semi-liberty, payment of a certain sum as guarantee, police supervision, ban on leaving the country, obligation to reside at a given address with periodic reporting to the authorities, withdrawal of passport: per Special Rapporteur on the Human Rights of Migrants, Ms. Gabriela Rodríguez Pizarro, Report to the 54<sup>th</sup> Session of the Commission on Human Rights, UN Doc. E/CN.4/2003/85, 30 December 2003, para. 39.

<sup>148</sup> See, e.g., *Sahin v. Canada*, as cited in Immigration and Refugee Board of Canada, Guideline 2, Guidelines on Detention, Ottawa, Canada, 12 March 1998, p. 4.

<sup>149</sup> Article 15(1), EU Returns Directive.

<sup>150</sup> *A v. Australia*, para. 8.2.

<sup>151</sup> Guideline 4, UNHCR, *Guidelines on Detention*.

Criteria and Standards relating to the Detention of Asylum Seekers'.<sup>152</sup> WGAD has likewise argued that 'alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention.'<sup>153</sup> This is further reflected in its Guarantee 13.<sup>154</sup>

The principles of necessity, reasonableness and proportionality require that states consider other options before relying on detention, otherwise the individual assessment as to the extent of the justified deprivation of liberty is merely fictional. The size and geography of an island-state has also been raised as a factor to suggest that there ought to be other measures at the state's disposal other than detention to secure an eventual removal (discussed below).<sup>155</sup> Likewise, this case suggests that the same is applicable for asylum applicants : there must be other measures at a state's disposal other than detention in order to process asylum claims. The fact that many states do not resort to detention in such cases also confirms that it is generally unnecessary for individuals with pending asylum claims.

In sum, states cannot detain individuals simply by indicating that there are no alternative options available. This would be a *male fides* implementation of international obligations (see below) and in conflict with international treaty law.<sup>156</sup> Like all human rights, the right to liberty and security of person imports both negative and positive obligations on the state. In relation to positive obligations, a state, if it intends to use detention, must ensure that there are review procedures in place, an option to order release or another form of A2D, and it is in their interests to do so (see Part C). Most states that do not (yet) offer A2Ds do have alternatives to detention in the criminal context, such as parole on conditions, which could be applied in the immigration context subject to some modifications and in separate procedures. Other options may need to be specifically developed within the immigration and asylum contexts, tailored to the needs of the individuals and the objectives of the state. The right to liberty places an onus on states when contemplating restricting an individual's liberty, particularly in the context of asylum, to first make available a range of lesser restrictions to match the risk involved and the individual's particular circumstances. WGAD, among others, has warned however that any alternatives developed must not function as alternatives to release.<sup>157</sup>

#### **e) Non-discrimination**

Article 2 of the ICCPR requires that the rights contained in the treaty, including Articles 9 and 12, are to be enjoyed equally and without discrimination. States cannot,

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<sup>152</sup> Sub-Commission on the Promotion and Protection of Human Rights res. 2000/21, (no document number), para. 6.

<sup>153</sup> WGAD, Report of the Visit to the United Kingdom on the issue of immigrants and asylum seekers, UN Doc. E/CN.4/1999/63/Add.3, 18 December 1998, para. 33.

<sup>154</sup> WGAD, *Legal Opinion on the Situation regarding Immigrants and Asylum-seekers*, UN Doc. E/CN.4/1999/63, para. 69: 'Possibility for the alien to benefit from alternatives to administrative custody.'

<sup>155</sup> *Massoud v. Malta*, discussed *infra*.

<sup>156</sup> States are required to implement their treaty obligations in good faith: Article 26, Vienna Convention on the Law of Treaties 1969.

<sup>157</sup> WGAD, Report to the 13<sup>th</sup> Session of the Human Rights Council, A/HRC/13/30, 15 January 2010, para. 65.

therefore, detain or restrict the movement of a person on the basis of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This applies even when derogations are in place.<sup>158</sup> Likewise, the rights to freedom of movement under Article 26 of the 1951 Convention and the 1954 Statelessness Convention are to be applied without discrimination.<sup>159</sup> According to the HRC, the ‘... general rule of [international human rights law] is that each one of the rights ... must be guaranteed without discrimination between aliens and citizens’<sup>160</sup> ‘[and they] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.’<sup>161</sup> The fact of being a non-national does not entitle a state to apply different standards in respect of Article 9. The HRC has 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.’<sup>162</sup>

It has been held that the application of forms of indefinite detention to ‘foreign’ terror suspects, for example, was not only discriminatory, but that the discrimination in question contributed to the characterisation of the detention as disproportionate.<sup>163</sup> Similarly, ‘foreign’ terror suspects cannot be deprived of their rights to challenge their detention before civil courts, no matter the legislation purporting to deny them this right nor their location outside the physical territory of the state.<sup>164</sup>

States that impose detention on persons of a ‘particular nationality’ may also be liable to charges of racial discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD).<sup>165</sup> Discrimination under the ICERD includes direct as well as indirect discrimination.<sup>166</sup> If a particular measure applies disproportionately to a particular ethnic, racial or religious group, for example, without a reasonable and objective justification, the measure would be discriminatory under the ICERD.<sup>167</sup> Where the effects are discriminatory, the question

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<sup>158</sup> No derogations may be based on discriminatory grounds: Article 4, ICCPR. A like provision is found in Article 15, ECHR.

<sup>159</sup> Art. 3, 1951 Convention and Art. 3, 1954 Statelessness Convention, as supplemented by developments in international human rights law.

<sup>160</sup> HRC, General Comment No. 15: The Position of Aliens under the Covenant, CCPR/C/21/Rev. 1, 11 April 1986, para. 2.

<sup>161</sup> *Ibid.*, para. 1.

<sup>162</sup> HRC, General Comment No. 31: Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, CCPR/C/21/Rev.1/Add.13, para. 10.

<sup>163</sup> See, *Belmarsh Detainees* case.

<sup>164</sup> Here, see, *Rasul v. Bush*, 542 U.S. 466 (2004); 124 S. Ct. 2868 (US Supreme Court) (non-citizens have a statutory right to challenge their detention in US courts); *Hamden v. Rumsfeld*, 548 U.S. 557 (2006); 126 S. Ct. 2749, (despite legislative amendments introduced to deprive Guantanamo Bay detainees of the benefit of the decision in *Rasul*, the court held that detainees were entitled to continue with *habeas* applications already pending); and finally, *Boumediene v. Bush*, 553 U.S. 723 (2008); 128 S. Ct. 2229, where the majority held, *inter alia*, that the detainees had a constitutional right to *habeas corpus* and that the legislation purporting to deny it was unconstitutional.

<sup>165</sup> Article 1(3), ICERD.

<sup>166</sup> CERD, General Recommendation No. 14: Definition of discrimination, UN Doc. A/48/19, 22 March 1993, para. 1.

<sup>167</sup> A. Edwards, ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *Int’l J. Ref. L.* 192-211: the Australian policy of mandatory detention of those arriving ‘onshore’ has been criticised for indirectly discriminating against particular nationalities as those more likely to arrive in an

of intent is no longer relevant to international law on discrimination.<sup>168</sup> It could also raise questions around the legality of detention for the purposes of ‘fast-track procedures’ from so-called ‘safe countries of origin’, as these accelerated procedures apply to persons from particular countries or regions and thus discriminate against particular nationalities. At a minimum, an individual has the right to challenge his or her detention on such grounds; and the state must show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals in this regard.<sup>169</sup> The CERD Committee has called in particular for states to respect the security of non-citizens, in particular in the context of arbitrary detention, and to ensure that conditions in centres for refugees and asylum-seekers meet international standards.<sup>170</sup>

#### **f) Good faith and proper purpose**

A decision to detain ‘actuated by bad faith or an improper purpose’ may also render the detention arbitrary.<sup>171</sup> Discrimination against a particular group, for example, would be an improper purpose (as discussed above). Using detention to deter irregular migration in general may amount to an improper purpose, as it is not tailored to an individual case. It may also amount to collective punishment.<sup>172</sup> Additionally, governments cannot, for example, use immigration powers to detain an individual who threatens public order on account of criminality (compared with immigration-related public order reasons), as this should be dealt with under criminal law.<sup>173</sup>

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unauthorised fashion arrive from Afghanistan, Iran, Iraq and Sri Lanka compared with those entering on student, tourist or other lawful visas.

<sup>168</sup> See, e.g., CERD, General Recommendation XIV (Forty-second session, 1993): On Article 1, Paragraph 1, of the Convention, UN Doc. A/48/18 (1993) 114, at paras. 1-3.

<sup>169</sup> For example, in deportation proceedings there may be a justified distinction drawn between nationals and non-nationals, in the sense that the national has a right of abode in their own country and cannot be expelled from it: *Moustaquim v Belgium* (1991) 13 EHRR 802. See, also, *Agee v. UK* (1976) 7 DR 164 (European Commission on Human Rights decision).

<sup>170</sup> CERD, General Recommendation No. 30: Discrimination against Non-Citizens, UN Doc. A/59/18, 10 January 2004, para. 19.

<sup>171</sup> See, *Bozano v. France*; *Shamsa v. Poland* ECtHR, Applic. Nos. 45355/99 and 45357/99, 27 November 2003; *Gonzalez v. Spain*, ECtHR, Applic. No. 43544/98, 29 June 1999 and *Amuur v. France*, ECtHR, Applic. No. 19776/92, 25 June 1996.

<sup>172</sup> See, A.C. Helton, ‘The Detention of Refugees and Asylum-Seekers: A Misguided Threat to Refugee Protection,’ in G. Loescher and L. Monahan (eds.), *Refugees and International Relations* (Oxford: Oxford University Press, 1989) p. 135 at 137: ‘Detention for the purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile.’ Goodwin-Gill also concludes that: ‘The use of detention for the purposes of deterrence is ... impermissible.’ (Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, p. 185 at 225.)

<sup>173</sup> WGAD, *Opinion No. 45/2006*, para. 28. Public order reasons for detaining a non-national in immigration detention may however be justified if these relate to immigration reasons (e.g., fear of absconding). See, also, decision of the ECJ in *Kadzoev v. Bulgaria*, ECJ Case C-357/09, 30 November 2009, in which it was held that the possibility of detaining a person on grounds of public order and safety cannot be based on the EU Returns Directive, as these were not included explicitly in the Directive.

#### **4. The right to liberty and security of persons under regional human rights instruments**

Each of the main regional human rights treaties contains a prohibition against arbitrary deprivation of liberty in similar terms to those set out in Article 9 of the ICCPR.<sup>174</sup> In addition, the EU, as a sub-regional entity, has also developed standards on questions of detention in the contexts of asylum and return. There are slight variations in the obligations of states between international and regional/sub-regional human rights standards, derived from the express wording of a particular provision or how it has been developed by case law. This plurality of provisions may give rise to issues around which right applies in the event of a conflict of standards. Article 5 of both the 1951 Convention and the 1954 Statelessness Convention clarifies that ‘[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees [or stateless persons] apart from this Convention.’ The intention behind the 1951 Convention was to assure refugees the highest possible exercise of their fundamental human rights, suggesting the highest standard must prevail.<sup>175</sup> Where a state is party to two or more instruments and both remain on foot, should it adopt measures that satisfy only the lower standard of one of the treaties, it would nonetheless still be in violation of any higher standards applied in the other treaties.

##### **4.1 The Council of Europe and the European Convention on Human Rights**

Article 5(1)(f) of the ECHR provides:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Like Article 9 of the ICCPR, the starting point of Article 5(1)(f) is the right to liberty and security of person as a foundational principle of the Council of Europe’s ECHR. European countries have long recognised basic *habeas corpus* guarantees within the context of the rule of law and democratic governance.<sup>176</sup> Since the 1700s, *habeas corpus* and other rights guarantees have applied to nationals and non-nationals

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<sup>174</sup> Discussed *infra*.

<sup>175</sup> Preamble, 1951 Convention. For more on which standard applies, see Edwards, ‘Human Rights, Refugees and the Right to “Enjoy” Asylum’, at pp. 305-307.

<sup>176</sup> See, e.g., English Bill of Rights 1689, which contained protections in favour of personal liberty and security by the prohibitions on imposition of excessive fines, bail, and infliction of cruel and unusual punishments: see, Bingham, *The Rule of Law*, p. 24. See, also, the French Declaration of the Rights of Man 1789, which at Article 7 prohibits charge, arrest and detention unless prescribed by law.

alike.<sup>177</sup> Thus, any limitations on the rights to liberty and security of person must be tightly controlled. Derogations in times of emergency are permitted, yet any measures introduced under derogation are still subject to proportionality and necessity tests, and must last only as long as the emergency exists.<sup>178</sup> The express wording of Article 5(1)(f) is the starting point. Articles 5(2), (4) and (5) are also relevant in relation to procedural standards, addressed separately below.

First, the right to detain must be prescribed in national law.<sup>179</sup> This is an identical standard as applied under Article 9 of the ICCPR, and so has been dealt with above.

Second, the detention must be for a prescribed purpose contained in Article 5. Article 5(1)(f) permits detention in two immigration-related circumstances: (a) to prevent unauthorised entry into the country and (b) for the purposes of deportation or extradition. In other words, a state has the right to detain a person for these express purposes only. According to the ECtHR, they are exhaustive in nature and must be interpreted restrictively.<sup>180</sup> As the ECtHR held in *Vasileva*, ‘Only a narrow interpretation of [the] exceptions [to the right to liberty and security of person] is consistent with the aim of that provision.’<sup>181</sup> Furthermore, the detention must ‘genuinely conform’ to these purposes for it to remain lawful.<sup>182</sup> In the context of the second purpose of Article 5(1)(f) regarding return, it has been held that the detention must be reasonable in all the circumstances to effect the removal.<sup>183</sup> Where a removal is no longer possible, for example, it would cease to be lawful (because it would not be a genuine part of the process towards return). This would appear to be so even if the person detained fails to cooperate in his or her removal.<sup>184</sup> (Cf. EU Returns Directive, see below.)

Controversially, the Grand Chamber of the ECtHR held in *Saadi v. United Kingdom* that Article 5 imposes no requirement to examine that ‘the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered

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<sup>177</sup> Per *Sommersett’s Case* (1772) 20 St. T. J., discussed *supra*, referred to in Bingham, *The Rule of Law*, p. 58. See, further, *R v. Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74, paras. 111-12.

<sup>178</sup> Article 15, ECHR.

<sup>179</sup> *Shamsa v. Poland*, ECtHR, Applic. Nos. 45355/99 and 45357/99, 27 November 2003: In order for legal certainty, the power to detain must be set down in legislation or prescribed by law or ordered by a judge, court or any body empowered to exercise judicial authority. In this case, two brothers were detained without legal authority beyond the 90-day period set down by law to effect a removal. They were subjected to several attempted removals, which had failed, due to the lack of cooperation of the applicants.

<sup>180</sup> *Vasileva v. Denmark*, ECtHR, Applic. No. 52792/99, 25 September 2003, paras. 32-36; *Ciulla v. Italy*, ECtHR, Applic. No. 11152/84, 22 February 1989, para. 41; *Wloch v. Poland*, ECtHR, Applic. No. 27785/95, 19 October 2000, para. 108.

<sup>181</sup> *Vasileva v. Denmark*, para. 33.

<sup>182</sup> *Winterwerp v. The Netherlands*, Judgment 24 Oct. 1979, Ser. A No. 33, para. 39; *Bouamar v. Belgium*, Judgment 29 February 1988, Ser. A No. 129, para. 50.

<sup>183</sup> See, e.g., *Abdi Ahmed Abdillahi v. The Secretary of State for the Home Department*.

<sup>184</sup> See, *Mikolenko v. Estonia*, which held that the ground for detention satisfied Article 5(1)(f), here to effect his removal, however it ceased to be justified as time passed, as he became non-removable. Mikolenko refused to cooperate with his deportation proceedings (he refused to fill in an application for a Russian passport) and the Russian authorities refused to accept him on a temporary travel document issued by Estonia. He spent more than 3 years and 11 months in detention, which was found to be arbitrary. On lack of cooperation, see, further, *Massoud v. Malta*.

necessary, for example to prevent his committing an offence or fleeing.<sup>185</sup> The decision followed the case of *Chahal*, in which it was held that additional bases for detention are not required; all that is required was that Mr. Chahal was detained ‘with a view to deportation’.<sup>186</sup> In contrast, Mr Saadi was detained in order to prevent him effecting an unlawful entry. The Court found that seven days detention for the purpose of expediting an asylum claim is a legitimate ground for detention. In other words, it appears that under the ECHR, a state may detain to prevent an unauthorised entry; it is not relevant whether detention was necessary in order to prevent that unlawful entry. By contrast, the HRC has held that administrative expediency is not a valid basis for detention on its own.<sup>187</sup> Nonetheless, as there is substantial overlap between the states parties to both the ICCPR and the ECHR, a state party to the ECHR may still be in violation of the rights of individuals under Article 9 of the ICCPR if it merely or automatically detains on account of the two grounds in the ECHR without further justification. More particularly, the ECHR provides in Article 60 that ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws or any High Contracting Party or under any other agreement to which it is a Party.’

The reasoning in *Saadi* is however flawed on a number of grounds. First, it divorces the ground or purpose of detention with its necessity: if the detention is not necessary, how can it achieve or be related to its purpose? The purpose would not therefore exist. The *Chahal* case is somewhat distinct from *Saadi*, because in the former, detention was required to be for the purposes of (or ‘with a view to’) deportation and such deportation, the Court held, must be reasonably foreseeable; thus a necessity criterion is already a built-in consideration of the ground. How is it that the ECtHR in *Saadi* can adopt a different approach from that applied to return? The second serious concern with *Saadi* is that it does not recognise an application for asylum as a lawful act and thus the Court treated Mr Saadi, who had applied for asylum prior to his detention, as still not being ‘lawfully within’ the territory. This is in contrast to various other judgments on the meaning of ‘lawfully in’ the territory (and by analogy, unlawfully in or unauthorised entry) and has been discussed above at 1.2.1. The dissenting opinion also criticised the majority for ‘attach[ing] no importance to the fact [that Mr Saadi claimed asylum upon arrival]’<sup>188</sup> and for failing to distinguish between categories of non-nationals.

Nonetheless, the ECtHR in both *Chahal* and *Saadi* conceded that there are limits on such detention and that it is subject to the rules relating to arbitrariness. The Court held in *Saadi* that this requires that the detention be a ‘genuine part of a process’ to grant immigration clearance.<sup>189</sup> On this basis, it would need to be shown, for example, that fast-track or accelerated procedures are a lawful basis for detention, especially if they run past the 7-day period recognised in *Saadi*. It would need to be shown by the immigration authorities that they could not process applications speedily outside

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<sup>185</sup> *Saadi v. UK*, para. 45.

<sup>186</sup> *Chahal v. United Kingdom*, ECtHR, Applic. No. 22414/93, 15 November 1996. The ECtHR did acknowledge that the length of Chahal’s detention could have rendered it arbitrary, but found that there had been some safeguards in place to ensure that it had not been. See, also, *Massoud v. Malta*.

<sup>187</sup> *van Alphen v. The Netherlands*, para. 5.8.

<sup>188</sup> *Saadi v. UK*, dissenting opinion, p. 31.

<sup>189</sup> *Saadi v. UK*, para. 45.

detention, or that the accelerated asylum procedures continue to be the basis for the detention as it becomes extended.

The third factor to ensure detention is not unlawful under the ECHR is that there must also be a connection between the ground of permitted deprivation of liberty and the place and conditions of detention.<sup>190</sup> The ECtHR has concluded that the detention of four children in a closed centre alongside adults, one of whom was showing signs of serious psychological trauma, was ill-suited to their extreme vulnerability and therefore in violation of Article 5(1)(f) (as well as other provisions relating to standards of care, referred to above).<sup>191</sup> It appears therefore that while there is an initial power of detention under the ECHR, principles of necessity and proportionality apply to decisions to extend it as well as to the conditions of detention.

Fourth, like Article 9 of the ICCPR, detention under the ECHR will also be unlawful if there has been an element of bad faith or deception on the part of the authorities.<sup>192</sup>

Finally, and most relevant to this study, the ECtHR has made a few, though not many, statements regarding A2Ds. Nonetheless, it has stated that each state must introduce sufficient safeguards in law to protect against arbitrary detention, which would necessarily include A2Ds. In particular, the ECtHR in *Massoud* stated:

It is hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal other measures to secure an eventual removal.<sup>193</sup>

In the specific context of return, the Council of Europe's *Twenty Guidelines on Forced Return* address the question of alternatives as well as other issues.<sup>194</sup> These guidelines largely mirror the obligations contained in the ECHR, with some important additional safeguards. Of particular relevance to this study, Guideline 6.1 provides:

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

The same principle would, by analogy, apply to front-end detention.

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<sup>190</sup> *Bouamar*, para. 50; *Aerts v. Belgium*, Reports 1998-V, 30 July 1998, para. 46; *Enhorn v. Sweden*, Applic. No. 56529/00, 10 December 2002, para. 42.

<sup>191</sup> *Muskhadzhiyeva et autres v. Belgique*, ECtHR, Applic. No. 41442/07, 19 January 2010, para. 69-75.

<sup>192</sup> *Bozano v. France*; *Conka v. Belgium*, ECtHR, Applic. No. 51564/99, 5 February 2002.

<sup>193</sup> *Massoud v. Malta*, para. 68.

<sup>194</sup> Council of Europe, *Twenty Guidelines on Forced Return*, available at: <http://www.unhcr.org/refworld/pdfid/42ef32984.pdf>.

## 4.2 European Union

The EU has considered the question of detention in both the asylum and return contexts. Each is addressed in turn.

Immigration detention is not comprehensively regulated within the EU Asylum Acquis as yet. Two directives make reference to detention, yet neither is a complete statement of international or European obligations. The first, the EU Procedures Directive, provides that ‘Member States shall not hold a person in detention for the sole reason that he or she is an applicant for asylum.’<sup>195</sup> This conforms with the general principle under the 1951 Convention that seeking asylum is not an unlawful act and asylum-seekers should not be subject to criminal or other penalties.<sup>196</sup> Article 18(1) could be read as implying an exception to Article 5(1)(f) of the ECHR that permits detention according to *Saadi* for the purposes of preventing an individual effecting an unlawful entry: the exception being where the individual is seeking asylum. It is arguably a stricter standard than that developed in *Saadi* (see above), although it could equally be argued that Mr Saadi was detained not ‘merely’ because he was an asylum-seeker but rather to accelerate his claim to asylum. Nonetheless, where detention is automatic and without regard to an intention to apply for asylum, even where the purpose may be to facilitate the processing of that asylum claim, this would appear to amount to a violation of Article 18(1).

Article 18(2) further provides for ‘speedy judicial review’. Article 21(1)(a) of the same Directive also provides that UNHCR is to have access to all asylum applicants, including those in detention. Where legal assistance and representation is provided in line with Article 15, such legal advisors and other counsellors are to have access to closed centres, such as detention facilities and transit zones.<sup>197</sup>

The EU Reception Directive, the second instrument of the Asylum Acquis relevant here, is equally vague regarding detention. It defines ‘detention’ as ‘confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement’.<sup>198</sup> This definition appears to apply to a wide spectrum of measures restricting liberty and freedom of movement, beyond just full deprivations of liberty. In particular, the EU Reception Directive provides that the reception of asylum applicants who are in detention should be specifically designed to meet their needs in that situation.<sup>199</sup> Arguably detention that does not meet their needs would be unlawful, matching the ECtHR ruling in *Muskhadzhiyeva* outlined above.

Finally, the EU Charter of Fundamental Rights and Freedoms secures the right to liberty and security of person to EU nationals,<sup>200</sup> which is relevant in this context to the extent that EU nationals are detained in immigration facilities pending an application for asylum or their deportation or extradition for criminal law, or for

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<sup>195</sup> Article 18(1), *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting or withdrawing refugee status*, L 326/13.

<sup>196</sup> Article 31(1), 1951 Convention (discussed *infra*).

<sup>197</sup> Article 16, EU Procedures Directive.

<sup>198</sup> Article 2(k), *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, L31/18, 6 February 2003 (EU Reception Directive).

<sup>199</sup> Preamble (10) and Article 13, EU Reception Directive.

<sup>200</sup> Article 6, EU Charter.

public order or security reasons. Moreover, the right to freedom of movement in the Union must be enjoyed on a basis of equality and without discrimination.<sup>201</sup>

Also in the returns context, the EU Returns Directive codifies some well-established principles of international law against arbitrary detention: ‘detention must only serve the purpose of facilitating removal; it must be for the shortest possible period while removal arrangements ‘are in progress and executed with due diligence’ (Article 15(1)); and where there is no reasonable expectation that someone will be removed, the detention ceases to be justified and the person concerned must be released immediately (article 15(4)).’<sup>202</sup> It further stipulates that Member States may only opt for detention of third country nationals when ‘other sufficient but less coercive measures can [not] be applied effectively in a specific case’.<sup>203</sup> This creates a first order duty to examine in each individual case whether an A2D would be sufficient to meet any concerns.<sup>204</sup> The Returns Directive matches the general trend in international law of assessing alternative options to ensure liberty and security of the person. In fact, according to the EU-FRA, approximately two-thirds of EU countries provide for the possibility of utilising A2Ds initially or at a review stage,<sup>205</sup> and several national judgments have dictated that authorities must apply more lenient measures where detention is not necessary.<sup>206</sup> The problem is that these alternatives are rarely used, or are applied often only when detention centres are full (discussed below).

Alternatives are envisaged where a removal is postponed, including regular reporting to the authorities, deposit of a financial guarantee, surrender of specific documents, or stay in a designated location.<sup>207</sup> As highlighted by Baldaccini, there is ‘no converse obligation upon Member States to ensure basic standards of subsistence to people in these circumstances, despite an exhortation in the preamble that this should be addressed (recital 12).’<sup>208</sup> This lacunae at general international law around post-release obligations is one of the crucial areas that must be tackled by states for multiple reasons, the least of which is to ensure that persons are treated humanely and that they are able to appear as requested (discussed *infra*).

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<sup>201</sup> France, for example, was at the time of writing under investigation by the European Commission for expelling from the territory, without due process, approximately 700 Roma EU nationals: European Commission, ‘European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens’, Doc. IP/10/1207, Brussels, 29 September 2010; ‘Have your Roma back’, *The Economist*, 19 August 2010, available at: [http://www.economist.com/blogs/easternapproaches/2010/08/frances\\_expulsion\\_roma](http://www.economist.com/blogs/easternapproaches/2010/08/frances_expulsion_roma). The investigation was subsequently dropped following undertakings by the French to amend their laws.

<sup>202</sup> A. Balaccini, ‘The EU Directive on Return: Principles and Protests’ (2010) 28(4) *Refugee Survey Quarterly* 114-138, at p. 129.

<sup>203</sup> Article 15(1), Council Directive 2008/115/EC (EU Returns Directive).

<sup>204</sup> A similar position is taken by the EU-FRA in their report, *Detention of Third Country Nationals in Return Procedures*, p. 67.

<sup>205</sup> EU-FRA, *Detention of Third Country Nationals in Return Procedures*, pp. 72-81.

<sup>206</sup> See, e.g., Austrian Constitutional Court (Verfassungsgerichtshof Österreich): B 223/06, 291/06 (27 February 2001), B 362/06 (24 June 2006); Slovenian Constitutional Court U-I-297/95 (28 October 1998).

<sup>207</sup> Article 10(2), EU Returns Directive.

<sup>208</sup> Balaccini, ‘The EU Directive on Return: Principles and Protests’, p. 129.

In addition to the above principles, the Returns Directive sets maximum limits on detention for the purposes of removal.<sup>209</sup> These limits have however been heavily criticised<sup>210</sup> and they have yet to be tested in any international court as to their compatibility with human rights standards. It has been held, however, by the ECJ that an individual cannot be held longer than the maximum period, even on the grounds that he or she is not in possession of valid documents, has acted aggressively, or has no means of support or accommodation.<sup>211</sup> In other words, Article 15 does not permit detention beyond the maximum period on public order or safety grounds.<sup>212</sup> Of the 27 Member States, only nine have not established legal time limits on pre-removal detention, or for certain types of removals.<sup>213</sup> Of the 17 that had established initial and upper limits, they ranged from 60 days to six months and six to 18 months respectively.<sup>214</sup> It remains of concern that an upper limit set by the Returns Directive is longer than that imposed in the majority of EU Member States, thereby questioning its compatibility with state practice, and it has encouraged some states to extend their pre-existing maximum limits.<sup>215</sup> While maximum limits assist in reducing the arbitrary nature of detention, these limits must be humane and reviewable. The existence of A2Ds (or lack thereof) would nonetheless be relevant to determining whether the length of detention is necessary and whether its objectives could have been achieved via other means.

### 4.3 The Americas<sup>216</sup>

A similar approach to that of the UN Human Rights Committee is taken by the American system of human rights to the question of detention, namely that ‘the right

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<sup>209</sup> The EU Returns Directive imposes an initial limit on pre-removal detention of six months (Article 15(5)), which should not normally be extended. In two expressly defined ‘exceptional circumstances’, however, it may be extended up to a further 12 months. The two exceptions are (a) where removal is to be delayed owing to a lack of cooperation by the person concerned; and (b) delays by the country of return in issuing documentation (Article 15(6)). In both situations, any extensions must be regulated by law and all reasonable efforts to carry out the removal operation must have been undertaken. The absolute maximum period of detention for removal purposes under the EU Returns Directive is, therefore, 18 months; after which release must be ordered. As decided by the ECJ in *Kadzoev v. Bulgaria*, the period in Article 15(5) and (6) must be interpreted as the maximum duration of detention and must include any period of detention completed before the rules in the Directive became applicable, but would not include any period of detention spent pending an asylum claim, which would be regulated by other laws.

<sup>210</sup> See, UNHCR, *Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals*, 16 June 2008, 2. See, also, European Council on Refugees and Exiles and Amnesty International joint statement, ‘Returns’ Directive: European Parliament and Member States risk compromising respect for migrants’ rights’, 20 May 2008, available at: <http://www.ecre.org/files/ECRE%20AI%20Joint%20PR%20Returns%20Directive.pdf>.

<sup>211</sup> *Kadzoev v. Bulgaria*.

<sup>212</sup> *Ibid.*

<sup>213</sup> See, EU-FRA, *Detention of Third Country Nationals in Return Procedures*, p. 43 (helpful map at p. 44).

<sup>214</sup> *Ibid.*, at p. 44.

<sup>215</sup> At least one Member State, Italy, has already increased the detention period up to the maximum amount of time permitted in the Directive (from 60 days to 18 months): ‘Italy targets illegal immigrants’, *BBC News*, 23 June 2008, as cited in Balaccini, ‘The EU Directive on Return: Principles and Protests’, at p. 130. Another Member State, Greece, increased detention periods to six months from three in June 2010: CoE Special Rapporteur, *Report on Detention*, n.5.

<sup>216</sup> A thematic report on detention by the I-ACmHR is currently overdue.

of due process of law is a right that must be ensured to everyone, irrespective of his migratory status.<sup>217</sup> Detention should only be applied as an exceptional measure after having assessed its necessity in each individual case; and last for the briefest possible time.<sup>218</sup> The Commission's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas clearly state that 'The Member States of the Organization of American States shall establish by law a series of alternative or substitute measures for deprivation of liberty, duly taking into account the international human rights standards on the topic.' In addition, in applying these alternative or substitute measures, OAS Member States 'shall promote the participation of society and the family'.<sup>219</sup> The Inter-American Court has also confirmed that even in times of emergency the rule against non-discrimination applies in the context of *habeas* guarantees;<sup>220</sup> and the Inter-American Commission has stated that the right to liberty applies to individuals intercepted on the high seas.<sup>221</sup>

The Court recently confirmed its position in a decision on repeated irregular entry by an Ecuadorian migrant, by noting that migration policies that have as their central element the mandatory detention of irregular migrants are arbitrary and incompatible with the American Convention on Human Rights. In particular, the Court underscored that the competent authorities must verify in every individual case the possibility to apply less restrictive measures.<sup>222</sup>

#### 4.4 Africa

In lieu of any refugee-specific case law before the African Court of Human and Peoples' Rights, it is asserted that the legal standards under Article 6 of the African Charter on Human and Peoples' Rights are the same as those enjoyed under Article 9, ICCPR.<sup>223</sup>

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<sup>217</sup> I-ACtHR, *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, OC-18, 17 September 2003, Ser. A No. 18/03, para. 121. Due process of law in this context included the right to consular assistance, referring to the I-ACtHR, *Advisory Opinion on the Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*, OC-16/99, 1 October 1999, Ser. A No. 16.

<sup>218</sup> I-ACmHR, res. 03/08 Human Rights of Migrants, International Standards and the Return Directive of the EU (no date), available at: <http://www.cidh.org/resoluciones/resolucion.03.08.eng.pdf>.

<sup>219</sup> I-ACmHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle III(4).

<sup>220</sup> I-ACtHR, *Advisory Opinion on Habeas Corpus in Emergency Situations*, OC-8/87, 30 January 1987, Ser. A No. 8, para. 19.

<sup>221</sup> See, *The Haitian Centre for Human Rights et al. v. United States*, I-ACmHR, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), 13 March, 1997, in which the I-ACmHR held that 'With regard to the "right to liberty" as provided by Article I of the American Declaration of the Rights and Duties of Man, the Commission finds that the act of interdicting the Haitians in vessels on the high seas constituted a breach of the Haitians' right to liberty within the terms of Article I of the American Declaration. The Commission therefore found that the right to liberty of Jeannette Gedeon, Dukens Luma, Fito Jean, the four Haitians who were interviewed at the United States Naval Base at Guantanamo, and other unnamed Haitians was breached by the United States Government.' (Para. 169)

<sup>222</sup> *Vélez Lóor v. Panama*, I-ACtHR, Ser. C No. 218, 10 December 2010, available at: <http://www.corteidh.or.cr/casos.cfm?idCaso=347>.

<sup>223</sup> There is some general case law on the prohibition on arbitrary detention available, which supports this position: see, African Human Rights Law Reports, available at: <http://www.chr.up.ac.za/index.php/ahrlr-downloads.html>. The AU Special Rapporteur on Refugees,

## 5. Procedural guarantees

International and regional human rights instruments set down a range of procedural safeguards relating to detention, absent which detention may be arbitrary and hence unlawful.<sup>224</sup> Most are included expressly within relevant provisions, and are further delimited by jurisprudence. A guiding principle relevant to procedures is that ‘the greater the effect on the life of the individual ... the greater the need for procedural protections ...’<sup>225</sup>

The relevant sub-paragraphs of Article 9 of the ICCPR provide:

2. 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].
4. 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.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Similar procedural rights are found in the regional human rights instruments in Africa, the Americas, and the Council of Europe.<sup>226</sup>

In summary, the procedural guarantees relevant to immigration detention are as follows:

- Any asylum-seeker or immigrant in detention must be brought promptly before a judicial or other authority;
- The ground for custody must be based on criteria of legality, *i.e.* established as law by a duly empowered authority;
- A maximum period should be set by law and the custody may in no case be unlimited or of excessive length;

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Asylum-Seekers, Migrants and Internally Displaced Persons in Africa has addressed specific complaints about the treatment of detainees in the Lindela Repatriation Centre in South Africa: Report of the Activities of the Inter-Session Period June – November 2006 for Commissioner Bahame Tom Nyanduga, available at: [http://www.achpr.org/english/info/rdp\\_intersess.html](http://www.achpr.org/english/info/rdp_intersess.html).

<sup>224</sup> See, e.g., *Jeebhai v. Minister of Home Affairs* (139/2008) [2009] ZASCA 35 (31 March 2009) (Supreme Court of Appeal, Republic of South Africa), in which it was held that the detention and deportation in question were unlawful ‘because they were carried out without compliance with the peremptory procedures prescribed by the Act’ (para. 53).

<sup>225</sup> *Suresh v. Canada (Minister for Immigration and Citizenship)* [2002] 1 S.C.R. 3, 11 January 2002 (Supreme Court of Canada) as cited in *Charkaoui v. Canada (Minister for Citizenship and Immigration)* [2007] 1 S.C.R. 350, 23 February 2007 (Supreme Court of Canada).

<sup>226</sup> Article 6, ACHPR; Article 7, ACHR. Article 5 of the ECHR similarly provides: ‘(2) Everyone who is arrested shall be informed promptly, in a language he understands, of the reasons for his arrest and of any charge against him; (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful; (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.’

- An asylum-seeker or immigrant must be notified of the custodial measure in a language understood by him or her, including the conditions for applying for judicial review, which shall decide promptly on the lawfulness of the measure and be competent to order the release of the person concerned, if appropriate;
- States must place asylum-seekers and immigrants in premises separate from persons imprisoned under criminal law; and
- UNHCR, ICRC and, where appropriate, non-governmental organisations must be granted access to places of custody.<sup>227</sup>

These procedural safeguards apply irrespective of one's status as an asylum-seeker or other migrant, and whether one is entering or being removed from the territory.

### 5.1 Informed of reasons for arrest or detention

Persons detained must be informed of the reasons or grounds for their detention, which must be communicated promptly and in a language the person understands (and not merely a language he or she is expected to understand). In terms of what would constitute an unreasonable delay in the provision of such information, the ECtHR held that waiting 76 hours before providing reasons for detention was too long.<sup>228</sup> The information provided must also include the procedures available to challenge the lawfulness of the detention order.<sup>229</sup>

### 5.2 Periodic review

As mentioned above, while an initial period of detention may be lawful, extended periods may not be.<sup>230</sup> In order to ensure that lawful detention does not become unlawful or arbitrary, any period of detention must be subject to periodic review.<sup>231</sup> It was held to be unlawful, for example, to detain incommunicado a de facto stateless person pending deportation.<sup>232</sup> Mandatory and non-reviewable detention has also been held to be arbitrary.<sup>233</sup> There is limited guidance as to what constitutes acceptable periodic review, however the EU-FRA study indicates that over half of the states of the EU prescribe limits, and of these, they range from 48-72 hours,<sup>234</sup> with the maximum of any country being 10 days (Latvia). Canada meanwhile institutes a process of regular administrative reviews, initially at 48 hours, then 7 days and then every 30 days, and is probably the best practice.<sup>235</sup>

<sup>227</sup> See, WGAD Deliberation No. 5, E/CN.4/2000/4, annex II; WGAD Report 1998, E/CN.4/1999/63, paras. 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10.

<sup>228</sup> *Saadi v. UK*, at p. 84.

<sup>229</sup> ECPT, *Twenty Years of Combating Torture*, 19<sup>th</sup> annual report, para. 86; WGAD, A/HRC/13/30, para. 61.

<sup>230</sup> *Spakmo v. Norway*, HRC, Comm. No. 631/1995, para. 6.3.

<sup>231</sup> *A v. Australia*, para. 9.2.

<sup>232</sup> *Al-Nashif v. Bulgaria*, ECtHR Applic. No. 50963/99 (20 June 2002).

<sup>233</sup> *A v. Australia* and *C v. Australia*.

<sup>234</sup> EU-FRA, *Detention of Third Country Nationals in Return Procedures*, p. 57.

<sup>235</sup> *Immigration and Refugee Protection Act* (Canada), Division 6.

### 5.3 Right to challenge detention and possibility for order of release before a court

The right to challenge the lawfulness of detention must include a right of access to a court.<sup>236</sup> Anything less than a court will not meet a state's obligations under Article 9(4) of the ICCPR or other international instruments.<sup>237</sup> Even if the initial decision to detain is taken by an administrative body, Article 9(4) of the ICCPR (and equivalent provisions) guarantees the right of judicial review.<sup>238</sup> Moreover, such review must be effective, which would include a realistic possibility of accessing the remedy,<sup>239</sup> the court must be empowered to order release (which might necessitate alternative arrangements that impose lesser restrictions on liberty and movement),<sup>240</sup> and the court must have the power to examine the lawfulness of any detention in light of the requirements of international or regional human rights treaty standards.<sup>241</sup> Mere formal review will not discharge a state's obligations under these provisions.<sup>242</sup> Furthermore, the review must be speedy or prompt. Constitutional or other legal challenges that are lengthy or cumbersome, for example, would not be sufficient to meet this requirement.<sup>243</sup> The UN's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* reiterates that any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.<sup>244</sup>

Delays in providing judicial review can also lead to violations of rights to liberty and security of person. The ECtHR has found, for example, a delay of 32-46 days in a court's review of the lawfulness of detention to be excessive.<sup>245</sup> Some countries also impose time limits on the applications of persons who seek to exercise rights to judicial review under administrative law. While there are usually some statutes of limitation, especially to avoid vexatious or 'no hope' litigation, the time limits imposed must nonetheless be reasonable. There cannot however be limits on the

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<sup>236</sup> *Al-Nashif v. Bulgaria*, para. 92; *S.D. v. Greece*, 53541/07, 11 June 2009, p. 76.

<sup>237</sup> *Torres v. Finland*, HRC Comm. No. 291/1988, 5 April 1990; *Vuolanne v. Finland*, HRC Comm. No. 265/1987, 7 April 1989; *Amuur v. France*. See, also, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Mission to the United States of America, in Report to the Human Rights Council, Seventh Session, A/HRC/7/12/Add. 2, 5 March 2008, p. 9: 'United States policy is a long way out of step with international obligations. Immigration enforcement authorities have failed to develop an appropriate appeals procedure, and for all practical purposes have absolute discretion to determine whether a non-citizen may be released from detention ... Given that these discretionary measures are not subject to judicial review, current United States practices violate international law.' The Australian detention system has also been found to lack proper and effective procedural safeguards: *C v. Australia*.

<sup>238</sup> *Vuolanne v. Finland*, para. 9.6.

<sup>239</sup> *Conka v. Belgium*, paras. 46 and 55.

<sup>240</sup> *A v. Australia*, para. 9.5; *C v. Australia*, para. 8.3.

<sup>241</sup> See, *Massoud v. Malta*, which found that Article 409A of the Criminal Code of Malta to be ineffective as a means of challenge, as it stopped short of examining the lawfulness of the detention in light of the requirements of the ECHR. This position could have ramifications for other jurisdictions that have not incorporated international law into their domestic legal frameworks: here Australia and the reluctance of the High Court of Australia to take account of international human rights treaty obligations in deciding questions of immigration detention: see, *Al-Kateb*.

<sup>242</sup> This also conforms with Article 2(3) of the ICCPR, which necessitates a right to remedy under international law for violation of rights.

<sup>243</sup> *Massoud v. Malta*.

<sup>244</sup> UN General Assembly res. 43/173 of 9 December 1988.

<sup>245</sup> *Sanchez-Reisse v. Switzerland*, ECtHR, Applic. No. 9862/82, paras. 59-60.

challenge to the detention itself, as the longer detention continues, the more likely it is to be arbitrary and the more remote it is from achieving its objectives.

An ‘effective challenge’ might also impose an obligation on states to provide legal assistance. Two ‘enemies’ of the rule of law are said to be the failure to provide legal aid to those who need it (referring specifically to such denial to refugees) and delays in affording a remedy.<sup>246</sup> In *Zamir v. United Kingdom*, the European Commission on Human Rights (ECmHR) held that ‘it would be unreasonable to expect the applicant to present his own case in the light of the complexity of the procedures involved and his limited command of English.’<sup>247</sup> See, also, the decisions in *Chahal* and *Conka v. Belgium*, in which the ECtHR accorded considerable importance to the lack of legal representation when determining whether an existing remedy was effective.<sup>248</sup> Guideline 9 of the Council of Europe’s *Twenty Guidelines on Forced Return* indicates too that ‘legal aid should be provided for in accordance with national legislation.’<sup>249</sup> Likewise, Article 13(4) of the EU Returns Directive provides, ‘Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid ...’. Here of course the right to legal aid is not unlimited and is subject to domestic legal arrangements, including means testing, except where such denial might infringe other human rights.

#### **5.4 Burden of proof**

The burden of proof to establish the lawfulness of the detention rests on the government in question.<sup>250</sup> As highlighted above, the state must establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of proportionality and necessity,<sup>251</sup> and that it has considered other, less intrusive means of achieving the same objectives and they were not applicable.

#### **5.5 Right to compensation for unlawful or arbitrary detention**

In combination with the right to an effective remedy for human rights violations found in myriad human rights instruments,<sup>252</sup> there is a specific guarantee of compensation in cases of unlawful or arbitrary detention.

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<sup>246</sup> Bingham, *The Rule of Law*, p. 87-88.

<sup>247</sup> *Mohammed Zamir v. United Kingdom*, ECmHR, Applic. No. 9174/80, Report of the Commission 11 October 1983, para. 113

<sup>248</sup> *Chahal v. UK*, para. 130 and *Conka v. Belgium*, paras. 44-45.

<sup>249</sup> See, also, *Luboya and Another v. State* (2007) AHRLR 165 (Namibian Supreme Court 27/2003, 3 May 2007), finding that nationality or foreign status should not be a bar to legal aid or legal representation.

<sup>250</sup> See, e.g., *Khan and Others v. Minister of Home Affairs and One Other* (15343/06) [2006] TPD (26 June 2006) (High Court of South Africa; Transvaal Provincial District).

<sup>251</sup> See, *Saadi v. UK*, for a potential exception to the necessity requirement (*supra*).

<sup>252</sup> See, e.g., Article 2(3), ICCPR; Article 25, ACHR; Article 13, ECHR.

## 5.6 Independent monitoring and inspection

A necessary safeguard against arbitrary detention is regular and independent monitoring and inspection. Article 35 of the 1951 Convention requires states to cooperate with UNHCR, and this has been held to include granting asylum-seekers [and others under its mandate] access to UNHCR, including those in detention.<sup>253</sup> While many states grant UNHCR access to asylum-seekers on a regular basis, many other countries do not.<sup>254</sup> Although there are now many international and regional monitoring and/or inspection bodies, national inspection bodies ought also to be established. The Optional Protocol to the Convention of Torture reinforces this norm as it provides for automatic visits to detention facilities (rather than based on the consent of the state party) and also an obligation to set up or designate national inspection mechanisms.<sup>255</sup>

## 6. Standards of treatment in detention leading to arbitrary detention

While this paper is not specifically concerned with conditions in detention facilities *per se*, they are relevant to the extent that poor or inadequate standards or those that are inappropriate for particular persons may render otherwise lawful detention arbitrary and thus in contravention of Article 9 of the ICCPR and other relevant international or regional human rights provisions. The ECtHR in *Muskhadzhiyeva*, for example, held that detaining children in a transit centre created for adults not only amounted to inhuman and degrading treatment in violation of Article 3 of the ECHR (one of the four children had exhibited serious signs of psychological distress and psycho-traumatic symptoms), it also rendered the children's detention unlawful.<sup>256</sup> The Inter-American Commission on Human Rights has also stated that immigrants must not be detained in prisons and that states are required to institute special protections for vulnerable persons.<sup>257</sup> Such conditions may also violate other stand-alone provisions, such as the absolute prohibition against torture and other

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<sup>253</sup> UNHCR, *Guidelines on Detention*, Guideline 5(v).

<sup>254</sup> See, e.g., UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case Abdolkhani and Karimnia v. Turkey*, ECtHR, *Applic. No. 30471/0*, January 2009, available at: <http://www.unhcr.org/refworld/docid/4991ad9f2.html>, indicating the lack of access to potential asylum-seekers in Turkish detention facilities.

<sup>255</sup> On the OPCAT and the detention of refugees and asylum-seekers, see further A. Edwards, 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 *International and Comparative Law Quarterly* 789-825. Note, too, decision in *Khan and Others v. Minister of Home Affairs and One Other* (15343/06) [2006] TPD (26 June 2006) (High Court of South Africa; Transvaal Provincial District), in which the court noted that none of the interactions between the immigration officer and the applicant were subject to independent control and that this brought these measures into conflict with the OPCAT (this statement was made despite South Africa not being a party to the OPCAT at the relevant date).

<sup>256</sup> *Muskhadzhiyeva and others v. Belgium*, ECtHR, *Applic. No. 41442/07*, 19 January 2010.

<sup>257</sup> I-ACmHR, res. 03/08 Human Rights of Migrants, International Standards and the Return Directive of the EU, p. 2. In the US, for example, in 2006, around 57 per cent of immigration detainees were held in local and county jails: 'Critics Decry Immigrant Detention Push', Associated Press, 25 June 2006. In Canada, persons with mental illness or who are exhibiting signs of aggression are frequently transferred from immigration facilities to provincial jails: Interview, Citizenship and Immigration Canada, Toronto, May 2010 and see, Schizophrenia Society of Ontario, *Double Jeopardy: Deportation of the Criminalized Mentally Ill: A Discussion Paper*, March 2010.

forms of cruel, inhuman or degrading treatment or punishment,<sup>258</sup> the right to humane treatment in detention,<sup>259</sup> and the right to privacy and to family life.<sup>260</sup> They may also violate rights such as the right to development for children,<sup>261</sup> to health and, in particular, to mental health,<sup>262</sup> and to an adequate standard of living.<sup>263</sup> As detention can create significant impediments to an individual's ability to develop his or her legal case,<sup>264</sup> it may also interfere in a particular situation with the rights to seek asylum, due process, and an effective remedy.

## **7. Right to freedom of movement and choice of residence under international law**

Article 12 of the ICCPR provides for the right to freedom of movement to those lawfully in the territory and to choose one's place of residence. Article 12 (and equivalent provisions under international and regional laws, stipulated below) is relevant for the purposes of this paper as most A2D options involve some level of restriction on liberty or on one's freedom of movement and choice of residence, and these are thus regulated by international law. Designated residence to a particular address or to a specific district/region is a case in point. Severe restrictions on freedom of movement of those lawfully in the territory may be considered a deprivation of liberty and would thus move a particular situation from consideration under Article 12 to consideration under Article 9.<sup>265</sup> The distinction between restrictions on freedom of movement and deprivation of liberty is 'merely one of degree or intensity, and not one of nature or substance.'<sup>266</sup>

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<sup>258</sup> Article 7, ICCPR; Articles 1 and 16, UNCAT; Article 5, UDHR; Article 3, ECHR; Article 5, ACHR; Article 5, ACHPR. In this regard, see *Abdolkhani and Karimnia v. Turkey* (No.2), ECtHR Applic. No. 30471/08, 27 July 2010, in which the Court held that the detention of refugees for three months in the basement of police headquarters amounted to a violation of Article 3 of the ECHR; *A.A. v. Greece*, ECtHR Applic. 12186/08, 22 July 2010, in which a violation of Article 3 was found on account of the detention of an asylum-seeker in squalid conditions in a Greek detention centre.

<sup>259</sup> Article 10, ICCPR. See, e.g., *Francesco Madafferi et al. v. Australia*, HRC, Comm. No. 1011/2001, 26 August 2004: the HRC found that the separation of a family pending removal causing financial and psychological difficulties would violate Article 10(1) of the ICCPR.

<sup>260</sup> Articles 17 and 23, ICCPR; Article 11, ACHR; Article 8, ECHR; Article 12, UDHR.

<sup>261</sup> Discussed, *infra*.

<sup>262</sup> Article 12, ICESCR; Article 12, CEDAW; Article 24, CRC.

<sup>263</sup> Article 11, ICESCR.

<sup>264</sup> In the US case of *DeMore v. Kim*, Justice Souter in his dissent noted that detention prior to removal may 'impede the alien's ability to develop and to present his case on the very issue of removability.' Therefore, he argued that the detention of immigrants in such proceedings ought to demand a higher government interest in confining than in the case of detainees with final orders of removal. He continued that '[The Supreme Court's] recognition that the serious penalty of removal must be justified on a higher standard of proof, will not mean much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence.' (*DeMore v. Kim*, 538 US 510, 554 (2003) (Souter J. dissenting)). It is not far to also conceive that detention can interfere with the ability to prepare one's claim for asylum. The UN Special Rapporteur on the Human Rights of Migrants made a similar finding, noting 'Immigrants are often transferred to remote detention facilities, which interferes substantially with access to counsel and to family members.' (Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Mission to the United States of America, in Report to the Human Rights Council, Seventh Session, A/HRC/7/12/Add. 2, 5 March 2008, p. 11).

<sup>265</sup> See, e.g., *Celepli v. Sweden*, HRC Comm. No. 456/1991, 26 July 1994 and *Karker v. France*, HRC Comm. No. 833/1998, 30 October 2000.

<sup>266</sup> *Guzzardi v. Italy*, para. 93.

The relevant sub-paragraphs of Article 12 provide:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his [or her] residence.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

The *GA Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live* reiterates an almost identical provision,<sup>267</sup> meanwhile the International Convention on the Protection of Migrant Workers and Members of their Families (ICPMW) guarantees the same right to migrant workers and members of their families (whether documented or undocumented).<sup>268</sup> Most regional and sub-regional instruments contain similar provisions.<sup>269</sup> The ICERD provides too that the right to freedom of movement and residence within the border of the state shall comply with non-discrimination obligations.<sup>270</sup> See, also, discussion on Article 26, 1951 Convention and 1954 Statelessness Convention, above at 1.2.1.

### **7.1 Lawfully within the territory**

Article 12 (and equivalent regional human rights provisions on freedom of movement and Article 26, 1951 Convention and 1954 Statelessness Convention) applies only to those ‘lawfully within the territory’. This was explained fully in relation to Article 26 of the 1951 Convention and 1954 Statelessness Convention *supra*, and is generally held to include refugees, registered asylum-seekers and registered stateless persons outside their country of habitual residence or stateless persons living in their place of habitual residence. Any restrictions on Article 12 of the ICCPR must therefore be considered under the express wording in Article 12(3), rather than in relation to restrictive interpretations of Article 12(1).

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<sup>267</sup> Article 5, *Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live*, UN Doc. A/RES/40/144, 13 December 1985.

<sup>268</sup> Article 39, ICPMW.

<sup>269</sup> See, e.g., Article 12, ACHPR; Article 22, ACHR; Article 2, ECHR; Article 2 of Protocol No. 4 to the ECHR, *Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto*, ETS 155, 16 November 1963. See, also, Article 7(1), EU Reception Directive, which is the most explicit, according asylum-seekers the right to ‘move freely within the territory’, yet it also entitles a Member State to limit such right ‘to an area assigned to them’. It provides that an asylum-seeker may be assigned to a particular area for reasons of ‘public interest, public order, or when necessary for the swift processing and effective monitoring of his or her application’, although it must not be prejudicial to their private life or access to benefits under the Directive,

<sup>270</sup> Article 5(d)(i), ICERD.

## 7.2 Limitations on the right to freedom of movement

Article 12(1) establishes the general principle that anyone lawfully in the territory has the right to freedom of movement and choice of residence. Persons are entitled to move from place to place and to establish themselves in a place of their choice, and need not justify such choice.<sup>271</sup> Although it is not an unfettered right to freedom of movement, any restrictions must not 'nullify the principle of liberty of movement.'<sup>272</sup> The UN Human Rights Committee has stated emphatically, 'Liberty of movement is an indispensable condition for the free development of a person'<sup>273</sup> and thus any restrictions on one's freedom of movement must be strictly necessary.<sup>274</sup>

There are several permissible exceptions detailed in Article 12(3), namely: national security, public order (*ordre public*), public health or morals, and the rights and freedoms of others. These permissible restrictions must conform to three requirements:

- They must be provided for by law (see analysis above in relation to same requirement under Article 9, ICCPR);
- They must only be imposed to serve one of the listed permissible purposes and be necessary to protect them;<sup>275</sup> and
- They must be consistent with other rights in the Covenant (in particular, the principle of non-discrimination).

The listed limitations in Article 12 are exhaustive. As they represent exceptions to the general rule of liberty and freedom of movement, they must be necessary in all the circumstances, importing an assessment of proportionality, with the burden of proof resting on the state party to justify the restriction.<sup>276</sup> They must also be the 'least intrusive' means to achieve the stated objective.<sup>277</sup> Thus, restrictions on movement are subject to a similar set of safeguards as other deprivations of liberty. If reporting conditions could achieve the desired objectives rather than a designated residence, for example, then the least intrusive measure must be adopted. If payment of a bond would satisfy the objectives of the order, and this was considered the least intrusive on the individual, then this should be the order made.

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<sup>271</sup> HRC General Comment No 27: Freedom of Movement, para. 5.

<sup>272</sup> HRC General Comment No 27: Freedom of Movement, para. 2.

<sup>273</sup> *Ibid.*, para. 1.

<sup>274</sup> *Ibid.*, para. 2.

<sup>275</sup> *Ibid.*, para. 14.

<sup>276</sup> *Ackla v. Togo*, HRC, Comm. No. 505/1992, 25 March 1996, para. 10.

<sup>277</sup> HRC, General Comment No. 27: Freedom of Movement, para. 14.

## 8. Special Protections and Considerations

### 8.1 Children

In addition to general guarantees outlined above, which apply to adults as well as children, the specific vulnerabilities of children call for additional safeguards against arbitrary deprivations of liberty. As the ECtHR noted in *Muskhadzhiyeva*, the extreme vulnerability of a child takes precedence over the status of an illegal alien.<sup>278</sup> The UN Convention on the Rights of the Child (CRC) contains a number of provisions relating to the protection of the rights of children in general, and asylum-seeking children in particular.<sup>279</sup> Article 37 provides children with a general right not to be detained or deprived of their liberty. Any detention permitted must be in conformity with the law, shall only be used as a measure of last resort and may endure only for the shortest possible period of time.<sup>280</sup> In all situations, and at all times, the ‘best interests of the child’ is to be the primary consideration.<sup>281</sup> As a general rule, ‘minors who are asylum-seekers should not be detained.’<sup>282</sup> This requires that all possible alternatives, including unconditional release, need to be considered prior to detention<sup>283</sup>

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<sup>278</sup> *Muskhadzhiyeva and others v. Belgium*.

<sup>279</sup> ‘Children’ are defined for the purposes of this paper as all persons below the age of 18 years of age: Article 1, CRC. Article 1 of the CRC actually provides ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’

<sup>280</sup> Article 37(b) of the CRC provides: ‘Every child shall not be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time ...’ See, also, near identical standards in Rules 1 and 2 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (1990) and Rules 17(b) and (c) of the *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) (1985). See, further, UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994), Chapter 7. See, also, the Special Rapporteur on the Human Rights of Migrants, Mr. Jorge Bustamante, Annual Report to the 11<sup>th</sup> Session of the Human Rights Council, UN Doc. A/HRC/11/7, 14 May 2009, para. 43, who stated: ‘... public policies and programmes should ensure the protection of children from detention and deportation, and migration laws should include concrete regulations to fulfil children’s rights and needs in such circumstances. In particular, these laws should include such children’s rights principles as detention as a last resort; priority and alternative measures to detention; and prohibition of deportation of unaccompanied children as a punishment for irregular migration status.’ See, too, *EU Action Plan on Unaccompanied Minors* (2010-2014), 6 May 2010, COM(2010)213 final, at p. 9.

<sup>281</sup> Article 3, CRC. See, e.g., *Bakhtiyari v. Australia*, HRC 1069/2002, in which the HRC observed that in this case the children had suffered demonstrable, documented and on-going adverse effects of detention up until the point of their release and as a result, the Committee concluded that the measures (their detention) had not been guided by the best interests of the child. The two children had been in immigration detention for 2 years and 8 months at the time of their release. The detention was thereby arbitrary contrary to Article 9(1) of the ICCPR and also violated Article 24(1) of the same treaty. See, also, Articles 5, 10(1) and 17(5), EU Returns Directive. See, further, I-ACmHR, res. 03/08 Human Rights of Migrants, International Standards and the Return Directive of the EU, p. 2.

<sup>282</sup> Guideline 6, UNHCR, *Guidelines on Detention*.

<sup>283</sup> See, e.g., *Bakhtiyari v. Australia*, HRC Comm. No. 1069/2002, 6 November 2003. See, too, I-ACtHR, Advisory Opinion on the Juridical Status and Human Rights of the Child, OC-17/02, 28 August 2002, Ser. A No. 17: ‘In the hypothesis of incarceration of children, detention must be conducted in accordance with the law, during the briefest appropriate period and respecting the principles of exceptionality, temporal determination and last resort. Also, detainment of children “requires much more specific conditions in which it is impossible to solve the situation through any other measure.”’ (no paragraph or page numbers).

(see Part C). It further requires that ‘all efforts, including acceleration [or prioritisation] of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.’<sup>284</sup> For stateless children, resolution of nationality and identity would also need to be made a priority.<sup>285</sup> For alien children born to stateless parents in detention, births must be registered and measures implemented to avoid statelessness, including options of obtaining nationality on the basis of *jus soli*.<sup>286</sup>

Many states accept that unaccompanied or separated children should never be detained,<sup>287</sup> while others recognise that detention should only be resorted to in exceptional circumstances.<sup>288</sup> The CRC Committee has noted that detention cannot be justified just because the child is unaccompanied or separated, or on the basis of his or her migration or residence status.<sup>289</sup> Such children should instead be housed in residential homes for children or foster care while longer-term solutions are considered.<sup>290</sup> The WGAD has likewise maintained, ‘Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort.’<sup>291</sup>

In addition to unaccompanied or separated minors, an increasing number of states recognise that families with children should also not be detained,<sup>292</sup> and a range of alternative options have been introduced in various countries (which are discussed in Part C). Difficult questions arise though where it may be necessary to detain one or both parents of a child. As in all cases involving children, their best interests will remain of paramount importance. Because of this, and other human rights that might

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<sup>284</sup> CRC Committee, General Comment No. 6 (2005), The Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 61.

<sup>285</sup> Article 24, CRC provides that a child has a right to be registered a birth, to a name and to a nationality.

<sup>286</sup> ExCom Conclusion No. 106 (LVII), 2006, on Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons, paras. (j), (l) and (q); Article 6(2), 1997 *European Convention on Nationality*; Article 1, 1961 *Convention on the Reduction of Statelessness*.

<sup>287</sup> The EU-FRA study found, for example, that one-third of EU countries prohibits the detention of children for the purposes of removal: EU-FRA, *Detention of Third Country Nationals in Return Procedures*, pp. 82-96. There is no similar information available for children at the front-end of the asylum process however.

<sup>288</sup> *Ibid.*

<sup>289</sup> CRC Committee, General Comment No. 6 (2005), The Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 61.

<sup>290</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997, p. 7; UNHCR, *Guidelines on Detention*, Guideline 6.

<sup>291</sup> WGAD, Report of Working Group on Arbitrary Detention, Chairperson-Rapporteur El Hadji Malick Sow, UN Doc. A/HRC/13/30, 15 January 2010, para. 60. See, too, German court decision that indicated that a higher threshold, as compared to adults, was required to conclude that alternatives to detention would not suffice: Germany/Oberlandesgericht (Regional Court) Köln, decision of 11 September 2001, Case No. 16 Wx 164/02, cited in EU-FRA, *Detention of Third Country Nationals in Return Procedures*, n. 350.

<sup>292</sup> Hungary, Italy and Ireland prohibit the pre-removal detention of children; meanwhile, Belgium, Cyprus and Malta have a policy that children under the age of 18 should not be kept in detention: per EU-FRA, *Detention of Third Country Nationals in Return Procedures*, pp. 82-96. In 2010, the UK ended the administrative detention of children.

be implicated (such as the right to family life),<sup>293</sup> asylum-seeking adults who are responsible for children ought be detained only in exceptional circumstances. Because of the implication of the detention of parents on the rights of others (namely their children), states must carefully evaluate the need for detention and, as noted above, be satisfied that other, less restrictive measures could not achieve the same objectives. Any decision to separate a child from his or her parents against the child's will must be subject to judicial review.<sup>294</sup> In particular, asylum-seeking [and stateless] children deprived of their family environment are entitled to special protection and assistance.<sup>295</sup>

In the exceptional case where an asylum-seeking, refugee or stateless 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.<sup>296</sup> Children are also entitled to participate in decisions affecting their lives,<sup>297</sup> which includes an obligation on states to provide children with the opportunity to be heard in judicial and administrative proceedings, including in all asylum and immigration procedures.<sup>298</sup> Any judicial review must also be effective, that is, the court must have the power to order release or reunification. In addition, any child who is placed in care is entitled to periodic review of the treatment provided to him or her and all other circumstances relevant to the placement.<sup>299</sup>

Failure to ensure that conditions of detention match the needs of a child would render the detention arbitrary. 'Special arrangements must be made for living quarters that are suitable to children and that separate them from adults, unless it is considered in the child's best interests not to do so.'<sup>300</sup> The ECtHR has clarified that a closed centre is not suitable for the 'extreme vulnerability' of an unaccompanied migrant child, not least because the facilities did not cater to his special needs.<sup>301</sup> A South African court has also highlighted the obligations of states to ensure that 'all children are provided with the basic necessities of life – particularly unaccompanied [migrant] children ...', including appropriate accommodation, hygiene, supervision, and child-suitable

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<sup>293</sup> Article 9(1), CRC; Article 17, ICCPR; Article 8, ECHR; Article 7, EU Charter of Fundamental Rights; Art. 18, ACHPR; Article 17, ACHR.

<sup>294</sup> Article 9(1), CRC.

<sup>295</sup> Articles 20(1) and 22(2), CRC.

<sup>296</sup> Article 37(d), CRC.

<sup>297</sup> Article 12, CRC.

<sup>298</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, fully revised edition, 2002, pages 166 and 179 ('UNICEF Implementation Handbook on CRC').

<sup>299</sup> Article 25, CRC.

<sup>300</sup> CRC Committee, General Comment No. 6 (2005), The Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 63. See, also, *Muskhadzhiyeva and others v. Belgium* and Guideline 11.3 of the Council of Europe's Twenty Guidelines on Forced Return; Article 17(3), EU Returns Directive.

<sup>301</sup> *Mitunga v. Belgium*, ECtHR, Applic. No.13178/03, 12 October 2006, para. 103. See, too, *Centre for Child Law v. Minister of Home Affairs and Others* (22866/04) [2004] TPD (13 September 2004) (High Court of South Africa (Transvaal Provincial Division)), in which it was held that children being detained at Lindela detention centre alongside adults was unlawful. Justice De Vos stated that in that case that 'the State is under a direct duty to ensure basic socio-economic provision for children who lack family care as do unaccompanied foreign children' (para. 17).

dietary requirements.<sup>302</sup> There are, in practice, limited examples of suitable detention arrangements for children, and numerous studies have demonstrated the seriously damaging effects of detention on children.<sup>303</sup> The CRC also contains a number of provisions to take all appropriate measures to protect children from all forms of violence and exploitation,<sup>304</sup> exposure to which is more likely in a detention environment.<sup>305</sup> As the CRC Committee has clarified, ‘the underlying approach ... should be “care” and not “detention”’.<sup>306</sup> This would include appropriate age assessments, as inappropriate age assessments can lead to prolonged detention of asylum-seeking minors.<sup>307</sup>

## 8.2 Persons with mental health or physical illness or disabilities

Research shows that immigration detention has widespread and seriously damaging effects on the mental (and sometimes physical health) of those incarcerated.<sup>308</sup> For those with pre-existing mental illness or those who are suffering from trauma, serious consideration must be given to A2Ds, or other arrangements that meet their treatment needs and subject to the safeguards elaborated under Article 9 of the ICCPR (outlined above). There are a range of human rights issues at play here, including protections against cruel, inhuman or degrading treatment or punishment, and the right to humane conditions of detention.<sup>309</sup> There is very clearly an intersection with other ‘at risk’ categories or vulnerabilities, such as age and/or gender.<sup>310</sup>

Furthermore, research has indicated that psychological damage can occur as a consequence of being detained over long periods regardless of any pre-existing disposition. A 2010 study conducted by the Jesuit Refugee Service of immigration

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<sup>302</sup> See, *Lawyers for Human Rights v. The Minister for Safety and Security and 17 Others* (5824/2009) [2009] NGHC (15 May 2009) (High Court of South Africa; North and South Gauteng High Court, Pretoria), pp.31-34.

<sup>303</sup> See, e.g., Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention*, 13 May 2004, available at: [http://www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/report/index.htm](http://www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm); Medical Justice, ‘*State Sponsored Cruelty*’ – *Children in Immigration Detention*, 9 September 2010, available at: <http://www.medicaljustice.org.uk/content/view/full/1420/89/>.

<sup>304</sup> Article 19, CRC. See, also, Articles 11, 32, 33, 34, 35 and 36, CRC.

<sup>305</sup> Exposure of children to riots, suicidal attempts and other violence has occurred in many settings: see, in particular, reports by Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention* and Medical Justice, ‘*State Sponsored Cruelty*’ – *Children in Immigration Detention*.

<sup>306</sup> CRC Committee, General Comment No. 6 (2005), *The Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 63.

<sup>307</sup> Likewise, age assessments become important in this context to avoid unrelated adults being detained or housed alongside children.

<sup>308</sup> See, e.g., G.J. Coffey et al., ‘The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum’ (2010) 70 *Social Science & Medicine* 2070-2079, which includes a summary of recent studies on the same topic.

<sup>309</sup> Articles 7 and 10(1), ICCPR respectively.

<sup>310</sup> ExCom, Conclusion No. 110 (LXI), 2010, on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR, noting the multiple or intersectional nature of discrimination in preambular para. 6. The Conclusion notes, for example, that ‘children with disabilities are at a greater risk of abuse, neglect, abandonment, exploitation, health concerns, exposure to the risk of longer term psychological disturbances, family separation and denial of the right to education.’ (preambular para. 7)

detainees in 23 EU Member States concluded, for instance, that detention creates vulnerabilities in persons who do not otherwise present such vulnerabilities at inception or who do not meet government criteria of persons with ‘special needs’.<sup>311</sup> Institutionally, this will necessarily have long-term consequences for national and local health systems for those admitted to the territory as refugees or through other legal avenues to stay. The practice of some states of transferring persons with serious psychological illnesses or those exhibiting serious signs of trauma or stress to provincial jails in lieu of any better alternatives ought to be considered a bad faith implementation of human rights obligations, and raises issues around violations of one’s right liberty and security of person and against inhuman or degrading treatment.<sup>312</sup> The EU Reception Directive requires that persons with specific needs be individually assessed, including persons with disabilities.<sup>313</sup> The International Convention on the Rights of Persons with Disabilities (ICRPD) further requires that persons with disabilities enjoy their rights without discrimination, including explicitly the right to liberty and security of person and that this requires states to make ‘reasonable accommodations’ or changes to detention policy to match their requirements and needs.<sup>314</sup> The ICRPD further provides that immigration proceedings must be accessible to persons with disabilities; especially where this is needed to facilitate their rights to freedom of movement.<sup>315</sup>

As a general rule, persons with ‘long-term physical, mental, intellectual and sensory impairments’<sup>316</sup> should not be detained. If detention is strictly necessary in an individual case, and there were no less intrusive means of achieving the same objectives, conditions of detention must be tailored to meet their needs, including, for example, the availability of suitable education of children with disabilities; the communication of information, procedures, decisions and policies appropriately and accessibly; the provision of specialised health and other services; and a swift and systematic identification and registration of such persons.<sup>317</sup> Equally, A2Ds may need to be tailored to the needs of persons with disabilities and members of their families so that they can benefit from the right to liberty and security of person on the basis of equality with able-bodied persons. This might include, for example, that accommodation facilities are adapted to one’s physical or intellectual impairments, as required by ICRPD;<sup>318</sup> or electronic reporting possibilities, such as via telephone, for persons with mobility or disability issues.

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<sup>311</sup> Jesuit Refugee Service - Europe (JRS-E), *Becoming Vulnerable in Detention*, June 2010, refers to stress, insomnia, depression, fear, worsening self-perception and self-worth, etc. The study focused on the views of detainees themselves.

<sup>312</sup> Canada, for example, transfers immigration detainees suffering psychological illnesses to provincial jails rather than order their release: Canada Citizenship and Immigration, Interview, May 2010.

<sup>313</sup> Article 17(1), EU Reception Directive.

<sup>314</sup> Article 14, International Convention on the Rights of Persons with Disabilities 2008 (ICRPD).

<sup>315</sup> Article 18(1)(b), ICRPD.

<sup>316</sup> Language taken from ExCom, Conclusion No. 110, preambular para. 3.

<sup>317</sup> *Ibid.*, paras. (c), (f), (h), (j).

<sup>318</sup> See, Article 19, ICRPD on living independently in the community, which recognises the right of persons with disabilities to live independently in the community and to have ‘access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.’ (Article 19(b))

### **8.3 Women**

Where there are no separate facilities housing unrelated males and females, or where the special needs of women cannot be met within detention, A2Ds may provide the only answer. As a general rule, detention of pregnant women and nursing mothers, who both have special needs, should be avoided.<sup>319</sup> Alternative arrangements must also take into account the particular needs of women, including concerns around violence and exploitation.<sup>320</sup>

### **8.4 The elderly**

The elderly may also require special care and assistance owing to their age, vulnerability, lessened mobility, psychological health, and other conditions. Without such care and assistance, any detention may become unlawful. In addition, alternative arrangements may need to take into account their particular circumstances, including physical and mental well-being.<sup>321</sup>

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<sup>319</sup> UNHCR, *Guidelines on Detention*, Guideline 8.

<sup>320</sup> Special measures, for example, would need to be in place to protect the right to live in dignity of women who have been trafficked into the country.

<sup>321</sup> See, e.g., Article 17(1), EU Reception Directive.

## **C. Alternatives to Immigration Detention: Practical and Functional Issues**

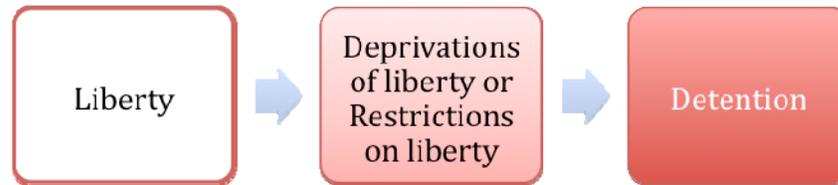
There is a wide range of A2Ds programmes and arrangements currently operating in a number of countries.<sup>322</sup> These can be categorised under the following sub-headings (and are explained in more detail below):

1. No detention or release without conditions or on own recognizance
2. Release on conditions
3. Release on bail, bond, surety/guarantee
4. Community-based supervised release or case management
  - 4.1 NGO-run models
  - 4.2 Hybrid government-NGO cooperation or partnership models
  - 4.3 Government-run models
5. Designated residence at a particular accommodation centre
6. Electronic tagging or reporting, or satellite tracking
7. Home curfews
8. Complementary measures

As noted in Part B of this study, many A2Ds involve some form of restriction on movement or other deprivation of liberty, and thus are subject to human rights oversight. Any alternatives that implicate restrictions on movement or deprivations of liberty must only be imposed where they are necessary and proportionate to the objectives in question. In order to satisfy these requirements, the least intrusive measure must be taken in each individual case. This would necessarily include an assessment as to whether conditions on release are required at all. Under the section entitled ‘complementary measures’, some examples of criteria on how to assess whether detention is necessary and proportionate are highlighted. Although these tools are not actually A2Ds as such, they could be an important component of fulfilling obligations under the right to liberty and security of person.

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<sup>322</sup> Approximately two-thirds of EU Member-States provide for the possibility to impose A2D in relation to returns, either before resorting to detention or at the time of extension (EU-FRA Study, Figure 6, p. 73).



#### D. Figure 1

This part of the study aims to outline various A2D options, plus some concrete examples of how these work in practice, as well as to unpack and examine factors and features that account for their success or effectiveness.<sup>323</sup> It looks at existing as well as previous pilots and programmes to identify some guiding principles or minimum content around alternatives.

There is a long way to go before A2Ds are systematized. The Council of Europe’s Special Rapporteur on Detention has noted that:

Where statutory alternatives are found, they are drafted in vague terms or require a high threshold to be crossed by the individual in question, before they can be applied. Furthermore, a high level of discretion is often associated with their use and there are often few clear and consistent guidelines.<sup>324</sup>

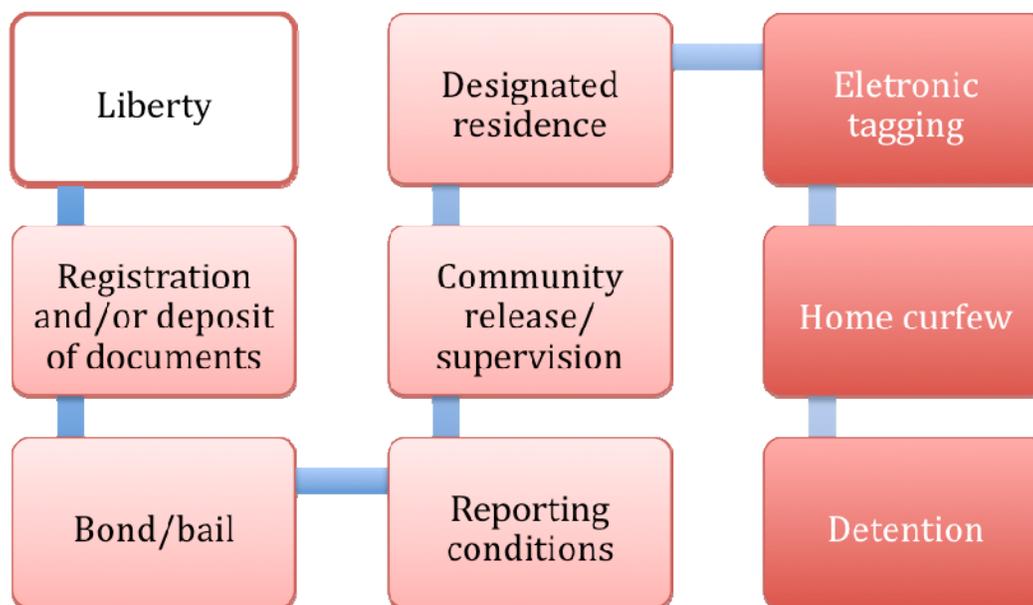
Nonetheless, there are increasing examples of A2Ds that could be replicated, extended and/or tailored to other contexts. The main focus of this paper is on empirical research conducted in five sites: Australia, Belgium, Canada, Hong Kong and the United Kingdom (namely Scotland); with some supplementary material drawn from secondary sources. It is well recognised that these will need to be tailored to each country situation and its particular legal, socio-economic and political context. Despite the *sui generis* nature of some A2D arrangements, adopting similar practices within particular regions may be advisable as states have an interest in avoiding individuals, aware of an A2D in one place and not in another, moving on to that place.

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<sup>323</sup> The question of whether a particular A2D is a success or effective is obviously a loaded one and will depend on the perspective taken and the aims that each alternative is attempting to achieve. For governments, rates of absconding and return of rejected asylum-seekers may be the ultimate goal; for human rights groups, a programme may be seen as a success simply by virtue of the fact that persons are released from detention. It is therefore a rather fluid notion, and is more qualitative than quantitative. It is used in this study primarily to respond to governmental objectives, noting that most alternatives to detention satisfy many human rights concerns (except those at the extreme end) and thus can also be viewed as a ‘success’ on that front.

<sup>324</sup> CoE Special Rapporteur, *Report on Detention*, para. 38.

Also important to note is that some unintended negative consequences have been associated with particular A2Ds. These are exposed with a view to taking steps to minimize them.



E. **Figure 2**

### 1. No detention or release without conditions or on own recognizance

The ultimate A2D is no detention being ordered in the first place, or release without conditions or on one's own recognizance. The Philippines, for example, provides asylum-seeker certification and releases asylum-seekers from detention without conditions. Meanwhile, South African law requires release from detention of anyone applying for asylum, unless other concerns prevail such as national security. As highlighted in Part B of this study, detention is only lawful under international human rights law if it is necessary and proportionate and this must be assessed on the basis of each individual case. This places the burden of proof on the state to provide grounds why detention is necessary and proportionate in each individual case. In many ways, this gives rise to a presumption against detention. To put it another way, there is a right to liberty and security of person save in justifiable circumstances judged according to law.

### 2. Release on conditions

Most countries operate formal review systems of administrative detention.<sup>325</sup> These systems permit the release of individuals either without conditions, or subject to one or more conditions tailored to their individual circumstances. France, Luxembourg

<sup>325</sup> As noted in Part B, the right to liberty and security of person requires that any detention is subject to periodic review and that the administrative or judicial review body must have the power to order release. The only exception to this in the industrialised world seems to be Australia.

and South Africa require asylum-seekers, for example, to present themselves in person to renew identity documentation.<sup>326</sup> Other countries, such as Austria, Canada, Denmark, Greece, Hong Kong, Ireland, Japan, Norway, Sweden and the United States, have legal frameworks that can require individuals to report to the police or immigration authorities at regular intervals.<sup>327</sup> Nearly all European Union countries, and Australia, for example, allow for the use of reporting and/or registration as an alternative.<sup>328</sup>

Several practical problems persist however, including that in many places where these alternatives are provided in law, they are not always accessible in practice; that conditions are imposed automatically and without an individual assessment as to their necessity; and they are at times imposed in a overly onerous way (and in some instances, this might rise to an unnecessary restriction on movement or an arbitrary deprivation of liberty (see Part B)).

Conditions on release might include one or more of the following obligations:

- a. to register one's place of residence with the relevant authorities and to notify them of any change of address or to obtain their permission prior to changing that address;
- b. to surrender one's passport and/or other documents;
- c. to appear for appointments, including refugee or stateless status determination procedures;
- d. to report to the authorities or others (e.g., community groups) periodically – this could be achieved in some cases via electronic telephone systems, which would be especially relevant to individuals with mobility or disability concerns;<sup>329</sup>
- e. to live at a designated address or in a particular administrative district, or being prohibited from residing in certain locations. In some countries, this alternative is also used as a dispersal tool to distribute asylum-seekers and migrants equally over the country and ensure burden-sharing by all regions and fair allocation of resources to meet asylum-seeker needs.

There is nothing magic about systems that permit possibilities for release on conditions. This, along with bail systems (see next), is arguably the least onerous model for the state. It has only minimal costs, as it can usually rely on pre-existing systems of periodic review of detention. Nonetheless, it appears to be under-utilised and in some countries, courts and administrative tribunals seem reluctant to release migrants under these schemes.<sup>330</sup>

### **3. Release on bail, bond, surety/guarantor**

Many countries operate systems that permit release on bail, bond, or under surety/guarantor. It is available, for example, in the United Kingdom, Slovenia,

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<sup>326</sup> Field and Edwards, *Alternatives to Detention*, pp.28-30.

<sup>327</sup> Field and Edwards, *Alternatives to Detention*, pp. 28-30.

<sup>328</sup> CoE Special Rapporteur, *Report on Detention*, para. 44.

<sup>329</sup> For example, the US ISAPII program permits persons to report by telephone.

<sup>330</sup> CoE Special Rapporteur, *Report on Detention*, para. 44.

Finland and Denmark;<sup>331</sup> and in Canada, Japan and the Republic of South Korea.<sup>332</sup> The terms ‘bail’, ‘bond’, and ‘surety/guarantor’ are similar in nature, and are applied differently according to national legal frameworks. In general, the term ‘bail’ is used to denote a financial deposit placed with the authorities in order to guarantee the individual’s future attendance at interviews, hearings or other reporting requirements. The sum of money is returned if the individual appears as required; otherwise it is forfeited. The amount of bail ought to be calculated on a fair basis of what the individual is likely to be able to pay, and which would encourage appearance (or discourage disappearance). The amount ought to take account that many asylum-seekers may not be able to pay large sums (and, as in the experience of Hong Kong, those who are able to pay large sums are also often in a position not to be concerned if the money is lost<sup>333</sup>). As shown below in relation to the Toronto Bail Program, there are ways in which the financial discrimination inherent in a bail system can be alleviated. Some studies have indicated that the payment of bail can bear little correlation to appearance rates and that it can be imposed unnecessarily, especially if persons subject to bail are in their preferred country of destination and thus already have an incentive to appear.<sup>334</sup>

The term ‘bond’ is used to denote a legal agreement, sometimes with sureties (explained below), guaranteeing the faithful performance of acts and duties, such as future attendance at interviews, inquiries and/or removal proceedings, alongside regular reporting requirements. The term ‘surety’ applies to the situation where a person or organisation vouches for the appearance of an asylum-seeker or other irregular migrant. The ‘guarantor’ agrees that if the person should fail to appear, they are liable to pay some or all of the agreed amount (the ‘surety’).<sup>335</sup> No amount is required to be paid up-front.

The best approach to bail/bond/surety/guarantor options is that they should be made available within normal review procedures on the legality of detention, and preferably these reviews should be periodic and automatic. While many legal systems provide for bail, the extent to which immigrants can benefit from these is questionable.<sup>336</sup> At least in the case of Canada, this has led the government to introduce a government-funded bondsperson.

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<sup>331</sup> CoE Special Rapporteur, *Report on Detention*, para. 47.

<sup>332</sup> Information supplied by the International Detention Coalition, email exchange December 2010.

<sup>333</sup> Interview, Security Bureau, Hong Kong, September 2010.

<sup>334</sup> Field and Edwards, *Alternatives to Detention*, p. 50.

<sup>335</sup> Note that in some systems, the ‘surety’ refers to the person making the guarantee (the guarantor).

<sup>336</sup> For example, the UK system of non-automatic bail is technically available to all immigration detainees after 7 days, and legal aid is provided for such applications. Nonetheless, the rate of successful bail applications remains low and many detainees regularly represent themselves at bail hearings owing to a reluctance on the part of some lawyers to seek their release. In 2007, for example, there were 8,950 applications for bail, of which only 1,990 were granted (or 22%), 4,108 cases (46%) were refused and 2,830 (32%) of cases were withdrawn before a decision was issued: Bail for Immigration Detainees (BID), *Immigration Detention in the UK – FAQs*, available at: <http://www.biduk.org/library/BID%20FAQ%20final.pdf>. Bail for Immigration Detainees (BID) is a non-governmental organisation that assists detained migrants make bail applications. In 2007, it assisted in 2,000 bail applications, owing to the reluctance of legal advisers to seek bail for their clients.

### **3.1 Canada's Toronto Bail Program: Automatic bail hearings and government-funded bail system**

In Canada, there is a right to automatic and periodic review of immigration detention under the Immigration and Refugee Protection Act (IRPA), which permits release with or without conditions. Canada operates a regular bail system, which is supplemented by a government-funded professional bail programme (the Toronto Bail Program or TBP). The TBP has been in operation since 1996. Immigration detention – in either a correctional facility<sup>337</sup> or an immigration holding centre - is permitted in Canada if ‘they [the individual] pose a danger to the public, if their identity is in question or if there is reason to believe they will not appear for immigration proceedings.’<sup>338</sup> Immigration officials are required to review the reasons for detention and have the power to order release with or without conditions within the first 48 hours. Automatic and periodic reviews of detention also occur after 48 hours or without delay thereafter, and then again after 7 days, and then every 30 days.<sup>339</sup> These reviews are conducted before a member of the Immigration Division of the Immigration and Refugee Board (IRB) (the quasi-judicial refugee status determination authority).<sup>340</sup> Judicial review is also available. The Canadian Border Services Agency (CBSA) represents the government in the detention reviews and admissibility hearings, while the detainee has the right to legal counsel and legal aid, subject to a means and merits test.

The aim of the system is to release persons from detention as soon as possible if there is no necessity to detain them, and where other conditions could satisfy the authorities to ensure appearance. In many ways, Canada operates a presumption against detention. The CBSA indicates that 90-95 per cent of asylum applicants are released into the community.<sup>341</sup> The 2002 regulations stipulate explicitly that ‘alternatives to detention’ must be explored.<sup>342</sup> The same system applies to front-end and back-end detention (i.e. those seeking asylum as well as those facing removal). Conditions of release may include depositing a sum of money (usual minimum amount is \$2,000 CAD with regular amounts being \$5,000 CAD) or signing an agreement guaranteeing a specified amount (a guarantee of compliance), together with or separately from other ‘performance’ conditions, such as reporting, registering one’s address, appearance at immigration procedures, etc. A third party is able to post bail in these circumstances.

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<sup>337</sup> There are many concerns about the detention of asylum-seekers and other migrants within correctional facilities: see Part B of this study.

<sup>338</sup> Canadian Border Service Agency (CBSA), Fact Sheet: Arrests and Detention, July 2009, available at: <http://www.cbsa-asfc.gc.ca/media/facts-faits/007-eng.html>. The Immigration and Refugee Protection Regulations set out relevant factors to consider, including whether the person has past criminal convictions; has a history of non-compliance with immigration regulations; has ties with the community; shows a willingness to cooperate with the authorities; any links to organised crime, including smuggling and trafficking; and public order and national security considerations.

<sup>339</sup> S. 57, Immigration and Refugee Protection Act.

<sup>340</sup> Please note that the information presented herein was legally valid as at the date of May 2010, although there have been a range of proposed changes to the asylum system in Canada ongoing during the period of the research and throughout the subsequent period.

<sup>341</sup> Interview, CBSA, Toronto, May 2010.

<sup>342</sup> Regulation 248(e), Immigration and Refugee Protection Regulations 2002.

The above system is supplemented by the TBP, which aims to eliminate the ‘financial discrimination’ inherent in the immigration bail system,<sup>343</sup> which is particularly likely to disadvantage asylum-seekers who have no or limited resources and/or community or family ties. It is described by its director as ‘professional bail’ in contrast to the more *ad hoc* community models in Canada, where diaspora groups or community organisations may post bail or offer their names as guarantors for particular individuals (discussed below). The TBP operates differently to normal bond/bail systems in so far as no money is paid over to the authorities to secure the release of any migrants from detention under the programme, and no guarantee of compliance is signed.<sup>344</sup> Instead, the TBP, under an agreement with the CBSA, acts as the bondsperson for particular individuals who could not otherwise be released. The TBP accepts both asylum applicants as well as persons pending deportation. The TBP conducts an intensive selection interview with the individuals concerned to assess their suitability for supervision (described below). The cooperation agreement between TBP and the CBSA means that, unlike normal bail proceedings, the CBSA relies on the judgment of the TBP in selecting its clients, and the system becomes streamlined as there is rarely an objection raised to their release of particular individuals by the government. The individual and/or family are then released to the ‘supervision’ of TBP on particular conditions (described next).

The TBP program has achieved considerable success in terms of its compliance rates. In FY 2009-10, of the 250-275 clients released to the TBP, only 3.65 per cent absconded, which equals 12 ‘lost’ clients. The so-called ‘lost client’ ratio has even improved over recent years.<sup>345</sup> There is minimal distinction between the ‘lost client’ ratio of asylum applicants versus persons pending removal.<sup>346</sup> According to the program’s director, a number of fundamental ingredients are the basis for the success of the program.<sup>347</sup> The first is the concept of ‘voluntary compliance’, in which persons ‘agree’ to be supervised by TBP.<sup>348</sup> This is held to create a sense of dignity and responsibility in the individuals released to the programme, of which one part is the signing of an agreement between the individual and TBP on the duties of each party. The contract notifies the individual that should they fail to appear for any appointments or otherwise breach the terms of the agreement, they will be reported to the CBSA (who will then issue a Canada-wide arrest warrant).<sup>349</sup> The TBP, for their part, agrees to provide information and advice relating to a range of services, etc.

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<sup>343</sup> Field and Edwards, *Alternatives to Detention*, p. 86.

<sup>344</sup> The Field and Edwards’ study wrongly stated that there were financial incentives directly linked to the payment of bond for individuals over to the immigration authorities. Rather, a set sum of money is paid for the service by the CBSA to TBP on an annual basis and no ‘bond’ is handed over by TBP to the authorities for the release of any specific persons. Should an individual abscond from the programme, there are no penalties and no money is lost as none has been handed over. Nonetheless, the TBP does have an incentive to ensure that persons comply with the requirements of the programme in order to ensure that it remains effective and is funded in subsequent years. This has led to some charges by NGOs that the TBP is ‘too selective’ in who it agrees to supervise; charges denied by the TBP.

<sup>345</sup> E.g., in FY 2002-3, the total lost client ratio of all immigration applicants was 5.65 percent: Field and Edwards, *Alternatives to Detention*, p. 88.

<sup>346</sup> Interview, Dave Scott, Executive Director, TBP, May 2010.

<sup>347</sup> Interview, Dave Scott, Executive Director, TBP, May 2010.

<sup>348</sup> Although there is a notion of ‘voluntary compliance’ in so far as individuals agree to be released to the supervision of TBP, where no other release options are available, it is hardly an entirely voluntary process of equality of arms.

<sup>349</sup> The reporting of non-complying individuals by TBP to the government is considered by the TBP to be one of its strengths as it is an important incentive to participate; however, it is this factor that has

The second fundamental ingredient is that of ‘community supervision’, discussed also *infra*, which TBP believes makes compliance more likely because asylum-seekers and other migrants benefit from their engagement with the programme. That is, there is an incentive to comply. Individuals released to TBP are provided with assistance and advice on how to navigate the Canadian asylum, immigration and social services systems. The TBP assists individuals to find housing, and to access healthcare, social welfare, and work (where permitted), or to file necessary paperwork, including applications for asylum and work permits. It has recently engaged specialised staff in mental health and addiction matters, and this will hopefully lead to an increase in such persons being released to TBP, rather than the current practice of transferring such persons from immigration holding centres to maximum security provincial jails.<sup>350</sup> It is clear that such supervision of this kind will not be suitable for all migrants.

Persons released to TBP are initially required to report twice weekly to the offices of TBP in downtown Toronto. Reporting requirements are softened as trust develops between the two parties and there are no lapses in reporting. Phone reporting can be later instituted, rather than reporting in person. The TBP requires proof that an individual has participated in any assigned programmes, such as receipts from English language courses, or pay stubs if working, or agreement to a treatment plan, if required, etc. Clients are also required to reside at an address approved by TBP, and must inform TBP if they change address. TBP assists with the finding of accommodation, often in conjunction with local shelters, and conducts spot checks. Furthermore, individuals must be doing ‘something productive’ that is permitted under the IRPA (e.g. some are not permitted to work). There is also a requirement that they cooperate with the TBP and with any immigration procedures, including, for example, the attainment of documents to facilitate their removal. Failure to report or otherwise comply with conditions of release will lead to TBP informing the authorities, which in turn sets in enforcement action.

Despite its high rates of release and compliance with release conditions, the programme has faced a number of complaints. First, some NGO advocates complain that the TBP and the CBSA are too closely associated, with the TBP being ‘too selective’ in its clients and thereby leaving out many persons who cannot be released but for whom the programme was intended. One NGO described the vetting system of the TBP to be ‘akin to immigration interrogation’ and thus, it was asserted, it has not expanded the pool of persons released to it. A second criticism is that many persons released to TBP ought to have been released on minimal conditions, and that the IRB relies on it too heavily (that is, it is over-used). For example, around 99 per cent of

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prevented Canadian NGOs from expanding the system with the government. This is to be compared to the Australian model (discussed later), where NGOs appeared far less concerned about reporting on individuals that fail to comply with the terms of their release. An alternative option that may bridge the gap between these two viewpoints is that any reporting obligations are made to the immigration authorities, whereas the NGO sector provides assistance and other services without any duty to report on non-compliant clients. That is, the NGOs become the service delivery agencies without enforcement responsibility, which remains with the immigration authorities.

<sup>350</sup> See, Schizophrenia Society of Ontario, *Double Jeopardy: Deportation of the Criminalized Mentally Ill: A Discussion Paper*, March 2010. Along the lines of the *Muskhadzhieva et autres v. Belgique* decision (see Part B), it is arguable that detaining persons with mental health and other psychological problems in maximum security provincial jails constitutes arbitrary detention as the facilities are clearly unsuited to their treatment and recovery.

TBP requests for release to their care were granted.<sup>351</sup> A final concern is the length of the selection or vetting process. The vetting process takes around one month, and can last longer. One reason for the delay is because the director personally vets every application.<sup>352</sup> Nonetheless, the TBP's response is that they sometimes delay their involvement in an individual case in order to ensure that they accept only those cases that have not been released on their own recognizance or under conditions that they can fulfil themselves. Getting the balance right seems to be one of the challenges of this process.

Other NGO advocates called for the programme to be replicated in the rest of Canada (currently it only operates in Toronto<sup>353</sup>); and there was criticism that the numbers released to the programme remained too small (250-275 in FY2009-2010, of which 113 (or 37 per cent) were 'new' releases. Of these, 42 were in the refugee category. The remainder were existing cases. TBP received a total number of 412 requests over the same period, amounting to an acceptance rate of 67 per cent of requests (33 per cent are not accepted as clients). In comparison, Ontario detains an average of 377 new individuals per month (average per year is approximately 4,524).<sup>354</sup> While some referrals to the TBP derive from lawyers or refugee and immigrant communities, the majority come directly from CBSA.

Essentially the TBP acts as the bondsperson for individuals and families who do not otherwise have sufficient resources or family or other ties to put up bail. It is therefore an A2D, but it can also act as an alternative to traditional forms of release where, for example, the authorities rely too heavily on it and it becomes a prerequisite to release. The TBP states that it does not accept cases, for example, where the individual cannot be removed (e.g. Cubans) as these persons should be released on minimal conditions. The TBP indicates that it does accept, on the other hand, high flight risk and criminality-related clients.<sup>355</sup>

There are other groups in Canada that perform a similar function to the TBP, although they are not government-funded. Many community groups and shelters will put forward their address or name as the relevant bondsperson/surety/guarantor in order to facilitate the release of an individual or family. These might include diaspora groups or registered non-governmental organisations or other charities. There appears to be little distinction in the absconding rates between release to these groups and the more formal TBP.<sup>356</sup> Nonetheless, TBP can confirm the total number of 'lost clients',

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<sup>351</sup> Interview, Director, Dave Scott, TBP, May 2010. This would indicate that it is very rare that an immigration official of the IRB would release a detainee on minimal conditions where the TBP offers to provide 'bail', even if such extensive supervision is not needed.

<sup>352</sup> Interview, Dave Scott, Director, TBP, May 2010.

<sup>353</sup> The reason behind its focus on Ontario is that the province receives the lion's share of asylum applicants and other irregular migrants entering Canada and has the largest number of immigration detainees. In February 2010, for example, the total number of detained persons in Canada was 1180, of which 709 were in Ontario. Of the 574 asylum claimants detained, 344 were located in Ontario. CBSA, National Detention Statistics, February 2010 (on file with the author).

<sup>354</sup> This figure is drawn from three months of statistics, so may not be entirely accurate for any year: 410 new detainees in December 2009, 340 in January 2010, and 380 in February 2010. This amounts to 58 per cent of the total received into Canada (total 1,945 over the same three month period). Annual statistics were not readily available.

<sup>355</sup> Interview, Dave Scott, TBP, May 2010.

<sup>356</sup> Field and Edwards, *Alternatives to Detention*, p. 26: Hamilton House, for example, reported that 99 per cent of its residents have complied with the full asylum procedure; Matthew House reported that

owing to its stringent reporting obligations and a number of other checks, such as escorting clients to the airport for removal. In comparison, released migrants may spend only a short while in the care of the various other alternatives, and so monitoring of compliance does not occur in the same way.

Immigration lawyers mentioned some unease with release on bail to diaspora groups who put their names forward to act as bondspersons, but where they were no pre-existing or real links. As this side of the bail system is unregulated and unmonitored, it can lead to exploitation and abuse of those released to the care of particular individuals or groups. Cases were reported in which migrants were being forced to pay over their social welfare cheques to the bondsperson; others were found to be living in poor, squalid and overcrowded conditions. In other words, the system can operate as a repayment system, even verging on extortion in individual cases; with some individual bondspersons having five or more 'clients'. Other cases had surfaced of women being sexually and physically assaulted, or forced into prostitution, by their bondspersons. Lawyers indicated that in these circumstances, clients were reluctant to report the exploitation or abuse because in doing so, they risked being returned to detention. However, arguably these cases would be suitable to be transferred to supervision via TBP. Ironically, there is no automatic or systematic right to challenge the conditions of one's release in Canada. This highlights further reasons why a managed bond system has its merits, especially for those who have no 'real' connections to the community.<sup>357</sup>

Finally, the cost of the TBP is particularly attractive, costing a mere \$10-12 CAD per person per day compared with the average cost in provincial jails being \$179 CAD per person per day.

#### **4. Community-based supervised release or case management**

This section documents so-called 'community supervision' or 'community-based case management' A2Ds. Three types of alternatives fall broadly under this heading. The first is where community organisations and NGOs perform the 'supervisory' or 'case management' component directly. Examples are drawn from Australia and Hong Kong. The second is where there is a joint programme between the government and NGOs, which might be referred to as a hybrid cooperation or partnership model. An example is drawn from Australia. The third type previewed here is government-administered alternatives, in which individuals are supervised by government officials and directed into pre-existing or enhanced government services. The examples are from Belgium and Scotland. Release into the community is often done in conjunction with another A2D, such as reporting requirements to the authorities or bail.

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only 3 out of 300 residents (or 1 per cent) disappeared over a five-year period; Sojourn House reported statistics of 3 asylum applicants out of 3,600 over a six-year period had disappeared from its premises and the asylum procedure.

<sup>357</sup> Many bail/bond systems operate on the basis that having community links is an indicator in favour of appearance, yet it is not clear that there is evidence to support this assumption. The more crucial factor may be whether the individual has reached his or her preferred destination, which may or may not be related to family or pre-existing community ties; that s/he is within a procedure for asylum or is otherwise cooperating with the authorities regarding return; and is otherwise treated with dignity and humanity while these procedures are ongoing.

## 4.1 NGO-run models

### 4.1.1 Australia: ‘bridging visas’/temporary lawful stay visas and community-based supervision and support

Under the Australian immigration system, detention of an unlawful non-citizen is mandatory until the person obtains a visa (this could be refugee status or a bridging visa, for example) or is removed.<sup>358</sup> There is thus no consideration of the necessity of detention in individual cases, or of any other factors.<sup>359</sup> Under this system, the only possibility of release is to provide a person with a temporary lawful status.<sup>360</sup> This is achieved through a substantive visa (such as refugee status) or through a discretionary ‘bridging visa’.<sup>361</sup> A bridging visa is a temporary visa granted at the discretion of the Minister to persons who are in the process of applying for a substantive visa or making arrangements to leave Australia. The visa is granted for a specific period of time, or until a specified event occurs.<sup>362</sup> While on the bridging visa, the person is entitled to live in the community. At any one time there are an estimated 56,000 persons on bridging visas,<sup>363</sup> the majority of whom are persons who had entered Australia lawfully on a tourist, student, temporary visitor or other visa and who initiated an immigration case while on that visa.<sup>364</sup> That is, the main beneficiaries of the programme are persons who were already living in the community and who have overstayed or otherwise breached a condition of their visa. Bridging visas may also be granted to persons in immigration detention, allowing them release into the community. The latter have typically been persons who cannot be removed from Australia.<sup>365</sup>

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<sup>358</sup> Per s. 189(1), Migration Act 1958. Curiously, persons entering Australia via an ‘excised territory’ are regulated by s. 189(3) of the Migration Act, which provides that ‘If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer *may* detain the person.’ It might appear that they are exempt from the mandatory detention policy that applies elsewhere, and could open up possibilities for litigation if no individual assessment is made.

<sup>359</sup> The Migration Act 1958 provides that any unauthorised entrant to Australia must be detained. Section 189(1) of the Act provides that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen – that is, a person who is not Australian and has no valid visa – the officer must detain the person. Detention lasts until a protection visa is granted or they are removed from Australia. As noted in Part B of this study, this system has been widely found to be in violation of the right to liberty under international law and in violation of Australia’s international legal obligations: see, *A v. Australia*; *C v. Australia*; *Bakhityari v. Australia*; etc.

<sup>360</sup> For more on the entire system of ‘bridging visas’, see The Parliament of the Commonwealth of Australia, *Immigration Detention in Australia: Community-based Alternatives to Detention*, Second Report of the inquiry into immigration detention in Australia, Joint Standing Committee on Migration, May 2009, Canberra, p.25.

<sup>361</sup> Although their use has expanded in recent years, bridging visas have always been available under the Migration Act: Interview, DIAC, Melbourne, September 2010.

<sup>362</sup> For example, a bridging visa may cease when a substantial one is granted; or, for example, 28 days after withdrawal of a visa application, notification of a visa decision or notification of a merits review or judicial appeal outcome: *ibid.*

<sup>363</sup> *Ibid.*

<sup>364</sup> The Australian government confirms that only 10 per cent of ‘overstayers’ were detained in 2009-10: DIAC, Annual Report 2009-10, p.171, available at: <http://www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf>.

<sup>365</sup> In fact, it was amid pressure from backbench Liberal members of parliament following the decision in *Al-Kateb*, which confirmed that his detention was lawful despite the fact that there was no reasonable prospect of his removal, that a group of such persons similarly situated were released from

The Australian system is structured in such a way that it creates a two-tier system of treatment. Those who enter Australia lawfully but who later overstay their visa and subsequently submit an immigration case are generally not detained, whereas persons attempting to enter Australia in an unauthorised manner (*i.e.*, irregular maritime and air arrivals) are routinely detained. As at May 2009, approximately 15 per cent of unlawful non-citizens are detained after they have been located,<sup>366</sup> although this figure does not include the 5000 plus ‘boat persons’ currently being held in some form of detention on Christmas Island and elsewhere, including over 700 children.<sup>367</sup>

Bridging visas may be granted with varying conditions attached.<sup>368</sup> In this way, they are similar in nature to bail in other jurisdictions. However, they are also distinct in so far as they provide a ‘lawful status’, albeit temporary; whereas in many other countries, persons who are granted bail are not necessarily considered lawfully within the territory.<sup>369</sup> On the other hand, bridging visas are dissimilar to bail in other jurisdictions because they are determined by total executive discretion, rather than via an independent administrative or judicial review procedure. This is one of the weakest elements of the Australian approach, and in other jurisdictions, it would be unlikely to survive human rights scrutiny.

There is a range of classes of bridging visas, with various entitlements attached; however, it is beyond the scope of this paper to explain the full extent of the scheme.<sup>370</sup> The average length of a bridging visa between 1 July 2008 and 31 December 2008 was 79 days before departure from Australia (there were no similar statistics available for those within asylum determination procedures); yet approximately 40 per cent of bridging visa E (‘pending return’) holders had been on the visa for more than two years and around 20 per cent had been in Australia for more than five years at the relevant date.<sup>371</sup>

A long-term concern of the bridging visa regime is that for many persons, especially those whose likelihood of removal is remote or non-existent or for whom asylum

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detention following the High Court decision. This group now benefits from the ‘pending removal’ bridging visa (these are essentially ‘intractable’ cases).

<sup>366</sup> *Immigration Detention in Australia: Community-based Alternatives to Detention*, p. 25.

<sup>367</sup> DIAC, *Immigration Detention Statistics Summary*, 22 October 2010.

<sup>368</sup> These conditions may include: a requirement to live at a specific address and to notify the authorities of a change of address; a requirement to pay the costs of detention or to make arrangements to do so (this is unique to Australia and, at least for asylum applicants, would amount to a double penalty in violation of Article 31, 1951 Convention); a requirement to lodge a security bond, generally between \$5,000 and \$50,000 AUD; a no work condition, or a restriction on working hours; a no study condition, or restrictions on study; restrictions on overseas travel: *Immigration Detention in Australia: Community-based Alternatives to Detention*, para. 2.49. Recently, there has been agreement that individuals on bridging visas may work, subject to an individual assessment, including whether they are cooperating with the authorities, which replaced the previous 45-day rule. This rule provided that an individual was not entitled to work if they had not registered their intention to apply for a lawful visa within 45 days of their arrival. Difficulties in exercising this right to work remain, including language barriers, the temporary (4-6 weeks) nature of the bridging visa, etc.

<sup>369</sup> They could be compared to ‘temporary admission’ visas in the UK, which are granted at the discretion of the Minister; however, persons on temporary admission visas are not considered to have entered the territory of the UK and so continue to be unlawfully present for the purposes of domestic law.

<sup>370</sup> See, instead, *Immigration Detention in Australia: Community-based Alternatives to Detention*.

<sup>371</sup> *Ibid.*, p. 34.

applications are delayed and/or suspended,<sup>372</sup> it remains at best a temporary legal status, and at worst, an uncertain and prolonged one, subject to revocation at any time.<sup>373</sup> A further shortcoming of this regime is that the granting of the visa is at the absolute discretion of the Minister. In other words, the only way to be released from detention or to not be detained (if already in the community) is via discretionary power, with no appeal rights. Moreover, mandatory detention in Australia is not subject to periodic review as to its lawfulness (as it is considered lawful per se: see *Al-Kateb* decision) and the courts have no power to order release.<sup>374</sup>

In conjunction with the bridging visa, the Australian system provides for two government-funded A2D programmes: (a) the Asylum-Seeker Assistance Scheme, which is paid for by the government but wholly administered by civil society; and (b) the Community Assistance Support Programme, which is characterised as a hybrid cooperation or partnership model. There are also a number of supplementary schemes for those who fall outside the criteria of the first two, which are operated and funded by a range of NGOs. This study visited the Hotham Mission in Melbourne, Victoria.

#### **(a) Asylum-Seeker Assistance Scheme (ASAS)**

This programme is targeted at a specific group of ‘vulnerable’ persons applying for refugee status in Australia, who have been granted a bridging visa to live in the Australian community. The scheme provides a living allowance, basic health care, pharmaceutical subsidies, and torture and trauma counselling. It is not as comprehensive as the Community Assistance Support Programme (see 4.2.1), and is means-tested. Ineligible applicants are those entitled to other government support, in a relationship with a permanent resident (either spouse, *de facto* or sponsored fiancé), and who have been waiting for more than six months for a primary decision. In other words, this scheme only starts after a six-month delay in an initial asylum determination.

There are some exemptions to these criteria, such as unaccompanied minors, elderly persons or families with children under 18 years, or persons unable to work owing to

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<sup>372</sup> The Australian government has in the past, for example, suspended the processing of asylum applications of the East Timorese in the 1990s; and recently suspended asylum applications for Afghans and Sri Lankans: ‘Australia Suspends Asylum Applications from Sri Lanka and Afghanistan’, *Govmonitor*, 11 April 2010. The routine suspension of asylum applications is contrary to the spirit, if not the letter, of the 1951 Convention in so far as the Convention provides a scheme for the cessation of refugee status in Article 1C to which the government could have recourse at the relevant time. Suspending asylum applications for particular groups may also constitute an indirect form of discrimination and, in any event, does not relieve the government of due process obligations under international human rights law or as implied into the 1951 Convention once any suspension is lifted.

<sup>373</sup> It remains arguable, albeit not yet established, that prolonged lack of status with no ability to be returned could constitute inhuman or degrading treatment. At a minimum, Australia should review the claims of persons who have been on such visas for longer than 2 years and who cannot be removed. They may in due course qualify for some form of complementary protection visa under proposed legislation, which is currently under review by the government.

<sup>374</sup> See, criticism of this from the UN Human Rights Committee, *C v. Australia*, *supra*. In fact, there were at least 14 occasions in which the UN Human Rights Committee made adverse findings against Australia in immigration detention cases: Mr. Evans, Minister for Immigration and Citizenship, Australian Department of Immigration and Citizenship, *New Directions in Detention – Restoring Integrity to Australia’s Immigration System*, Australian National University, Canberra, 29 July 2008.

disability, illness or effects of torture and/or trauma.<sup>375</sup> In fact, 95 per cent of beneficiaries of this programme have been waiting less than 6 months for a decision, but are eligible by virtue of the exemptions.<sup>376</sup> The support ceases upon grant of refugee status, or after 28 days of notification of refusal of status.<sup>377</sup> Extensions are available for those appealing to the Refugee Review Tribunal, but the support ceases after a decision of that body; and no extensions are available to those seeking judicial review of their decision, or the favourable exercise of ministerial discretion (this is where other non-government-funded options have stepped in to fill the gaps in support, see Hotham Mission, below).<sup>378</sup>

The Australian Red Cross (ARC) is the main delivery organisation and has been involved in the programme since 1992, including with many long-term groups (e.g. East Timorese refugees in the 1990s). Referrals to the programme are made by the Department of Immigration and Citizenship (DIAC), from other organisations, or self-referrals (every asylum-seeker is informed of the programme by letter).<sup>379</sup> In FY2009-10, there were 1,797 new cases entering the programme, and another 1,464 cases that closed during the same period.<sup>380</sup> The ARC indicated that the rate of persons absconding from the programme was ‘negligible’.<sup>381</sup> The low absconding rate could be attributed to the assistance component of the programme, as well as the fact that many participants have referred themselves to the programme.

#### **(b) Hotham Mission**

Despite the existence of government-funded alternatives, there remain many persons who fall through the gaps of support and supervision. The ARC is the only funded delivery agency of the formal A2D programmes. In contrast, Hotham Mission (HM) is one of a number of non-governmental organisations in Australia that operates a programme for those who are not covered by the formal programmes. HM replicates CASP (outlined below), but for those who are not eligible for that programme. It is described as an ‘independent case management model’, working collaboratively with DIAC, but independently of it. One of its main aims is to avoid destitution of asylum-seekers in the community, which has been identified as an increasingly serious issue in Australia.<sup>382</sup>

HM staff accompany clients to interviews and meetings at DIAC, and provide immigration advice, assistance in finding housing in the community, and referral to other services. At present the programme supports 220-250 clients. They employ five ‘case managers’ who are each responsible for between 25-30 cases. HM provides a small allowance of \$33 AUD per person per week if the client has no other form of income support. HM has its own housing stock (20 houses), but this is generally seen

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<sup>375</sup> *Immigration Detention in Australia: Community-based Alternatives to Detention*, p. 38-39.

<sup>376</sup> *Ibid.*

<sup>377</sup> *Ibid.*

<sup>378</sup> Interview, Australian Red Cross, Melbourne, September 2010.

<sup>379</sup> Interview, Australian Red Cross, Melbourne, September 2010.

<sup>380</sup> Australian Red Cross, Annual Program Analysis FY2009-2010, Migration Support Programs, November 2010. There was no breakdown of how the closed cases had been resolved.

<sup>381</sup> Interview, ARC, Melbourne, September 2010. No statistics were accessible at the date of writing.

<sup>382</sup> Hotham Mission Asylum Seeker Project, *Australia's Hidden Homeless: Community-based Approaches to Asylum Seeker Homelessness*, August 2010.

as insufficient to cover the needs.<sup>383</sup> In fact the shortage of housing in Australia was cited by several organisations as a real dilemma in making these programmes workable. The rate of ‘absconding’ is so minimal that HM can recall only one case that withdrew from the programme during the previous year. As noted by HM, the terminology of ‘absconding’ is not entirely accurate as it is a voluntary programme, and so it is more a matter of persons withdrawing from the programme than ‘absconding’ from it. This ought to be distinguished from whether they remain in contact with the immigration authorities, for which statistics were not available. Organisations like HM continue to operate these services because the official alternative programmes only deal with a small portion of the overall need.

#### 4.1.2 Hong Kong: Release on own recognizance with community support

Under pressure from a range of decisions that questioned the legality of detention policy in Hong Kong,<sup>384</sup> in 2008 the government revised its detention policy and indicated that each decision to detain must be based on the merits of each individual case. Under this new policy, the majority of asylum-seekers and torture claimants have been and are released from detention;<sup>385</sup> and while there is no set maximum limit in detention, the average length was said to be around 14 days in detention.<sup>386</sup> Released asylum or torture applicants are provided with a ‘recognizance’ document, which may be subject to a number of conditions, such as reporting to the nearest immigration office or payment of a bond. The ‘recognizance’ document is issued for periods usually between 6-8 weeks, which incentivizes a need to report regularly to obtain an extension. The ‘recognizance’ document does not however provide a legal status to individuals. For the purposes of Hong Kong law they remain ‘detained pending removal’ but they live in an alternative place of detention (that is, within the community).

This system of release is supplemented by a government-funded support service operated by the International Social Service (an NGO). Although the HK government

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<sup>383</sup> Interview, Hotham Mission, Melbourne, September 2010.

<sup>384</sup> Several of these cases were highlighted in Part B. Others include *Tan Te Lam v. Tai A Chau Detention Centre* [1997] AC 97 (PC), which involved the detention of Vietnamese asylum seekers of Chinese ethnic origin who had been refused refugee status but who could not be removed to Vietnam since the Vietnamese Government would not readmit those it did not consider to be Vietnamese nationals. The Privy Council held that if such removal could not be accomplished within a reasonable time period, then further detention was unlawful. In 1996, the Privy Council reversed a decision by the Court of Appeal and determined, in *Nguyen Tuan Cuong and Others and Director of Immigration and Others* [1996] 423 HKCU 1, that the Director of Immigration had not upheld his statutory duty under Part IIIA of the Immigration Ordinance by refusing to screen Vietnamese migrants who had arrived in Hong Kong from southern China. Taken from K. Loper, ‘Human Rights, *Non-Refoulement*, and the Protection of Refugees in Hong Kong’ (2010) 22(3) *International Journal of Refugee Law* 404-39.

<sup>385</sup> Hong Kong operates a two-tiered system in which persons can apply for asylum (and will be assessed by UNHCR, as Hong Kong is not a party to the 1951 Convention) or they can apply not to be returned owing to a fear of torture (Hong Kong is a party to the UN Convention against Torture and is thus responsible for processing these claims). On the Hong Kong system, see Loper, *ibid*.

<sup>386</sup> Interview, UNHCR, September 2010. Many individuals are still subject to detention for criminal offences as well as some immigration offences, although the latter has been challenged: see, *Mohammad Rahman v. HKSAR*, (2010) 13 HKCFAR 20, FACC 9/2009, 11-Feb-10. For more on the Hong Kong detention system, see [http://www.immd.gov.hk/a\\_report\\_08-09/eng/ch4/index.htm](http://www.immd.gov.hk/a_report_08-09/eng/ch4/index.htm).

disputes its responsibility over asylum-seekers,<sup>387</sup> they are absorbed within the support services operated by the government and ISS. These services include accommodation searches, the distribution of food and other material goods, reimbursement of transport costs, and counselling. The assistance is 'in-kind' and no money is passed over except reimbursement for travel expenses. Persons are housed within the community, and not within a large centre. There is no entitlement to work. The ISS supports 5,526 clients, and this is arguably the most expansive A2D programme worldwide.

The ISS is an extremely well-organised NGO, with staff specialised in the various aspects of the files. Individual case managers assess and determine the needs of each individual. The ISS aims to operate on the basis of one caseworker to every 135 clients. At present however the rate is 1:200 clients. It employs 38 caseworkers.<sup>388</sup> The ISS operates out of three different offices - two in Kowloon; one in New Territories. Like some of the other case management models studied, a contract is signed between ISS and the individual on their rights and responsibilities, and the contract is renewed every month. Failure to appear for two food collections will result in the agreement being terminated. Should persons fail to appear, there is no formal reporting between ISS and the government, although monthly statistics would reveal that food or other collection is down. The government reports that the absconding rate is very low, at approximately three per cent.<sup>389</sup>

The cost of the programme is \$108 HKD per person per day. Eighty-five per cent of this is on direct services with 15 per cent administration charge. The comparable cost of immigration detention was not available but it is estimated to be much greater.

Alongside the release scheme, the government has established what it calls 'enhanced administrative screening', in which it now operates a 'duty lawyer' service, provides legal aid to those without means, and has imposed some procedural regulations.<sup>390</sup> One of the issues in Hong Kong has been the slow processing of torture claims and in fact, there are 6,600 pending cases with an estimate of an additional 120 new cases every month in 2010 (this has been reduced from around 300 per month in 2009).<sup>391</sup> In fact, it is speculated that even with 300 duty lawyers, it will take 8-10 years to clear the backlog. The duration of asylum procedures is also lengthy, with the average processing time being between 8-12 months,<sup>392</sup> while unaccompanied minors may wait 5-6 months for a decision.<sup>393</sup>

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<sup>387</sup> The question of whether Hong Kong, a non-state-party to the 1951 Convention and the 1967 Protocol, has responsibility over asylum-seekers by virtue of the customary international law principle of *non-refoulement* is currently before the courts: *C v. Director of Immigration* [2008] HKCU 256 on appeal.

<sup>388</sup> ISS, Interview, September 2010.

<sup>389</sup> Interview, Security Bureau, Hong Kong Government, May 2010. They reported that about 100 out of 3000 persons abscond.

<sup>390</sup> *FB v. Director of Immigration* [2007] HCAL 51/2007, 5 December 2008.

<sup>391</sup> *Ibid.*

<sup>392</sup> Information supplied by UNHCR Hong Kong, 18 November 2010.

<sup>393</sup> Interviews, non-governmental organisations, Hong Kong, September 2010.

## 4.2 Hybrid government-NGO cooperation or partnership models

### 4.2.1 Australia - Community Assistance Support Programme (CASP) (formerly, Community Care Pilot (CCP))

In addition to the ASAS programme operating in Australia, the CCP was developed in 2005 to provide health and welfare support and assistance to persons with particular needs (or ‘exceptional’ or ‘vulnerable’ cases).<sup>394</sup> The rationale behind the pilot was that if you treat persons fairly, they are more likely to engage with the immigration process and the resolution of their cases will be more efficient.<sup>395</sup> There are four ‘guiding principles’ to the programme: fair and reasonable dealings with clients; duty of care to individuals; informed departmental and client decisions; and timely immigration outcomes.<sup>396</sup> The emphasis of the programme is on ‘case management’, which means the assignment of a DIAC ‘case manager’ for each individual case who is responsible for the person’s file, including support and preparation for all immigration outcomes as well as welfare issues.<sup>397</sup> This might include referral to one of the other three actors in the programme, namely the Australian Red Cross which is delegated responsibility for health and welfare; a legal provider where eligible; and/or to the International Organization for Migration (IOM) for counselling and assisted voluntary return (AVR).

Participation in the programme is based on eligibility criteria centred around ‘vulnerability’.<sup>398</sup> Non-vulnerable persons are eligible instead for the Community Status Resolution Service (described under ‘Complementary measures’ below). The programme also applies to recognised refugees released from immigration detention, as a form of transition support to aid their integration into the community.<sup>399</sup> Importantly, the ARC and other actors do not have a role in approving or rejecting cases. The ARC stated that it does report on persons who consistently fail to appear, but it does not ‘chase them’ (that is considered the role for the government

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<sup>394</sup> Australian Government, Department of Immigration and Citizenship, Fact Sheet 64 – Community Assistance Support program, 30 September 2009.

<sup>395</sup> Interview, DIAC, Melbourne, September 2010.

<sup>396</sup> International Detention Coalition, email exchange, December 2010.

<sup>397</sup> In some ways, the assignment of a ‘case manager’ is not unlike the United Kingdom’s ‘new asylum model’ (NAM) in which the Home Office assigns a ‘case owner’ who is responsible for dealing with all aspects of their case from initial interview to final integration or removal. The NAM was introduced in 2007. The difference is that the ‘case manager’ in the UK has been limited to the refugee status determination process and later integration or removal; rather than related necessarily to other needs or services. Furthermore, case owners are assigned for those inside and outside detention; see, Immigration Law Practitioners’ Association, Information Sheet: New Asylum Model, 5 Mar. 2007.

<sup>398</sup> Eligible persons will generally indicate one or more of the following ‘vulnerabilities’: living with the effects of torture and trauma; experiencing significant mental health issues; living with serious medical conditions; incapable of independently supporting themselves in the community (for example, if elderly, frail, mentally ill, disabled); facing serious family difficulties, including child abuse, domestic violence, serious relationship issues, child behavioural problems; suicidal: Australian Government, Department of Immigration and Citizenship, Fact Sheet 64 – Community Assistance Support program, 30 September 2009.

<sup>399</sup> *Ibid.*

enforcement agency).<sup>400</sup> The pilot operated in Victoria, New South Wales and Queensland;<sup>401</sup> and has now been accepted as a programme.

Participation in the programme is voluntary.<sup>402</sup> The programme consists of an assessment of the individual's needs and circumstances in order to tailor support, which might include any or all of the following:

- Help with basic living expenses.
- Help with finding suitable accommodation. The ARC will verify the suitability of the accommodation and make periodic spot checks. Individuals are then responsible for making rental payments.
- Essential healthcare and medical expenses.
- Counselling.
- Other help to meet basic health and welfare needs. An emergency fund is available to provide 'one-off' assistance, such as crisis accommodation or emergency hospitalisation and ambulance expenses.<sup>403</sup>

Between May 2006 and 30 June 2008, the pilot assisted 746 persons in various ways. The most common nationalities in the pilot were Chinese, Sri Lankan, Fijian, Indonesian, Indian and Lebanese.<sup>404</sup> Evidence suggests that many more persons are in need of this assistance than are currently eligible under the programme as discussed above. In FY2009-10, the programme dealt with 184 cases, of which 102 were closed during the same reporting period. Of the closed cases, 38 per cent were granted visas, eight per cent departed voluntarily and one client was involuntarily removed.<sup>405</sup>

The CCP has yielded a 94 per cent compliance rate over a three-year period.<sup>406</sup> For all those on 'bridging visas' of any kind, including those not being directly assisted by these programmes, the compliance rate was 'about 90 per cent' in 2009-10.<sup>407</sup> In addition, 67 per cent of those found ineligible for a visa voluntarily departed Australia without recourse to detention.<sup>408</sup> According to the International Detention Coalition (IDC), the two essential features of 'case management' programmes are early intervention and individual assessment of needs.<sup>409</sup> The Australian government has moved from a "one-size-fits-all" enforcement model to individual case and risk management model' and the success is obvious.<sup>410</sup> The IDC describes the 'case management model' as follows:

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<sup>400</sup> Interview, Australian Red Cross, Melbourne, September 2010. According to the ARC, this has caused some concerns relating to one of its key founding principles, confidentiality, but has overall been seen as a necessary component of the program.

<sup>401</sup> *Immigration Detention in Australia: Community-based Alternatives to Detention*, p. 36.

<sup>402</sup> DIAC, Fact Sheet 64 – Community Assistance Support program, 30 September 2009.

<sup>403</sup> *Ibid.*

<sup>404</sup> *Immigration Detention in Australia: Community-based Alternatives to Detention*, p. 37.

<sup>405</sup> ARC, Annual Program Analysis FY2009-10, p. 13. There was no further explanation of what happened to the remaining closed cases.

<sup>406</sup> International Detention Coalition, *Care Management as an Alternative to Immigration Detention: The Australian Experience*, June 2009, at p. 1, available at: <http://idcoalition.org/wp-content/uploads/2009/06/casemanagementinaustralia.pdf>.

<sup>407</sup> DIAC, Annual Report 2009-10, p. 171.

<sup>408</sup> IDC, *Case Management as an Alternative to Immigration Detention: The Australian Experience*.

<sup>409</sup> *Ibid.*

<sup>410</sup> *Ibid.*

Case management is a comprehensive and coordinated service delivery approach widely used in the human services sector as a way of achieving continuity of care for clients with varied complex needs. It ensures that service provision is ‘client’ rather than ‘organization’ driven and involves an individualized, flexible and strengths-based model of care. Case managers are often social workers and welfare professionals, but are also people who are skilled and experienced in the particular sector where the case management approach is being used.<sup>411</sup>

Three stages are identified in the case management process: the initial needs assessment; the development of a plan to meet those needs; and continual monitoring and engagement.<sup>412</sup> From the government’s perspective, case management is a means of managing migration within the community. It facilitates voluntary returns, while treating persons with dignity and ensuring a minimum level of assistance and support. The programme is based on early intervention principles, and all possible outcomes are on the table, not only return, an approach which has been found to assist with voluntary return. This is not dissimilar to the Belgium experience (described at 4.3.1). In many ways, the Australian programme is based on the Swedish model of releasing families with children into shared housing,<sup>413</sup> although it is acknowledged that many other countries operate similar management systems.<sup>414</sup> Other ‘case management’ models have had similar rates of success in terms of very high compliance (and cooperation) rates.<sup>415</sup>

### **4.3 Government-run models**

#### **4.3.1 Belgium’s ‘Return Houses’<sup>416</sup>**

In October 2008 Belgium established two ‘return houses’, which were aimed at facilitating the return of families with minor children who had no right to remain in Belgium - without having recourse to detention. Many of these cases come to the

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<sup>411</sup> IDC, *Case Management: the Australian Experience*, p. 4.

<sup>412</sup> *Ibid.*

<sup>413</sup> IDC, *Case Management: The Australian Experience*.

<sup>414</sup> E.g. see Belgium below. IDC also mentions, inter alia, the UK’s Milibank Alternative to Detention Project and the New Asylum Model, and the Vera Institute in the US: IDC, *Case Management: The Australian Experience*, at p. 5.

<sup>415</sup> The Vera Institute of Justice, for example, had a 93 per cent appearance rate: Field and Edwards, *Alternatives to Detention*, Annex on United States. See, Table 1.

<sup>416</sup> Note that Belgium also operates two ‘Observation and Orientation Centres’ for unaccompanied and separated children in which they are provided with specialised care, maintenance, education and assessment in an open centre for the first 15 days of their stay before being transferred to a reception centre and other local places with appropriate facilities for minors. However, due to a shortage of places, at the end of April 2010, 134 minors were still accommodated together with unrelated adults: *Arrêté royal du 9 Avril 2007 déterminant le régime et les règles de fonctionnement applicables aux centres d’observation et d’orientation pour les mineurs étrangers non accompagnés*, Official State Gazette, 7 May 2009. In addition, there have been recent discussions in parliament on extending the non-detention philosophy to families with children in an irregular situation (proposed new Article 74/9 of the *Aliens Act*). Discussions in parliament are ongoing based on proposals of law introduced in 2007-2008 by the Flemish Christian Democrats. Pointedly there is no clear prohibition on the detention of unaccompanied minors. Rather, it is merely stated in the Belgian law on reception that unaccompanied minors are to be housed in an ‘Observation and Orientation Centre’, but no principle of non-detention as such is explicit in the law.

notice of the authorities via arrest by the police on the basis of a lack of documentation, via the Aliens Office upon expiry of the final order to leave Belgium following exhaustion of asylum procedures, or after the delivery of an order to leave Belgium in the context of Dublin II-procedures.<sup>417</sup> The return-only focus was later revised to include an examination of whether there were any lawful means in which families could remain.<sup>418</sup> Counter-intuitively, and similar to findings in Australia, this more holistic approach of examining all legal avenues to stay has had the effect of increasing the number of families returning voluntarily.<sup>419</sup> It also has had the consequence of lowering the number of families absconding. According to the ‘coaches’, this has occurred because families ‘felt listened to’.<sup>420</sup>

In October 2009, the programme was expanded to include asylum-seeker families with children arriving at the border. Ordinarily, and almost without exception, asylum applicants at the border would be detained in a transit centre (Centre 127) throughout the asylum procedure. This law contains a two month maximum period of detention before release must be ordered if the asylum claim is still pending. If an asylum claim is rejected, the detention may be extended for two months plus a one further month (2+1).<sup>421</sup> It has been reported that this so-called five-month maximum period is frequently flouted for persons refusing to embark and re-detention is ordered and the time clock recommences.<sup>422</sup> UNHCR calculated that about 30 per cent of all detainees in Belgium in 2009 were asylum-seekers.<sup>423</sup> Most ‘border case families’ transferred to the ‘return houses’ had applied for asylum upon arrival at the border,<sup>424</sup> and of these, latest figures indicate that around 50 per cent have since obtained refugee status.<sup>425</sup> This is to be compared to the average asylum success rate of 26.85 per cent for Belgium as a whole.<sup>426</sup>

For the purposes of Belgian law, families staying in the ‘return houses’ are still ‘detained’.<sup>427</sup> In reality, however, they are free to come and go as they please. There is a 10 p.m. to 8 a.m. curfew, although there is no 24-hour presence at the return houses except one ‘coach’ (described below) is ‘on call’ by phone each evening. The third category of persons housed in the return houses is Dublin II cases.

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<sup>417</sup> Interview, Coaching Staff, Tubize, Belgium, 7 June 2010.

<sup>418</sup> This was partly driven by the realisation by the coaching staff that some of the families had not applied for regularisation under various ad hoc schemes, yet would have benefited from such schemes: Interview, Coaching Staff, Coaching Staff, Tubize, Belgium, 7 June 2010.

<sup>419</sup> Initially when the focus was purely on return, only 10 per cent of families returned voluntarily. After this was expanded to include advice in relation to all possible avenues for stay, the return rate increased to 30 per cent: Interview, Coaching Staff, Tubize, Belgium, 7 June 2010.

<sup>420</sup> Interview, Coaching Staff, Tubize, Belgium, 7 June 2010.

<sup>421</sup> See, Comité Belge D’aide aux réfugiés (BCAR), *Fiche d’aide juridique*, 6 August 2009, available at: <http://www.cbar-bchv.be/InformationJuridique/NotesJuridique/Detention&Vulnerabilite.pdf>.

<sup>422</sup> This is likely to amount to indefinite and therefore unlawful detention as the time limits become meaningless: see Part B of this study.

<sup>423</sup> Communication with UNHCR Belgium, November 2010.

<sup>424</sup> Of the other 11 cases in which there was a decision 5 obtained protection status and 6 were rejected: Verbauwheide, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, a discussion paper for EU Asylum Conference 13-14 September 2010, p. 4.

<sup>425</sup> Coaching Staff, Tubize, Belgium, 7 June 2010 (note that these are not official statistics).

<sup>426</sup> UNHCR, statistics for 2009 (note that this figure does not include the rate of acceptance for subsidiary protection).

<sup>427</sup> This is not dissimilar to Australia’s ‘community detention’ in which persons are released into the community but are considered ‘detained’ for legal purposes: see, *Immigration Detention in Australia: Community-based Alternatives to Detention*, p. 24.

There are three ‘return houses’ in Belgium, in Zulte, Tubize and Sint-Gillis-Waas. The capacity is 6 units in an apartment block in Tubize, 3 houses in Zulte and 5 houses in Sint-Gillis-Waas. The capacity is therefore limited, but expansion plans are previewed.<sup>428</sup> The houses are located in the community, in apartments provided by and serviced by the state.<sup>429</sup>

In so far as the families pending removal are concerned, the ‘return houses’ are rightly considered to be alternatives to pre-removal detention. The state has the power to detain individuals provided their return is reasonably foreseeable.<sup>430</sup> However, do they operate as A2Ds for families seeking asylum? Or, are the return houses merely being used as another accommodation (or control) facility, as many of these families ought to be or could be released without conditions, or otherwise housed in the open reception centres operating in Belgium? Asylum-seekers who enter Belgium illegally or legally (*sur place* claims) and who are found in the community, for example, are generally not detained, but are rather housed in open accommodation centres.

The principal objective of the ‘case management’ model of the Belgium ‘return houses’ is ‘to prepare families ... for all possible immigration outcomes, whether return or legal stay.’<sup>431</sup> Belgium’s case management model is distinguished from the community-based alternatives in Australia and Hong Kong, because it is run and is administered by the government, rather than delegated to civil society groups. This distinction may well be a factor why the compliance rate is lower in Belgium than in Australia or Hong Kong, and is at least calls for further investigation. One could speculate, for example, that the lack of arms-length in the government-run models could create suspicion among those in the programme.

The ‘case management’ feature of the return houses entails a number of dedicated ‘coaches’ who are on-site to explain to the families the removal process and to look into any potential legal options to stay, to oversee the houses, to distribute goods and other items, to inform them of the rules of the houses, and to make appointments with

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<sup>428</sup> Since September 2010, the project was extended to 5 housing units in St. Gillis-Waas (Flanders). In Dentergem (near Zulte), 3 more units have been identified, but for now, there does not seem to be any prospect these will be used due to administrative problems: Information, Belgium NGO, November 2010.

<sup>429</sup> According to a recent report, the right to freedom of movement is subject to specific rules: for example, they are entitled to visit their lawyer, take their children to school, buy groceries and participate in religious celebrations: Verbauwhede, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, a discussion paper for EU Asylum Conference 13-14 September 2010, p. 2. During my visit to the return houses, any rules that did exist operated in a very informal manner, in which almost complete freedom of movement was enjoyed by the families. There was no formal reporting to the office, for example, when persons were leaving the centre for daily activities, and there were no daily checks that families were still in their apartments: Interview, Return House staff, 7 June 2010.

<sup>430</sup> See, Part B of this study.

<sup>431</sup> Verbauwhede, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, a discussion paper for EU Asylum Conference 13-14 September 2010, p. 5. Initially the approach was merely to focus on returns, however, it was felt that better cooperation with the families would be ensured if it was a holistic approach to their situation. While some of the families have been permitted to remain under regularisation exercises, it does beg the question about the nature of procedures up to this point if 33 of the 106 families (i.e., 31 per cent) who have passed through the houses have been given permission to remain, either permanently or temporarily, including on medical grounds, new asylum claims, temporary non-removable grounds, court decision, or refugee/subsidiary status.

relevant actors, not least lawyers, the immigration authorities, medical practitioners, etc. Appointments are also made with IOM, which informs the families of the various voluntary return packages. The families receive a weekly allowance per family, and various non-food items, such as sanitary, baby and cleaning products are supplied on-site. The families and the coaches enter into a 'contrat de confiance', which is based on mutual respect and the idea of 'conditional liberty' based on observing the rules of the house. Although the coaches are employed by the Immigration Office, and so are not independent of the government, they claim to have had success in achieving the confidence of the families. The coaches indicate that they are able to tell within the first 24 hours whether families will cooperate in the process, or abscond.<sup>432</sup> The coaches have an obligation to inform the immigration authorities should a family disappear from the houses.

The Belgium return houses are to be congratulated for their attempts to get families with minor children out of detention; however, they also raise questions about whether some families should be in this programme at all. The fact that 30 per cent of families found other legal avenues to remain in Belgium raises questions around the state of the Belgium migration system – why were families only aware of the various avenues for legal stay in Belgium at such a late stage? Why does this level of counselling occur only after a removal order has been issued, or families have been picked up in Belgium by the police? This points towards a need for a more comprehensive approach around earlier intervention and access to legal advice throughout the asylum procedure (see 'complementary measures' below).

One of the main distinctions between the Australian and Hong Kong approaches on the one hand, and the Belgium 'Return Houses' on the other is that specially designated housing is provided in the latter, rather than subsuming families within the community or private housing sector. Even though the government is motivated by the view that the 'return houses' represent a 'break from life as normal' and that this assists in preparing families for return ('they know we are serious about their removal'<sup>433</sup>), it is not clear that there is any evidence (yet) to prove this true.

It raises the question whether the 'coaching' services could be performed in the community or in an open reception centre at an earlier stage, rather than putting families through the extra disruption of moving them (sometimes from reception facilities), especially with children in school, and not least the extra cost of doing so.<sup>434</sup> There are many asylum-seeking families who are not detained in Belgium, and who are assigned to various accommodation centres run by, variously, the Red Cross, the state, local initiatives, or other non-governmental organisations.<sup>435</sup> It is not clear on what basis this two-tier system is justified in Belgium. As soon as asylum-seeking families have had their identification verified, they could be transferred to these open

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<sup>432</sup> Interview, Coaching Staff, Tubize, Belgium, 7 June 2010.

<sup>433</sup> Interview, Coaching Staff, Tubize, Belgium, 7 June 2010.

<sup>434</sup> In the Belgian context, coaching in the earlier phases would not then be performed by the Immigration Office (since it would not yet be in the phase of forced removal), but by Fedasil, which is responsible for reception and social assistance to asylum seekers during their procedure, and for voluntary return after their procedure.

<sup>435</sup> None of these accommodation centres were visited. N. Chmelickova (ed.), *Survey of Alternatives to Detention of Asylum Seekers in EU Member States*, 2006, available at: <http://www.detention-in-europe.org/>.

accommodation facilities, rather than to the ‘return houses’.<sup>436</sup> Flemish Refugee Action and nine other Belgium NGOs have also recommended that these housing units need to be part of a broader policy of counselling on legal stay and return, which should commence at the start of the asylum process, or on first contact with the authorities. This would mean that the coaching could occur in other reception and/or detention facilities.<sup>437</sup>

Not unlike detention, it does mean that the whereabouts of families scheduled for removal are known to the authorities and theoretically, they are therefore available for removal; however, this could also be achieved via regular reporting of addresses, especially for families returning voluntarily.

The average period of stay in the return houses is 21.4 days. This may increase with the inclusion of asylum-seeking families, as the usual period for an asylum claim to be heard in Belgium is between 6-8 months.<sup>438</sup> However, the average time for a decision for asylum seeking families who were recognized as refugees while staying in the housing units was in fact 24 days. This is considered ‘exceptionally fast’ however, and will be longer if any appeals are lodged.<sup>439</sup> Again, it raises the question whether these families could not be accommodated in the community generally. The ‘return houses’ in this sense operate as a form of ‘designated residence’.

Over an almost 2-year period (1 October 2008-2 September 2010), 106 families, with 189 minor children, have stayed in the family units. Of the 99 families over the same period who have departed the return houses, 46 families have returned to their countries of origin or been transferred to a third country (46%);<sup>440</sup> 19 families absconded (19%); 33 families were released into the community for various reasons (33%);<sup>441</sup> and 1 child was released to open centre for minors.<sup>442</sup> As at 18 June 2010, of the 90 cases who departed the return houses until that date, 44 were part of the illegal staying or original group (39%), 30 were in the Dublin procedure (33%) and 16 were border asylum cases (18%).<sup>443</sup>

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<sup>436</sup> One advantage of the ‘return houses’ for asylum applicants appears to be the higher rate of asylum success (as noted in the text above). This might be due to special guidance (‘coaching’) on how to navigate the asylum process and appointments made with lawyers.

<sup>437</sup> Flemish Refugee Action and nine other NGOs, *An Alternative to Detention of Families with Children: Review of One Year of Operation*, December 2009.

<sup>438</sup> Information, Belgium NGO, November 2010.

<sup>439</sup> Information, Belgium NGO, November 2010.

<sup>440</sup> Of these, 15 returned with the support of IOM; 18 Dublin II cases; 1 transferred on the basis of a bilateral agreement; 5 ‘forced’ removals; and 7 border cases refusals: Verbauwhede, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, p. 3.

<sup>441</sup> The reasons included regularization, medical grounds, new asylum claim, temporary non-removable status, court decision, refugee/subsidiary status: Verbauwhede, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, p. 3.

<sup>442</sup> This was because it was established that the child was not related to the adult who was accompanying the child: Verbauwhede, *Alternatives to Detention for Families with Minor Children – The Belgian Approach*, p. 3.

<sup>443</sup> Information, Belgium NGO, November 2010.

### 4.3.2 Glasgow: ‘Family Return Project’

While the majority of asylum applicants are not detained in the UK, many are detained during the initial stages for identity or security checks,<sup>444</sup> or during accelerated procedures; and until mid-2010 there were an estimated 2,000 children in detention for immigration purposes each year.<sup>445</sup> Except for children in transit, it is reported that all children have now been released from detention under the coalition government’s commitment to end the detention of children.<sup>446</sup> Detention has also formed a regular part of return operations in the UK,<sup>447</sup> although a recent study indicates that the majority of detained immigrants are not deported thus raising questions of indefinite and therefore arbitrary detention.<sup>448</sup> According to the UK Border Agency’s (UKBA) *Operational Enforcement Manual* (OEM), there are three ‘alternatives to detention’ in the UK: temporary admission, release on restrictions, or bail. The distinction between these three options is that temporary admission and release on restrictions may be ordered prior to any detention being imposed, whereas bail is granted only after one has already been detained.<sup>449</sup> These are not discussed here. The OEM provides that A2Ds should be used wherever possible so that detention is used only as a measure of last resort and, further, that there should be a presumption in favour of temporary release.<sup>450</sup> Despite these provisions, the UN Human Rights Committee has observed that, in practice, A2Ds are applied only when detention space is unavailable, and that detention is frequently used for mere administrative convenience.<sup>451</sup> Moreover, there is no statutory limit on periods in detention, leading to regular judicial and costly review of detention.<sup>452</sup>

There have also been a number of projects piloted in the UK, of which the Glasgow ‘family return project’ is but one example.<sup>453</sup> The UKBA’s Glasgow pilot is similar to

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<sup>444</sup> See, e.g., *Saadi v. UK*.

<sup>445</sup> Edwards, *Thematic Legal Study: United Kingdom*.

<sup>446</sup> According to the UK Border Agency, approximately 12 children are in detention each month. However, these children are not asylum-seekers and are said to be awaiting return or are in transit zones at the airport awaiting immediate return to their countries of origin. Information supplied to the author, London, November 2010. On the commitment, see *The Coalition: Our Programme for Government – Freedom, Fairness, Responsibility*, May 2010, 17: Immigration, p. 21, available at: <http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf>.

<sup>447</sup> The UK also has a system of assisted voluntary return options, which it implements in conjunction with the IOM: see Edwards, *Thematic Legal Study: United Kingdom*.

<sup>448</sup> London Detainee Support Group, *No Return, No Release, No Reason: Challenging Indefinite Detention*, September 2010, available at: <http://www.ldsg.org.uk/files/uploads/NoReasonReport0910.pdf>.

<sup>449</sup> UKBA (2008) *Operational Enforcement Manual*, Ch. 55.20. For more on the UK detention pending return process, see Edwards, *Thematic Legal Study: United Kingdom*.

<sup>450</sup> UKBA (2008) *Operational Enforcement Manual*, Chs. 55.1.1, 55.20; UK Home Office (1998) *Fairer, Faster, Firmer: A Modern Approach to Immigration and Asylum*.

<sup>451</sup> UN Human Rights Committee (HRC) (2001) *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/CO/73/UK and CCPR/CO/73/UKOT, 6 December 2001, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.73.UK:CCPR.CO.73.UKOT.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.73.UK:CCPR.CO.73.UKOT.En?Opendocument) (25.06.2009).

<sup>452</sup> See, cases mentioned in Part B of this study.

<sup>453</sup> Other pilots included the Milbank Project in Kent 2007-2008 and the Liverpool Key Worker pilot (April 2009-March 2010); the latter is described under ‘complementary measures’. There is also

the Belgium ‘return houses’, but with somewhat different results. Like the Belgium project, the aim of the project in Scotland is ‘to reduce the need for enforced removal and detention in Scotland’.<sup>454</sup> It aims to encourage refused asylum-seekers to return voluntarily to their countries of origin by providing ‘intensive family support focused on helping families make sense of their stay in Scotland, confronting issues delaying a return and building up skills and preparedness for a voluntary return.’<sup>455</sup> The project is for families only and makes provision for 4-5 families to be accommodated at any one time in self-contained, open flats. The project notes that many more families will be eligible than can be accommodated within the project. The central feature of the pilot is described as ‘intervention’.<sup>456</sup>

Both the Belgium (as explained above) and Glasgow projects buy into a view that the ‘coaching’ or counselling on return options could not occur in the families’ habitual homes and that moving families to a new residence facilitates return, as it acts as a ‘break’ with ‘life as normal’ and ‘makes families serious about their return’.<sup>457</sup> The Glasgow pilot project has yet to bear this out on the evidence. In its first year in operation, not a single family has voluntarily returned from the ‘return houses’.<sup>458</sup> This could be attributed to many factors, some are highlighted here.<sup>459</sup>

First, unlike Belgium, the whereabouts of the return houses in Glasgow are well known among immigrant communities and are located close to their previous residences – as families move into and out of the houses and back into the

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another project of which I am aware in the East Midlands, but documentation about it is virtually non-existent.

<sup>454</sup> Memorandum of Understanding – Family Return Project, Glasgow City Council, UK Border Agency and the Scottish Government, final version May 2009 (on file with the author).

<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.*

<sup>457</sup> Interview, UKBA, Glasgow, July 2010.

<sup>458</sup> Interview, UKBA, Glasgow, July 2010. See, also, the Ashford pilot in which only one family voluntarily accepted to be removed within nine months and the Clan Ebor project in Yorkshire and Humberside which did not see a return of any of its 60-family caseload: IOM, Submission to the Child Detention Review, 22 June 2010. The IOM reported that in 1999, the IOM assisted more than 34,000 persons to return to their countries of origin, of which 79 per cent were single men. It is not clear why the IOM relied on 1999 statistics in their submission. More recent statistics include that in 2007-2008 (August 2007 – July 2008), 2702 persons were returned under the VARRP and 1598 under the AVRIM programmes respectively. The *Voluntary Assisted Return and Reintegration Programme* (VARRP) is aimed at asylum-seekers (including failed asylum-seekers) and their dependents, including persons whose claims are still pending, whose claims have been rejected and who have either exhausted all appeal options or who are in the process of appeal, or persons who fall within one of these categories and is in detention on immigration offences. It also applies to asylum-seekers who have been refused asylum but granted discretionary leave to remain. The *Assisted Voluntary Return for Irregular Migrants* (AVRIM) Programme generally applies to persons and their dependents who have entered or stayed in the UK illegally, as well as persons who are accepted by the UK Border Agency (UKBA) as victims of trafficking. The majority of the applications under VARRP were from single applicants (94.83 per cent) who were typically male (nearly 83.69 per cent). For the AVRIM over the same period, the majority of the applications (84.64 per cent) were from single applicants (56 per cent male; 44 per cent female): Information supplied by IOM, London, and cited in Edwards, *Thematic Legal Study: United Kingdom*. In 2009, only 14 per cent of returns of asylum-seekers and migrants from the UK were made through one of these schemes: Home Office, Control of Immigration: Quarterly Statistical Summary, United Kingdom, December 2009, London: Office of National Statistics, cited in The Children’s Society and Bail for Immigration Detainees, ‘Review into ending the detention of children for immigration purposes: Response’, 1 July 2010.

<sup>459</sup> These are my the author’s own initial observations. A proper evaluation of the project has not yet been conducted.

community, it might be that the message soon gets around that return does not occur and thus encourages resistance to return. Second, moving families to houses near to their previous accommodation hardly acts as a 'break' with the past, but rather may ring of another administrative obstacle (even an abuse of power) to their stay and that they are not being treated with dignity.<sup>460</sup> Third, a widely criticised pilot project conducted in Milibank, Kent between 2007-2008, cautioned that the selection of families is particularly crucial.<sup>461</sup> It is not clear that proper lessons have been learned from that pilot. The eligibility criteria for the Glasgow project appear to relate to external factors rather than suitability for such an 'intervention'.<sup>462</sup> The social workers in the Glasgow pilot recounted that most of the families within the project feel that they were poorly, if not unfairly, treated within the asylum procedure and are not therefore willing to engage in discussion about return, but are rather looking for other ways to remain.<sup>463</sup> The view of the social workers is that the families in the pilot found the asylum procedure particularly disempowering, and so were not ready to be 'empowered' by making decisions about their return. Moreover, there is no limit on the number of judicial review applications one may lodge in Scotland (cf. England and Wales), so some of the participants in the programme later lodged new judicial review applications and were therefore released back into the community from the 'return houses'. One of the eligibility criteria is that the family is at the end of the road with no other stay options.

A fourth, related factor is that the 'return only' focus ought to be expanded to include all other legal avenues to stay, otherwise it does not lead to constructive engagement (as was expanded in the Belgium pilot to improve return and compliance rates; the case management approach in Australia also focuses on other legal avenues to remain). A fifth difficulty observed is that the caseworkers in this pilot are government social workers, who indicated that they felt a conflict between the 'ethics of social work' and the enforcement of returns. Thus, it is not clear that the 'social work' model is necessarily the right one for this type of programme, where families are not necessarily seeking counselling for social issues, but rather real guidance on their legal options. A further concern is that the pilot appears less designed as an A2D project (that moved families out of detention or avoided detention for particular families), than a removal project. While some of these families would become eligible to be detained pending a forced removal (subject to the necessary legal safeguards outlined in Part B of this study), most of the families were not yet subject to detention pending removal orders. A further distinction with the Belgium project is that families

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<sup>460</sup> Without empirical research into the reasons why families have not cooperated with the project, this view is purely speculative and deductive.

<sup>461</sup> In fact, the Milibank Pilot was criticised for failing (a) to reduce the number of children going through detention and (b) to improve the rate of voluntary return. In particular an evaluation highlighted how families were inappropriately referred to the project, including those who were not able to return to their country of origin for a variety of reasons and so made the job of those running the pilot virtually impossible: See, e.g., The Children's Society, *An Evaluative Report on the Milibank Alternative to Detention Pilot*, Milibank, Kent 2007-2008, June 2009, available at: [http://www.childrenssociety.org.uk/whats\\_happening/media\\_office/latest\\_news/17137\\_pr.htm](http://www.childrenssociety.org.uk/whats_happening/media_office/latest_news/17137_pr.htm).

<sup>462</sup> The eligibility criteria include having at least one minor dependant; have exhausted appeal rights; no history of violent behaviour or inclination towards violence; no medical problems requiring significant medical intervention; no child at risk under child protection arrangements; no child sitting examinations within the next three months; be removable; be eligible for assisted voluntary return through IOM; be accommodated in Glasgow and on s.95 support: Annex A to Memorandum of Understanding – Family Return Project.

<sup>463</sup> Interview, Social workers, Glasgow Family Return Project, Glasgow, July 2010.

are expected to stay in the return houses for 3 months (cf. the average length of stay in the Belgium ‘return houses’ being 21 days). This has meant that there is limited urgency to the assessment and planning stage relating to their return, a lack of a sense of urgency nor imminence of return, and that the process towards return is arguably drawn out.<sup>464</sup> An earlier intervention in their normal accommodation facilities would arguably be a more humane and more efficient use of resources.

Overall, it is too early to assess the Glasgow pilot as to its two objectives: to increase voluntary removals and to reduce detention of families. In relation to the former, no voluntary returns had occurred at the date of writing. In relation to the latter, it is not clear that it really operates as an A2D, rather than another step in the removal process. What is clear though is that further research is needed, including the reasons why families are not willing to engage in the project.<sup>465</sup> Many NGOs have called for improvements in the asylum system as a whole, which they argue would improve engagement with at each of the stages of the process, including at the end. Improvements could incorporate better and earlier information and legal advice to individuals and better access to voluntary return options (see, e.g., Liverpool project at 9.2 below).

Many NGOs have also indicated that the negligible absconding rates of families with children<sup>466</sup> means that detention serves no useful purpose and is thus unnecessary.<sup>467</sup> Its use as a deterrent is also widely criticised, and, as indicated elsewhere in this study, has no empirical basis. These views also call into question the basis for promoting and developing more formalised A2Ds in the UK, such as the family return project, rather than rely on existing alternatives, such as release on bail, including release on no or limited conditions (and the expansion and improvement of access to bail options), release on restrictions and temporary admission; or for families who are not detained, their continued residence in the community with counselling provided there. Instead, the real challenge appears to be how to get families who have exhausted legal avenues to remain in the UK to engage in the return process. This is a separate, albeit related, question to that of immigration detention and its alternatives. One solution has been to make improvements in the asylum process and thus build confidence in the system as a whole.<sup>468</sup> Another response is to ensure that families

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<sup>464</sup> Some NGOs disagree with this position and suggest that families need sufficient time to prepare for return. My own view (and shared with the social workers) is that three months is too long, and may hinder rather than foster returns. A period between 14 days and 30 days would seem optimal.

<sup>465</sup> Some research has been conducted into why detainees have not engaged with return processes by Bail for Immigration Detainees and the Children’s Society, which indicated that for families, the main imperative to cooperation has been child welfare considerations: Submission, ‘Review into ending the detention of children for immigration purposes: Response’, 1 July 2010

<sup>466</sup> See, also, Oral evidence given by Dave Wood, UKBA to the Home Affairs Committee 16 September 2009, HC 970-I (Question 25), cited in Medical Justice submission. The general rate of absconding for asylum-seekers has also been found to be negligible in the UK. South Bank University’s study in 2002 traced the compliance rates for 98 asylum-seekers released on bail between July 2000 and October 2001 and found that 90 per cent satisfied the conditions of their bail, despite having been originally detained because of an allegedly high risk of absconding: I. Bruegel and E. Natamba, *Maintaining Contact: What happens after detained asylum seekers get bail?*, South Bank University, 2002.

<sup>467</sup> Medical Justice submission.

<sup>468</sup> It is beyond the scope of this paper to examine this proposal in-depth, but it is based on the theory that a fairer and more humane asylum system will facilitate voluntary return for those families not entitled to remain in the UK: see, Liverpool Key Worker Project, discussed below. Other systems, such

remain entitled to social security support, which in turn encourages their engagement with the authorities; or are given access to other rights, including the right to work, until removal. The Canadian model, for example, permits in most cases rights to work, which appears to encourage engagement with the authorities.

## **5. Designated residence**

Designated residence (or ‘dispersal’) is a common practice within the European Union.<sup>469</sup> It is permitted under the EU Receptions Directive (see legal analysis in Part B). Sweden, for example, operates a system in which persons are housed in communal houses and apartments;<sup>470</sup> and the UK disperses asylum-seekers to various municipalities within the country.

## **6. Electronic tagging and reporting, or satellite tracking**

At the extreme end of restrictions on liberty are options for electronic tagging and electronic reporting, or satellite tracking.<sup>471</sup> While the possibility to phone in could be less restrictive than appearing in person, the use of the other electronic methods of keeping track of a person’s movements can be particularly intrusive. Ankle or wrist bracelets, for example, can require an individual to be plugged into the wall for up to three hours per day in order to recharge the batteries.<sup>472</sup> This amounts to a restriction on liberty, and would be inappropriate in systems that permit asylum-seekers or others the right to work, as it could interfere with their ability to do so. Some ankle monitors also have voice notifications that speak to the wearers. As a result, this would not be appropriate for persons suffering any form of mental illness. Moreover, the use of ankle or wrist bracelets can have the effect of criminalising the wearers; and in many cases, where they have been applied, they have been used unnecessarily.<sup>473</sup> An ankle bracelet, for example, will not prevent absconding as it can be forcibly removed, so its use for persons who indicate a willingness to comply with the asylum or other procedures is likely to be excessive and unnecessary.

## **7. Home curfew**

Home curfew is also at the extreme end of A2Ds, and should only be applied in exceptional cases. In many situations, it will amount to a deprivation of liberty (see Part B). It is not therefore discussed in this paper.

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as Belgium, indicate that there is evidence to support this view. For a range of sound recommendations on the same, see Medical Justice submission.

<sup>469</sup> Marx indicates that many EU Member States have laws that allow asylum-seekers to be required to live in designated locations: Marx, ‘Article 26 (Freedom of Movement/Liberté de Circulation)’.

<sup>470</sup> G. Mitchell, ‘Asylum Seekers in Sweden: An Integrated Approach to Reception, Detention, Determination, Integration and Return’, August 2001, available at: <http://idcoalition.org/asylum-seekers-in-sweden/>.

<sup>471</sup> See, Part B of this study on whether ankle bracelets amount to a form of deprivation of liberty or custody.

<sup>472</sup> Communication with the IDC on their visit to the US, September 2010.

<sup>473</sup> In the US, for example, where ankle bracelets were used routinely for asylum-seekers, it is reported that the private organisation that won the government tender to provide monitoring of asylum-seekers released from detention, was paid according to how many units were used. Interview, US NGOs, 2010.

## 8. Complementary measures to alternatives to detention

### 8.1 Australia: Community Status Resolution Service (CSRS)

The CSRS is a mechanism to assist the Australian government to facilitate the early resolution of cases. It applies to non-vulnerable cases (vulnerable cases are eligible instead for other alternatives, described above). It is better described as a complementary measure to assist the government to expedite or accelerate the resolution of cases, and applies to those persons living in the community, rather than an A2D. Nonetheless, it operates alongside A2D and it reduces reliance on detention. The CSRS was developed because the government realised that early intervention means that persons are released from detention and their status is resolved more quickly. Under this service, individuals are released on bridging visas, with a number of conditions attached, such as actively taking steps to leave Australia or reporting conditions. Bond is rarely used under this scheme.<sup>474</sup> The DIAC case managers explore the range of immigration options open to individuals, with departure from Australia being only one option. The Australian government has calculated that this service, alongside IOM's return packages, is cheaper than the 'detain and deport' model.<sup>475</sup> Under this service, the majority leave Australia within two weeks and a very small percentage of those who do not, are detained.<sup>476</sup>

### 8.2 Liverpool: 'Voluntary Sector Key Worker Pilot'

Another pilot that commenced in April 2010 in the UK is the 'Voluntary Sector Key Worker Pilot', hosted in Liverpool. This pilot aims to test the impact of increased asylum-seeker trust and understanding of the asylum process ('client confidence') on return rates. The pilot facilitates access to effective legal and sustainable solutions to asylum claims and voluntary return programmes for those with no legal claim to remain. It was also motivated in part by the goal of reducing destitution among failed asylum-seekers following the completion of their claims. The pilot is similar to the NGO-run 'case management' approach in Australia, in which the client's support needs are identified and addressed, and clients are given one-on-one contact to be able to understand fully not only the asylum process, but also the consequences of a failure to obtain asylum or any other protection status. This is referred to as 'dual planning' – for both stay or return. However, a whole range of other topics are addressed in the counselling sessions, including other potential immigration options; the reality of detention and removal; and the possibility of destitution.<sup>477</sup>

As at November 2010, 200 clients had been referred by the UK Border Agency to the project. The large majority (183 clients) of these are single clients (78 per cent male; 22 per cent female) with another 17 family units. The referral of clients into the

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<sup>474</sup> Interview, DIAC, Melbourne, September 2010.

<sup>475</sup> Interview, Australian Department of Immigration and Citizenship, Melbourne, September 2010.

<sup>476</sup> *Ibid.*

<sup>477</sup> Destitution is a real concern in the UK for refused asylum-seekers: Still Human Still Here campaign: <http://stillhumanstillhere.wordpress.com/>.

project is unsystematic, that is, no particular criteria is used. The advice and assistance component of the pilot is managed by the non-governmental organisation, Refugee Action. 'Key workers' are assigned between 35-40 clients each, who engage with them at key intervention points and at other regular intervals.<sup>478</sup> Participating in the project is purely voluntary; it is not used, for example, as a condition of bail. As most asylum-seekers are not detained for the duration of the asylum procedure (save for initial periods) in the UK,<sup>479</sup> the pilot does not operate as an A2D in this sense. Nonetheless, the pilot hopes to improve the satisfaction of clients with the asylum procedure and as a consequence, to improve the up-take of voluntary return. A secondary purpose is to reduce the number of persons being detained pending their removal by opting to return voluntarily.

It is too early to judge whether this hypothesis will prove true, but after 7 months, five individuals have opted to return voluntarily, with another three removed by force and one who was otherwise transferred to detention.<sup>480</sup> Although the figures are small, of those within the 'control group' (or those who do not have access to the Key Worker pilot), only one voluntary removal had occurred over the same period. Ninety-nine clients have been granted refugee status (or approximately 50 per cent), while the return of another 32 is judged to be unfeasible (owing generally to a lack of cooperation on the part of the embassy to authenticate nationality). Sixty-nine clients remain in the process; while 12 have moved to other parts of the country so have left the pilot. Around 7-9 individuals have 'absconded' during the pilot period (or 4.5 per cent).<sup>481</sup>

### 8.3 Risk and needs assessment tools

Providing guidance to administrative decision-makers regarding when and for whom detention is necessary and proportionate in individual cases is an important assurance against arbitrary detention. Hong Kong courts, for example, have held that this is a requirement for a lawful detention policy.<sup>482</sup> Any guidance must however be carefully balanced, and must not presume or unfairly encourage detention over liberty, as this would also be unlawful.

The UKBA, for example, elaborates a range of factors that must be taken into account in deciding upon the necessity and proportionality of detention including: the likelihood of removal and the related timeframe; evidence of previous absconding;

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<sup>478</sup> The five key intervention points are: 1. Before the initial substantive hearing for asylum (if this is not possible, then before the initial decision is made so further information can be supplied if need be); 2. After the initial decision; 3. Before the appeal; 4. After the appeal; and 5. When support is terminated. At all stages, 'dual planning' occurs.

<sup>479</sup> The real exception to this statement is individuals facing fast-track procedures, which occur within detention.

<sup>480</sup> Interview, Ryan Nelson, Refugee Action, 11 November 2010.

<sup>481</sup> The UKBA statistics indicate that 11 clients have absconded according to their criteria; however, Refugee Action remains aware and in touch with two of these persons, while another was identified as a victim of trafficking and referred to other services (so wrongly counted); meanwhile one individual has voluntarily returned (and so was wrongly counted). It is not clear that 'absconding' is the right terminology for a pilot that is voluntary in nature, rather than persons having opted to discontinue their involvement with the pilot.

<sup>482</sup> Discussed in Part B.

evidence of failure to comply with conditions of temporary release or bail; previous history of complying with immigration control; ties in the UK; any outstanding claims in relation to their case; age; history of torture; history of physical or mental ill health.<sup>483</sup>

The US is in the process of developing a ‘risk assessment tool’, which contains an elaborate scoring system with points added or subtracted based on the individual’s circumstances and profile, including emergency and existing medical and mental health issues, other special vulnerabilities, national security issues, public health and public safety factors, identity establishment, removability, history of serious criminal offences,<sup>484</sup> supervision history (previous attempts at absconding, etc.), and flight risk (including ties to the local community). While the risk assessment tool is an improvement on what has generally been a ‘detain first, ask later’ policy, the US risk assessment tool, based on a mathematical calculation, risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones. It also appears heavily weighted in favour of detention.<sup>485</sup>

Likewise, the Hong Kong government has produced a policy statement on factors to consider in decisions to detain or release an individual, however, there are still substantial problems with it as it contains 15 reasons ‘for detention’ and only 6 ‘against detention’.<sup>486</sup> Given this imbalance, it could be argued that the policy amounts to a presumption in favour of detention, which, according to the jurisprudence from other jurisdictions, would be unlawful, and is not a balancing test at all.<sup>487</sup> Each of the factors ought to be considered and balanced in each individual case.

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<sup>483</sup> See, e.g., UKBA, *Enforcement Instructions and Guidance*, Ch. 55.3.1 – Factors influencing a decision to detain, available at: [www.ukba.homeoffice.gov.uk/](http://www.ukba.homeoffice.gov.uk/).

<sup>484</sup> Note that these should be dealt with via criminal law, rather than in relation to immigration law, as per decisions identified in Part B.

<sup>485</sup> Pilot Version 5/28/2010, Intake Worksheet (on file with the author).

<sup>486</sup> Hong Kong Special Administrative Region Government, Security Bureau, Notice on Detention Authority Section 29 of the Immigration Ordinance (Cap. 115), January 2009 (on file with the author).

<sup>487</sup> See, e.g., *N (Kenya) v. Secretary for State for Home Department* [2004] INLR 612 and *Ulde v. Minister of Home Affairs* (320/2008 [2009] ZASCA 34 (31 March 2009) (The Supreme Court of Appeal, South Africa)).

## D. Lessons learned and the cost-benefit analysis

This part of the study draws together the various findings from the country examples examined in Part C. In particular, it assesses the particular examples in relation to compliance/appearance rates as well as costs compared with imprisonment/incarceration. It also identifies various elements of the various alternatives that might be replicated or modified in other national contexts.

### 1. Compliance or cooperation rates

Field and Edwards concluded in 2006 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.’<sup>488</sup> This study, based on five more years worth of data, reaches the same conclusion (see Table 1). Additionally, there have been a number of important human rights cases as well as regional regulation efforts (e.g., in the EU context) that have delineated the permissible scope of detention and which have forced the hands of some governments to shift their position from considering and implementing detention as routine to detention as an exceptional measure. In relation to the latter, consideration of A2Ds has become an important component of reducing incarceration rates. There is a growing body of evidence which calls into question the purpose and effectiveness of detention as a policy aimed at deterring irregular migration, preventing absconding, or ensuring persons are available for removal. The policy motivations for detention increasingly fail to map onto the empirical evidence.<sup>489</sup>

**F. Table 1: Compliance or cooperation rates**

<b>Programme (asylum-seekers; return cases; mixed caseload)</b>	<b>Compliance or cooperation rates (%)<sup>490</sup></b>	<b>Absconding rates (%)</b>
Australia (mixed)	94	6
Belgium (mixed)	80	20
Friendship House, Pennsylvania <sup>491</sup>	99	1
Hamilton House, Canada (mostly asylum-seekers) <sup>492</sup>	99.9	0.01
Hong Kong (mixed)	97	3
Liverpool Key Worker Pilot (asylum-seekers)	95.5	4.5

<sup>488</sup> Field and Edwards, *Alternatives to Detention*, p. 50.

<sup>489</sup> In comparison, the political motivations of governments in pursuing harsh detention policies cannot be easily accounted for, yet they certainly call into question the necessity and proportionality of detention and are in fact irrelevant to testing the lawfulness of detention in an individual case.

<sup>490</sup> These rates do not always take into account whether an individual at the end of a process returns voluntarily, but they do encompass whether an individual complies with the various requirements while released to one of the alternatives.

<sup>491</sup> Field and Edwards reported that Friendship House in Pennsylvania had a one per cent absconding rate for persons released to their supervision (of 100 persons released to their care over a four-year period): Field and Edwards, *Alternatives to Detention*, Annex on United States.

<sup>492</sup> Field and Edwards, *Alternatives to Detention*, Annex on Canada.

Lutheran Immigration and Refugee Services <sup>493</sup> (asylum-seekers)	99	1
Matthew House, Canada (mostly asylum-seekers) <sup>494</sup>	99	1
New Orleans <sup>495</sup> (mixed)	96	4
Sojourn House, Canada (asylum-seekers) <sup>496</sup>	99.95	0.05
South Bank University (asylum-seekers)	90	10
Toronto Bail Program (mixed)	96.35	3.65
Vera Institute of Justice <sup>497</sup> (asylum-seekers)	84	16

Field and Edwards identified several factors that influence whether asylum-seekers and others comply with their release orders or otherwise appear for various administrative and judicial procedures. This study has confirmed, expanded, and in relation to the last, has questioned parts of those findings. Factors accounting for compliance can be summarised as follows:<sup>498</sup>

- (a) The provision of legal advice. This study further recommends that the provision of legal advice or guidance occur early in the asylum process. In addition, legal advice or guidance for persons facing deportation should include all legal options available. This has been found to improve voluntary return rates.
- (b) Individuals must understand the asylum procedure and all obligations relating to release, including the consequences of failing to appear. This study also found that providing information about the consequences of a failed asylum application at an early stage is helpful to prepare individuals and families for voluntary return should they fail in their asylum claim and to improve their cooperation with the process, including return.

<sup>493</sup> The Lutheran Immigration and Refugee Service's experimental project in 1999 reported a 96 per cent appearance rate of a so-called 'high flight risk' group of 25 Chinese asylum-seekers released without bond or surety. See, also, Esther Ebrahimian, 'The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention', Detention Watch Network, August/September 2000, p. 8.

<sup>494</sup> Field and Edwards, *Alternatives to Detention*, Annex on Canada. Matthew House reported that of 300 asylum-seekers released to them, only 3 absconded over a five-year period.

<sup>495</sup> New Orleans 1998, INS released asylum-seekers and other persons with over 90-day-old removal orders to a program run by the Catholic Charities with a 96% appearance rate: Joan Treadway, 'Detainees get chance to change their lives', *New Orleans Times Picayune*, 22 January 2001, p. B-3.

<sup>496</sup> Field and Edwards, *Alternatives to Detention*, Annex on Canada. Sojourn House reported that over a 6 year period with 3,600 (approximately 600 per year), only two individuals absconded.

<sup>497</sup> Between 1997-2000, the Vera Institute of Justice was invited by the US government to conduct a three-year pilot to supervise the release of selected detainees. Vera's Appearance Assistance Program found that 84 per cent 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, compared with 62 per cent of asylum-seekers (over 80 per cent appearance rate was observed if one excluded a sub-set of the control group who had indicated that they wished to transit to Canada) whose actions post-release were tracked as part of the a non-participant control group. Field and Edwards, *Alternatives to Detention*, Annex on USA.

<sup>498</sup> Field and Edwards, *Alternatives to Detention*, p. 45.

- (c) The provision of adequate material support and accommodation throughout the asylum procedure. This study confirmed this finding, and further found that such support should be made available also while pending return, and that it can improve the cooperation of individuals in the return process.
- (d) Field and Edwards noted that screening for family or community ties or ‘creating these ties via community groups’ assisted compliance rates. While this study has not looked into this aspect in detail, it has highlighted the risks in such a system and advocates that the system be regularised and/or monitored. For example, a system of registering Diaspora or community groups putting forward their names for bail could counter risks of exploitation and other forms of abuse. This study has also indicated that a lack of family or community ties does not necessarily result in lower compliance rates (in fact this has not been tested comprehensively in either the Field and Edwards’ 2006 study or this study). Belgium’s ‘return houses’ achieved compliance rates of 80 per cent in a programme that moves families to an area without family or community links. This was not identified by the managers of that programme as a factor increasing or reducing compliance or cooperation.

A number of common factors can therefore be distilled from the research and which contribute to higher compliance rates:

- the treatment of refugees, asylum-seekers, stateless persons and other migrants with dignity, humanity and respect throughout the relevant immigration procedure;
- the provision of clear and concise information about rights and duties under the A2D and consequences of non-compliance;
- referral to legal advice, including advice on all legal avenues to stay, especially starting at an early state in the relevant procedure and continuing throughout;
- access to adequate material support, accommodation and other reception conditions; and
- individualised ‘coaching’ or case management services.

Treatment within asylum and other legal procedures seems to be one of the biggest factors contributing to positive engagement with the system. Where individuals are disgruntled with the system, or feel they have been dealt with unfairly, their ability to cooperate with the same system towards the end of the process and to make decisions about return is less likely.

While research is still lacking around A2Ds in so-called ‘transit’ countries,<sup>499</sup> it may be extrapolated that persons facing return are in a similar predicament as those not in their preferred destination countries (i.e., in transit). There is a governmental assumption, for example, that persons facing return are more likely to abscond, as they have not achieved their hoped-for outcome. This has not tended to play out on the empirical evidence. The TBP, for example, has not noted any difference in appearance rates between asylum-seekers and persons awaiting deportation.

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<sup>499</sup> The classification of countries into destination and transit is somewhat artificial and is based on crude global trends, rather than the motivations of individuals. In any assessment as to the need for detention to prevent absconding might include questions around preferred destination country, although this would need to be balanced by other factors. In general, almost all countries are both simultaneously transit and destination countries.

Meanwhile, Belgium has noted a 20 per cent absconding rate amongst families with children pending deportation (although statistics are based on a very small sample) and the rate of voluntary return has improved since they introduced consideration of the range of legal stay options.

## 2. Crude costs

The cost argument is a simple one: detention costs considerably more than most A2Ds. Financial savings may not however be a sufficient motivating factor where political and/or electoral factors override them; but they do provide at least one incentive to consider alternative options. Table 2 identifies crudely the costs of A2Ds versus incarceration. Notably, the incarceration rates do not factor in the well-documented longer-term consequences of detention on mental and physical health and related services, and later integration prospects of individuals. Likewise, some of the A2D costs do not factor in access to mainstream services, rather than those provided directly by the implementing organisation. Moreover, the A2D programmes identified here are the most intensive, involving direct government funding to various organisations or government departments. As mentioned in Part C, bail and bond systems are less expensive. Very little data was available however on costs.

G. **Table 2: Detention versus alternatives to detention costs**

Country	Detention per person per day <sup>500</sup>	A2D per person per day	Saving per person per day
Australia	\$339 AUD; <sup>501</sup> \$124 AUD for 'community detention'	\$7 AUD <sup>502</sup> - \$39 AUD <sup>503</sup>	Between \$333 AUD to \$117 AUD
Canada: Toronto Bail Program	\$179 CAD	\$10-12 CAD	\$167 CAD
Hong Kong	\$108 HKD	Not available	Not available
United States	\$95 USD <sup>504</sup>	\$22 USD <sup>505</sup>	\$73 USD

## 3. Increase in voluntary return for failed asylum-seekers and other migrants

The study bore out some evidence, albeit still small and somewhat piecemeal, that failed asylum-seekers and other migrants will increasingly opt for voluntary return within A2D processes than outside them. The Belgium example showed that, rather

<sup>500</sup> Costs may vary depending on the number of detainees, as specially built immigration facilities bear a cost regardless of number of detainees.

<sup>501</sup> FY 2005-6.

<sup>502</sup> \$7 AUD per person per day under the Asylum Seeker Assistance Scheme in 2007-8 was based on 1,867 persons at cost of \$4.79 million. Comparative date in the corrections field: parole \$5.39 AUD pppd; probation \$3.94 pppd and home detention \$58.83 pppd.

<sup>503</sup> This is the figure for the CASP programme, which involves a more comprehensive approach.

<sup>504</sup> 'US Detention of Asylum-Seekers and Human Rights', by Bill Frelick, Amnesty International USA, 1 March 2005.

<sup>505</sup> 'Immigration Enforcement Benefits Prison Firms', *New York Times*, 19 July 2006; 'Detention and Removal of Illegal Aliens', Office of the Inspector General, Department of Homeland Security, April 2006; [www.ice.gov](http://www.ice.gov), 7 August 2006. [H. Rep. 109-476 (2006), p. 38 in Lutherin Report n. 38.

ironically, voluntary returns improved when ‘coaches’ were tasked to give consideration to all legal avenues to remain. Australia, too, has noted a 67 per cent voluntary return take-up for those within its A2D programmes, which is a very satisfactory figure. Australia’s programme too considers all legal options to stay, and not just return. The Liverpool Pilot has hinted so far that more persons have returned voluntarily within the pilot than from the control group (5:1), although statistics are too small to draw any firm conclusions. The role of the case manager or coach in working with and building trust with people on their immigration options as early as possible, ensuring access to legal advice and repatriation assistance, appear to be key factors in whether individuals engage constructively with the process.

#### **4. Establishing ‘Minimum Safeguards’ and Other Considerations**

Alternatives to detention are only one part of larger asylum and migration systems. Such systems must be compliant with international rights relating to liberty and incorporate safeguards against unlawfulness and arbitrariness. The latter should include:

- Setting statutory maximum time limits on detention.
- Establishing explicit grounds for detention in law.
- If detention is being considered, imposing an obligation to consider the least intrusive means first, which might include a presumption against detention.
- Developing clear guidelines on how to assess the necessity and proportionality of detention in individual cases.
- Reviewing detention periodically and automatically (best practice is within 48 hours, followed by 7 days, and then every 30 days).
- Providing an opportunity for judicial review of any detention order, with the power of the courts to order release or to impose conditions on release.
- If detention is necessary, ensuring that it complies with human rights standards.
- Establishing special safeguards and conditions for particular groups, such as children, the elderly, pregnant women, persons with physical or mental disabilities, etc.
- Where an alternative to detention involves restrictions on movement, creating a periodic review system of conditions of release upon request.

In terms of alternatives to detention, a few overall observations are listed here, most particularly in relation to case management systems:

- Introduce case management from the very start of asylum procedures, including referrals to adequate legal advice, health and other needed services.
- Tailor case management and/or community supervision to each individual based on three stages: needs assessment, planning, and delivery.
- If desirable, enter into contracts between the individual and the delivery organisation or case managers to ensure both parties are aware of their rights and responsibilities, and consequences of non-compliance.
- As far as possible promote ‘voluntary engagement’.
- Select participants carefully, especially if at the back-end stage (are the persons willing to engage with the process and to cooperate – if not, why not?).

- Institute safeguards to ensure that releasing individuals to alternatives that involve some form of restriction of liberty does not become the default position where release without conditions or on one's own recognizance is possible.
- Disconnect the official immigration reporting requirements that lead to sanctions and enforcement from the case management and service delivery component in order to build trust and cooperation in the process, although this may also depend on the partnership arrangement.
- Separate the selection and referral of clients from the service delivery organisation (an exception might be the TBP which carries out its own screening).
- Alert individuals to the full range of legal options to stay and consequences of non-compliance.
- Tailor A2D programmes to any special or specific needs of individuals or groups, such as persons with disabilities, children, etc.
- For children, pursue a 'care' rather than an 'enforcement' model, including specially tailored arrangements, guardianship, and specialised advice and counselling. Special arrangements would be needed for unaccompanied minors.
- Acknowledge and respond to risks of A2Ds, such as risks of exploitation or other abuse.
- Guard against contracts with delivery organisations that incentivize more restrictive measures than necessary.<sup>506</sup>
- Acknowledge the primary and secondary purposes for an A2D, which may have an effect on whether it is perceived as being a success and its longer-term survival.<sup>507</sup>

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<sup>506</sup> For example, the US government's contract with Behaviour Inc. included payments for how many ankle bracelets were employed and thus was seen as encouraging the unnecessary tagging of many persons: Interview, US NGOs, July 2010.

<sup>507</sup> E.g. the Scotland pilot is primarily about facilitating voluntary return, rather than necessarily keeping persons out of detention, although this is a secondary outcome/objective.

## E. Conclusion

The first half of this study outlined the international legal framework applicable to immigration detention. In particular, it highlighted the duty on states to consider the least intrusive means of achieving the objectives pursued by detention. Implementing A2D programmes can be one way of achieving this.

The second half of the study highlighted a number of A2Ds that are currently being implemented in various states – from release without conditions to release under various conditions to fully funded and organised community supervision, assistance and case management programmes. The study confirmed that properly managed projects or procedures (e.g. bail) can secure high rates of compliance with asylum as well as return procedures. These were also shown to be significantly cheaper than imprisonment or incarceration, not only in direct costs but also regarding longer-term costs associated with detention, such as the impact on health services, integration problems, and other social challenges.

While there is no single recommended example, a key finding emerging throughout the study is the observation that treating persons with dignity and humanity throughout the asylum and returns processes and setting out clear guidelines on rights and responsibilities can lead to better rates of compliance, lower costs, better and more effective asylum systems, and higher voluntary return rates. This study found that A2Ds which provide for access to legal advice, the full range of social and health services and satisfactory material support and accommodation, result in the willingness of clients to comply with various reporting and other requirements, including, in some cases, an increased take-up of voluntary return options. Moreover, these measures can lead to knock-on improvements in asylum, reception and migration management systems. This study has highlighted the need to ensure that humane reception conditions are in place in general in order to avoid other problems, such as destitution.

Government policy development in this area cannot be based on assumptions about likely migrant behaviour and must be instead based on empirical evidence. The research conducted for this study, coupled with the research of others, found that most alternatives to detention achieve 90 per cent or higher compliance rates when individuals are released to proper supervision and assistance. It further found that if all legal stay options are made part of a case management process, the rate of voluntary return can (somewhat counter-intuitively) also increase. While not directly part of this study, the success of programmes with persons pending deportation (in terms of both compliance and return rates) questions the general view that lower compliance rates are expected in transit rather than destination countries.<sup>508</sup> It is worth exploring further whether some of the learning from the return context could be transferred to so-called ‘transit countries’.<sup>509</sup>

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<sup>508</sup> Cf. Field and Edwards considered that appearance rates may vary depending on whether an individual is in their preferred destination, but this was not made out on the evidence: Field and Edwards, *Alternatives to Detention*, p. 45.

<sup>509</sup> The description of a particular country as a ‘transit’ versus a ‘destination’ country is rather mono-dimensional. Most countries are both transit and destination countries and the more relevant question is whether individuals are in their preferred destination.

The study also noted that without clear guidance and monitoring of release and conditions of release, risks of exploitation can arise and measures need to be put in place to guard against this. It was also generally considered that enforcement aspects of A2Ds, while part and parcel of migration management systems, should be detached from the organisations operating alternative projects. At the same time, there were some exceptions in which the various organisations did not have any concerns with also being part of the enforcement component. This would need to be assessed on the basis of the particular national context in question.

## Annex A: Table of cases

### International Cases

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*Al-Nashif v. Bulgaria*, ECtHR, Applic. No. 50963/99, 20 June 2002

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*Bouamar v. Belgium*, ECtHR, Ser. A. No. 129, 29 February 1988

*Bozano v. France*, ECtHR, Applic. No. 9990/82, 18 December 1986

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*Massoud v. Malta*, ECtHR, Applic. No. 24340/08, 27 July 2010

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*Mikolenko v. Estonia*, ECtHR, Applic. No. 10664/05, 8 January 2010

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