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Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons

Geneva, Switzerland, 11-12 May 2011

Summary Conclusions

On 11 and 12 May 2011, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Office of the High Commissioner for Human Rights (OHCHR) organized the first Global Roundtable on Alternatives to Detention (ATD) of Asylum-Seekers, Refugees, Migrants and Stateless Persons, in Geneva. Thirty eight participants from 19 countries took part, drawn from governments, international organizations, human rights mechanisms, national human rights institutions, national and international non-governmental organizations (NGOs) and academic experts. The discussion was informed by a number of research papers.¹

The roundtable follows up on a number of events, including side panels at both the 2009 Executive Committee of the High Commissioner for Refugees' Programme and the Annual UNHCR-NGO Consultations in the same year, the UNHCR-organized East Asian Roundtable on Alternatives to Detention in Seoul in April 2010, a Regional Consultation on Detention of Asylum-Seekers and Refugees in Bangkok in October 2010, a panel discussion on the human rights of migrants in detention centres held during the 12th session of the Human Rights Council in 2009 and other meetings held during the 13th session in 2010.

The following summary conclusions do not necessarily represent the views of participants, or of UNHCR or OHCHR, but reflect broadly the themes, issues and understandings that emerged from the discussion.

Main messages

- There is no empirical evidence that detention deters irregular migration, or discourages persons from seeking asylum.
- The human rights consequences as well as social and economic costs of immigration detention compel investigation, study and implementation of alternatives to detention.
- Seeking asylum is not a criminal act and asylum-seekers should not, as a consequence, be penalized for the act of seeking asylum through detention.

¹ A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Person and Other Migrants*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, Melbourne, 2011, available at: <http://www.unhcr.org/4dde23d49.html>.

- States should avoid criminalizing persons moving irregularly through imposing penal sanctions or conditions of treatment that are not suitable to persons who have not committed a crime.
- Alternatives to detention² – from reporting requirements to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention.
- Alternatives to detention should not be used as alternative *forms of* detention; nor should alternatives to detention become alternatives to release.
- All alternatives to detention should be established in law and subject to human rights oversight, including periodic review in individual cases, as well as independent monitoring and evaluation. Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.
- Treating persons with respect and dignity, including due regard to human rights standards, throughout the asylum or immigration processes contributes to constructive engagement in these processes, and can improve the rates of voluntary return.
- Research shows over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities.
- More research is needed in the area of alternatives to detention.

International legal framework

1. There is a solid international legal framework that sets out the permissible purposes and conditions of immigration detention.³ This legal framework is guided by the principles of necessity, reasonableness in all the circumstances and proportionality. The starting point is that no one shall be subjected to arbitrary or unlawful detention.⁴
2. Detention is thus a measure of last resort and must only be applied in exceptional circumstances, be prescribed by law, meet human rights standards, be subject to periodic and judicial review and, where used, last only for the minimum time necessary.

² For the purposes of the roundtable discussion, the International Detention Coalition’s (IDC) definition of “alternatives to detention” was used: “any legislation, policy or practice that allows for asylum-seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country”: Sampson et al., *There are Alternatives*, p. 2.

³ “Immigration detention” refers to the holding in detention of individuals suspected of illegal entry, unauthorized arrival, visa violations and those subject to procedures for deportation and removal.

⁴ This right is found in various international and regional instruments: Article 9(1) of the International Covenant on Civil and Political Rights; Article 16(4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 6 of the Charter of Fundamental Rights of the European Union; Article 7 of the American Convention on Human Rights; Article I and XXV of the American Declaration on the Rights and Duties of Man; Article 6 of the African Charter on Human and Peoples’ Rights.

Maximum time limits on such administrative custody in national legislation are an important step to avoiding prolonged or indefinite detention.

3. International and national jurisprudence has held that decisions around detention must be exercised in favour of liberty, with due regard to the principles of necessity, reasonableness and proportionality. These principles imply that detention can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention, such as national security or public order.

4. While recognising the legitimate interests of States in controlling and regulating immigration, criminalising illegal entry or irregular stay by penal sanctions or inappropriate conditions of detention would exceed the legitimate interests of States.⁵

5. With regard to refugees and asylum-seekers, it was highlighted that the right to seek asylum is not an unlawful act and detention for the mere fact of having sought asylum is, therefore, unlawful. Moreover, the 1951 Convention relating to the Status of Refugees prohibits penalties – such as detention – from being imposed on refugees purely on account of their illegal entry or presence.⁶ It has been widely held that mandatory or non-reviewable detention of refugees and asylum-seekers is incompatible with international law. For refugees lawfully staying in a State's territory, they have the right to enjoy freedom of movement and choice of residence.⁷

6. For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Stateless status determination procedures are therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention.⁸

7. General principles relating to detention apply *a fortiori* to children, who should in principle not be detained at all. The Convention on the Rights of the Child provides specific international legal obligations in relation to children. These include that all actions taken in respect of children are in the best interests of the child, and ensure every child's right to development, family unity, education, information, and the opportunity to express their views and to be heard. A specific challenge remains, however, around accurate age assessments of asylum-seeking and migrant children, and the use of appropriate assessment methods that respect human rights standards.

Human rights impacts of detention

8. Detention can severely limit access to legal advice and can interfere with the ability to claim asylum or establish other means of lawful stay. In some instances, this can result in unlawful deportation or even *refoulement*.

9. The drastic human rights impacts of immigration detention on individuals and their families are well-documented. Reports on immigration detention often reveal

⁵ Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4, 10 January 2008, para. 53.

⁶ Article 31 of the 1951 Convention relating to the Status of Refugees.

⁷ Article 26 of the 1951 Convention relating to the Status of Refugees.

⁸ Summary Conclusions of the UNHCR Expert meeting on Stateless Determination Procedures and the Status of Stateless Persons, Geneva, 6-7 December 2010, para. 23, available at: <http://www.unhcr.org/4d919a436.html>.

overcrowded, undignified and inhumane conditions, ill-treatment and abuse, or failure to separate children from adults.

10. Detention can and has been shown to cause psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional and psychological consequences.

11. Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons. Limited access to lawyers, interpreters, social workers, psychologists or medical staff, as well as non-communication with the outside world, exacerbates the vulnerability and isolation of many individuals, even if they have not been officially classified as “vulnerable” at the time of detention.⁹

12. Another not uncommon, yet problematic, practice is the detention of asylum-seekers or other migrants in criminal facilities, such as prisons and other correctional institutions. All asylum-seekers and migrants who have not been convicted of recognizable crimes should be kept separate from convicted criminals and housed in specific facilities adapted to their particular circumstances and needs.

13. A shortage of qualified personnel working in detention facilities and a lack of understanding of the specific situation of persons in immigration detention may further negatively impact on individuals in detention.

14. With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees was identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international human rights law and remain accountable as a matter of international law. Accordingly, States should ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms.¹⁰

15. Furthermore, there may be negative impacts on the health and welfare of individuals even after their release from immigration detention. These might include family separation or breakdown, or psychological trauma, which can lead to later difficulties for integration or constructive engagement in the community.

Alternatives to detention

16. Research across various alternatives to detention has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities. A correlation has also been found between some alternatives to detention and voluntary return rates.

17. Moreover, alternatives to detention are considerably less expensive than detention. Costs of detention increase also when one takes into account the negative long-term economic and social consequences of depriving individuals of their liberty.

⁹ See, e.g., Jesuit Refugee Service, *Becoming Vulnerable in Detention*, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project), June 2010, available at: <http://detention-in-europe.org/>.

¹⁰ Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, para. 5.

18. Some alternatives to detention may themselves impact upon a person's human rights, be it on their liberty or other rights. As a consequence, such measures also need to be in line with principles of necessity, proportionality, legitimacy and other key human rights principles. Each alternative to detention must be assessed on its merits and individuals released subject to conditions that restrict their liberty should enjoy the right to periodical review.

19. For this reason, alternatives should not be used as alternative *forms of* detention. Likewise, alternatives to detention must not become alternatives to release. Safeguards must be put in place to ensure that those eligible for release without conditions are not diverted into alternatives.

20. Alternatives to detention may take various forms, including registration and/or deposit of documents, bond/bail, reporting conditions, community release and supervision, designated residence, electronic monitoring or home curfew. Ideally, alternatives to detention are provided for by laws and regulations.

21. In designing alternatives to detention, States should observe the principle of minimum intervention and should pay attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities.¹¹ While electronic tagging (such as ankle or wrist bracelets) was criticised as being particularly harsh, phone reporting and the use of other modern technologies were seen as good practice, especially for individuals with mobility difficulties.

22. Overly-onerous conditions can lead to non-cooperation, even in alternative programmes, and can set up individuals willing to comply to instead fail. Reporting, for example, that requires an individual and/or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfil the conditions, and can unfairly discriminate on the basis of economic position.

23. Where community models of alternatives to detention are applied, individuals should be able to enjoy economic, social and cultural rights, such as their right to health and to adequate housing. It was emphasized that releasing persons from detention to face destitution was not an appropriate response.

24. Documentation is a necessary feature of alternative to detention programmes in order to ensure that persons possess evidence of their right to reside in the community and to avoid (re-)detention. It also facilitates their ability to rent accommodation, and to access employment, healthcare, education and/or other services. In case of conditions of release that require the deposit or surrender of passports or identity documents, individuals need to be issued with substitute documentation.¹²

25. Independent and transparent evaluation and monitoring are important facets of any alternative programme. In this respect, the important role played by civil society and NGOs in service delivery and/or monitoring in close cooperation with government authorities was acknowledged.

¹¹ See the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990, para. 2.6.

¹² See in the case of refugees and asylum-seekers, Article 27 of the 1951 Convention relating to the Status of Refugees.

Screening and assessment

26. Screening and assessment methods were identified as essential components of detention policies and in respect of alternative to detention programmes, although it was noted that many countries continue to base detention or release decisions on unproven assumptions and/or administrative convenience. Some States that did have screening and assessment mechanisms reported better compliance outcomes.

27. The International Detention Coalition's 5-Step Community Assessment and Placement (CAP) Model was welcomed as worthy of further exploration.¹³ It allows governments to assess suitability of an individual to a specific alternative programme by, for example, identifying particular vulnerabilities and taking into account other relevant individual factors, such as stage in the migration process, intended destination, family and community ties, belief in the process, past behaviour of compliance and character, risk of absconding, or previous criminal record.

28. The CAP Model assists governments to make informed decisions on the best placement, management and support requirements for individuals. It assesses the level and appropriateness of placement in the community, including both needs and risks to the community. The community assessment comprises case management, legal advice and interpretation, the ability to meet basic needs and documentation. Matching an individual to his or her community circumstances was considered an important part of the success of an alternative programme.

Case management in the community

29. Case management was identified as an important aspect in several successful alternative to detention programmes. Case management is a strategy for supporting and managing individuals whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.

30. Case management should be part of an integrated process, starting at an early stage in the asylum or immigration process and continuing until asylum or other legal stay is granted, or deportation is carried out. Providing clear and consistent information about asylum, migration and/or return processes, as well as any consequences for non-cooperation, was highlighted as an element of successful alternative programmes. This is often best achieved via individual case management programmes. Transparency, active information-sharing and good cooperation between all actors involved has also been shown to develop trust among the individuals concerned.

31. Skill sets and personalities of staff can contribute to the success or failure of alternative programmes. Recruitment and training of staff needs to be well managed, including tailored training, courses and/or certification. Individuals should have access to non-discriminatory and discreet complaints and redress mechanisms in cases of abuse.

¹³ Sampson, Mitchell, and Bowring, *There are Alternatives* (supra n. 1): Step 1: Presume detention is not necessary; Step 2: Screen and assess each case individually; Step 3: Assess the community context; Step 4: Apply conditions to release if necessary; and Step 5: Detain only as the last resort in exceptional cases.

Bail plus community supervision

32. Traditional bail systems can work in favour of asylum-seekers, migrants and stateless persons. Best practice suggests that bail hearings be automatic, rather than upon request. In both systems, the provision of legal advice and language assistance can be essential to effective access to bail. Nonetheless, many asylum-seekers, migrants and stateless persons lack the financial means to be released on bail. Release on conditions without money deposit, or other options, can avoid the discrimination on the basis of financial resources inherent in normal bail systems.

33. A number of alternative programmes were identified as good practice in this regard. Those that combine relief from bail payments with reporting obligations, supervision, counselling and individual coaching on all relevant matters were explored.¹⁴

Case management in the returns context

34. It was widely acknowledged that voluntary returns are preferred to forced returns. In fact, many governments undertake considerable efforts to encourage this objective, including through engagement with the International Organization for Migration's Assisted Voluntary Return (AVR) programmes. Reintegration aspects, including return packages, which improve the prospects for families and individuals upon return, can be part of a process for achieving voluntary returns.

35. However, case management services limited to the removal procedure and/or return packages were considered to be inadequate. In comparison, programmes that examined all possible legal avenues to stay enjoyed higher return rates than those that only focused on return. This was attributed to the persons concerned having trust and confidence in the process and their realisation that all legal avenues to stay had been exhausted. In addition, experience of governments and research show that treating persons with respect and dignity throughout asylum or immigration processes contributes to constructive engagement in those processes, including in improving voluntary return outcomes.

36. Research shows that families have a greater interest in cooperating if their needs are met and, at the same time, they are helped to realize that irregular stay is not sustainable.

37. In addition to appropriate services, careful "coaching" alongside adequate space and time for individuals and families to deal with their future prospects, are integral components of such programmes. Case management creates a space for empowerment of families and individuals, including the ability to work through the migration options available to them. By creating trust and faith in the system, case management can assist the government in designing and implementing migration policies that are responsive to migration management imperatives as well as human rights.

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¹⁴ Edwards, *Back to Basics*, specifically examines the Toronto Bail Program in Canada.