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Alternatives to detention

Summary

In view of the hardship that it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be a measure of last resort. This paper surveys some of the most effective alternatives to detention currently used by States and identifies elements that contribute to their success.

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I. Introduction

1. This paper surveys some of the most effective alternatives to detention currently in use and examines why States select these arrangements. For the purposes of this paper, “alternatives to detention” is a non-legal term covering any legislation, policy or practice that allows asylum-seekers (and/or migrants) to reside in the community subject to a number of conditions or restrictions on their freedom of movement while their status is being resolved. In view of the hardship that it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should in principle be avoided and be a measure of last resort. The promotion of alternatives to detention is accordingly one of the key objectives of UNHCR’s “Guidelines on applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention” of 2012 (Detention Guidelines) and its global strategy – beyond detention 2014 - 2019,¹ the latter notably in the context of ending the detention of children.

2. Irregular entry can create challenges for the operation of national asylum and migration systems. However, State practices show that alternatives to detention can meet the needs of States while taking account of the rights and particular circumstances of the individuals concerned. In some cases, the escalating costs of immigration detention and the well-documented harmful effects on those detained have prompted governments to review their detention policies and to consider a range of less coercive options appropriate to the individual case. Some States manage their migration and asylum systems with no or minimal recourse to detention. In certain countries, legislation explicitly exempts asylum-seekers from being detained. Other States have adopted reception arrangements which effectively preclude any need for detention. Some of these alternatives are explored below.

II. Why do States adopt alternatives to detention?

3. One challenge for all States - particularly in today’s complex environment - is ensuring security on their territory. Knowing who is on one’s territory is essential to this security. Many States recognize that widespread detention practices can undermine, rather than enhance, security by encouraging people to live clandestinely. For example, if individuals believe they may be detained should they apply for asylum or ask for any form of help, they may feel compelled to avoid contact with the authorities. Alternatives to detention, on the other hand, are premised on individuals engaging with asylum and other processes, rather than seeking to evade them. In order to facilitate such engagement, well-functioning screening and assessment procedures, registration and documentation systems, including birth and other civil registration,² and access of asylum-seekers to those systems, are fundamental.

4. Another challenge for States is ensuring the cooperation of asylum-seekers with procedures and, eventually, the departure of those found not to have a right to stay. Alternatives to detention put in place by States in recent years have seen high rates of cooperation. A 2010 UNHCR-commissioned study of 13 alternatives to detention implemented in different countries around the world found that the rate of absconding was between 1 and 20 per cent, with 10 of the 13 projects enjoying cooperation rates above

¹ UNHCR, “Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention”, 2012, <http://www.refworld.org/docid/503489533b8.html> (Detention Guidelines); UNHCR, “Beyond detention: a global strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019”, 2014, www.unhcr.org/detention. For further information relating to the global strategy – beyond detention 2014-2019 see: UNHCR, “Note on international protection”, A/AC.96/1134, 16 June 2014, para. 19.

² UNHCR, Executive Committee of the High Commissioner’s Programme (ExCom), Conclusion on Civil Registration, No. 111 (LXIV) – 2013.

94 per cent.³ While the issue of irregular onward movement from countries of transit continues to be of concern, there is some evidence to suggest that asylum-seekers are less likely to move on when alternatives to detention allow them to meet their basic needs and do not put them at risk of detention or refoulement.⁴ Even with respect to removals, voluntary departure rates of between 65 and 85 per cent have been observed in contexts where alternatives to detention have been used. Further empirical research commissioned by UNHCR in 2014 found that asylum-seekers are predisposed to comply with immigration procedures and that perceptions of fairness in the asylum procedure were far more important for ensuring compliance than the use of detention.⁵

5. The harmful physical and psychological effects of detention on asylum-seekers and migrants are well-documented, and this has been one of the motivations for exploring a range of options beyond detention. Alternatives to detention permit individuals to reside in the community, with general freedom of movement and support services, allowing them to enjoy a dignified stay. Such arrangements encourage asylum-seekers to develop and strengthen their links with the community and help preserve family life. For those whose claims for international protection are successful, their acceptance into the local community can be accelerated. In contrast, the physical and mental effects of detention on individuals can not only thwart cooperation with any removal processes, but also make individuals less able to cope with return to and reintegration in their countries of origin.

6. It is also well-established that keeping asylum-seekers and others in detention is costly. Empirical evidence demonstrates that alternatives to detention are considerably less expensive. Community-based alternative to detention programmes have demonstrated per person/per day cost savings of USD \$49 in the United States of America, AUD \$86 in Australia and CAD \$167 in Canada.⁶ Significant savings are also evident in the context of removal. When refused asylum-seekers depart voluntarily after having been accommodated in community-based alternatives to detention, the average cost to the State is around one-third the cost of escorted deportations.⁷ Using alternatives to detention can also assist States in preventing or reducing cases of wrongful or arbitrary detention, avoiding costly litigation.

III. Which alternatives work?

7. Lessons and good practices can be drawn from many alternatives to detention currently in use in a wide range of countries and contexts. The Office recently published two options papers on open reception and alternatives to detention, which documented more than 30 good examples.⁸ Many of these examples were also explored at the Second Global Roundtable on Reception and Alternatives to Detention, held in Toronto, Canada, in April 2015 in conjunction with the International Detention Coalition and the Oak Foundation. Some alternatives are used in combination, depending on the individual case. Alternatives to detention may also involve greater or lesser restrictions on freedom of movement. Some of the most effective alternatives to detention are set out below.

³ Alice Edwards, “Back to basics: the right to liberty and security of person and ‘alternatives to detention’ of refugees, asylum-seekers, stateless persons and other migrants”, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, <http://www.refworld.org/docid/4dc935fd2.html>, pp. 82-82.

⁴ International Detention Coalition, “There are alternatives: a handbook for preventing unnecessary immigration detention”, 13 May 2011, <http://www.refworld.org/docid/4f0c14252.html>, p. 17.

⁵ Cathryn Costello and Esra Kaytaz, “Building empirical research into alternatives to detention: perceptions of asylum-seekers and refugees in Toronto and Geneva”, UNHCR Legal and Protection Policy Research Series, PPLA/2013/02, June 2013, <http://www.refworld.org/docid/51a6fec84.html>.

⁶ International Detention Coalition, above note 4, p. 52.

⁷ International Detention Coalition, above note 4, p. 52.

⁸ UNHCR, “Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families”, 2015, <http://www.refworld.org/docid/5523e8d94.html>; UNHCR, “Options Paper 2: Options for governments on open reception and alternatives to detention”, 2015, <http://www.refworld.org/docid/5523e9024.html>.

A. Deposit or surrender of documentation

8. A common alternative, used by many States, is to require asylum-seekers to surrender travel or identity documentation (such as passports). Surrender of travel documentation can minimize the risk of onward movement or departure from the country of asylum. In such cases, individuals will need to be issued with substitute documentation that authorizes their stay in the territory and/or release into the community, in order to avoid re-detention on the grounds of failing to possess appropriate documentation.

B. Reporting

9. Reporting consists of an obligation to present oneself to the designated authorities (usually migration officials or the police) at periodic intervals. New technologies can assist. In the United States of America, for example, reporting by telephone is available for low-risk individuals. It is recommended that the frequency of reporting obligations be no more than necessary, reducing over time, and that the reporting location be easily accessible to minimize non-compliance. Reporting requirements which are unnecessarily onerous can set people up to fail to report. Reasons for non-compliance need to be properly assessed and some flexibility shown where there are good reasons for delay.

C. Designated or directed residence

10. Use of a designated or directed residence as an alternative to detention requires asylum-seekers to reside at a specific address or within a particular administrative region. In Germany, a quota is calculated on an annual basis per *Länder* (state), and asylum-seekers are assigned to an initial reception centre using a nationwide distribution system called “EASY”. Distribution systems need to take into account the personal situation of the individual and his or her family, such as links with the local community, as well as any special support or health services required. For example, the EASY system takes into account the presence of family members in the designated area.

D. Alternatives based on bail or bond

11. Bail or bond systems typically require a financial deposit that may be forfeited in the event the individual absconds. However, such systems tend to discriminate against persons with limited funds, or those who do not have connections in the community, as may be the case for many asylum-seekers. Efforts to minimize these disadvantages are encouraged. For example, the Toronto Bail Program, a non-profit organization under contract with the Canada Border Services Agency, provides a guarantee to support the release of immigration detainees, subject to a number of reporting and other conditions. It also provides case management support services (see below). In Lithuania, foreigners may be released to the “guardianship” of a citizen of Lithuania or a relative legally residing in the country, and there have also been cases of release to a charity or church.

12. It is preferable that procedures to consider whether bail is appropriate be automatic for those in immigration detention. Persons acting as guarantors or sureties need to be properly vetted to avoid exploitation, and information about bail, lawyers and legal aid should be available in multiple languages and in various communication formats (for example, video screens or pamphlets in detention facilities).

E. Community supervision and case management

13. There is a range of options that can permit individuals and families to reside in the community, subject to supervision and/or case management. Living independently in the community is the preferred approach, to allow asylum-seekers and others to resume as far as possible “normal lives”. In Chile, for example, asylum-seekers are issued renewable temporary stay permits, with work entitlements attached. Comprehensive social assistance

is provided, facilitating the linking of asylum-seekers to local social and economic structures, with support diminishing over time to facilitate self-reliance. In many countries, a network of open accommodation options are available, including groups of self-contained flats or purpose-built centres, providing a range of services on site. Individuals may come and go freely, but often must meet their caseworker regularly. In Hong Kong SAR, China, the International Social Service, a non-governmental organization, runs a government-funded programme enabling refugees and torture claimants to live in the community, mostly in privately-owned accommodation, while their cases are being processed. As many as 5,000 claimants benefit from this alternative.

14. Many community-based reception arrangements include a component of case management. Case management is a strategy for supporting and managing individuals while their asylum or other claims are being considered, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being.

15. In Sweden, two case workers are appointed to an asylum-seeker after registration: one dealing with the asylum process, the other assisting with everyday life questions and making appropriate referrals for medical care, counselling or other services. Motivational counselling is used, which prepares the asylum-seeker for all possible eventualities, including return. Belgium provides “coaches” to families required to stay in open family units. Coaches provide support for various aspects of daily life, including by facilitating logistical, administrative and medical assistance, and help resolve asylum or migration issues through referrals.

F. Child- and family-appropriate alternatives to detention

16. The principles of minimal intervention and the best interests of the child are key in implementing alternatives to detention for children. Ensuring the liberty and freedom of movement of children is always the preferred option. Important aspects of reception and processing arrangements for children include identification, registration and documentation, appointment of a guardian for unaccompanied or separated children, legal representation and advice, best interests assessment, age assessments, early release and/or referral mechanisms, family tracing and reunification, and prioritized asylum processing.

17. Various mechanisms for the release of unaccompanied and separated children into the community are available, including foster care, supervised independent living, group care or, as a last resort, collective residential (institutional) care. In practice, alternative care arrangements are most effective when designed and approved by competent child protection authorities, in close coordination with asylum or migration authorities, and when they are integrated into existing national child protection systems.

18. Working closely with children and tailoring alternatives to their specific needs is important, taking into account different stages in the asylum or migration process, as well as in the child’s development. For example, Belgium’s “orientation and observation centre”, a small-scale, protective yet open reception centre, adapted to the needs of children, allows specialized social workers to observe the children and orient them to the next phases in their lives over a two- to four-week period. Specific support for vulnerable children is provided. In Argentina, the Public Defender’s Office appoints a guardian for each unaccompanied or separated child to accompany him or her throughout various legal processes. Based on the child’s specific risk factors, the guardian also coordinates appropriate assistance and support. The Mexican Refugee Commission has standard procedures in place to explain the national asylum system to children, including through the use of an age-appropriate video produced by UNHCR. In Israel, unaccompanied and separated children between the age of 14 and 17 years old are integrated into residential schools called “youth villages”, together with Israeli youth.

19. Individual care plans, coordination conferences of relevant institutional bodies, guardianship systems and mechanisms to hear from and listen to children are all good practices. For children seeking asylum together with their families, detention remains a last resort. It therefore is appropriate to explore family-based alternatives to detention, prior to

any detention decision or separation of the child from his or her parents. Belgium's open family units are a good example of family and child-adapted accommodation, with children enrolled in local schools, and families enjoying freedom of movement and able to receive visitors. The United Kingdom of Great Britain and Northern Ireland's Family Returns Panel, which assists the Home Office in taking decisions in the child's best interest during the removals process, minimizes the need for enforcement action involving detention.

IV. Elements of successful alternatives to detention

20. The following elements have been widely found to contribute to the success of alternatives to detention:

- treating asylum-seekers (and migrants) with dignity, humanity and respect throughout the relevant asylum or migration procedure;
- providing clear and concise information about rights and duties under the alternative to detention and the consequences of non-compliance;
- providing asylum-seekers with legal advice, including on their asylum applications and options available to them should their asylum claim be rejected. Such advice is most effective when made available at the outset of and continuing throughout relevant procedures;
- providing access to adequate material support, accommodation and other reception conditions; and
- offering individualized “coaching” or case management services.⁹

21. Recent research in Europe confirmed that alternatives were less successful when they did not incorporate one or more of the above elements.¹⁰ Other features of successful alternatives to detention identified by States and other actors include ensuring close working partnerships between governments and civil society, and taking holistic approaches to alternatives to detention – that is, approaches that apply from the beginning to the end of the asylum or migration process, and that identify and address individual needs in a comprehensive way. It is also important that alternatives to detention are developed and implemented in a way that is context-specific. No single alternative to detention will be fully replicable in every context, however there are elements that remain constant through the many examples that exist.¹¹

V. Conclusion

22. There is a range of good State practices of successful alternatives to detention. UNHCR, together with its partners, will continue to support efforts to introduce, enhance and expand the use of alternatives to detention. Such efforts will include: the development of a generic screening tool to guide front-line officials in their decision-making on the need for detention and use of alternatives to detention in individual cases; further exchanges among States and others on policies and practices; and an animated video on the Detention Guidelines.

23. In addition, UNHCR encourages States to remove any reservations to the freedom of movement and non-penalization provisions (Articles 26 and 31) of the 1951 Convention relating to the Status of Refugees and to implement detention-related pledges made in the

⁹ See Detention Guidelines, above note 1, para. 41. See also above note 3 and note 4.

¹⁰ Odysseus Network, “Alternatives to immigration and asylum detention in the EU: time for implementation”, January 2015, <http://www.refworld.org/docid/54f481094.html>. See also, European Migration Network (EMN), “The use of detention and alternatives to detention in the context of immigration policies”, November 2014, <http://www.refworld.org/docid/546dd6f24.html>.

¹¹ See UNHCR, above note 8.

context of the 2011 ministerial intergovernmental event.¹² UNHCR also invites the Executive Committee to consider adopting a conclusion on international protection on alternatives to detention, which would reflect current standards and document the wealth of good State practices.

¹² Information relating to the 2011 ministerial intergovernmental event is available at: UNHCR, “Ministerial Meeting”, <http://www.unhcr.org/ministerial>.