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STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration

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Executive summary

This Analysis is the outcome of the work carried out by the Drafting Group on Migration and Human Rights (CDDH-MIG) in light of the mandate entrusted to the Steering Committee for Human Rights (CDDH) by the Committee of Ministers for the biennium 2016–2017. The Analysis aims, *inter alia*, at:

- enhancing the understanding of the legal and practical aspects of alternatives to detention in the context of migration;
- giving a coherent and precise overview of the applicable international human rights standards in the field, highlighting critical themes as well as clarifying both the similarities and the differences between varied bodies of the Council of Europe ("CoE"), the United Nations ("UN") and the European Union ("EU");
- elucidating considerations in relation to vulnerability, such as in the case of children and other persons in a vulnerable situation;
- identifying essential elements that render alternatives to immigration detention effective in terms of compliance to migration procedures, respect for human rights and cost efficiency;
- providing a non-exhaustive and indicative list of different types of possible alternatives to detention in the context of migration, explaining their central features as well as potential benefits and drawbacks;
- reflecting on the ways in which the Council of Europe could engage in further follow-up work that is of practical value to member States in the field.

In the Analysis, immigration detention refers to the deprivation of liberty of persons who may be lawfully deprived of their liberty in accordance with Article 5 § 1(f) and, under certain circumstances, 5 § 1(b) of the European Convention on Human Rights ("the Convention"). Any deprivation of liberty is understood as contemplated by the relevant jurisprudence of the European Court of Human Rights ("the Court"). Alternatives to immigration detention are considered across a range of non-restrictive and restrictive options, providing the benefit of examining a wide range of practices that Council of Europe member States might consider in order to avoid detention in the context of migration.

Legal aspects

The consideration of alternatives to detention is linked to and derives from the right to liberty and security of person that is enshrined in all core international human rights instruments. At the Council of Europe level, deprivation of liberty is lawful only when it falls within the exhaustive list of permissible exceptions under Article 5 of the Convention. The Court has particularly stressed the lawfulness of detention, including the quality of domestic legislation and protection from arbitrariness. Overall, detention in the context of migration under Article 5 § 1(f) must adhere to the general criteria developed in the Court´s case law. It must be provided for in national law, carried out in good faith and closely connected to the aim pursued. The place and conditions of detention must be appropriate, and its length should not exceed that which is reasonably required for the purpose pursued. Proceedings should be carried out with due diligence and there should be a realistic prospect of removal. Sufficient procedural safeguards must be in place, such as the provision of reasons for detention, access to legal assistance and representation, and effective remedies.

The implementation of alternatives is, likewise, subject to important human rights standards, such as the principle of proportionality and non-discrimination, as considered by different bodies of the Council of Europe, the UN and the EU. Alternatives to detention should never amount to a deprivation of liberty, and the question on whether an alternative *to* detention is an alternative *form* of detention is crucial. This depends on the aggregated impact, degree and intensity of the particular measure(s) in place. Alternatives should be established in law and subject to judicial review and their implementation should respect other fundamental rights. Additionally, alternatives should always rely on the least restrictive measure possible.

Varied bodies of the Council of Europe, the UN and the EU have highlighted that immigration detention must always be an exceptional measure of last resort. This entails that detention can only be justified if, after a thorough and individual assessment of the particular circumstances in each case, it has been established that less coercive measures are insufficient. A number of instances have similarly emphasised the obligation of States to examine alternatives to detention as a general principle before any decision to detain is made.

As regards children in particular, the Court has called upon additional safeguards and emphasized the necessity of examining and implementing alternatives. The Court has consistently emphasised that the extreme vulnerability of children takes precedence over their immigration status and that their best interests should be a primary consideration in all actions concerning them. Alternatives should be sought and found ineffective in light of the aim pursued. Other international bodies have further concluded that immigration detention always contravenes the best interests of the child, and maintained that children in this context should never be detained.

Practical aspects

The need for alternatives to immigration detention has consistently been highlighted by international bodies, but there is limited guidance on how to develop and implement such alternatives effectively in practice. Defining “effectiveness” in terms of (a) respect for human rights, (b) compliance with immigration and asylum procedures, and (c) cost-efficiency, the Analysis explores the key question as to what, in practice, can render alternatives effective. By analysing practical experiences from the field and global as well as regional studies, the Analysis suggests certain key factors as “essential elements” to effectiveness, namely:

- Using screening and assessment to address individual circumstances, including vulnerabilities and risks;
- Providing clear and precise information about rights, duties and consequences of non-compliance;
- Ensuring access to legal assistance from the beginning and throughout the process;
- Building trust in asylum and migration procedures;
- Upholding individualised case management services;
- Safeguarding the dignity and fundamental rights of the persons concerned.

A number of different types of alternatives in the specific context of migration are listed in the Analysis, and their main features, benefits and drawbacks described. These include such measures as registration with authorities; temporary residence permits; case management or case worker support; alternative family-based accommodation; residential accommodation; open centres or semi-open centres; regular reporting; designated residence; supervision; return counselling; return houses or return centres; bail, bond, guarantor or surety; electronic monitoring.

Each and every alternative noted may not necessarily be recognized by all member States or all other actors as an alternative to detention, nor may the advantages, disadvantages and human rights implications listed reflect the views of particular authorities. Crucially, however, the ways in which alternatives are implemented, and the processes by which the "essential elements" are upheld or neglected, may well determine the outcome and the effectiveness of alternative measures to a greater degree than the specific type(s) of alternative applied.

An examination of the policies and practices in Council of Europe member States indicates that a large number of countries have established an obligation in national legislation to consider alternatives to immigration detention. The main types of alternatives provided are: (a) regular reporting; (b) designated residence; (c) surrender of documentation; (d) bail or surety. Vulnerability is a key consideration during the decision-making and implementation process in most member States. When it comes to children in particular, the situation varies as their detention is either prohibited – sometimes depending on their age – or permissible in exceptional cases. Specific types of alternatives for unaccompanied children and families, such as return houses, open centres and foster care arrangements have been developed in a number of countries.

Overall, persisting legal and practical challenges include the absence of clear guidance as regards the implementation of alternatives; the quality of the initial decision-making process; challenges with individual assessment procedures; lack of monitoring mechanisms; as well as limited data and evaluation concerning the use, effectiveness and human rights implications of the measures applied. The greatest gap identified, however, is the fact that alternatives remain largely unused in practice, and/or applied on a very limited scale.

Next steps

Council of Europe member States have taken significant steps to explore and implement alternatives to detention in their particular national contexts. However, as illustrated by this Analysis, member States could benefit from stronger support in their endeavours, especially as regards addressing persisting challenges in implementing alternatives effectively. The Council of Europe could play an important role in this regard, using this Analysis as a solid foundation on which to base further advancement in the field. A concrete *first step* in the near future could be the development of a practical and user-friendly handbook for authorities on effectively implementing alternatives to immigration detention. Alongside such work, the Council of Europe could, *inter alia*, explore possibilities of pursuing specific cooperation projects with interested member States on a voluntary basis. Additionally, as a conceivable *second step,* guidelines on effective alternatives to immigration detention, possibly focusing on children in particular, could be developed. For any such future follow-up work to be as useful as possible, it should illustrate the relevant human rights standards and the essential elements of effective alternatives, in a user-friendly, accessible and practical manner.

I. INTRODUCTION

1. Context

1. Estimates show that an unprecedented 65,6 million people were forcibly displaced globally in 2016. The refugee population worldwide reached a record high of 22,5 million people in total and almost half of them were children. In 2016, asylum seekers were around 2,8 million while an estimated 10 million persons were stateless or at risk of statelessness.[1] In 2016, Turkey hosted the largest number of refugees in the world with an estimated 2,9 million people.[2]

2. More than 380,000 people categorised as migrants, asylum seekers or refugees arrived in Europe in 2016. Nearly all the arrivals came through two frontline countries, namely Greece with over 176,000 people and Italy with over 181,000 people.[3] According to the United Nations High Commissioner for Refugees ("UNHCR"), Germany was the world's largest recipient of new asylum applications (722,400) in 2016, Italy was the third-largest (123,000) and Turkey the fourth-largest (78,600).[4] Greece was ranked as the sixth receiving country globally (51,092).[5] While a great number of people were saved from drowning through extensive rescue operations, more than 5,000 individuals are estimated to have lost their lives or gone missing in the Mediterranean Sea in 2016.[6]

3. In 2015 and 2016 around 800,000 children applied for asylum in Europe, 170,000 of whom were considered unaccompanied.[7] Over 261,000 of asylum applications lodged in Germany in 2016 were made by children, approximately 35,000 of whom were unaccompanied or separated. In 2016 more than 100,000 children arrived in Greece, Italy, Spain and Bulgaria,

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[1] United Nations High Commissioner for Refugees ("UNHCR"), "War, violence, persecution push displacement to new unprecedented high," 19 June 2017; UNHCR, *Global Trends: Forced Displacement in 2016*, 19 June 2017, p. 2. For distinctions between persons of concern to UNHCR referenced here, see pages 56-57 of the aforementioned report.
It should also be noted that 40,3 million people were internally displaced in 2016. Looking at Council of Europe member States, Ukraine was estimated to have 1,653,000 internally displaced persons in 2016; followed by Turkey (1,108,000); Azerbaijan (582,000); Cyprus (272,000); Georgia (208,000); Bosnia and Herzegovina (98,000); and the Russian Federation (19,000). The aforementioned country specific figures refer to internal displacement by conflict. Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *Global Report on Internal Displacement - 2017*, May 2017, pp. 25-26 and 113-116.

[2] UNHCR, *Global Trends: Forced Displacement in 2016*, 19 June 2017, pp.14-15. Pakistan hosted the second-largest refugee population (1,4 million), followed by Lebanon (over 1 million - proportionally hosting the largest number of refugees in relation to its national population), and the Islamic Republic of Iran (979,4000).

[3] International Organisation for Migration ("IOM"), *Mixed Migration Flows in the Mediterranean and Beyond, Compilation of Available Data and Information*, Reporting period 2016, p. 1.

[4] The United States of America was globally the second largest recipient of new asylum applications in 2016 (262,000). UNHCR, *Global Trends: Force Displacement in 2016*, 19 June 2017, pp. 39-40. For numbers on other Council of Europe member States please see page 41 of the aforementioned report.

[5] According to official statistical data of the Greek Asylum Service. The respective figure for Greece in the statistical data presented in UNHCR, *Global Trends: Force Displacement in 2016*, 19 June 2017, p. 41, is 49,000.

[6] IOM, *Mixed Migration Flows in the Mediterranean and Beyond, Compilation of Available Data and Information*, Reporting period 2016, p. 12.

[7] As specified in the report, numbers concern 32 European countries which include "European Union countries and the four countries of the European Free Trade Association." United Nations International Children's Emergency Fund ("UNICEF"*), A child is a child - Protecting children on the move from violence, abuse and exploitation*, UNICEF, May 2017, Figure 5, p. 14.

over 33,000 of whom were unaccompanied or separated.[8] Around 92% of children arriving in Italy by sea in 2016 and in the first two months of 2017 were unaccompanied or separated.[9]

4. The overall response in Europe to these historic developments is complex, diverse and intricate with no simple explanations or solutions. But the wide use of immigration detention as a response to the arrivals of refugees, asylum seekers and migrants raises serious issues of compliance with human rights standards.[10] Detention of persons in a vulnerable situation, such as children,[11] remains a matter of grave concern not only in Europe but across continents. Due to the negative impact of detention, especially on children and other persons in a vulnerable situation, various actors have consistently called for greater implementation of alternatives to detention. It is, therefore, becoming ever more pertinent to understand and share the ways in which humane and financially sound policies can be effectively implemented in the current context, simultaneously encouraging individual compliance with migration procedures and respecting the right to liberty. While there are no easy answers to issues of migration in Europe, Council of Europe member States could benefit from further support in meeting their international commitments in this regard. Such support could not only be beneficial to individual States in their pursuit of effective migration management but could also significantly reduce human suffering. It is against this backdrop that this exploration into effective alternatives to immigration detention is undertaken.

2. Terms of reference

5. At their 1241st meeting on 24-26 November 2015, the Committee of Ministers mandated the Steering Committee for Human Rights ("CDDH") to carry out the following work for the biennium 2016-2017: "in light of the Court's relevant jurisprudence and other Council of Europe instruments, conduct an analysis of the legal and practical aspects of specific migration-related human rights issues, in particular effective alternatives to detention, and the need for further work in the field by the CDDH is explored."[12]

6. In light of the above-mentioned terms of reference, the CDDH set up a Drafting Group on Migration and Human Rights ("CDDH-MIG")[13] and appointed Mr Frank SCHÜRMANN (Switzerland) Rapporteur for this activity at its 84th meeting on 7-11 December 2015.[14]

7. At the 85th meeting of the CDDH on 15-17 June 2016, the Committee appointed Mr Morten RUUD (Norway) Chair of the CDDH-MIG.[15] At the same meeting, the Rapporteur of the CDDH-MIG presented a potential draft outline of the analysis. During the discussion that followed the CDDH emphasised that "vulnerability did not only extend to children but a much wider spectrum of individuals" and instructed the addition of vulnerable groups and individuals in

[8] UNHCR, UNICEF and IOM, *Refugee and Migrant Children- Including Unaccompanied and Separated Children- in the EU*, *Overview of Trends in 2016*, April 2017, p. 1.
[9] UNICEF, *A child is a child - Protecting children on the move from violence, abuse and exploitation*, UNICEF, May 2017, p. 11.
[10] *State Of Democracy, Human Rights and the Rule of Law, Populism – How strong are Europe's checks and balances?* Report by the Secretary General of the Council of Europe, April 2017, p. 109.
[11] For the purpose of this Analysis, "children" will be understood in accordance with the definition provided in Article 1 of the CRC, namely "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."
[12] Terms of reference of the CDDH and its subordinate bodies for the biennium 2016–2017 (*as adopted by the Committee of Ministers at their 1241st meeting, 24–26 November 2015*).
[13] Document CDDH(2016)R85, § 39.
[14] Document CDDH(2015)R84, § 40 (iii).
[15] Document CDDH(2016)R85, § 63.

the analysis.[16] The CDDH further advised coordinating with other Council of Europe bodies, in particular the Committee of Experts on Administrative Detention of Migrants ("CJ-DAM") and the Ad hoc Committee for the Rights of the Child ("CAHENF").[17]

8. The 1st meeting of the CDDH-MIG was held on 14-16 September 2016 and the Group elected Mr Ota HLINOMAZ (Czech Republic) as Vice-Chair.[18] At the meeting, the Group asked the Secretariat to prepare a text for a request for information on alternatives to detention in the context of migration to further enrich the on-going analysis based on contributions of Council of Europe member States and observers.[19] Such a request for information was sent to all members of the CDDH and CDDH-MIG as well as observers on 10 October 2016.[20]

3. Definitions and scope

3.1. Definitions

3.1.1. Immigration detention

9. Under international law, deprivation of liberty is contemplated 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."[21] As for the deprivation of liberty in the context of migration, commonly referred to as "immigration detention," definitions have been produced by a number of bodies, including at the United Nations ("UN") and the European Union ("EU").[22]

10. At the Council of Europe level, the right to liberty and security of person is guaranteed by Article 5 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"), the central aim of which is to ensure that no one is deprived of their liberty in an arbitrary fashion. The Convention does not provide any definition of detention as such but rather refers to "deprivation of liberty." An exhaustive list of permissible exceptions where liberty can be deprived is contained in Article 5 § 1 (sub-paragraphs (a) to (f)).

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[16] *Ibid.*, § 37.
[17] *Ibid.*, § 38.
[18] Document CDDH-MIG(2016)R1, § 4.
[19] *Ibid.*, § 10.
[20] See Appendix.
[21] United Nations ("UN"), Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT"), Article 4 (2). In a dedicated thematic report on immigration detention, the Special Rapporteur on the human rights of migrants noted that detention for purposes of immigration control is included in the scope of deprivation of liberty and that "[d]ifferent categories of migrants may be subjected to [such] detention, including migrants who are undocumented or in an irregular situation, asylum-seekers awaiting the outcome of their asylum application and failed asylum-seekers awaiting removal." *Report of the Special Rapporteur on the human rights of migrants*, François Crépeau, A/HRC/20/24, 2 April 2012, § 8.
[22] For example, at the UN level, UNHCR has defined immigration detention as "the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities." UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, § 5. At the European Union ("EU") level, detention of persons applying for international protection is defined as "confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement." Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, L 180/96, Article 2 (h).

11. In order to determine whether someone has been deprived of his or her liberty within the meaning of Article 5, the starting point must be the individual's concrete situation. Account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.[23] In determining whether or not there has been a deprivation of liberty, the European Court of Human Rights ("the Court") is not bound by national law or legal decisions of the domestic authorities but undertakes an autonomous assessment of the situation.[24]

12. According to the Court, the difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance.[25] Hence, different measures that restrict movement can, when taken together, amount to a deprivation of liberty. Part of the examination includes the cumulative effects of the restrictions under which a person has been placed.[26]

13. In light of the above, the question on whether a measure is actually an alternative *form of* detention rather than an alternative *to* detention is of critical importance. Measures labelled as "alternatives to detention" can, in effect, amount to a deprivation of liberty if the aggregated impact, degree and intensity of the actions taken constitute severe restrictions on a person's liberty. This is especially important in the context of restrictions or conditions-based alternatives, as some restrictions on liberty of movement, either by themselves or in combination with other measures, may either amount to arbitrary restrictions on freedom of movement or to an arbitrary deprivation of liberty.[27]

14. In the leading case *Guzzardi v. Italy*, the Court acknowledged that deprivation of liberty may take various forms. It further clarified that the variety of these forms is being increased by developments in legal standards and attitudes; and "the Convention is to be interpreted in the light of the notions currently prevailing in democratic States."[28] The Court found that the measures applied to the applicant, namely confinement at a particular place on a small island, a residence requirement, the obligation to report twice a day and being subject to constant supervision amounted in fact to a deprivation of liberty within the meaning of Article 5. The Court noted that the restrictions imposed made it difficult for the applicant to make social contacts. The Court concluded that these measures taken individually could not amount to a deprivation of liberty but when taken cumulatively and in combination they amounted to *de facto* detention and thus fell under the scope of Article 5 of the Convention. [29]

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[23] *Guzzardi v. Italy,* No. 7367/76, 6 November 1980, § 92; *Medvedyev and Others v. France*, No. 3394/03, 29 March 2010 [GC], § 73; *Creangă v. Romania*, No. 29226/03, 23 February 2012 [GC], § 91; *De Tommaso v. Italy*, No. 43395/09, 23 February 2017 [GC], § 80.

[24] *H.L. v. the United Kingdom*, No. 45508/99, 5 October 2004, § 90; *H.M. v. Switzerland*, No. 39187/98, 26 February 2002, §§ 30 and 48; *Creangă v. Romania* [GC], § 92.

[25] *Guzzardi v. Italy,* § 93; *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, § 314; *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012 [GC], § 115.

[26] *Guzzardi v. Italy*, § 95.

[27] Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons ("CAHAR"), September 2005, commentary to Guideline 6 § 1 of Committee of Ministers, *Twenty Guidelines on Forced Return*, § 3.

[28] *Guzzardi v. Italy*, § 95.

[29] *Ibid.*; See, in contrast to the *Guzzardi* case, the case of *De Tommaso v. Italy*, where the Court held that "in the present case, the applicant […], unlike the applicant in the *Guzzardi* case, was not forced to live within a restricted area and was not unable to make social contacts,"§ 85.

15. Furthermore, the Court can look to the specific context and circumstances surrounding restriction other than confinement in a particular place. For example, deprivation of liberty may occur in circumstances where the person deprived of his or her liberty is given the sole option to leave the territory, such as in a transit zone where a person is seeking asylum, whose application has not yet been considered and who has no option but to enter the State which he or she left.[30] In the judgment *Amuur v. France*, the Court maintained that the confinement of the applicants in an international zone together with restrictions on movement with strict and constant police surveillance had turned a mere restriction of movement into a deprivation of liberty when this holding was "prolonged excessively."[31] The Court attached particular attention to the absence of suitable procedural safeguards i.e. speedy review of the restrictions imposed and the fact that the applicants "were left to their own devices" with no access to legal and social assistance, particularly as regard the formalities of their asylum applications.[32] The Court rejected the argument that because the persons could choose to return to their country voluntarily they could also end their detention as this possibility was merely theoretical in the absence of any other country's willingness to take them.[33] Moreover, holding in a transit zone may be considered *de facto* detention and incompatible with Article 5 § 1(f) where there has been an absence of "a formal decision of legal relevance, complete with reasoning."[34]

16. For the purpose of this analysis, immigration detention refers to the deprivation of liberty of persons who may be lawfully deprived of their liberty in accordance with Article 5 § 1(f) and, under certain circumstances, 5 § 1(b) of the Convention. Any deprivation of liberty will be understood as contemplated by the relevant jurisprudence of the Court.

3.1.2. Alternatives to immigration detention

17. There is no universally agreed-upon definition of "alternatives to detention" or "alternatives to immigration detention." Various terms such as "non-custodial measures," "less restrictive measures," "less coercive measures," "less drastic measures," "less invasive measures," "less onerous measures," "less intrusive measures," "special measures," "more lenient measures" or "alternative measures" are often used when referring to alternatives to detention.[35] "Alternatives to immigration detention" is also not a legal term, but rather refers to a range of different practices which may be utilised to avoid detention[36] and, thus, respect the

[30] *Amuur v. France*, No. 19776/92, 25 June 1996, § 48; *Z.A. and others v. Russia*, Nos. 61411/15 and 3 others, 28 March 2017, § 89 (Referral to the Grand Chamber).
[31] *Amuur v. France*, § 43.
[32] *Ibid.*, § 45.
[33] *Ibid.*, § 48.
[34] *Ilias and Ahmed v. Hungary*, No. 47287/15, 14 March 2017, §§ 67-69 (Referral to the Grand Chamber).
[35] See, for example, Replies to the CDDH-MIG request for information; *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011, § 124; *A.B. and Others v. France*, No. 11593/12, 12 July 2016, § 124; Committee of Ministers, *Twenty Guidelines on Forced Return*, 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 6 § 1; UN Human Rights Committee ("CCPR"), *General comment No. 35 on Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, § 18; *Zeyad Khalaf Hamadie Al-Gertani v. Bosnia and Herzegovina,* Communication No. 1955/2010, Views adopted on 1 November 2013, § 10.4; UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 35; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 24 December 2008, L 348/98, Article 15 § 1.
[36] UNHCR, *Detention Guidelines*, 2012, § 8; International Detention Coalition ("IDC"), *There are Alternatives: A handbook for preventing unnecessary immigration detention (revised edition)*, 2015, p. 7; C. Costello and E. 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.REV.1, June 2013, p. 10.

principle of necessity and proportionality. Regardless the name used, there is broad consensus that alternatives to immigration detention are non-custodial measures that respect fundamental human rights and allow individual options other than detention.[37]

18. Overall, the term has been interpreted and used "in at least two distinct senses. In the narrow sense, it refers to a practice used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State's disposal which can and even should be used. In the broader sense, [alternatives to detention] refer to any of a range of policies and practices that States use to manage the migration process, which fall short of detention, but typically involve some restrictions."[38]

19. Using the narrow sense, UNHCR has defined alternatives to immigration detention as "any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement."[39] In the broader sense, alternatives to immigration detention have been defined as "any law, policy or practice by which persons are not detained for reasons relating to their migration status," which includes open accommodation on a continuum from the least to the most restrictive measures, as part of the range of alternative options available to States.[40]

20. For the purpose of this analysis, alternatives to immigration detention will be considered across a range of non-restrictive and restrictive options, providing the benefit of consideration of a wider range of practices that Council of Europe member States may consider implementing in order to avoid detention in the context of managing migration.

3.2. Scope of the analysis, persons concerned and sources referenced

21. This paper sets out and analyses the European and international standards relevant to alternatives to detention for persons who may be lawfully deprived of their liberty in accordance with Article 5 § 1(f) and, under certain circumstances, 5 § 1(b) of the Convention, while giving special attention to the particular rights, obligations and nuances regarding vulnerability.[41] In light of the mandate given to the CDDH by the Committee of Ministers, primary consideration is given to the jurisprudence of the Court, as well as other Council of Europe standards. Certain essential elements of effective alternatives to detention are presented, as well as a non-exhaustive list of types of alternatives with reflections on the advantages, challenges and human rights implications of each type. Simultaneously, various legal and practical aspects for member States to consider when developing and implementing alternatives to detention in the context of migration are discussed. In closing, the paper gives an outline of possible future work that the CDDH may envisage.

22. The key sources of information in the analysis are a number of documents issued by the Council of Europe, the UN and the EU. The human rights standards referenced in this Analysis

[37] See, for example, Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6, § 1; Directive 2013/33/EU, Recital (20); UNHCR, *Detention Guidelines*, 2012, § 8; UN Committee on the Rights of the Child ("CRC Committee"), *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, § 79.
[38] C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention*, 2013, p. 10.
[39] UNHCR, *Detention Guidelines*, 2012, § 8.
[40] IDC, *There are Alternatives,* 2015, p. 7.
[41] When referring to vulnerability, terms such as vulnerable persons, vulnerable individuals, vulnerable groups and/or persons in a vulnerable situation are used interchangeably in this Analysis.

are based on legally-binding instruments (i.e. Conventions, Charters, EU secondary legislation, etc.) and non-legally binding guidelines, recommendations, resolutions, reports, etc. For the sake of clarity and precision, each body is mentioned, where appropriate, in the text and referenced in the footnotes. Additional sources, including studies, reports and academic work are also consulted and referenced throughout. Primary sources referenced constitute the replies received to the request for information on alternatives to detention sent out by the CDDH-MIG. These replies give further information on the policies, practices and implementation of alternatives to detention in Council of Europe member States. Finally, the outcomes of the International Conference *"Immigration Detention of Children: Coming to a Close?"*, held on 25-26 September 2017 in Prague under the Czech Chairmanship of the Council of Europe Committee of Ministers, are referenced where appropriate.[42] The Conference, organised in cooperation with the Council of Europe, was partly inspired by the on-going work of the CDDH-MIG and designed to give further contribution and impetus to the field at large.

II. LEGAL ASPECTS: APPLICABLE HUMAN RIGHTS STANDARDS

1. The European Court of Human Rights and other Council of Europe standards

1.1. Right to liberty: Article 5 of the Convention

1.1.1. General conditions

23. The consideration of alternatives to detention is linked to and derives from the right to liberty and security of person which is enshrined in all core international and regional human rights instruments.[43]

24. As already noted, in the framework of the Council of Europe the right to liberty and security of person is enshrined in Article 5 of the Convention. The Court has emphasised that this provision "enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty."[44] The right to liberty is considered of the highest importance "in a democratic society" within the meaning of the Convention[45] and applies to everyone.[46] State Parties have an obligation "not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within [their] jurisdiction."[47]

Exhaustive list of permissible exceptions

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[42] See http://dmcprague2017.justice.cz/

[43] See, for example, Article 3 of the Universal Declaration of Human Rights ("UDHR"); Article 9 of the International Covenant on Civil and Political Rights ("the Covenant"); Article 5 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") and Article 6 of the Charter of Fundamental Rights of the European Union ("EU Charter").

[44] See, for example, *Saadi v. the United Kingdom*, No. 13229/03, 29 January 2008 [GC], § 63; *Khlaifia and Others v. Italy*, No. 16483/12, 15 December 2016 [GC], § 88; *Thimothawes v. Belgium,* No. 39061/11, 4 April 2017, § 56; *Suso Musa v. Malta,* No. 42337/12, 23 July 2013, § 89.

[45] *Medvedyev and Others v. France* [GC], § 76; *Ladent v. Poland*, No. 11036/03, 18 March 2008, § 45.

[46] *Medvedyev and Others v. France* [GC], § 77; *Nada v. Switzerland*, No. 10593/08, 12 September 2012 [GC], § 224.

[47] *El-Masri v."the former Yugoslav Republic of Macedonia*," No. 39630/09, 13 December 2012 [GC], § 239.

25. Article 5 § 1, sub-paragraphs (a) to (f), contains an exhaustive list of permissible exceptions where liberty can be deprived. These exceptions should be interpreted narrowly to be "consistent with the aim of this provision, namely to ensure that no one is arbitrarily deprived of his or her liberty."[48] Any deprivation of liberty that does not fall within one of these permissible exceptions will always be unlawful.[49]

Lawfulness/Conformity with national procedure (references to national law)

26. The text of the Convention sets two general conditions: the detention must be "lawful" and it must be ordered "in accordance with a procedure prescribed by law" (references to national law). Thus, in *Saadi v. the United Kingdom*, the Grand Chamber of the Court held:[50]

> "It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law."

27. The Court has paid particular attention to the *quality* of the domestic law that restricts an individual's liberty, especially in respect of an asylum seeker. Consequently, the relevant law must be compatible with the rule of law[51] and should be "sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness."[52] This is "of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies."[53]

28. Based on these references to national law, the Court has made clear that if a State's own laws provide for the necessity of detention to be demonstrated then there must be compliance with the necessity requirement in those national laws in order for the detention not to be arbitrary.[54] Similarly, in a case of a prolongation of detention, the Court has held that there must be compliance with relevant rules of domestic law (such as any requirement that the authorities verify that the detained person was frustrating the enforcement of the expulsion, that alternative, less stringent measures were not applicable or if the expulsion order could eventually be enforced or not) in order for the detention not to be arbitrary. [55]

Protection from arbitrariness

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[48] *Vasileva v. Denmark*, No. 52792/99, 25 December 2003, § 33; *Khlaifia and Others v. Italy* [GC], § 88.
[49] *Khlaifia and Others v. Italy* [GC], § 88.
[50] *Saadi v. the United Kingdom* [GC], § 67.
[51] "A concept inherent in All Articles of the Convention." *Amuur v. France*, § 50*; Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009, § 130; *Khlaifia and Others v. Italy* [GC], § 91.
[52] *Longa Yonkeu v. Latvia*, No. 57229/09, 15 November 2011, §§ 120, 133-144 (particularly at § 140); *Shamsa v. Poland*, No. 45355/99 and 45357/99, 27 November 2003, § 49; *Baranowski v. Poland*, No. 28358/95, 28 March 2000, § 52; *Amuur v. France*, § 50; *Sadaykov v. Bulgaria*, No. 75157/01, 22 May 2008, § 23.
[53] *Amuur v. France*, § 50; *Rashed v. the Czech Republic*, No. 298/07, 27 November 2008, § 73.
[54] *Rusu v. Austria,* No. 34082/02, 2 October 2008, §§ 54-58.
[55] *Nabil and Others v. Hungary*, No. 62116/12, 22 September 2015, §§ 40-43.

29. In the above mentioned case of *Saadi*, the Court, after having underlined the requirement of compliance with national law, has furthermore emphasised that this compliance:[56]

> "…is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. […] It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention. […] It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved."

1.1.2. Detention under Article 5 § 1(f)

General

30. Particularly relevant in the context of migration is Article 5 § 1(f) of the Convention which permits detention in two different situations: first limb, "to prevent an unauthorised entry into the country;" second limb, detention "of a person against whom action is being taken with a view to his or her deportation or extradition."

31. The Court has held that detention under Article 5 § 1(f) is not required to be reasonably necessary.[57] Thus, sub-paragraph (f) differs in its level of protection as compared to other sub-paragraphs, notably sub-paragraph (c). In the case of *Rusu v. Austria*, concerning deportation, the Court stated:[58]

> "The applicant's detention falls to be considered under Article 5 § 1(f) of the Convention. The Court reiterates that all that is required under this provision is that "action is being taken with a view to deportation." Article 5 § 1(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 § 1(f) provides a different level of protection from Article 5 § 1(c) (see Č*onka,* cited above, § 38, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1862-63, §§ 112-13)."

32. Notwithstanding this differentiation, detention under Article 5 § 1(f) must be consistent with the purpose of Article 5, i.e. the protection from arbitrariness.

33. To avoid being considered arbitrary, detention under Article 5 § 1(f) (both situations[59]) must adhere to the general criteria developed in the Court's case law, that is that the detention:[60]

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[56] *Saadi v. the United Kingdom* [GC], § 67.
[57] *Ibid.*, § 72; *Rusu v. Austria,* § 52; *Čonka v. Belgium*, No. 51564/99, 5 February 2002, § 38; *Chahal v. the United Kingdom*, No. 22414/93, 15 November 1996 [GC], §§ 112-113.
[58] *Rusu v. Austria*, § 52.
[59] *Saadi v. the United Kingdom* [GC], § 73.
[60] *Ibid.*, § 74. See also, *Suso Musa v. Malta*, § 93; *Longa Yonkeu v. Latvia*, § 134.

i. must be carried out in good faith;
ii. must be closely connected to the purpose pursued by detention;
iii. the place and conditions of detention should be appropriate, also bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country;"[61]
iv. the length of the detention should not exceed that reasonably required for the purpose pursued;
v. proceedings must be carried out with due diligence;[62]
vi. there must be a realistic prospect of removal (second limb of sub-paragraph (f)).[63]

Detention to prevent an unauthorised entry

34. In *Saadi*, the Court made clear that any entry would be "unauthorised" until the State has provided authorisation. The Court has held that the detention of asylum seekers and other migrants prior to formal authorisation to enter falls under, and is in line with, the first limb of Article 5 § 1(f).[64] The reasoning was summarised in the case of *Suso Musa v. Malta*:[65]

> "In *Saadi* (cited above, §§ 64-66) the Grand Chamber interpreted for the first time the meaning of the first limb of Article 5 § 1(f), namely, "to prevent his effecting an unauthorised entry into the country". It considered that until a State had "authorised" entry to the country, any entry was "unauthorised" and the detention of a person who wished to effect entry and who needed but did not yet have authorisation to do so, could be, without any distortion of language, to "prevent his effecting an unauthorised entry". It did not accept that, as soon as an asylum seeker had surrendered himself to the immigration authorities, he was seeking to effect an "authorised" entry, with the result that detention could not be justified under the first limb of Article 5 § 1(f) (§ 65). It considered that to interpret the first limb of Article 5 § 1(f) as permitting detention only of a person who was shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above. Such an interpretation would, moreover, be inconsistent with Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Programme, the UNHCR's Guidelines and the Committee of Ministers' Recommendation (see §§ 34-35 and § 37 of the *Saadi* judgment), all of which envisaged the detention of asylum seekers in certain circumstances, for example while identity checks were taking place or when elements on which the asylum claim was based had to be determined."

[61] *Saadi v. the United Kingdom* [GC], § 74, citing with approval *Amuur v. France*, § 43.
[62] *Chahal v. the United Kingdom* [GC], § 113. See also, *Singh v. the Czech Republic*, No. 60538/00, 25 January 2005, §§ 61-68; *Raza v. Bulgaria*, No. 31465/08, 11 February 2010, §§ 72-75; *M. and Others v. Bulgaria*, No. 41416/08, 26 July 2011, §§ 61-77; *Auad v. Bulgaria*, No. 46390/10, 11 October 2011, §§ 128-135.
[63] *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, § 69.
[64] *Saadi v. the United Kingdom* [GC], §§ 65-66.
[65] *Suso Musa v. Malta*, § 90.

35. The issue on whether the first limb of Article 5 § 1(f) ceases to apply depends largely on whether a formal authorisation to stay or enter the State's territory has been granted pursuant to national legislation. Thus, in the case of *Suso Musa v. Malta*, the Court emphasised:[66]

> "Indeed, where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application […], an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1(f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1(f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning."

36. In view of the aforementioned, the Court's case law on the first limb of Article 5 § 1(f) suggests that detention of a person may raise an issue of lawfulness of detention under this provision when domestic legislation has authorised entry or stay pending their asylum application.[67]

Detention with a view to deportation or extradition

37. Detention of a person awaiting deportation or extradition falls under the second limb of Article 5 § 1(f).[68] The deportation of a person cannot be carried out until a decision has been given on his or her asylum application.[69] The Court has maintained that all that is required for detention to be justified is that "action is being taken with a view to deportation."[70] Detention, however, will be compatible with Article 5 § 1(f) only as long as deportation proceedings are actively in progress and pursued with "due diligence."[71] If the prospect of removal becomes no longer feasible[72] or the criterion of "due diligence" is not met,[73] detention will be unlawful. In that sense, the proportionality test for sub-paragraph (f) is different from the one in sub-paragraph (b) (see below, 1.1.3). Thus, in *Saadi*, the Court held:[74]

> "where a person has been detained under Article 5 § 1(f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained "with a view to deportation", that is, as long as "action [was] being taken with a view to deportation", there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing (see *Chahal*, cited above, § 112). The Grand Chamber further held in

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[66] *Ibid.*, § 97.
[67] *Idem.*; See also, *O.M. v. Hungary*, No. 9912/15, 5 July 2016, § 47.
[68] *Chahal v. the United Kingdom* [GC], § 112.
[69] *R.U. v. Greece*, No. 2237/08, 7 June 2011, § 94; *S.D. v. Greece*, No. 53541/07, 11 June 2009, § 62.
[70] *Chahal v. the United Kingdom* [CG], § 112; *Rusu v. Austria*, § 52.
[71] *Chahal v. the United Kingdom* [GC], § 113; *A. and Others v. the United Kingdom,* No. 3455/05, 19 February 2009 [CG], § 164; *Singh v. the Czech Republic*, §§ 61-68; *Raza v. Bulgaria*, §§ 71- 75; *M. and Others v Bulgaria*, §§ 61-77; *Auad v. Bulgaria*, §§127-135.
[72] *Louled Massoud v. Malta*, § 67; *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009, §§ 64-65.
[73] *Auad v. Bulgaria*, §§130-135.
[74] *Saadi v. the United Kingdom* [GC], § 72.

> *Chahal* that the principle of proportionality applied to detention under Article 5 § 1(f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held that "any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible ..." (ibid., § 113; see also *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, ECHR 2007-II)."

38. As to the assessment of arbitrariness, the Court has considered the availability to States of measures other than protracted detention in the absence of any immediate prospect of the person's removal or the failure of authorities to conduct proceedings with due diligence.[75] Thus, in the case of *Louled Massoud v. Malta*, the Court found:[76]

> "…it 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 measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion."

1.1.3. Detention under Article 5 § 1(b)

39. Article 5 § 1(b), which permits detention for the purpose of "securing the fulfilment of an obligation prescribed by law," may also be relevant in the migration context. According to the Court, for detention to be lawful under Article 5 § 1(b), several criteria must be met:

i. there must be an unfulfilled obligation incumbent on the person concerned;
ii. the arrest and detention must be for the purpose of securing the fulfilment of that obligation;
iii. the arrest and detention must not be punitive in character;
iv. the obligation incumbent on the person has to be specific and concrete;
v. the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment;[77]
vi. the obligation prescribed by law cannot be fulfilled by milder means;
vii. the principle of proportionality must be applied, namely "a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty."[78]

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[75] *Louled Massoud v. Malta*, § 68; *Mikolenko v. Estonia*, § 67. See also, *Raza v. Bulgaria*, §§ 73-75 (where the deportation of the applicant in detention was blocked because he lacked the necessary travel documents. The Court attached particular attention to the fact that proceedings had not been actively and diligently pursued while also noting that the authorities had at their disposal measures other than the applicant's protracted detention). Reference has also been made by the Court to the examination of alternatives to immigration detention following the application of an interim measure under Rule 39 of the Rules of the Court: See, for example, *Keshmiri v. Turkey* (No 2), No. 22426/10, 17 January 2012, §§ 34-35 (the applicant remained in prolonged detention while alternative solutions had not been sought); *Azimov v. Russia*, No. 67474/11, 18 April 2013, §§ 169-174 (the applicant remained in prolonged detention without any review of his continued detention while "alternative solutions" had not been considered); *Ermakov v. Russia*, No. 43165/10, 7 November 2013, § 252 (the applicant's detention was subject to time limits and less strict preventive measures had been considered).
[76] *Louled Massoud v. Malta*, § 68.
[77] *O.M. v. Hungary*, § 42.
[78] *Ibid*., § 43; *Saadi v. the United Kingdom* [GC], § 70.

40. When assessing the compatibility of an arrest or detention with Article 5 § 1(b), three key factors are taken into account by the Court: "the nature of the obligation arising from the relevant legislation, including its object and purpose; the person being detained and the particular circumstances leading to detention; and the length of the detention."[79] As soon as the obligation in question is fulfilled, the basis for detention under Article 5 § 1(b) comes to an end.[80]

41. In comparison to sub-paragraph (f), sub-paragraph (b) includes an assessment of necessity and proportionality in each case.[81]

1.2. Procedural safeguards

Provision of reasons for detention

42. Central to the ability of a detained person to challenge the lawfulness of detention is compliance with Article 5 § 2 which requires that anyone "who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." This is to enable the detained person to challenge the detention order under Article 5 § 4. "Arrest" under Article 5 § 2 has been held by the Court to be analogous to "detention."[82] Compliance with Article 5 § 2 is compulsory in all situations of detention under Article 5 § 1,[83] with the satisfaction of Article 5 § 2 turning on an assessment of each individual case.[84] Failure to provide reasons for detention can result in detention being unlawful under Article 5 § 1(f).[85]

43. The content of the reasons for detention must include the "essential legal and factual grounds" for arrest.[86] The language used to convey the reasons must be "simple, non-technical language that [the detained person] can understand."[87] The person must be informed promptly of the reasons for their arrest or detention.[88]

Review of detention decisions (Habeas Corpus)

44. Article 5 § 4 provides that everyone deprived of liberty is "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." The guarantee applies to detention that is not judicially ordered.[89] Article 5 § 4 contains two chief elements pertinent to the review of a detention decision: firstly, that the review should be conducted "speedily," and secondly, that the review must be accessible and effective in practice. Speedy judicial review of the detention decision must be available throughout a person's detention.[90] Accessibility to, and the effectiveness of,

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[79] *O.M v. Hungary,* § 44.
[80] *Ibid*., § 42.
[81] *Saadi v. the United Kingdom* [GC], § 70.
[82] *Shamayev and Others v. Georgia and Russia*, No. 36378/02, 12 April 2005, §§ 413-414.
[83] *Kerr v. the United Kingdom*, No. 40451/98, Partial Decision, 7 December 1999; *Fox, Campbell and Hartley v. the United Kingdom*, Nos. 12446/86, 12245/86 and 12383/86, 30 August 1990, § 40.
[84] *Kerr v. the United Kingdom*; *Murray v. the United Kingdom*, No. 14310/88, 28 October 1994 [GC], § 72; *Čonka v. Belgium*, § 50.
[85] *Lokpo and Touré v. Hungary*, No. 10816/10, 20 September 2011, § 24.
[86] *Kerr v. United Kingdom*; *Abdolkhani and Karimnia v. Turkey,* §§ 136-138; *Rusu v. Austria*, § 36; *Kaboulov v. Ukraine*, No. 41015/04, 19 November 2009, § 143.
[87] *Kerr v. the United Kingdom*; *Čonka v. Belgium*, § 50.
[88] *Saadi v. the United Kingdom* [GC], §§ 81-85 (76 hours held to be in breach of Article 5 § 2); *Murray v. the United Kingdom* [GC], §§ 77-80 (1 hour 15 minutes from arrest held to be in breach of Article 5 § 2).
[89] *Shamsa v. Poland*, § 59.
[90] *Abdolkhani and Karimnia v. Turkey*, § 139.

the right to challenge the detention decision may be affected by the denial of access to a lawyer or lack of effective access to a lawyer.[91] In guaranteeing Convention rights that are "not theoretical and illusory, but practical and effective," the Court has emphasised the importance of legal assistance to detained persons to enable them to access a remedy,[92] including to challenge the detention decision.[93] The Court has held that member States should provide a lawyer to ensure effective access to a remedy where legal representation is compulsory or "by reason of the complexity of the procedure or of the case."[94] The denial of access to a lawyer, or lack of effective access to a lawyer, can result in a finding that the right to challenge the detention decision under Article 5 § 4 was not accessible and effective in practice.[95]

45. The Committee of Ministers, among others, has reasoned along such lines, emphasising the importance of providing prompt information on the legal and factual reasons of detention in a language which the person understands, including the available remedies to challenge the lawfulness of detention.[96] Access to lawyers and the provision of legal assistance[97] as well as the obligation to review detention decisions *ex officio* and on request has likewise been highlighted.[98]

1.3. Obligation to consider alternatives to detention (other Council of Europe bodies)

46. Whereas in the Court's case law the obligation to consider alternatives to detention is dealt with in the specific context of vulnerable persons,[99] other Council of Europe bodies have clearly highlighted the obligation to consider alternatives to detention in each case. There is a broad consensus that detention will only be permissible if it is in accordance with a procedure prescribed by law; and only, if, after a careful and individual examination of the necessity of deprivation of liberty, it has been established that less coercive measures cannot be applied effectively in each case.[100] Alternatives to detention, feasible in the individual case,[101] should always be sought and found ineffective before any detention order is made.[102]

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[91] *Ibid.*, §§ 139-142; *Rahimi v. Greece*, No. 8687/08, 5 April 2011, § 120.
[92] *Čonka v. Belgium*, §§ 44-46.
[93] *Ibid.*, § 55.
[94] *Airey v. Ireland*, No. 6289/73, 9 October 1979, § 26.
[95] *Abdolkhani and Karimnia v. Turkey*, §§ 139-142; *Rahimi v. Greece*, § 120.
[96] Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6 § 2; Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies, § XI. 5.
[97] Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6 § 2 and 9 § 2; Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, XI. §§ 5 and 6; Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers,* (Adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies)*,* § 17. See also, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), factsheet on immigration detention, March 2017.
[98] Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 8 § 2; Committee of Ministers, *Recommendation Rec(2003)5,* § 5.
[99] See below, 1.4.1; 1.4.3.
[100] Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, § XI. 4; Committee of Ministers, *Recommendation Rec(2003)5,* §§ 4 and 6. Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6 § 1; Parliamentary Assembly, *Resolution 1707 (2010) on Detention of asylum seekers and irregular migrants in Europe*, §§ 9.1.1 - 9.1.7.
[101] Committee of Ministers, *Recommendation Rec(2003)5*, § 6.
[102] *Ibid.,* §§ 4 and 6; Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6 § 1; Parliamentary Assembly, *Resolution 1707 (2010)*, § 9.1.1; Commissioner for Human Rights, Human

47. The Parliamentary Assembly has, *inter alia*, sought to give guidance on the implementation of alternatives to detention. It has encouraged member States to provide for a presumption in favour of liberty under national legislation and to incorporate into national law and practice a proper legal institutional framework to ensure that alternatives are considered first.[103]Additionally, member States have been called upon to provide a clear framework for the implementation of these measures and ensure that their application is subject to human rights safeguards, including the principles of necessity, proportionality and non-discrimination.[104] The individual circumstances and particular vulnerabilities of the persons concerned should always be taken into account and alternative measures should be regularly reviewed by an independent judicial body or other competent authority.[105]

48. The above recommendations have been consistently supported and brought to the attention of member States by, *inter alia*, the Commissioner for Human Rights.[106] The Commissioner recently urged States to invest more in alternatives to detention while ensuring that the obligation to provide less coercive measures is clearly set out in domestic legislation and policy. He has likewise called for the establishment of "comprehensive programmes of viable and accessible alternatives, catering to a range of different needs and circumstances."[107]

1.4. Positive obligations in relation to vulnerability

1.4.1. The Court's jurisprudence

General

49. Vulnerability as a distinct concept was discussed for the first time by the Court in 1981.[108] Since then, the term has been re-emerging in the Court's overall jurisprudence at a growing rate.[109] The Court has repeatedly taken steps to point out that some individuals or groups are more vulnerable than others and require special care and protection. Additionally, the Court has acknowledged that a person may be found in a (particularly) vulnerable situation on account of specific circumstances. Thus, the issue of vulnerability has been raised, *inter alia*, in relation to children; asylum seekers; persons with serious health conditions (including mental health); LGBTI persons; stateless persons; victims of human trafficking; pregnant women; victims of torture, ill-treatment and domestic violence; the elderly and persons with disabilities.[110]

Rights Comment, "High time for states to invest in alternatives to migrant detention," 31/01/2017; Commissioner for Human Rights, Document CommDH(2015)12, § 140; CPT, factsheet on immigration detention, March 2017. It should be noted that CPT uses the following wording "alternatives should be developed and used wherever possible."

[103] Parliamentary Assembly, *Resolution 1707 (2010)*, §§ 9.3.1-9.3.2.

[104] *Ibid.*, §§ 9.3.2-9.3.3.

[105] *Ibid.*, § 9.3.3.

[106] See, for example, Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017; Commissioner for Human Rights, Document CommDH(2016)31, 5 October 2016, § 122; Document CommDH(2011)17, 9 June 2011, § 17.

[107] Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017.

[108] *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981.

[109] Vulnerability was very scarcely discussed by the Court in the 20th century, but, in 2012, to name one example, the term appeared in more than 80 judgments.

[110] This is a non-exhaustive list and the individuals, groups, situations mentioned above may not always be related to the migration and/or detention context. The information, however, intends to provide an overview of the Court's reference to vulnerability.

The specific context of detention

50. Vulnerability has also been the particular subject of the Court's focus in cases of detention, especially detention in criminal matters, and the Court has acknowledged that detention *per se* entails an inherent level of suffering and humiliation.[111] Thus, the Court's case law in the context of Article 3 suggests that vulnerability establishes more extensive positive obligations, especially with regard to detention:[112]

> "In the context of prisoners, the Court has already emphasised in previous cases that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured."

51. This case law applies, *a fortiori*, to immigration detention, where the level of distress and hardship may even be stronger than in criminal detention, and where "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country."[113]

52. The Court's increasing focus on vulnerability has implications for member States. Vulnerable individuals and groups, and/or persons in a vulnerable situation require special protection[114] which narrows the State's margin of appreciation.

53. The Court has likewise emphasised the positive obligations of States arising under Article 3 to take adequate measures to provide care and protection to the most vulnerable in society.[115] When determining whether the minimum level of severity has been reached with regard to Article 3 of the Convention, consideration will be given to all the circumstances of the case such as the duration of treatment in question as well as its mental and physical effect. A person's state of health, age and sex are, in certain cases, among the factors the Court may also take into consideration.[116]

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[111] *S.D. v. Greece*, § 47; *Riad and Idiab v. Belgium*, Nos. 29787/03 and 29810/03, 24 January 2008, § 99; *Mahmundi and Others v. Greece,* No. 14902/10, 31 July 2012, § 62.
[112] *Orchowski v. Poland*, No. 17885/04, 22 October 2009, § 120.
[113] *Saadi v. the United Kingdom* [GC], § 74 citing with approval *Amuur v. France*, § 43. In the same vein, the Committee of Ministers, the Parliamentary Assembly and the CPT have, among others, highlighted that asylum seekers and migrants should not be accommodated together with prisoners. Material conditions and a regime appropriate to their legal situations should be provided. See, Committee of Ministers, *Recommendation Rec(2003)5*, § 10; Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 10, §§ 1 and 4; Parliamentary Assembly, *Resolution 1707 (2010)*, §§ 9.2.2. and 9.2.5-9.2.6; CPT, factsheet on immigration detention, March 2017, p. 1.
[114] *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011 [GC], § 251.
[115] *Rahimi v. Greece*, § 87.
[116] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* No. 13178/03, 12 October 2006, § 48; *Tarakhel v. Switzerland*, No. 29217/12, 4 November 2014 [GC], § 118.

54. In the context of Article 5 § 1, the place and conditions of detention can have a bearing on the lawfulness of detention,[117] and a person's "extreme vulnerability" may be a factor in that regard.[118] Indeed, particular vulnerabilities may preclude detention. Thus, in the case of *Thimothawes v. Belgium*, the Court recalled that:[119]

> "…qu'elle a déjà estimé que des décisions généralisées ou automatiques de placement en détention des demandeurs d'asile sans appréciation individuelle des besoins particuliers des intéressés pouvaient poser problème au regard de l'article 5 § 1 f). Corrélativement, la Cour a estimé que les autorités compétentes devaient rechercher s'il était possible de leur substituer une autre mesure moins radicale. Cette exigence vise à détecter si les intéressés présentent une vulnérabilité particulière qui s'oppose à la détention (voir, par exemple, s'agissant de mineurs étrangers accompagnés, *Muskhadzhiyeva et autres*, précité*, Kanagaratnam*, précité, § 94, *Popov c. France*, nos 39472/07 et 39474/07, § 119, 19 janvier 2012, et *A.B. et autres c. France*, no 11593/12, § 123, 12 juillet 2016 ; en ce qui concerne des mineurs non accompagnés, *Mubilanzila Mayeka et Kaniki Mitunga c. Belgique*, no 13178/03, §§ 99-104, CEDH 2006-XI, *Rahimi, précité*, §§ 108-110, et *Housein c. Grèce*, no 71825/11, § 76, 24 octobre 2013, et à propos d'étrangers malades : *Yoh-Ekale Mwanje c. Belgique*, no 10486/10, § 124, 20 décembre 2011). Dans certaines affaires, la Cour a mis en cause la politique généralisée de détention de migrants (*Suso Musa c. Malte*, no 42337/12, § 100, 23 juillet 2013, et *Abdullahi Elmi et Aweys Abubakar c. Malte*, nos 25794/13 et 28151/13, § 146, 22 novembre 2016 ; voir également, dans des cas où la preuve de la nécessité de la détention était requise par le droit national, *Rusu*, précité, §§ 57-58, et *Nabil et autres c. Hongrie*, no 62116/12, §§ 40-43, 22 septembre 2015)."

55. On this basis, the Court's jurisprudence on vulnerability arguably narrows the scope of detention in the case of persons who enter the territory of a State unlawfully, with a particular emphasis on asylum seekers and children, who should be treated as particularly vulnerable individuals. In such cases the Court considers that detention will be unlawful if the aim pursued by detention can be achieved by other less coercive measures.[120] Alternatives to detention should be thoroughly considered and detention must in principle be ruled out and only employed when there are very weighty reasons, i.e. as a measure of last resort.

Detecting vulnerability

56. Central to the protection from arbitrary detention and the effective application of alternatives to detention is the identification of vulnerable individuals or groups. In the recent case of *Thimothawes v. Belgium*, although no violation was found, the Court's *obiter* comments suggest that authorities of member States have an obligation to detect whether the persons concerned have a particular vulnerability that precludes their detention.[121] Accordingly, if the

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[117] *Aerts v. Belgium,* No. 61/2997/845/1051, 30 July 1998, § 46; *Bizzotto v. Greece*, No. 22126/93, 15 November 1996, § 31; *Ashingdane v. the United Kingdom,* No. 8225/78, 28 May 1985, § 44; *Saadi v. the United Kingdom* [GC], § 74.

[118] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, §§ 102-105 cited with approval in *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, §§ 73-75.

[119] *Thimothawes v. Belgium*, § 73.

[120] *Rahimi v. Greece*, §§ 102**-**110; *Yoh-Ekale Mwanje v. Belgium*, § 124; *Popov v. France*, §§119 and 121.

[121] *Thimothawes v. Belgium*, § 73.

persons concerned are in such a vulnerable situation, the authorities are to consider substituting their detention for another less radical measure consistent with the Court's case law. To be able to benefit from this protection, persons should have access to vulnerability assessment procedures. Indeed, in the case of *Abdi Mahamud v. Malta*, the absence of information on the existence of such procedures and the lack of active steps taken by the authorities to inform the detained person, coupled with lengthy delays in conducting the vulnerability assessment procedure raised serious concerns as to the Government's good faith. The criterion of good faith was a decisive factor in finding that arbitrary detention of a vulnerable person had occurred given the absence of procedural safeguards to challenge the lawfulness of detention (contrary to Article 5 § 4) and the applicant's placement in inappropriate conditions (contrary to Article 3).[122]

1.4.2. Other Council of Europe bodies

57. The issue of vulnerability has also been addressed regularly by other Council of Europe bodies and further treaties have been developed to ensure that the specific needs of certain individuals or groups are effectively protected.[123] When referring to vulnerability, non-exhaustive lists have been produced with the common denominator being the requirement to take duly into consideration the "special needs" of the persons or groups concerned, ensuring that they have access to appropriate protection and care. In the migration context, vulnerability has emerged regularly in the varied work of different bodies. When identifying vulnerability as such, consistent references have been made to persons, categories, groups, specific situations as well as to detention *per se*.[124]

58. The Committee of Ministers and the Parliamentary Assembly, among others, have acknowledged that the deprivation of liberty may increase the vulnerability of asylum seekers and irregular migrants in particular and have expressed their concern about their vulnerable situation.[125] Similarly, CPT has stressed that persons in immigration detention "are particularly vulnerable to various forms of torture and ill-treatment" at various stages of the process.[126]

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[122] *Abdi Mahamud v. Malta*, No. 56796/13, 3 May 2016, §§ 134-135.

[123] These include, *inter alia*, the Council of Europe Convention on Action against Trafficking in Human Beings ("the Anti-Trafficking Convention"); the Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention"); the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse ("the Lanzarote Convention").

[124] For example, the Committee of Ministers has referred to "persons with special needs" and lists such categories, including "minors, pregnant women, elderly people, persons with physical or mental disabilities and people who have been seriously traumatised, including torture victims." Committee of Ministers, *Recommendation Rec(2003)5* § 13; CPT has referred to "vulnerable categories of persons" and lists, *inter alia*, "victims of torture, victims of trafficking, pregnant women and nursing mothers, children, families with young children, elderly persons and persons with disabilities." CPT, factsheet on immigration detention, March 2017, p. 8; The Parliamentary Assembly has referred to, *inter alia,* "vulnerable persons" including "unaccompanied minors, pregnant women, families with minors, persons with medical or other special needs, the elderly, victims of torture and sexual violence and victims of trafficking." Parliamentary Assembly, *Resolution 1637 (2008) on* E*urope's boat people: mixed migration flows by sea into southern Europe*, § 9.6; The Commissioner for Human Rights has referred to, *inter alia*, "vulnerable persons" including "children, persons with disabilities and victims of trafficking." Commissioner for Human Rights, Document CommDH(2014)4, 24 March 2014, § 72.

[125] Committee of Ministers, reply to the Parliamentary Assembly *Recommendation 1900 (2010)*, § 2.

[126] CPT, Safeguards for irregular migrants deprived of their liberty, *Extract from the 19th General Report of the CPT, published in 2009*, § 75.

59. Both the Parliamentary Assembly and the Commissioner for Human Rights have highlighted that vulnerable persons should not be placed in detention.[127] Specific protection and adequate support should be provided instead, such as in the form of alternatives to detention,[128] and their needs should always be taken into account in any decision to limit their personal freedom.[129] In a similar vein, CPT has called for meaningful alternatives to be applied to certain vulnerable categories of persons.[130]

Detecting vulnerability

60. The importance of detecting vulnerability has also been addressed by various Council of Europe bodies. In this regard, the Committee of Ministers has called for asylum seekers to be screened at the outset of detention so that appropriate care and conditions are provided to them.[131] The CPT has likewise emphasised the need to put in place specific screening procedures so that persons in situations of vulnerability are identified and granted access to appropriate care.[132] Further, the Commissioner for Human Rights has encouraged national authorities to ensure an early and prompt identification of all potential vulnerabilities, in order to avoid the detention of vulnerable persons.[133]

1.4.3. Specific considerations for persons in a vulnerable situation

61. The following is a non-exhaustive list of vulnerable individuals and groups, compiled with the objective of identifying the specific duties owed to them according to the Court and/or other Council of Europe bodies.[134]

Children

62. Children are among the most commonly mentioned vulnerable group in the Court's jurisprudence and the issue of the detention of children (either unaccompanied or with family members) has been addressed in particular in relation to Article 3, 5, 8 and 13 of the Convention.

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[127] These include, among others, unaccompanied minors, families with children, persons with medical or other special needs, pregnant women, the elderly, victims of torture and sexual violence, and victims of trafficking. Parliamentary Assembly, *Resolution 1637 (2008),* § 9.6; Commissioner for Human Rights, Document CommDH(2014)4, 24 March 2014, § 72; Document CommDH(2014)18, 14 October 2014, § 101.

[128] Parliamentary Assembly, *Resolution 1637 (2008),* § 9.6. See also, Commissioner for Human Rights, Document CommDH(2016)16, 16 March 2016, §§ 72 and 80; Document CommDH(2014)21, 16 December 2014, § 165.

[129] Parliamentary Assembly, *Recommendation 1547 (2002) on Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity,* § 13 (h).

[130] CPT, factsheet on immigration detention, March 2017.

[131] Committee of Ministers, *Recommendation Rec(2003)5*, § 12.

[132] CPT, factsheet on immigration detention, March 2017, p. 8.

[133] Commissioner for Human Rights, Document CommDH(2016)16, §§ 72 and 80; Document CommDH(2014)21, § 165; Document CommDH(2016)1, 28 January 2016, § 44.

[134] In some of the following categories and/or situations, the Court has noted the vulnerability of certain individuals or groups in its interpretation of the Convention outside of a migration and/or detention context. These considerations may nevertheless provide guidance in the context of both decisions to detain and the placement of individuals in the community with an appropriate level of support. For the sake of precision and accuracy it will be explicitly mentioned when the case is not related to the migration and/or detention context.

63. The Court has, *inter alia*, highlighted the "extreme vulnerability" of children and their specific needs based on their age, lack of independence and status as asylum seekers or migrants.[135] A child's "extreme vulnerability" is such to not only engage States' positive obligations under Article 3 of the Convention but also "takes precedence over considerations relating to the [child's] status as an illegal immigrant."[136] States should take into account the age and personal situation of the child, and take adequate measures and provide care and protection for their specific needs.[137] Reception conditions must be adapted to the child's age "to ensure that they do not create... for them a situation of stress and anxiety with particularly traumatic consequences." Failure to do so can result in a breach of Article 3.[138]

64. The extreme vulnerability of children has consequences not only in the context of protection against arbitrariness under Article 5 § 1(f), but also for the interpretation of what has to be considered as inhuman or degrading treatment under Article 3 of the Convention.[139] Hence, the Court has found violations of Article 3 based on the young age of the child, the detention conditions and the length of detention.[140] Among others, the case of *Popov v. France* illustrates these three elements:[141]

> "It can be seen from the foregoing that the conditions in which the children were held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied, added to the parents' distress, were manifestly ill-adapted to their age. The two children, a small girl of three and a baby, found themselves in a situation of particular vulnerability, accentuated by the confinement. Those living conditions inevitably created for them a situation of stress and anxiety, with particularly traumatic consequences.
>
> Accordingly, in view of the children's young age, the length of their detention and the conditions of their confinement in a detention centre, the Court is of the view that the authorities failed to take into account the inevitably harmful consequences for the children. It finds that the authorities' treatment of the children was not compatible with the provisions of the Convention and

[135] *Tarakhel v. Switzerland* [GC], § 99.
[136] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, § 55; *Muskhadzhiyeva and Others v. Belgium*, §§ 56-58; *Popov v. France*, § 91.
[137] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* § 55; *Rahimi v. Greece,* §§ 86-87; *Muskhadzhiyeva and Others v. Belgium*, § 58; *Popov v. France*, § 91.
[138] *Tarakhel v. Switzerland* [GC], § 119.
[139] In several recent French cases, the Court, after having recalled the general principles of interpretation, recalled: "qu'elle a conclu à plusieurs reprises à la violation de l'article 3 de la Convention en raison du placement en rétention d'étrangers mineurs accompagnés (voir *Muskhadzhiyeva et autres c. Belgique*, no 41442/07, 19 janvier 2010 ; *Kanagaratnam c. Belgique*, no 15297/09, 13 décembre 2011; *Popov*, précité) ou non (voir *Mubilanzila Mayeka et Kaniki Mitunga c. Belgique,* no 13178/03, CEDH 2006 XI; *Rahimi c. Grèce*, no 8687/08, 5 avril 2011). Dans les affaires concernant le placement en rétention d'enfants étrangers mineurs accompagnés, elle a notamment conclu à la violation de l'article 3 de la Convention en raison de la conjonction de trois facteurs: le bas âge des enfants, la durée de leur rétention et le caractère inadapté des locaux concernés à la présence d'enfants." *R.M. and Others v. France*, No. 33201/11, 12 July 2016, § 70; *A.B. and Others v. France*, No. 11593/12, § 109; *A.M. and Others v. France,* No. 24587/12, § 46; *R.C. and V.C. v. France*, No. 76491/14, § 34; *R.K. and Others v. France*, No. 68264/14, § 66.
[140] *R.M. and Others v. France*, §§ 71-76. See also, of the same date, *A.B. and Others v. France*, §§ 110-115; *A.M. and Others v. France,* §§ 47-53; *R.C. and V.C. v. France*, §§ 35-40; *R.K. and Others v. France*, §§ 67-72.
[141] *Popov v. France*, §§ 102-103.

> exceeded the threshold of seriousness for Article 3 of the Convention to be engaged. There has therefore been a violation of that Article in respect of the children."

65. More recently, the Court has taken a disaggregated approach as to the weight to be attributed to the aspects cited above, i.e. the detention conditions and the young age of the children on the one hand, and the length of their detention on the other hand:[142]

> "La Cour considère que de telles conditions [sc. mauvaises], bien que nécessairement sources importantes de stress et d'angoisse pour un enfant en bas âge, ne sont pas suffisantes, dans le cas d'un enfermement de brève durée et dans les circonstances de l'espèce, pour atteindre le seuil de gravité requis pour tomber sous le coup de l'article 3. Elle est convaincue, en revanche, qu'au-delà d'une brève période, la répétition et l'accumulation de ces agressions psychiques et émotionnelles ont nécessairement des conséquences néfastes sur un enfant en bas âge, dépassant le seuil de gravité précité. Dès lors, l'écoulement du temps revêt à cet égard une importance primordiale au regard de l'application de ce texte. La Cour estime que cette brève période a été dépassée dans la présente espèce, s'agissant de la rétention d'un enfant de sept mois qui s'est prolongée pendant au moins sept jours dans les conditions exposées ci-dessus."

66. Of great significance in the context of immigration detention is the express reference made by the Court to the Convention on the Rights of the Child ("CRC"). In its reasoning the Court refers regularly to the ***best interests of the child as a primary consideration*** in all actions concerning children.[143] Moreover, reference is made to the obligation to adopt appropriate measures to ensure that refugee and asylum seeking children benefit from the protection and humanitarian assistance in line with Article 22 of the CRC.[144] This has in turn resulted in stronger safeguards as regards the immigration detention of children. For example, when the Court examined detention under Article 5 § 1(f), in the case of *Rahimi v. Greece,* the fact that his best interests as a child or his individual situation had not been taken into account and that alternatives to detention were not considered gave rise to a doubt by the Court as to whether the authorities had acted in good faith:[145]

> "Or, en l'occurrence, en ordonnant la mise en détention du requérant, les autorités nationales [...] n'ont pas recherché si le placement du requérant dans le centre de rétention de Pagani était une mesure de dernier ressort et si elles pouvaient lui substituer une autre mesure moins radicale afin de garantir son expulsion. Ces éléments suscitent des doutes aux yeux de la Cour, quant à la bonne foi des autorités lors de la mise en œuvre de la mesure de détention."

67. Regarding the consequences, especially in the context of children, of the omission to examine whether less restrictive measures would be available and sufficient, the Court has stated on several occasions that such omission can constitute in itself a violation of Article 5 § 1(f). In the case of *Popov v. France*, the Court found:[146]

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[142] *R.M. and Others v. France*, § 75.
[143] *Rahimi v. Greece*, § 108; *Popov v. France*, § 140.
[144] *Muskhadzhiyeva and Others v. Belgium*, § 62; *Popov v. France*, § 91.
[145] *Rahimi v. Greece*, § 109.
[146] *Popov v. France*, § 119. See also, *Rahimi v. Greece*, § 109; *Mohamad v. Greece*, No. 70586/11, 11 December 2014, §§ 84-86; *A.B. and Others v. France*, § 124.

> "that, in spite of the fact that [the children] were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children's particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available. The Court thus finds that the French system did not sufficiently protect their right to liberty."

68. In several recent judgments concerning France, the Court dealt with the issue of detention in the context of a small child or children detained with their parents (or the mother). The Court emphasised that the necessity requirement under Article 5 § 1(f) arises when children are involved.[147] With a view to the dilemma that on the one hand children should not be detained, and, on the other hand, they should not be separated from their parents, the necessity to evaluate alternative measures for the entire family is crucial and the Court sets forth strict criteria in this regard:[148]

> "However, the Court observes that the situation of children is intrinsically linked to that of their parents, from whom they should not be separated as far as possible. That link, which is in the children's interest, has the consequence that, where the parents are placed in detention, their children are themselves de facto deprived of liberty. That deprivation of liberty stems from the legitimate decision of the parents, having authority over their children, not to entrust them to the care of a third party. The Court can accept that such a situation is not, in principle, incompatible with domestic law. It nevertheless emphasises that the environment in which the children then find themselves is a source of anxiety and tension that may cause them serious harm.
>
> In those circumstances, the Court finds that the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1 (f) only where the national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be implemented."

69. In the case of families with children the issue of alternatives has also been addressed in relation to Article 8 of the Convention. Given that detention can also be regarded as an interference with the right to respect for family life, any measure interfering with this right has to be compatible with the conditions set out in Article 8 § 2. Consequently, the authorities have a duty to take into account the children's best interests when assessing whether a measure is proportionate in achieving the aim pursued. In light of the endorsement by the Court of the best interests of the child in the context of detention of migrant children, it has since been concluded that the protection of the best interests of the child calls both for families to be kept together as far as possible, and alternatives to be considered so that detention of children is truly a measure of last resort.[149] Thus, the Court has found detention to be a disproportionate measure to the aim pursued in light of the absence of any real risk of absconding.[150]

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[147] *R.M. and Others v. France*, § 83.
[148] *Ibid.*, §§ 85-86. See also, *A.B. and Others v. France*, §§ 122-123; *A.M. and Others v. France,* §§ 66-67; *R.C. and V.C. v. France*, §§ 54-55; *R.K. and Others v. France*, §§ 84-85.
[149] *Popov v. France*, § 141; *A.B. and Others v. France*, §§ 152-156; *R.K. and Others v. France*, §§ 113-117.
[150] *Popov v. France*, §§ 145-148; *A.B. and Others v. France*, § 156; *R.K. and Others v. France*, § 117.

70. Overall, the criteria for detaining children in the context of migration are stringent and focus not only on the material conditions that detained children face, which may or may not be inappropriate, but also on the effects that detention *per se* may have on children in any case. Such an approach makes the exhaustive, active consideration and implementation of alternatives to detention even more imperative for States.

71. In summary, the following principles can be drawn from the Court's case law in the context of immigration detention of children:

- The extreme vulnerability of the child takes precedence over immigration status;[151]
- The principle of the best interests of the child must be a primary concern;[152]
- The fact that children are accompanied by their parents or one of their parents does not release the authorities from their positive obligation to protect children under Article 3;[153]
- The fact that a detention facility is certified by the authorities to be suitable for the accommodation of families is not decisive. The Court has regard to the effective conditions;[154]
- An inappropriate environment does not necessarily constitute in itself a violation of Article 3, but in order to avoid the minimum level of severity being reached, it can only be accepted for a very short period of time;[155]
- Inversely, the detention conditions may be so poor that there is a violation of Article 3 without having regard to the length of detention;[156]
- Administrative detention of children may exceptionally be admissible, after having concretely established that no other alternative could be implemented instead, as a measure of last resort and for a very short period of time, if all appropriate conditions are fulfilled.[157]

72. Other Council of Europe bodies have also highlighted the particular vulnerability of children in the migration context. Among others, the Committee of Ministers has acknowledged that refugee, asylum seeking, migrant and unaccompanied children are a particularly vulnerable group of children in need of "specific protection and assistance."[158] The Parliamentary Assembly has likewise stressed the triple vulnerability of undocumented migrant children i.e. as children, as migrants and as persons in an undocumented situation.[159]

[151] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, § 55; *Popov v. France*, § 91.
[152] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, § 83; *Rahimi v. Greece*, § 108; *Popov v. France*, § 140.
[153] *R.M. v. France*, § 71; *Muskhadzhiyeva and Others v. Belgium*, §§ 57- 58; *Popov v. France*, § 91.
[154] *R.M. v. France*, §§ 73-74.
[155] *R.M. v. France*, § 75 (7 days were considered to be too long).
[156] *Rahimi v. Greece*, § 86 (the detention lasted 2 days).
[157] *Popov v. France*, § 119; *Rahimi v. Greece*, § 109; *Mohamad v. Greece*, §§ 84-86; *A.B. and Others v. France*, § 124.
[158] Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and Explanatory memorandum, October 2011, III. Fundamental Principles, D. Protection from discrimination, § 2, as well as §§ 43 and 78 of the Explanatory memorandum.
[159] Parliamentary Assembly, *Recommendation 1985 (2011) on Undocumented migrant children in an irregular situation: a real cause for concern*, § 2.

73. There is a broad consensus that the best interests of the child should always be a primary consideration in all cases concerning or affecting them.[160] This in turn requires putting in place effective and multidisciplinary procedures to accurately assess the best interests of the child.[161]

74. The Committee of Ministers has emphasised that specific attention should be given to the particularly vulnerable group of children seeking asylum while unaccompanied children, whether or not they are asylum seekers, should never be deprived of their liberty "motivated or based solely on the absence of residence status."[162] The Committee of Ministers has instead called for the adoption of alternative and non-custodial care arrangements, such as residential homes or foster placements.[163] Overall, the Committee of Ministers has held that children should, as a rule, not be detained[164] and has acknowledged that the Council of Europe "has a role to play in bringing to an end the immigration detention of migrant children and in identifying alternatives to that practice."[165]

75. In a similar vein, the CPT has maintained that "detention of children, including unaccompanied and separated children, is rarely justified and […] can certainly not be motivated solely by the absence of residence status."[166] In CPT's view, unaccompanied and separated children, should, as a rule, not be detained[167] while "every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor."[168] In those exceptional circumstances when children are detained, it should be for the shortest time possible. Children and their primary caregivers should be accommodated together in a facility catering for their specific needs while every effort should be made for the immediate release of unaccompanied children and their placement in appropriate care.[169] When children are exceptionally detained, special arrangements should be made that are suitable for them. They should be separated from adults, unless it is considered in the child's best interests not to do so.[170]

76. Other Council of Europe bodies such as the Parliamentary Assembly, the Commissioner for Human Rights, the Special Representative of the Secretary General on Migration and

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[160] Council of Europe Anti-Trafficking Convention, Article 28, § 3, and § 127 of the Explanatory Report to the Convention; Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, III. Fundamental Principles, B. Best interests of the child, and § 36 of the Explanatory memorandum; Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, III.1; Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 11 § 5; Parliamentary Assembly, *Recommendation 1985 (2011),* § 1.

[161] Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, B. Best interests of the child, and § 36 of the Explanatory memorandum.

[162] Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, IV. Child-friendly justice before, during and after judicial proceedings, § 22, as well as § 78 of the Explanatory memorandum.

[163] Committee of Ministers, *Recommendation Rec(2003)5*, § 23.

[164] Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, § XI.2.

[165] Committee of Ministers, reply to Parliamentary Assembly *Recommendation 2056 (2014) on the alternatives to immigration detention of children*, § 2.

[166] CPT, Safeguards for irregular migrants deprived of their liberty, *Extract from the 19th General Report of the CPT, published in 2009*, § 97; CPT, factsheet on immigration detention, March 2017.

[167] *Ibid.*

[168] CPT, factsheet on immigration detention, March 2017.

[169] *Ibid.*

[170] *Idem.*

Refugees ("SRSG") and the Conference of International Non-Governmental Organisations ("Conf-INGOs") have taken a strong position against the immigration detention of children, whether unaccompanied or with their families.

77. In 2014 the Parliamentary Assembly adopted a recommendation where it held that:[171]

> "States which practise the immigration detention of children contravene the principle of the best interests of the child and violate children's rights. They deprive children of their fundamental right to liberty and put them at risk of severe and lifelong physical, mental and developmental harm. They may also violate other fundamental child rights, such as the rights to family, health, education and play."

78. In light of the above, the Parliamentary Assembly has stressed that the Council of Europe has a role to play in promoting alternatives to detention of children.[172] It has also encouraged member States to, *inter alia*:[173]

- *acknowledge* that detention on the basis of their or their parent's migration status is never in the best interest of the child;
- *prohibit* by law the detention of children on migration grounds and ensure that this prohibition is fully implemented in practice;
- *adopt* alternatives to detention that respect the best interests of the child and allow children to remain with their family members or guardians in non-custodial, community-based contexts;
- *develop* and implement non-custodial, community-based alternatives to detention programmes for children and their families.

79. In the same vein, the Commissioner for Human Rights has consistently emphasised that children, whether travelling alone or with their parents, should never be detained as detention is never in their best interests.[174] He has called upon States to expeditiously and completely end the immigration detention of children; to enshrine this prohibition in law;[175] and to put in place alternatives to detention on the model of existing good practices.[176]

80. Similarly, the SRSG has held that children should never be detained for immigration related purposes.[177] To this end, the SRSG has also coordinated an *Action Plan on Protecting*

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[171] Parliamentary Assembly, *Recommendation 2056 (2014),* § 2.
[172] *Ibid.*
[173] Parliamentary Assembly, *Resolution 2020 (2014) on the alternatives to immigration detention of children*, §§ 9.1 -9.2 and 9.7–9.9. In 2015 the Parliamentary Assembly launched a Campaign to end immigration detention of children.
[174] See, for example, Commissioner for Human Rights, Human Rights Comment, Protecting Children's Rights: Europe should do more, 18 November 2014; Document CommDH(2015)12, 22 June 2015, § 141; Document CommDH(2016)1, 28 January 2016, §§ 48-49.
[175] Commissioner for Human Rights, Human Rights Comment, Protecting Children's Rights: Europe should do more, 18 November 2014; Document CommDH(2016)1, §§ 48-49.
[176] Commissioner for Human Rights, Human Rights Comment, Protecting Children's Rights: Europe should do more, 18 November 2014; Commissioner for Human Rights, Human Rights Comment, "High time for states to invest in alternatives to migrant detention," 31/01/2017.
[177] Thematic Report on migrant and refugee children, Prepared by the Special Representative of the Secretary General on migration and refugees, Information Documents, SG/Inf(2017)13, 10 March 2017; Ambassador Tomáš Boček Special Representative of the Secretary General on migration and refugees, Speeches/Statements, Speech at the High-level meeting on Europe's challenge to ensure a rights

Refugee and Migrant Children, adopted by the Committee of Ministers, aiming to, *inter alia*, ensure that the immigration detention of children is avoided and guidance on alternatives to detention is provided.[178]

Asylum seekers

81. In its leading case *M.S.S. v. Belgium and Greece*, the Grand Chamber of the Court ruled that asylum seekers are "a particularly underprivileged and vulnerable population group in need of special protection."[179] In its assessment of the compatibility of the applicant's conditions of detention with Article 3, the Court noted that, "being an asylum seeker, [the applicant] was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously."[180] The Court likewise held that the applicant's distress in detention "was accentuated by the vulnerability inherent in his situation as an asylum seeker."[181] The Court went on to emphasise that as evidenced by the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol ("1951 Refugee Convention"), the remit and the activities of the UNHCR as well as the standards set out in the EU Reception Conditions Directive, there is "a broad consensus at the international and European level concerning this need for special protection."[182] The reference to the vulnerability of asylum seekers has since then been reiterated in other judgments.[183]

82. Note should be taken of the fact that the Court has employed the term "particularly vulnerable" (as opposed to "vulnerable") to stress further specific circumstances involving individuals or groups that require special and particular care on the part of the State, such as children and mentally ill persons. Belonging to more than one of these groups can only be interpreted as further intensifying the care required to be afforded by the State to such persons. This is exemplified in cases of asylum seekers who belong to or claim to belong to vulnerable groups in their country of origin (see further below § 85). Recently the Court recalled that the generalised and automatic detention of asylum seekers without an individual assessment of their specific situation may raise an issue of lawfulness under Article 5 § 1(f).[184]

83. The Committee of Ministers has maintained that detention of asylum seekers should be the exception;[185] permissible only if, after an individual and careful examination of the necessity of detention, it has been concluded that alternative and non-custodial measures cannot be

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perspective for children in migration, 24 April 2017; Ambassador Tomáš Boček Special Representative of the Secretary General on migration and refugees, Discours lors de la rencontre d'Ombudsmans, Médiateurs et défenseurs des droits de l'enfant organisée par l'ENOC et le Défenseur des Droits, 28 June 2016. The Secretary General of the Council of Europe has likewise emphasised that children should not be detained on migration grounds. *State Of Democracy, Human Rights and the Rule of Law, Populism – How strong are Europe's checks and balances?*, Report by the Secretary General of the Council of Europe, April 2017, p. 108.

[178] Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe, Committee of Ministers, 127th Session of the Committee of Ministers (Nicosia, 19 May 2017).

[179] *M.S.S. v. Belgium and Greece* [GC], § 251 (in relation to living conditions in Greece outside a detention context).

[180] *Ibid.*, § 232.

[181] *Ibid.*, § 233.

[182] *Ibid.*, § 251.

[183] See, for example, *Sharifi and Others v. Italy and Greece*, No 16643/09, 21 October 2014, § 172; *Tarakhel v. Switzerland* [GC], § 97.

[184] *Thimothawes v. Belgium,* § 73.

[185] Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, § XI.1.

applied instead.[186] According to the Commissioner for Human Rights, asylum seekers should, in principle, not be detained and alternatives should always be sought.[187]

Persons with serious health conditions

84. In the context of factors contributing to the minimum level of severity under Article 3, the Court has held that an applicant was in a vulnerable position because of her status as an irregular immigrant, her specific past and her personal emotional circumstances in combination with her fragile health.[188] In the case of *Yoh-Ekale Mwanje v. Belgium*, the Court examined the lawfulness under Article 5 § 1(f) of detention with a view to deportation of a Cameroonian national in an advanced stage of HIV. Based on her vulnerability and the fact that the authorities knew her identity and exact address, as well as that she appeared regularly to the authorities and had taken steps to regularise her situation, the Court considered that alternatives to detention should have been applied instead of detention.[189]

LGBTI persons

85. The vulnerability of LGBT persons was emphasised in the case of *O.M. v. Hungary*, when the Court examined the lawfulness of detention under Article 5 § 1(b). In this regard, the Court noted that the applicant was a vulnerable individual and part of a vulnerable group by virtue of belonging to a sexual minority in his country of origin. The Court cautioned the authorities to "exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee their country in the first place."[190] In its reasoning the Court held that authorities had not reflected adequately on whether a vulnerable person such as the applicant would be safe or unsafe in custody amongst other detained persons, "many of whom had come from countries with widespread cultural or religious prejudice against such persons."[191] To this end, the Court's reasoning highlighted not only the vulnerability of the applicant as an LGBT person, but also the particular context in which the applicant would be detained.

Stateless persons

86. Stateless persons may be found in a vulnerable situation because of their statelessness and the practical difficulties linked to their status. The absence of identity/travel documents, the extensive delays in securing such documents and States' unwillingness to accept the persons concerned may render the prospect of removal unrealistic and subject stateless persons to indefinite and repeated detention.[192] Thus, the obligation "to consider whether removal is a

[186] Committee of Ministers, *Recommendation Rec(2003)5,* §§ 4 and. 6; Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, § XI.4. See also, Parliamentary Assembly, *Resolution 1707 (2010)*, § 9.1.1

[187] Commissioner for Human Rights, Document CommDH(2016)17, § 55; Document CommDH(2014)18, 18 October 2014, § 101.

[188] *Aden Ahmed v. Malta*, No. 55352/12, 23 July 2013, § 97.

[189] *Yoh-Ekale Mwanje v. Belgium*, § 124.

[190] *O.M. v. Hungary*, § 53.

[191] *Ibid.*

[192] For example, the Court has remained aware that the enforcement of an expulsion order against a stateless person may entail "considerable difficulty and even prove impossible because there is no readily available country to which they may be removed." *Amie and Others v. Bulgaria*, No. 58149/08, 12 February 2013, § 77. In another judgement the Court doubted the Government's argument that detention of a stateless person was justified with a view to deportation given that there was no realistic prospect of removal without giving rise a risk of ill-treatment under Article 3 of the Convention. This was particularly

realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified" is of paramount importance with the "necessity of procedural safeguards" becoming a decisive factor in this regard.[193] In such circumstances, the criterion of due diligence in conducting the proceedings is central, with failure to do so resulting in a violation of Article 5.[194]

87. In the case of *Kim v. Russia*, when the Court examined the lawfulness of detention of a stateless person awaiting deportation, it expressed its concern about the "applicant's particularly vulnerable situation" and went on the emphasise that as "a stateless person, he was unable to benefit from consular assistance and advice, which would normally be extended by diplomatic staff of an incarcerated individual's country of nationality." This was underscored by the fact that the applicant had no financial assistance and family connections nor any effective remedy or other safeguards to contest the lawfulness and length of his detention.[195]

88. It is also worth noting that the Court remained concerned about the applicant being exposed to a possible risk of a new round of prosecution following his release from detention due to his statelessness, lack of identity documents and fixed residence. Thus, based on Article 46 of the Convention, the Court emphasised that the necessary steps should be taken "to prevent the applicant from being re-arrested and put in detention for the offences resulting from his status of a stateless person."[196]

Victims of human trafficking

89. Although not expressly noted in the context of Article 5 § 1, the Court has indicated that "trafficking threatens the human dignity and fundamental freedoms of its victims"[197] and has been mindful of the vulnerability of victims of human trafficking.[198] Relying on Article 4 of the Convention and the relevant provisions of, among others, the Council of Europe Convention on Action against Trafficking in Human Beings ("the Anti-Trafficking Convention"), the Court has emphasised, *inter alia*, the positive obligations of States to identify victims of human trafficking, including in detention and to take appropriate measures to effectively protect them.[199]

90. Of significant importance in this context is the aforementioned Anti-Trafficking Convention which stipulates that victims of human trafficking shall not be penalised for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.[200] State Parties of the Anti-Trafficking Convention have, similarly, a positive obligation to exercise due diligence in identifying victims of human

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true since no other State was willing to accept the applicant. *A. and Others v. the United Kingdom* [CG], § 167.

[193] *Kim v. Russia*, No. 44260/13, 17 July 2014, § 53.

[194] *Auad v. Bulgaria*, § 135; *Kim v. Russia*, § 56.

[195] *Kim v. Russia,* §§ 53-54.

[196] *Ibid.*, §§ 73-74.

[197] *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, § 282.

[198] *Breukhoven v. the Czech Republic*, No. 44438/06, 21 July 2011, § 56.

[199] The Court referred also to the provisions of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") and emphasised the positive obligations of States to prevent trafficking, to protect victims or potential victims and to prosecute and punish those responsible. *Rantsev v. Cyprus and Russia,* §§ 283-309.

[200] Council of Europe Anti-Trafficking Convention, Article 26.

trafficking, before and during detention.[201] Persons identified as victims of trafficking shall be offered a recovery and reflection period of at least 30 days, during which they shall be entitled to assistance, including appropriate accommodation, psychological and material assistance, access to emergency medical treatment, counselling and information, in particular as regards their legal rights and the services available to them.[202] A renewable residence permit should be made available to victims of human trafficking based on the specific situations delineated in the relevant provision of the Anti-Trafficking Convention.[203]

Pregnant women

91. The Court has acknowledged that women in an advanced stage of pregnancy are in a particularly vulnerable position.[204] In the migration context, the detention of an eight months pregnant woman in inappropriate conditions without specific supervision of her particular situation led the Court to conclude that the minimum level of severity under Article 3 had been attained.[205]

92. The Commissioner for Human Rights has taken a clear position against the detention of pregnant women.[206]

Victims of torture, ill-treatment and/or domestic violence

93. Although not expressly noted in the context of migration [Article 5 §1], the Court has highlighted that authorities have an obligation to take into account the particular vulnerability of victims of torture and ill-treatment.[207] Additionally, the Court also considers that victims of domestic violence fall within the group of "vulnerable individuals" entitled to State protection.[208] The Court has emphasised that the vulnerability of victims of domestic violence is highlighted in various international instruments which stress the need to take active measures to protect them.[209]

94. The need to provide special protection to victims of domestic violence is further supported by the Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention"). The Istanbul Convention sets out a common framework for preventing and combating violence against women. States Parties are required to adopt measures to protect the rights of victims on the basis of equality and without discrimination on any ground, which includes migrant, refugee, or other status.[210] In addition, any measure taken should duly consider and address the "specific needs of persons made vulnerable by particular circumstances."[211] Specific provisions in the Istanbul Convention also address the particular situation of refugee, migrant and asylum seeking women.[212] These

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[201] *Ibid.*, Article 10, §§ 1 and 2, and § 127 of the Explanatory Report to the Council of Europe Anti-Trafficking Convention.
[202] Council of Europe Anti-Trafficking Convention, Article 13 and Article 12, §§ 1 and 2.
[203] *Ibid.*, Article 14.
[204] *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, 2011, § 156.
[205] *Mahmundi and Others v. Greece*, § 70.
[206] Commissioner for Human Rights, CommDH(2016)17, § 55; CommDH(2014)18, § 101.
[207] *Gisayev v. Russia*, No.14811/04, 2011, § 116 (vulnerability was mentioned under Article 3).
[208] *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 160 (vulnerability was mentioned under Article 3).
[209] *E.M. v. Romania*, No. 43994/05, 30 October 2012, § 58.
[210] Council of Europe, Istanbul Convention, Article 4, §§ 3 and 4.
[211] *Ibid.*, Article 12 § 3.
[212] See in particular, Chapter VII – Migration and asylum, Articles 59-61 of the Council of Europe Istanbul Convention.

include, *inter alia*, the possibility of granting migrant victims an autonomous residence permit; ensuring that gender-based violence against women is recognised as a form of persecution within the meaning of the 1951 Refugee Convention; the development of gender-sensitive reception and asylum procedures as well as gender guidelines and support services in the asylum process.[213] Additionally, it provides a series of general measures, including on prevention, protection and specialised support services.[214]

1.5. Ensuring dignity and respect for other fundamental rights whilst placed in the community

95. When alternatives to detention are implemented, other Articles of the Convention may also be particularly relevant. Certain types of alternatives may in themselves, or in combination with other measures, constitute, in particular, restrictions on the right to move freely and to choose one's residence, the right to physical or psychological integrity and/or the right to respect for private and family life.[215]

1.5.1. Restrictions on the freedom of movement

96. The right to freedom of movement is enshrined in Article 2 of Protocol No. 4 and applies to those who are lawfully within the territory. The provision complements the protection given by Article 5 of the Convention, in the sense that it applies to any restriction of liberty. In this context, it is important to note that a combination of restrictions can, under certain circumstances, amount to a *deprivation* of liberty. In this case, Article 5 of the Convention comes into play.[216]

97. To be compatible with Article 2 of Protocol No. 4, any restriction on the freedom of movement has to be considered as necessary in a democratic society in the pursuit of the legitimate aims contained in paragraph 3 of Article 2. Article 2 may be relevant where a person has been granted a right to enter or remain pending his or her asylum application. In *De Tommaso v. Italy*, the Court reiterated: [217]

> "…that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement within a given territory and the right to leave that territory, which implies the right to travel to a country of the person's choice to which he or she may be admitted (see *Khlyustov v. Russia*, no. 28975/05, § 64, 11 July 2013, and *Baumann v. France*, no. 33592/96, § 61, ECHR 2001-V). According to the Court's case-law, any measure restricting the right to liberty of movement must be in accordance with law, pursue one of the legitimate aims referred to in the third paragraph of Article 2 of Protocol No. 4 and strike a fair balance between the public interest and the individual's rights (see *Battista v. Italy*, no. 43978/09, § 37, ECHR 2014; *Khlyustov*, cited above, § 64; *Raimondo*, cited above, § 39; and *Labita*, cited above, §§ 194-195)."

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[213] Council of Europe, Istanbul Convention, Articles 59-60.

[214] These include, for example, timely information on available support services and legal measures in a language that the person understands; access to services facilitating recovery from violence including, where necessary, legal and psychological counselling, financial assistance, housing, education, health care and social services; shelter, etc. Council of Europe, Istanbul Convention, Articles 19-23.

[215] CAHAR, commentary to Guideline 6 § 1 of Committee of Ministers, *Twenty Guidelines on Forced Return*, § 3.

[216] See Part. I, 3.1.1, Immigration detention.

[217] *De Tommaso*, § 104. In this case, the Court came to the conclusion that the restrictions were not sufficiently foreseeable in law. § 124.

1.5.2. Living conditions

98. The maintenance of human dignity for those placed in the community through ensuring that, *inter alia*, their basic needs are met, is also essential to avoid a breach of Article 3 of the Convention. Article 3 applies to all persons under the jurisdiction of member States, regardless of immigration status. In the aforementioned seminal judgment of *M.S.S. v. Belgium and Greece*, the Court held that a breach of Article 3 had occurred on account of the living conditions in Greece reaching the minimum level of severity whilst the applicant, an asylum seeker, was at liberty in the community. To this end, the Court considered that the authorities:[218]

> "…have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention."

99. Special consideration is required in this regard for families with children. Important in the Court's assessment of the "special protection" required under Article 3 have been cases concerning children in light of their "specific needs and their extreme vulnerability."[219] Furthermore, any failure or inaction from the authorities to take appropriate measures to protect and care for a child, especially unaccompanied, while in the community may amount to a degrading treatment.[220] Indeed, the Court has held that the authorities' indifference had caused profound anxiety and concern to an unaccompanied child, especially in the absence of any steps taken to appoint a legal guardian to him, leaving him to his own devices.[221] Overall, the Court considers that reception conditions must be adapted to the child's age "to ensure that they do not "create…for them a situation of stress and anxiety with particularly traumatic consequences." Failure to do so results in a breach of Article 3,[222] while families with children should be kept together.[223]

100. Particularly relevant in this context is the European Social Charter ("the Charter") and its interpretation by the European Committee of Social Rights ("ECSR"). The ECSR has concluded that certain fundamental rights linked to the right to life and human dignity should be enjoyed by all persons within the territory of a State Party, regardless of their migration or residency status.[224] These provisions include the right to social and medical assistance,[225] the right of

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[218] *M.S.S. v. Belgium and Greece* [GC], § 263.
[219] *Tarakhel v. Switzerland* [CG], §119. The Court considered the minimum level of severity to be reached under Article 3 of the Convention if a family of two parents and their six children were to be transferred from Switzerland to Italy.
[220] *Rahimi v. Greece*, §§ 87-94.
[221] *Ibid.*, §§ 88-94.
[222] *Tarakhel v. Switzerland* [CG], §119.
[223] *Ibid.*, § 122
[224] European Committee of Social Rights("ECSR"), *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 3 November 2004, §§ 30 and 32.
[225] Article 13 of the Charter. See, ECSR*, Conference of European Churches (CEC) v. the Netherlands,* Complaint No. 90/2013, 1 July 2014.

children and young persons to social, legal and economic protection [226] and the right to housing.[227]

101. With regard to the rights of refugees under the Charter, the ECSR has reiterated the obligation of States Parties to "ensure that everyone within their territory is treated with dignity and without discrimination." Accordingly, this obligation is not limited to ensuring respect for civil rights but also requires supporting "physical and mental integrity" and recognising the "fundamental human needs of community and belonging."[228] It has concluded that "the rights guaranteed by the Charter are to be enjoyed to the fullest extent possible by refugees."[229]

102. Recognising that respect of dignity is a basic human rights requirement,[230] the Committee of Ministers has held that the "right to the satisfaction of basic human material needs should contain as a minimum the right to food, clothing, shelter and basic medical care" while noting that this right "should be open to all citizens and foreigners, whatever the latters' position under national rules on the status of foreigners, and in the manner determined by national authorities."[231] As regards children, the Committee of Ministers has held that they should receive special attention taking into account their well-being, personal situation, specific needs with full respect for their physical and psychological integrity regardless of, *inter alia*, their legal status.[232]

103. The Commissioner for Human Rights has emphasised that the basic needs of persons in alternatives should be covered so as to protect their human dignity and ensure positive engagement with migration procedures.[233]

2. Other international standards (United Nations and European Union)

2.1. Right to liberty

104. Within the UN system, the International Covenant on Civil and Political Rights ("the Covenant") guarantees the right to liberty and security of person to everyone regardless of, *inter alia*, legal status, nationality or statelessness, including refugees, asylum seekers, stateless persons and irregular migrants.[234] The Covenant does not contain an explicit list of permissible

[226] Article 17 of the Charter. See, ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012.
[227] Article 31 of the Charter. See, ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, 2 July 2014.
[228] ECSR, Statement of interpretation on the rights of refugees under the European Social Charter, (elaborated during the 280th session of the European Committee of Social Rights in Strasbourg, 7-11 September 2015), § 3.
[229] *Ibid.,* § 4.
[230] Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, III. Fundamental principles, C. Dignity, § 1, as well as § 39 of the Explanatory memorandum.
[231] Committee of Ministers, *Recommendation No. R (2000) 3 of the Committee of Ministers to member states on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship*, (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies), §§ 2 and 4.
[232] Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, III. Fundamental principles, C. Dignity, § 1.
[233] Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017.
[234] The Covenant, Article 9. See further, CCPR, *General comment No. 35*, § 3; CCPR, *General comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13, § 10; *Situation of migrants in*

grounds for detention.[235] It expressly prohibits any arbitrary arrest or detention. Similarly, any deprivation of liberty that is unlawful is also expressly prohibited.[236]

105. The notion of lawfulness requires that detention should be based on "grounds and in accordance with a procedure" laid down in national law.[237] This has been interpreted as requiring that the reasons for detention and the procedures for carrying out such detention should be "clearly defined and exhaustively enumerated in legislation"[238] including being sufficiently precise to avoid any overly broad or arbitrary interpretation or application.[239] If such reasons and procedures are not exhaustively elaborated in national law and sufficiently precise then detention becomes unlawful.

106. Regarding the notion of "arbitrariness," the UN Human Rights Committee ("CCPR") has concluded that:[240]

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

107. The CCPR has also indicated the importance of proportionality under Article 9 § 1 of the Covenant:[241]

> "…remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."

108. In the migration context, detention is not considered arbitrary *per se* under Article 9 § 1 of the Covenant,[242] and the CCPR has noted that irregular entry "may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period."[243] However, the absence of such specific factors pertaining to the individual could render detention arbitrary even when entry was irregular.[244] Consequently, any use of immigration detention must be an exceptional measure of last resort, subject to the principles of reasonableness, necessity and

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transit - Report of the Office of the United Nations High Commissioner for Human, A/HRC/31/35, 27 January 2016, § 42.

[235] CCPR, *General comment No. 35*, § 14.

[236] The Covenant, Article 9 § 1.

[237] CCPR, *General comment No. 35*, § 11.

[238] *Report of the Working Group on Arbitrary Detention*, A/HRC/13/30, 18 January 2010, § 59; CCPR, *General comment No. 35*, §§ 11 and 23.

[239] CCPR, *General comment No. 35*, § 22.

[240] CCPR, *Van Alphen v. the Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988, 23 July 1990, § 5.8.

[241] CCPR, *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, 30 April 1997, § 9.2. See also, CCPR, *General comment* No. 35, § 12.

[242] CCPR, *General comment No. 35*, § 18.

[243] *A. v. Australia*, § 9.4.

[244] *Ibid.*

proportionality based on an individual assessment in each case, including due consideration for the effects that such detention may have on the mental and physical health of the individual.[245]

109. The above has been reiterated by the Working Group on Arbitrary Detention ("WGAD") and the Special Rapporteur on the human rights of migrants, among others, who have held that the administrative detention of migrants should always be the last resort in line with the principle of proportionality.[246] According to the CCPR, the State must assess whether there is "justification for detention" based on each person's individual circumstances, and ensure that the imposition of detention is the last possible recourse and a proportionate response to the risk an individual poses.[247]

110. Particularly relevant on the issue of protection from arbitrary detention of refugees and asylum seekers is the 1951 Refugee Convention which prevents State Parties from penalising refugees and asylum seekers for unauthorised entry or presence in their territory when "coming directly from a territory where their life or freedom was threatened in the sense of Article 1," and "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[248] Furthermore, the 1951 Refugee Convention requires that any restriction to the freedom of movement of individuals with such a profile must be necessary and only "applied until their status in the country is regularized or they obtain admission into another country."[249] Moreover, refugees lawfully in the territory have the right to freedom of movement and choice of residence.[250] Given the declaratory nature of refugee status,[251] asylum seekers are "considered lawfully in the territory for the purposes of benefiting from this provision."[252]

111. Similarly, Article 12 § 1 of the Covenant also provides for persons lawfully in the territory the right of liberty of movement and free choice of residence. This right may only be restricted when provided by law and is necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and is consistent with the other

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[245] CCPR, *General comment No. 35*, § 18.

[246] *Report of the Working Group on Arbitrary Detention*, A/HRC/13/30, January 18, 2010, § 59; *Report to the Seventh Session of the Human Rights Council - Report of the Working Group on Arbitrary Detention*, A/HRC/7/4, 10 January 2008, § 80 (b); *Report of the Special Rapporteur on the human rights of migrants*, François Crépeau, A/HRC/20/24, 2 April 2012, § 68.

[247] *Danyal Shafiq v. Australia*, Communication No. 1324/2004, CCPR/C/88/D/1324/2004, Views adopted on 31 October 2006, § 7.3; *C. v. Australia,* Communication No. 900/1999, CCPR/C/76/D/900/1999, Views adopted on 28 October 2002, §§ 8.2 and 8.4.

[248] 1951 Refugee Convention, Article 31 § 1. Further, it should be noted that under Article 5 of the UN Protocol against the smuggling of migrants by land, sea and air supplementing the UN Convention against Transnational Organised Crime, migrants who have been the object of smuggling shall not be subject to criminal prosecution.
For a more comprehensive discussion on Article 31 (1) of the 1951 Refugee Convention, see, Commentary on the Refugee Convention 1951, Articles 2-11, 13-37, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997, pp. 97-104; Dr C. Costello (with Y. Ioffe and T. Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees, Legal and Protection Policy Research Series*, PPLA/2017/01, July 2017, pp.10-43; Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001.

[249] 1951 Refugee Convention, Article 31 § 2.

[250] *Ibid.*, Article 26.

[251] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV, December 2011, p. 9.

[252] UNHCR, *Detention Guidelines*, 2012, Guideline 2, § 13.

rights recognised in the Covenant.[253] The CCPR has indicated that "an alien who entered a State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of Article 12."[254]

112. The UNHCR *Detention Guidelines* reiterate that detention of asylum seekers "should be avoided" and only used as a measure of last resort when it proves "necessary in the individual case, reasonable in all circumstances and proportionate to a legitimate purpose."[255] The "availability, effectiveness and appropriateness of alternatives to detention" should be duly examined in each individual case to ensure "that detention of asylum-seekers is a measure of last, rather than first, resort."[256] Failure to consider alternatives could also render detention arbitrary.[257]

113. Appropriate screening and assessment procedures should be established to ensure that asylum seekers are not wrongfully detained when assessing a risk of absconding.[258] Detention should not be used to deter future asylum seekers or dissuade those who have already lodged a claim from pursuing it.[259] Additional guidance on the application of alternative measures has been provided by UNHCR with a specific focus on refugees and asylum seekers and other persons in need of international protection.[260]

114. At the EU level, the right to liberty and security is guaranteed under Article 6 of the EU Charter of Fundamental Rights ("EU Charter") and corresponds to Article 5 § 1 of the Convention.[261] The Court of Justice of the European Union ("CJEU") has emphasised the importance of the right to liberty enshrined in Article 6 § 1 of the EU Charter and has stressed that the "gravity of the interference" with this right caused by detention requires that "limitations on the exercise of the right must apply only in so far as is strictly necessary."[262] Overall, under EU law, immigration status of a person is never a sole reason for detention, as there are stringent and exhaustive grounds under relevant legislative acts for recourse to detention, with even more safeguards provided for children.

115. In light of Article 31 of the 1951 Refugee Convention, EU law prohibits detention of persons for the sole reason of requesting international protection.[263] Similarly, detention of persons under Regulation (EU) No 604/2013 for the sole reason of being subject to the procedure is not permitted.[264]

116. Detention of asylum seekers and persons in Dublin procedures should be for the shortest time possible and subject to the principle of necessity and proportionality with regard to

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[253] The Covenant, Article 12 § 3.
[254] CCPR, *General Comment No. 27*, *Freedom of Movement (Art. 12)*, 2 November 1999, § 4. See also, *Celepli v. Sweden,* Communication No. 456/1991, Views adopted on 18 July 1994, § 9.2.
[255] UNHCR, *Detention Guidelines*, 2012, Introduction, § 2. and Guideline 4, § 18.
[256] *Ibid.*, Guideline 4.3, § 35.
[257] *Ibid.*, Guideline 4, § 18.
[258] *Ibid.*, § 22. See also UNHCR, *UNHCR and IDC (2016), Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016
[259] *Ibid.*, Guideline 4, § 32.
[260] UNHCR, *Detention Guidelines*. See also, UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015; UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, 2015.
[261] EU Charter, Article 52 §§ 2 and 3 and Article 53.
[262] Judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, § 56.
[263] Directive 2013/32/EU, Article 26 § 1; Directive 2013/33/EU, Recital (15) and Article 8 § 1.
[264] Regulation (EU) No 604/2013, Recital (20) and Article 28 § 1.

both the manner and the purpose. Detention should be resorted to only if, on the basis of an individualised assessment, it has been established that alternatives cannot be applied effectively in each case.[265] According to Directive 2013/32/EU, asylum seekers are given a right to remain on the territory of member States pending the examination of their application until a decision has been made at first instance, or until their appeal of the first instance decision has been exhausted, provided that it has been lodged within the prescribed time limits.[266]

117. Asylum seekers have the right to move freely within the territory of the host member State or within an area assigned to them by that member State.[267] If asylum seekers are within an assigned area, then "the unalienable sphere of private life" must not be affected and there must be "sufficient scope for guaranteeing access to all benefits" under Directive 2013/33/EU.[268]

118. Under secondary EU law, detention of persons in return procedures is subject to the principle of necessity and proportionality. Alternatives should be examined and found ineffective in each individual case before any decision to detain is taken.[269] Detention should be for the shortest time possible and only "maintained as long as removal arrangements are in progress and executed with due diligence." A person may only be kept in detention in order to prepare the return and/or carry out the removal process, in particular when there is a risk of absconding or the person concerned avoids or hampers the preparation of return or the removal process. If the prospects of removal are unrealistic because of legal or other considerations then detention ceases to be justified.[270]

119. In the recent judgment *Al Chodor*, the CJEU interpreted Article 28 § 2 read together with Article 2 (n) of Regulation (EU) No 604/2013, which permits the detention of a person subject to a Dublin procedure in case there is a significant risk of absconding.[271] Referring in particular to the principle of the *quality* of the law as developed in the relevant case-law of the Court, namely the criteria of clarity, predictability, accessibility and protection against arbitrariness, the CJEU held that the objective criteria for assessing the risk of absconding should be established in a binding provision of general application.[272] If such objective criteria are not provided for in domestic legislation, detention under Article 28 § 2 taken together with Article 2 (n) of Regulation (EU) No 604/2013 will be unlawful.[273]

2.2. Obligation to consider alternatives to detention

120. Given that detention is an exceptional measure of last resort, States have a legal obligation, in line with the principles of necessity and proportionality, first, to examine carefully

[265] Directive 2013/33/EU, Recitals (15) and (16) and Article 8 §2; Regulation (EU) No 604/2013, Recital (20) and Articles 28 §§ 2 and 3.
[266] Directive 2013/32/EU, Article 9 § 1 and Article 46 § 5.
[267] Directive 2013/33/EU, Article 7 § 1.
[268] *Ibid.*
[269] Directive 2008/115/EC, Recital (16) and Article 15 § 1.
[270] Directive 2008/115/EC, Article 15 § 4. See also, Judgment of 30 November 2009, Grand Chamber, *Kadzoev,* C-357/09 PPU, EU:C:2009:741, § 64.
[271] According to Article 2 (n) of Regulation (EU) No 604/2013, the risk of absconding is defined as "the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond." An almost similar definition is also provided in Article 3 § 7 of Directive 2008/115/EC.
[272] Judgment of 15 March 2017, *Salah Al Chodor and Others*, C-528/15, EU:C:2017:213, § 45.
[273] *Ibid.*, § 46.

alternative measures and, second, only then resort to detention if it has been established that alternatives are not sufficient to achieve the aim pursued.[274]

121. The CCPR has confirmed this obligation in a number of views where it found a violation of Article 9 § 1 of the Covenant where States failed to demonstrate that "in the light of the individuals' particular circumstances, there were no less invasive means of achieving the same ends."[275] Similarly, the WGAD has stated that "alternative and non-custodial measures [. . .] should always be considered before resorting to detention."[276] This includes, in the context of removal, "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."[277] Overall, the obligation to examine alternatives to immigration detention has been confirmed by a broad range of UN human rights bodies.[278]

122. At the EU level, the obligation to consider alternatives is linked to the principle of proportionality in primary law and is clearly established in specific provisions of EU secondary law. Thus, detention of asylum seekers, including those in Dublin procedures as well as persons in return procedures is permissible only if it has been established on the basis of an individual assessment in each case that other less coercive alternatives cannot be applied effectively.[279]

123. The obligation to consider alternatives was reaffirmed by the CJEU in the case of *El Dridi* where it was stressed that removal should be carried out using a gradation of measures based on an individual assessment, starting from the least coercive measure possible, namely voluntary return, and only when each measure has proven ineffective, move to more restrictive ones, with detention being the last.[280] In a similar vein, when referring to the supervising powers of the judicial authority, the CJEU concluded that:[281]

> " 'supervision' undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and

[274] For EU members States the obligation to consider alternatives to detention is established in: Directive 2013/33/EU, Recital (20) and Article 8 § 2; Directive 2008/115/EC, Recital (16) and Article 15 §1; Regulation (EU) No 604/2013, Recital (20) and Article 28 § 2.

[275] *C. v. Australia*, § 8.2; *Saed Shams and Others v. Australia*, Communications Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, Views adopted on 20 July 2007, § 7.2; *Zeyad Khalaf Hamadie Al-Gertani v. Bosnia and Herzegovina,* § 10.4; *F.K.A.G. et al. v. Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011, Views adopted on 26 July 2013, § 9.4.

[276] *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, E/CN.4/1999/63/Add.3, 18 December 1998, § 33.

[277] WGAD, *Opinion No. 45/2006*, A/HRC/7/4/Add.1, 16 January 2008, § 25.

[278] These include, among others, the WGAD, the UNHCR, the Committee on the Elimination of Racial Discrimination, the Special Rapporteur on the human rights of migrants and the Office of the High Commissioner for Human Rights.

[279] Directive 2013/33/EU, Recitals (15) and (20) as well as Article 8 § 2; Directive 2008/115/EC, Recital (16) and Article 15 §1; Regulation (EU) No 604/2013, Recital (20) and Article 28 § 2.

[280] Judgment of 28 April 2011, *El Dridi*, C-61/11 PPU, EU:C:2011:268, §§ 39 and 41.

[281] Judgment of 5 June 2014, *Mahdi*, C-146/14 PPU, EU:C:2014:1320, § 64.

observations which may be submitted to the judicial authority in the course of the proceedings."

2.3. Procedural safeguards

Provisions of reason for detention

124. The right to be informed of the reasons for arrest and detention stem from Article 9 § 2 of the Covenant. The reasons must be specific "to enable [the detained person] to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded."[282] By analogy, the requirement for the communication of a detention order promptly, together with reasons is also found in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("UNBOP").[283] Notice of the detained person's rights and how to exercise them should be given to the person in a language he or she understands.[284] Similarly, according to the WGAD, the person should be informed of the detention order in writing, including the grounds of detention.[285] The information given to the person should also set out means by which to seek a judicial remedy to decide promptly on the lawfulness of detention and, where appropriate, order the person's release.[286] The UNHCR has also provided for asylum seekers to be informed of the reasons for their detention, their rights in relation to the detention order (including review procedures), "in a language and in terms which they understand."[287]

125. Under EU secondary legislation, the detention of applicants for international protection is to be ordered in writing by judicial or administrative authorities, setting out the reasons in fact and in law upon which the order is based.[288] Detained applicants for international protection must be immediately informed in writing in a language they understand or are reasonably supposed to understand of the reasons for detention.[289] In addition, they are to be informed of the procedures contained in national law for challenging the detention order.[290] These guarantees are applicable for those applicants in a Dublin situation.[291]

126. For those subject to a return decision and detained, EU secondary legislation provides that the detention shall be ordered in writing with reasons being given in fact and in law.[292] Member States are required to immediately inform the detained person about the possibility to take proceedings in order to subject the lawfulness of detention to speedy judicial review.[293]

Legal assistance

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[282] *Adolfo Drescher Caldas v. Uruguay*, Communication No. 43/1979, CCPR/C/OP/2, 1990, § 13.2.
[283] Principle 11 § 2.
[284] UNBOP, Principles 13 and 14.
[285] WGAD, Deliberation No. 5 concerning the situation regarding immigrants and asylum-seekers, Principle 8.
[286] *Ibid.*
[287] UNHCR, *Detention Guidelines*, 2012, Guideline 7, § 47 (i).
[288] Directive 2013/33/EU, Article 9 § 2.
[289] *Ibid.*, Article 9 § 4.
[290] *Ibid.*
[291] Regulation (EU) No 604/2013, Article 28, § 4.
[292] Directive 2008/115/EC, Article 15 § 2 second paragraph.
[293] *Ibid.*, Article 15 § 2 (b).

127. Prompt and regular access to lawyers is seen as an important precaution against inhuman or degrading treatment, in light of Article 7 the Covenant.[294] UNBOP expressly provides for a detained person to firstly, have the right to the assistance of legal counsel; secondly to be informed of this right promptly after his arrest; and thirdly to be provided "reasonable facilities" to exercise his right to legal counsel.[295] The person has the right to be assigned legal counsel by a judicial or other authority if the person does not have a legal counsel of his own choice "in all cases where the interests of justice so require and without payment if the person does not have sufficient means to pay.[296]

128. The UNHCR has indicated that asylum seekers should be informed of their right to legal counsel, with free assistance provided where it is also available to nationals similarly situated. Access to legal assistance should be made available "as soon as possible after arrest or detention to help the detainee understand his/her rights."[297]

129. Under EU secondary legislation, detained applicants for international protection are to be informed of the possibility to request free legal assistance and representation.[298] Procedures for accessing legal assistance must be laid down in national law.[299] Member States are required to provide free legal assistance and representation to persons detained on judicial review of detention ordered by administrative authorities,[300] subject to some member State discretion including the means of the applicant and monetary and time limits.[301] The scope of that legal assistance is to include "at least the preparation of the required procedure documents and participation in the hearing before the judicial authorities on behalf of the applicant."[302] These guarantees also apply to those applicants for international protection in a Dublin situation.[303]

130. For those subject to a return decision and detained, they have a right to establish contact with legal representatives "on request" and "in due time."[304]

Judicial review

131. Article 9 § 4 of the Covenant provides for the judicial review of the lawfulness of a deprivation of liberty "without delay" and to order the release of the person if detention is not lawful. CCPR has outlined the scope of judicial review with the scrutiny of the lawfulness of detention not just against national law but the Covenant itself, as well as the ability for the court to order release.[305]

132. The UNHCR has indicated that, in order for the detention decision to be reviewed, detained asylum seekers should be brought before a judicial or other independent authority, with the review ideally being automatic and taking place within 24-48 hours of the initial decision

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[294] CCPR, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, § 11.
[295] UNBOP, Principle 17 § 1.
[296] *Ibid.*, Principle 17 § 2.
[297] UNHCR, *Detention Guidelines*, 2012, Guideline 7, § 47 (ii).
[298] Directive 2013/33/EU, Article 9 § 4.
[299] *Ibid.*, Article 9 § 10.
[300] *Ibid.*, Article 9 §§ 6 and 3.
[301] *Ibid.*, Article 9 §§ 7, 8 and 9.
[302] *Ibid.*, Article 9 § 6.
[303] Regulation (EU) No 604/2013, Article 28 § 4.
[304] Directive 2008/115/EC, Article 16 § 2.
[305] *A. v. Australia*, § 9.5; *C. v. Australia*, § 7.4; *Omar Sharif Baban v. Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001, Views adopted on 6 August 2003, § 7.2.

to detain.[306] Regular periodic reviews of the necessity for detention being continued should take place before a court or independent body in the period after the initial review of detention.[307] The UNHCR has also indicated that the right for the detained person (or through a representative) "to challenge the lawfulness of detention before a court of law at any time needs to be respected" – regardless of whether an initial or periodic review has been provided for.[308]

133. Under EU secondary legislation, in circumstances where the detention has been ordered by administrative authorities, detained applicants for international protection are entitled to speedy judicial review of the lawfulness of their detention *ex officio* and/or at the detained applicant's request. An *ex officio* review is to be decided upon as speedily as possible from when detention commences. When conducted at the detained applicant's request, the review is to be decided upon "as speedily as possible after the launch of the relevant proceedings." Member States are obliged to define in national law "the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted." If the judicial review finds that the detention is unlawful, the person must be immediately released.[309]

134. The judicial review of detention decisions for detained applicants for international protection is to occur "at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention."[310] The above guarantees also apply to those in a Dublin situation.[311]

135. For those subject to a return decision and detained by administrative authorities, member States are required to give detained persons either the a right to "speedy judicial review of the lawfulness of their detention to be decided upon as speedily as possible from the beginning of detention,"[312] or alternatively, the right to initiate their own proceedings for the speedy judicial review of the lawfulness of detention "to be decided upon as speedily as possible after the launch of the relevant proceedings."[313] Detention in every case is to be "reviewed at reasonable intervals of time" either on application or *ex officio*, with prolonged detention period subject to judicial supervision.[314]

2.4. Positive obligation to avoid detention for persons in a vulnerable situation

136. Not only must consideration of the use of detention and alternatives to detention respect States' obligations *not* to violate individual rights, they must also *protect* individuals or groups who are known to be particularly vulnerable to rights violations within detention.

137. Under EU law, member States must take into account the specific situation and special needs of vulnerable persons seeking international protection or subject to a return decision.[315]

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[306] UNHCR, *Detention Guidelines*, 2012, Guideline 7, § 47 (iii).
[307] *Ibid.*, § 47 (iv).
[308] *Ibid.*, § 47 (v).
[309] Directive 2013/33/EU, Article 9 § 3.
[310] *Ibid.*, Article 9 § 5.
[311] Regulation (EU) No 604/2013, Article 28 § 4.
[312] Directive 2008/115/EC, Article 15 § 2 (a).
[313] *Ibid.*, Article 15 § 2 (b).
[314] *Ibid.*, Article 15 § 3.
[315] Directive 2013/33/EU, Article 21 and Article 22 § 1 third paragraph; Directive 2008/115/EC, Article 14 § 1 (d). Article 21 of Directive 2013/33/EU provides a non-exhaustive list of vulnerable persons such as " minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders

When it comes to applicants for international protection in particular, EU member States have an obligation to assess within a reasonable period of time whether they have special reception needs.[316] Member States are required to indicate the nature of such needs and ensure that they are taken into account throughout the duration of an asylum procedure, while adequate support and appropriate monitoring of their situation is provided.[317] Directive 2013/33/EU further notes that "[t]he health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities."[318] Those subjected to torture, rape or other serious acts of violence are to receive the necessary treatment for damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.[319] Additionally, EU law requires from member States to take additional measures to ensure that the standards of living and material conditions for vulnerable persons seeking international protection are met in their "specific situation."[320]

138. The following is a brief overview of the legal aspects of alternatives to immigration detention for some of these particularly vulnerable individuals and groups.

Children

139. According to CCPR, detention of children should be an exceptional measure of last resort, to be applied for the shortest time possible and their best interests should be a primary consideration with "regard to the duration and conditions of detention." Particular attention should be paid to the extreme vulnerability and need for care of unaccompanied minors.[321]

140. Although Article 37 (b) of the CRC provides for the deprivation of liberty of children as a last resort, that provision is subject to important principles and considerations including the principles of non-discrimination, the best interests of the child and maintenance of family unity that significantly reduce the instances where children may be deprived of their liberty on account of their or their parents' immigration status.

Non discrimination

141. The rights enshrined in the CRC apply to all children within the jurisdiction of the State Parties on the basis of non-discrimination.[322]Accordingly, the CRC Committee has indicated that:[323]

> "the enjoyment of rights stipulated in the Convention are not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children, irrespective of their nationality, immigration status or statelessness."

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and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation." An almost similar non-exhaustive list of vulnerable persons is also provided in Article 3 § 9 of Directive 2008/115/EC.

[316] Directive 2013/33/EU, Article 22.

[317] *Ibid.*

[318] *Ibid.*, Article 11 § 1.

[319] *Ibid.*, Article 25 § 1

[320] *Ibid.*, Article 17 § 2.

[321] CCPR, *General comment No. 35*, §18.

[322] CRC, Article 2.

[323] CRC Committee, *General comment No. 6(2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 17 May-3 June 2005, § 12.

Best interests of the child as a primary consideration[324]

142. Although emphasising the that there is no hierarchy of rights in the CRC, the CRC Committee identified the best interests of the child as one of the four general principles of the CRC[325] and noted that it has three dimensions:[326] *firstly*, a "substantive right" in itself;[327] *secondly*, a "fundamental, interpretative legal principle;"[328] *thirdly*, a " rule of procedure."[329]

143. In light of the above, State Parties are required to conduct an individual assessment of the best interests of the child "at all stages of and decisions on any migration process affecting children"[330] and any decision taken should justify how the right has been taken into consideration. This assessment should take into account the particular circumstances of each child including due consideration for the "different kinds and degrees of vulnerability" in the specific case.[331]

144. Given the particular vulnerability of children to ill-treatment in places of detention, the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment concluded:[332]

> "Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children."

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[324] The CRC Committee has clarified that the "expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness […]." The CRC Committee went on to emphasise that "the right of the child to have his or her best interests taken as a primary consideration" has "high priority and [is] not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best." CRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* adopted by the Committee at its sixty-second session (14 January–1 February 2013), §§ 37 and 39.

[325] The other three general principles include, Article 2 on non-discrimination; Article 6 on the right to liberty, survival and development; and Article 12 on the rights of the child to express his or her views freely. CRC Committee, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, § 2; CRC Committee, *General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, § 12.

[326] CRC Committee, *General comment No. 14*, § 6.

[327] Meaning that every child should have his/her interest assessed and, when different interests are being considered, taken as a primary consideration and that this right will be implemented in all decisions and actions concerning children, including "inaction or failure to take action."

[328] Whereby the choice of interpretation that most effectively serves the child's interest should be chosen in the event that a legal provision is open to more than one interpretation.

[329] Meaning that any decision that will affect a child individually or a specific group of children should include an evaluation of the (positive or negative) impact it will have on the child or the group of children concerned.

[330] CRC Committee, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, § 72.

[331] A child's situation of vulnerability includes, *inter alia*, "disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc." CRC Committee, *General comment No. 14*, § 75.

[332] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, A/HRC/28/68, 5 March 2015, § 80.

145. In line with the advisory opinion of the Inter-American Court of Human Rights of 2014 which held that "the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity […] [and] can never be understood as a measure that responds to the child's best interest,"[333] the Special Rapporteur further concluded that:[334]

> "the principle of *ultima ratio* that applies to juvenile criminal justice is not applicable to immigration proceedings. The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. Deprivation of liberty in this context can never be construed as a measure that complies with the child's best interests. Immigration detention practices across the globe, whether *de jure or de facto*, put children at risk of cruel, inhuman or degrading treatment or punishment. […]"

146. Also relevant in this context is Article 22 which requires from States parties to take appropriate measures to ensure that refugee and asylum seeking children enjoy to the fullest the rights enshrined in the CRC and benefit from the additional protection afforded to them through other international instruments to which States are Parties. Additionally, Article 20 is also of relevance for unaccompanied and separated children and requires that special protection and assistance is provided to this group, including placement in alternative care.

147. Further guidance on the protection of children in the context of migration has been provided by the CRC in various General Comments and the Days of General Discussion. Thus, in 2005 the CRC Committee looked specifically at the treatment of *unaccompanied and separated children,* characterised as a "particular vulnerable group of children."[335] Referring to the best interests of the child, the CRC Committee held that unaccompanied and separated children should not, as a general rule, be placed in detention and further maintained that:[336]

> "Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof."

148. The Day of General Discussion in 2012 dedicated to "*The rights of all children in the context of international migration"* marked a turning point regarding the immigration detention of children, including families. Then, the CRC Committee concluded that:[337]

> "Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light,

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[333] Inter-American Court of Human Rights, Advisory Opinion OC-21/14 of 19 August 2014, § 154.
[334] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez,* A/HRC/28/68, 5 March 2015, § 80.
[335] CRC Committee, *General comment No. 6,* § 4. Note should be taken of the fact that the CRC Committee warned States Parties that when applying the standards contained in the aforementioned comment "they must be cognizant of their evolutionary character and therefore recognize that their obligations may develop beyond the standards articulated herein."
[336] *Ibid.*, § 61.
[337] CRC Committee, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, § 78.

> States should expeditiously and completely cease the detention of children on the basis of their immigration status."

149. The position against the immigration detention of children has since then been regularly reaffirmed. For example, recently while referring to unaccompanied and separated adolescents, the CRC Committee called upon State Parties to prioritise the "assessment of protection needs over the determination of immigration status," to address their particular vulnerability and prohibit immigration-related detention.[338]

150. The unequivocal position against the immigration detention of children has been endorsed by various international and regional human rights bodies which have consistently held that children should not be detained for purposes of immigration enforcement or control.[339] UNHCR's latest position is that children should not be detained for immigration-related purposes, irrespective of their legal or migratory status or that of their parents, and that detention is never in their best interests.[340] Instead, appropriate care arrangements and alternatives to detention need to be in place to ensure adequate reception of children and their families. [341] The best interests of the child should be a primary consideration in every decision concerning them.

151. States have also recently committed to working towards ending the practice of detaining children for migration-related purposes.[342]

Maintenance of family unity

152. The CRC provides that a child is never to be separated from his or her parents against his/her will unless it is in the best interests of the child and is in accordance with the applicable laws and procedures.[343] Accordingly, when the best interests of the child warrant the maintenance of family unity, then the right to liberty is also applicable to that child's parents.[344] Rather than resorting to the immigration detention of children, the CRC Committee, together with other bodies, have called upon States to implement non-custodial, community-based

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[338] CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December 2016, § 77.

[339] See, Inter-Agency Working Group (IAWG) to End Child Immigration Detention, *Summary of normative standards and recommendations on ending child immigration detention*, August 2016.

[340] UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017.

[341] See examples that have been compiled in UNHCR's *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families* and *Options Paper 2 on Options for governments and open reception and alternatives to detention*. In the joint UNHCR/UNICEF Safe and Sound report, UNHCR noted that "detention has negative lasting effects. It undermines the human dignity of individuals and can cause unnecessary suffering and has potentially serious consequences for health and well-being. Detention of children is particularly serious due the devastating effect it may have on their physical, emotional and psychological development. Children should, in principle, not be detained." UNHCR, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014

[342] General Assembly, *New York Declaration for Refugees and Migrants*, § 33.

[343] CRC, Article 9 § 1. The CRC Committee has reminded State Parties that "parents" is analogous to "biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom." CRC Committee, *General comment 14*, § 59.

[344] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* Juan E. Méndez A/HRC/28/68, 5 March 2015, § 80.

alternatives to detention for the entire family, such as those found in the UN Guidelines for the Alternative Care of Children:[345]

> "To the greatest extent possible, and always using the least restrictive means necessary, States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians if they are present in the transit and/or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved."[346]

153. According to the EU Charter and the relevant EU secondary legislation, primary consideration should be given to the best interests of the child in all actions concerning them, as well as the right to family unity and family life.[347] Under EU law, the immigration detention of children is a measure of last resort, for the shortest period of time and after it has been established that alternative measures cannot be applied effectively prior to any resort to detention,[348] with a special provision for unaccompanied children to be detained "only in exceptional circumstances."[349] EU law provides for strict safeguards guaranteeing *a priori* best interests determination of children in the context of migration. The best interests of the child shall be a primary consideration in all actions concerning them. Hence, under EU law there should not be cases of detention against the best interests of the child. All efforts shall be made to release detained children seeking asylum and place them in accommodation suitable for minors.[350] Similarly, a heightened obligation exists for unaccompanied children asylum seekers whereby all efforts are to be made for their release "as soon as possible" and for them to "be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age."[351]

154. The European Parliament has echoed the CRC Committee recommendation, calling on member States to "cease, completely and expeditiously, the detention of children on the basis of their immigration status, to protect children from violations as part of migration policies and

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[345] General Assembly, *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly*, A/RES/64/142, 24 February 2010.

[346] CRC Committee, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, § 79.

[347] EU Charter, Articles 7 and 24 § 2; Directive 2013/33/EU, Recital (9) and Article 23 §§ 1 and 2; Directive 2008/115/EC, Recital (22) and Article 5 (a) and (b), as well as Article 17 § 5; Regulation (EU) No 604/2013, Recitals (13) and (16), Article 6 §§ 1 and 3. See further, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 29 December 2011, L337/9, Recital (18), Article 20 § 5 and Article 23. On the best interest of the child see also, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, L 180/60, Recital (33) and Article 25 § 6.

[348] Directive 2013/33/EU, Recital (15) and Articles 8 § 2 and 11 § 2; Directive 2008/115/EC, Recital (16), Article 15 § 1; Regulation (EU) No 604/2013, Recital (20) and Article 28 § 2.

[349] Directive 2013/33/EU, Article 11 § 3. Recently the European Commission encouraged EU member States to "ensure that a range of alternative care options for unaccompanied children, including foster/family-based care are provided." European Commission, *Communication from the Commission to the European Parliament and the Council, The protection of children in migration*,COM(2017) 211 final, 12 April 2017, p. 9.

[350] *Ibid*., Recital (15) and Articles 8 § 2 and 11 § 2.

[351] *Ibid*., Article 11 § 3.

procedures and to adopt alternatives to detention that allow children to remain with family members and/or guardians."[352]

Stateless persons

155. In light of the complexities related to their status, including lack of identity and travel documents which in turn lead to lack of legal residence in any country, stateless persons are especially at risk of prolonged and repeated detention.[353] Lack of necessary immigration permits or being undocumented cannot, therefore, be used as a general justification for detention of stateless persons.[354] Similarly, the routine detention of persons seeking protection based on their statelessness is arbitrary. Particularly important in this context are appropriate statelessness determination procedures to ensure that stateless persons are properly identified.[355] According to the UNHCR, "identification of statelessness should be considered as part of the identification of other vulnerabilities."[356] UNHCR has further clarified that although the 1954 Convention relating to the Status of Stateless Persons "does not prescribe any mechanism to identify stateless persons as such," it is implicit in the aforementioned Convention that "States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments."[357] Release of stateless persons in the community or referral to appropriate alternatives to detention should be the given priority.[358]

Survivors of torture or trauma

156. Victims of trauma or torture and other serious physical, psychological or sexual violence require special attention and should in principle not be detained. Factors such as depression, anxiety, aggression, physical, psychological or other emotional consequences should be weighed when assessing the necessity to detain them.[359] Initial and periodic assessments of detainee's physical and mental health should be carried out due to the serious impact of detention.[360] Appropriate treatment needs to be provided,[361] and effective rehabilitation services and programmes that take into account the victim's culture, personality, history and background should be made accessible regardless of, *inter alia*, identity or status.[362]

Victims or potential victims of human trafficking

157. Victims or potential victims of human trafficking should not, under any circumstances be detained punished or prosecuted for the illegality of their entry or residence, or for their

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[352] European Parliament resolution of 4 February 2014 on undocumented women migrants in the European Union (2013/2115(INI)), 4 February 2014, § 29. See also, European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)), § 13.
[353] UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, § 112.
[354] *Ibid*.
[355] UNHCR, *Stateless Persons in Detention: A tool for their identification and enhanced protection*, June 2017, p. 7.
[356] *Ibid*., p. 4.
[357] UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, § 8.
[358] UNHCR, *Stateless Persons in Detention: A tool for their identification and enhanced protection*, June 2017, p. 4.
[359] UNHCR, *Detention Guidelines*, 2012, Guideline 9. 1, § 49.
[360] *Ibid.*, § 50.
[361] *Ibid.*
[362] Committee against Torture ("CAT"), *General Comment No. 3 (2012) - Implementation of article 14 by States parties*, CAT/C/GC/3, 13 December 2012, § 15.

involvement in unlawful activities as a direct consequence of their situation as trafficked persons.[363] Appropriate protection and support should be provided to them,[364] including alternatives to detention such as safe houses and other care arrangements, especially for children.[365]

158. Under EU law, victims of human trafficking can be detained subject to provisions on special guarantees for vulnerable persons, but member States should protect them from prosecution or penalisation related to their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subject to trafficking.[366] Member states also have an obligation to establish appropriate mechanisms to ensure the early identification of victims.[367] Special assistance and support, such as safe and appropriate accommodation, material assistance, necessary medical treatment, including psychological assistance, counselling and information, translation and interpretation should be provided to them.[368] A residence permit can be issued to persons who are victims of human trafficking or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.[369]

Persons with disabilities or other special needs

159. The Convention on the Rights of Persons with Disabilities ("CRPD") prohibits the unlawful or arbitrary detention of a person with a disability and a person's disability must "in no case justify a deprivation of liberty."[370] Further, the Committee on the Rights of Persons with Disabilities ("CRPD Committee") has emphasised that restrictive detention of asylum seekers and migrants with disabilities is not in line with the CRPD and recommended that the EU issue guidelines to its agencies and member States in this regard.[371] Similarly, UNHCR has held that asylum seekers with long term physical, mental, intellectual and sensory impairments should, as a rule, not be detained.[372] A swift and systematic identification and registration of such persons is needed to avoid arbitrary detention and alternatives tailored to their specific needs, such as telephone reporting, should be made available to them.[373]

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[363] Office of the United Nations High Commissioner for Human Rights ("OHCHR"), Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1, 20 May 2002, Guideline 2, § 6 and Guideline 4, § 5. See further, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/32/41, 3 May 2016, §§ 64 (h) and 66 (d) (e); *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, A/HRC/20/24, 2 April 2012, § 72 (i).

[364] See, for example, Article 6 of the Palermo Protocol; OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1, Guideline 6.

[365] UNHCR, *Detention Guidelines*, 2012, Guideline 9. 5, § 62.

[366] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, L 101/1, Recital (14) and Article 8.

[367] Directive 2011/36/EU, Article 11 § 4.

[368] *Ibid.*, Articles 11 §§ 1, 2 and 5.

[369] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, 6 August 2004, L 261/19.

[370] CRPD, Article 14 § 1 (b).

[371] CRPD, Concluding observations European Union, CRPD/C/EU/CO/1, 2 October 2015, § 35.

[372] UNHCR, *Detention Guidelines*, 2012, Guideline 9.5, § 63.

[373] *Ibid.* See also UNHCR, *UNHCR and IDC (2016), Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016.

Pregnant women and nursing mothers

160. The Committee on the Elimination of Discrimination against Women ("CEDAW") and UNHCR have, among others, stressed that pregnant women and nursing mothers should not, as a general rule, be detained.[374] Alternative arrangements that take into account their particular needs, including safeguards against sexual and gender-based violence and exploitation should be applied instead.[375]

Elderly persons

161. Alternative arrangements that take into account the particular circumstances of elderly persons, including their physical and mental well-being should be provided.[376]

LGBTI

162. LGBTI people should be released from detention and referred to alternatives, when their security is not guaranteed in detention.[377]

2.5. Alternatives must always rely upon the least restrictive measure possible

163. At the UN level, the CRC Committee, the UNHCR and the Special Rapporteur on the human rights of migrants have, *inter alia*, highlighted that when alternatives to immigration detention are applied in an individual case, the principle of minimum intervention must be respected and the least intrusive measure possible should be applied, based on an individualised assessment which takes into account the particular needs, vulnerabilities and circumstances of the person concerned.[378]

164. Similarly, according to the Special Rapporteur on the human rights of migrants when restrictions on personal liberty are deemed unavoidable, consistent with the principles of reasonableness, necessity, and proportionality, they should be considered along "a sliding scale of measures from least to most restrictive, allowing for an analysis of proportionality and necessity for every measure."[379]

165. In the EU context, the CJEU in its leading judgment *El Dridi*, further confirmed that Directive 2008/115/EC establishes an "order in which the various, successive stages" of the removal procedure are to take place.[380] This order is congruous with a "gradation which goes from the measure which allows the person concerned the most liberty […] to measures which

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[374] CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women,* 14 November 2014, CEDAW/C/GC/32, § 34; UNHCR, *Detention Guidelines*, 2012, Guideline 9.3, § 58. See also, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, § 72 (g).
[375] UNHCR, *Detention Guidelines*, 2012, Guideline 9. 3, § 58.
[376] *Ibid.*, Guideline 9.6, § 64.
[377] *Ibid*., Guideline 9.7, § 65.
[378] *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/65/222, 4 August 2010, §§ 92 (a) and 95; CRC Committee, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, § 79; UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 39.
[379] *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, §§ 53 and 73.
[380] Judgment of 28 April 2011, C-61/11 PPU, EU:C:2011:268, § 34.

restrict that liberty the most."[381] Therefore, member States are required to use "the least coercive measure possible" based on an individual assessment in each case. It is essential that the principle of proportionality is observed throughout the stages of the return procedure.[382]

166. The UNHCR has further clarified that the level and appropriateness of any community placement (as an alternative to detention) should "balance the circumstances of the individual with the risks to the community."[383] Further, the individual and/or his/her family should be matched to an appropriate community as part of the assessment of alternatives to detention as well as the required level and availability of support services.[384] Finally, persons subject to restrictions or conditions on their personal liberty in the context of alternatives to detention should receive information on the conditions governing the application of such alternatives, including their obligations and rights as well as the consequences of non-compliance.[385] Detention should not be automatically imposed following a failure of an alternative measure.[386]

2.6. Alternatives must never amount to deprivation of liberty or arbitrary restrictions on liberty of movement

167. Both the UNHCR and the Special Rapporteur on the human rights of migrants have emphasised that alternatives *to* detention should never become alternatives *forms of* detention nor alternatives to unconditional release.[387] This is especially important in the context of restrictions or conditions-based alternatives, as some restrictions on liberty of movement, either by themselves or in combination with other measures, may either amount to arbitrary restrictions on freedom of movement or to an arbitrary deprivation of liberty.

2.7. Alternatives must be established in law and subject to judicial review

168. The UNHCR has emphasised that alternatives for asylum seekers should both be available in practice, and properly governed by laws and regulations to avoid the arbitrary imposition of restrictions on liberty or freedom of movement.[388] Legal regulations should specify the types of alternatives available, the criteria for their use as well as the authorities responsible for their implementation and enforcement.[389] The Special Rapporteur on the human rights of migrants has similarly emphasised that States should provide for a presumption in favour of liberty in national legislation[390] and ensure that a broad range[391] of human rights-based[392] alternatives is available and established in law.

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[381] *Ibid.*, § 41.
[382] *Ibid.*, §§ 41-43.
[383] UNHCR, *Detention Guidelines*, 2012, Guideline 4, § 20.
[384] *Ibid.*
[385] *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, A/HRC/20/24, 2 April 2012, § 66.
[386] *Ibid.*, § 55. See, by analogy, UN Standard Minimum Rules on Non-Custodial Measures ("Tokyo Rules"), rule 14.3.
[387] UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 38; *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, § 73; *Report of the Working Group on Arbitrary Detention*, A/HRC/13/30, 18 January 2010, § 65. See further, O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, UNHCR Legal and Protection Policy Research Series, POLAS/2006/03, April 2006, §13.
[388] UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 36.
[389] *Ibid.*; see also by analogy Tokyo Rules, rule 10.2.
[390] *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, A/HRC/20/24, 2 April 2012, § 68.
[391] *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, A/65/222, 4 August 2010, § 94.

169. Both the UNHCR and the Special Rapporteur on the human rights of migrants have maintained that alternatives which impose restrictions on personal liberty or freedom of movement should be reviewed regularly in individual cases by an independent body or other competent authority to ensure their on-going necessity and proportionality.[393] Additionally, individuals subject to restrictions on liberty or freedom of movement should have the possibility to challenge these restrictions before a judicial or other competent and independent authority with timely access to effective complaint mechanisms and remedies.[394]

170. Under Directive 2013/33/EU, EU member States have the obligation to establish rules on alternatives to detention in national law for asylum seekers.[395] As regards persons in return procedures, it is arguable that a combined reading of Recital (16) and Article 15 § 1 of Directive 2008/115/EC requires each member State to provide in its national legislation for alternatives to detention.[396]

2.8. Alternatives must ensure human dignity and respect for other fundamental rights

171. When persons are detained or benefit from alternatives to detention they remain holders of other human rights. Applying alternatives to detention is an important step in reducing the risk of their other rights being violated. However, the UNHCR and the Special Rapporteur on the human rights of migrants, among others, as well as civil society organisations in the field have acknowledged that lack of effective access to fundamental rights, including adequate material support and accommodation, in the context of alternatives to detention, can lead to marginalisation or destitution, and undermine the effectiveness of alternative measures.[397]

172. Recently the Committee on Economic, Social and Cultural Rights ("CESCR") reiterated that all persons, irrespective of nationality or legal status, should benefit from the "essential minimum content of each right" enshrined in the Covenant on the Economic, Social and Cultural Rights ("ICESCR") in all circumstances.[398] These include (but are not limited to) the right to an adequate standard of living i.e. food, water, clothing and housing, as well as the enjoyment of the highest attainable standard of physical and mental health, including access to preventive, curative and palliative health services,[399] essential drugs, and education.[400] The

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[392] *Ibid.*; *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, A/HRC/20/24, 2 April 2012, § 73.
[393] UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 37; *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante,* A/65/222, 4 August 2010, § 92 (b).
[394] UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 37; *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, § 55.
[395] Directive 2013/33/EU, Article 8 § 4.
[396] European Commission, *Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks,* C(2017) 6505, Brussels, 27 September 2017, p. 67.
[397] UNHCR, *Detention Guidelines*, 2012, Guideline 4.3, § 41; *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, § 66; Jesuit Refugee Service ("JRS"), Alternatives to Detention of Asylum Seekers, Working paper, October 2008, p. 7.
[398] Committee on Economic, Social and Cultural Rights ("CESCR"), *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights,* E/C.12/2017/1, 13 March 2017, § 9.
[399] *Ibid.*, §§ 9 and 12.
[400] *Ibid.*, §§ 6 and 9.

aforementioned have also been supported by, among others, the Special Rapporteur on the human rights of migrants.[401]

173. In the EU context, Article 1 of the EU Charter guarantees the right to dignity which is contemplated in EU secondary legislation.[402] Article 3 provides for the right to the physical and mental integrity of the person. Article 4 prohibits torture or inhuman or degrading treatment or punishment.

174. As in the case of *M.S.S. v. Belgium and Greece*, the obligations incumbent upon member States in their implementation of EU law to ensure that reception conditions do not amount to inhuman and degrading treatment or punishment were highlighted by the CJEU in *N.S.* The CJEU held that member States cannot transfer an applicant in a Dublin situation to another member State:[403]

> "where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."

175. With regard to asylum seekers, EU law requires that member States provide information on any established benefits and obligations with which applicants must comply relating to reception conditions, as well as information on any organisations or group of persons that provide legal assistance and organisations that might assist or inform them about available reception conditions, including health care.[404] Further, EU law compels member States to make available to asylum seekers and other persons in need of international protection "material reception conditions" and provide "an adequate standard of living […] which guarantees their subsistence and protects their physical and mental health." [405]

176. In *Saciri*, the CJEU held that, firstly, in light of Article 1 of the EU Charter, the provision of material reception conditions must be immediate upon making an application for asylum even if the asylum seeker is in a Dublin situation;[406] secondly, where material reception conditions are provided to an asylum seeker in the form of financial allowances, these must be such as to ensure a dignified standard of living, adequate for their health, "capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market," and to maintain family unity;[407] and thirdly, where material reception conditions are provided through the bodies of the general public assistance system, those bodies are required to meet the standards set out in Directive 2013/33/EU, with no derogations from those standards on account

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[401] *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, § 66.
[402] Directive 2013/33/EU, Recital (35); Directive 2013/32/EU, Recital (60); Directive 2011/95/EU, Recital (16); Directive 2008/115/EC, Recital (24).
[403] Judgment of 21 December 2011, Grand Chamber, Joined cases C-411/10 and C-493/10, *N.S. and Others*, EU:C:2011:865, § 94.
[404] Directive 2013/33/EU, Article 5 § 1. See, in relation to the inadequacy of the information given and in light of the inadequacy of that information, it was not on the applicant to improve his situation: *M.S.S. v. Belgium and Greece* [GC], § 257.
[405] Directive 2013/33/EU, Article 17 § 2.
[406] Judgment of 27 February 2014, *Saciri and Others*, C-79/13, EU:C:2014:103, § 35. See further in relation to the application of Directive 2013/33/EU to those in a Dublin situation: Judgment of 27 September 2012, *Cimade and GISTI*, C-179/11, EU:C:2012:594.
[407] *Saciri and Others*, § 46.

of overcrowding of the reception systems.[408] Entitlement to adequate reception conditions applies also to those in a Dublin situation.[409]

177. Specific modalities for material reception conditions are provided for in the case of asylum seekers,[410] including in premises used for housing applicants during an examination of their application and in accommodation centres which guarantee an adequate standard of living.[411] Amongst other obligations, member States are obliged under EU law to take appropriate measures to prevent assault and gender-based violence (including sexual assault and harassment), as well as to take into consideration gender and age-specific concerns and the situation of vulnerable persons. Provision is made for the schooling and education of children,[412] and the possibility to allow applicants to access vocational training.[413]

178. Under Directive 2008/115/EC, persons in return procedures are entitled to emergency health care and essential treatment of illness.[414] Member States are, simultaneously, obliged to ensure the dignity of persons in return procedures consistent with their obligations under Article 1 of the EU Charter.[415]

III. PRACTICAL ASPECTS: EFFECTIVE ALTERNATIVES TO IMMIGRATION DETENTION

1. Essential elements of effectiveness

179. Although the need for alternatives to immigration detention has been consistently emphasised by the Council of Europe, the EU, and UN experts and treaty bodies, there remains limited guidance on how to *effectively* develop and implement such alternatives to immigration detention.

180. However, there have been at least four seminal global studies on alternatives to immigration detention seeking to identify what can be called "essential elements" of effective alternatives in terms of cost, compliance, and respect for individual rights and well-being.[416] In

[408] *Ibid.*, §§ 49-51.
[409] *Cimade and GISTI*.
[410] Directive 2013/33/EU, Article 18.
[411] *Ibid.*, Article 18 § 1. See in the context of Article 18 §3 and § 14.
[412] *Ibid.*, Article 14.
[413] *Ibid.*, Article 16.
[414] Directive 2008/115/EC, Article 14 § 1 (b).
[415] *Ibid.*, Recital (24).
[416] a) In 2002, UNHCR commissioned global research into the use of alternatives to detention for asylum seekers and refugees. See, O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, 2006.

b) Later, the IDC and the UNHCR undertook additional global comparative research on alternatives to immigration detention which were both published in 2011. See, IDC, *There are Alternatives: A handbook for preventing unnecessary immigration detention*, 13 May 2011; and A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention of Refugees,' Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011. These researches contributed to the first Global Roundtable on Alternatives to Detention.

c) In 2013, a comparative study looking at programmes in Canada and Switzerland was also commissioned by the UNHCR. See, C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention*, 2013.

addition to this global comparative research, there have also been a number of regional European studies of alternatives to immigration detention, mostly attempting to document the various alternative practices in use in European member States.[417] Overall, there is a broad consensus to evaluate the effectiveness of alternatives to detention based on the following three criteria:[418]

i. Ensuring compliance with immigration procedures, including:
   - Prompt and fair case resolution
   - Facilitating voluntary and enforced returns
   - Reducing absconding
   - Minimising any risks of offending during immigration processes;
ii. Respecting human rights and meeting basic needs;
iii. Promoting cost-effectiveness.

181. These criteria should not be considered in isolation from one another but rather as mutually supportive. The legitimate aim of States to ensure compliance with immigration procedures is clearly a fundamental part of the effectiveness of alternatives. Without this crucial element, alternatives cannot be deemed effective. Similarly, States are more likely to implement alternatives on the scale necessary if they can be shown to meet their legitimate objectives in a cost-effective way. This section will explore some of the key processes, approaches and procedures by which the objective of compliance can be met through alternatives to detention, as evidenced by research.

182. In seeking to identify the essential elements of effective alternatives to immigration detention, the key findings are remarkably similar across the existing studies, and appear consistent whether looking to develop alternatives in the context of arrival, during processing of migration or asylum claims, or to facilitate safe and dignified return. Due to this noteworthy

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d) From 2011 to 2015, the IDC undertook an additional programme of global research to better identify and describe the various models of alternatives to immigration detention. See, IDC, *There are Alternative,* 2015.

[417] See, for example, A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, Odysseus Network, January 2015; European Agency for Fundamental Rights ("FRA"), "Alternatives to detention for asylum seekers and people in return procedures," October 2015; European Migration Network ("EMN"), Synthesis Report – *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies*, November 2014; JRS, *From Deprivation to Liberty: Alternatives to detention in Belgium, Germany and the United Kingdom*, December 2011; FRA, *Detention of third country nationals in return procedures*, 30 November 2010; European Council on Refugees and Exiles ("ECRE"), *Research Paper on Alternatives to Detention; Practical Alternatives to the Administrative Detention of Asylum Seekers and Rejected Asylum Seekers*, September 1997.

[418] This formulation adapts to that of the EMN study, which defined effectiveness as "(i) reaching prompt and fair decisions on the immigration status of applications for international protection as well as persons subject to return; (ii) maximising cost-effectiveness; (iii) ensuring respect for fundamental rights; and (iv) reducing the risk of absconding." EMN, Synthesis Report, November 2014, p. 36; IDC has identified effectiveness as "reduc[ing] the use of detention… costs, compliance rates, effective and timely case resolution… uphold[ing] health, wellbeing and human rights." IDC, *There are Alternatives*, 2015, p. 9. The 2006 global research commissioned by the UNHCR refers to effectiveness exclusively in terms of State priorities of "preventing absconding and/or improving compliance with asylum procedures." O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, 2006, p. 45. The 2011 study commissioned by the UNHCR highlights differing perspectives on the concept, identifying rates of absconding and return as priorities for governments and release from detention for human rights groups, whilst emphasising human rights concerns. A. Edwards, *Back to Basics*, 2011, footnote 323, p. 52.

similarity, each of the essential elements will be discussed in greater detail below, but in brief, effective alternative programmes:[419]

- Understand the individual circumstances and use screening and assessment to make informed decisions about management and placement options;
- Ensure individuals are well-informed and provide clear, concise and accessible information about their rights, duties, and consequences of non-compliance;
- Provide meaningful access to legal advice and support from the beginning and continuing throughout relevant asylum or migration procedures;
- Build trust and respect through a spirit of fairness and cooperation, rather than an exclusive focus on control or punishment;
- Support individuals through personalised case management services;
- Safeguard the dignity and fundamental rights of individuals, ensuring that basic needs can be met.

1.1. Screening and assessment

183. Screening and assessment procedures are considered "fundamental" elements of effective alternatives to immigration detention[420] because they assist decision makers in understanding the individual circumstances of each person for whom alternatives to detention are being considered. Thus, they help authorities to make informed decisions about the most appropriate management and placement options.

184. Screening and assessment consist of two different but mutually supportive procedures. Screening is the process of obtaining basic information such as an individual's identity, nationality, asylum or migration status, health status, or any particular vulnerability indicators.[421] Assessment involves a more in-depth evaluation of an individual's particular circumstances, including risks, needs or vulnerability factors identified during screening. It is used to evaluate the appropriate solutions to respond to these needs.[422]

185. It is important that screening occurs at a very early stage, and especially before detention, whether at the border or upon identification within the territory.[423] Assessment may occur at the same time as screening or at a later stage, and should continue at regular intervals throughout the asylum or migration process, including during detention.[424] Additionally, identification of possible international protection needs and effective mechanisms of referral to asylum procedures, including from within detention facilities, needs to be ensured. Screening and assessment procedures should be as transparent and structured as possible and properly monitored, to reduce the risk of arbitrary detention or arbitrary restrictions on freedom of movement.[425]

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[419] While many of the cited regional and global comparative studies came up with their own lists of "essential elements" of successful alternatives, the list provided here seeks to consolidate and synthesise they key elements from across each of these studies.
[420] UNHCR, Second Global Roundtable on Reception and Alternatives to Detention, Toronto, Canada, 20-22 April 2015, Summary of deliberations, § 5; Executive Committee of the High Commissioner's Programme, Alternatives to detention, 3 June 201 5, § 3.
[421] IDC, *There are Alternatives*, 2015, p. 36.
[422] *Ibid.*
[423] UNHCR, Second Global Roundtable on Reception and Alternatives to Detention, Toronto, Canada, 20-22 April 2015, Summary of deliberations, § 6.
[424] *Ibid.*, § 10.
[425] *Ibid.*, § 11.

186. Successful screening and assessment systems approach migrants as a highly diverse population with different needs and motivations, requiring individually tailored responses. This requires *a range of placement and support options* that correspond to individual profiles and particular circumstances.[426]

1.2. Access to information

187. One of the essential elements for ensuring effective alternatives to immigration detention is the provision of clear, concise and accessible information about an individual's rights and duties, including any consequences for non-compliance. Doing so not only enhances trust in the system[427] but maximises understanding both on the part of the person concerned and by the authorities assessing their migration or asylum case, thus raising the quality of decisions, including fewer decisions being overturned on appeal.[428]

188. Accurate information provision reduces the rate of absconding and facilitates a more cooperative return process.[429] Individuals are naturally in a better position to comply with migration authorities if they understand their legal position, the judicial and bureaucratic procedures in which they are engaged, and the potential options they may have.[430] Migration officials themselves have noted that this contributes to increased appearance rates and helps to combat misinformation that may have been provided by smugglers or other unscrupulous individuals during the migration journey.[431]

189. For individuals to truly be well-informed, information should be provided *in multiple formats and in a manner that is easily accessible*. This includes ensuring that information is provided both written and orally in a language the individual understands, and that officials check to ensure that the information was understood.[432] It may require – free of charge if necessary – the provision of *translators or interpreters*. Translated written materials and the provision of qualified interpreters have been noted not only to improve communication with those going through asylum or migration procedures, but to improve the communication between lawyers, caseworkers and immigration officials working on the case.[433]

190. Information on an individual's rights, duties and consequences for non-compliance should also be provided from the very beginning of the asylum or migration process, with a focus on *early engagement*, and continue throughout the migration or asylum process, as necessary. For example, individuals should have a clear understanding of the asylum or migration process at the beginning stages of the procedure, but also the reasons of why a particular alternative to detention scheme has been chosen, the reasons why any restrictions or negative consequences for non-compliance have been deemed necessary, or any other relevant information as circumstances change throughout the process. Such knowledge has been found to be a key factor in strengthening the efficiency of alternative to detention

[426] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 120.
[427] *Ibid.*, p. 111.
[428] *Ibid.*, p. 99.
[429] *Ibid.*
[430] IDC, *There are Alternatives,* 2015, p. 31.
[431] O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, 2006, p. 232.
[432] *Ibid.*
[433] IDC, *There are Alternatives,* 2015, p. 32.

systems[434] and to better prepare individuals for voluntary return should their asylum or migration claim fail, leading to improved voluntary return rates.[435]

1.3. Provision of legal assistance

191. A second essential element of effective alternatives to immigration detention is the provision of legal advice and support throughout the asylum or migration process. Meaningful access to legal advice is a critical ingredient to the effective functioning of alternatives to immigration detention and helps to ensure compliance with asylum and migration procedures, including return. The provision of legal assistance has been called "highly significant" to the proper functioning of alternative to detention programmes by some practitioners,[436] and in several countries the provision of free legal advice and support has been found to "significantly increase rates of compliance and appearance."[437] Legal assistance also helps individuals to pursue *all of the legal options available to them*, and has thus been found to improve voluntary return rates, as individuals are more likely to understand the reasons why they may have no legal right to remain.[438]

192. Ideally, the provision of legal advice and support could be *free and automatic*, but when it is not available as a right in administrative immigration proceedings, a number of successful alternative to detention programmes rely on non-governmental organisations, legal aid clinics, law firms, or local communities to ensure that all individuals going through asylum or migration proceedings are able to meaningfully access legal assistance.[439]

1.4. Building trust in asylum and migration procedures

193. At the heart of the essential elements of effective alternatives to immigration detention— and a cross-cutting theme across each of the other essential elements— is the need to *build trust and respect* in the asylum or migration process *through a spirit of fairness and mutual cooperation*. Individuals who perceive the asylum and migration processes as fair have been found to be much more likely to cooperate with the authorities.[440] Indeed, this is consistent with "[t]he vast social scientific literature seeking to understand when and why individuals comply with the law in other fields," which demonstrates that "compliance is more likely to emerge through persuasion, and measures to encourage cooperation, than through harsh treatment."[441]

194. Even in the context of return, global comparative research into alternatives to immigration detention has found that individuals "are more likely to accept and comply with a negative decision on their visa application, status determination or other immigration process if they trust they have been through a fair process; they have been informed and supported through that process; and they have explored all options to remain in the country legally."[442]

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[434] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 109.
[435] A. Edwards, *Back to Basics,* 2011, p. 83.
[436] O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, 2006, p. 232.
[437] *Ibid.*, § 156.
[438] A. Edwards, *Back to Basics*, 2011, p. 83.
[439] IDC, *There are Alternatives*, 2015, p. 32.
[440] C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention*, 2013, p. 15.
[441] *Ibid.*, p. 8.
[442] IDC, *There are Alternatives*, 2015, p. 44.

195. One critical aspect of building trust in and respect for the asylum or migration process is to ensure *procedural fairness*, by which is meant "not merely that [the] government follows pre-ordained rules and procedures, but also that it acts in a manner perceived by individuals themselves to be fair."[443] Procedural fairness is therefore rooted in the *perceived legitimacy* that the asylum and migration process has in the eyes of the persons concerned.[444] Relevant indicators influencing individuals' perceptions of fairness and legitimacy include whether they felt they were heard in procedures, inconsistency of treatment, delays in decision-making, and the lack of availability or accessibility of legal advice.[445] When individuals believe their case has not been heard properly or that the process has been unfair they are more likely to appeal a negative decision, to abscond and to seek other avenues to remain in the country, or to undertake secondary movement.[446]

196. Authorities can promote a sense of procedural fairness and legitimacy by ensuring that many of the other key aspects of effective alternatives to immigration detention are respected and implemented in practice, such as the early provision of clear and accessible information, free access to legal advice and support, and the provision of case management support.[447]

197. Meanwhile, widespread or arbitrary use of detention has been shown to weaken trust in immigration procedures, undermining individuals' predisposition to comply.[448] So, too, do alternatives to immigration detention that focus predominantly on control or punishment for non-compliance rather than *promoting compliance* through support and active engagement with the individual.[449]

1.5. Provision of case management services

198. The provision of individualised case management support has been broadly acknowledged as an essential element across a wide range of effective alternatives to immigration detention.[450] The role of case managers or coaches in working to build trust and promote constructive engagement with the asylum or migration process as early as possible, including by ensuring access to information and legal advice, has proven to be a key factor of whether individuals chose to engage or abscond from migration processes.[451]

199. Tailored individual support in the return context has also been highlighted as a key strategy for empowering returnees to successfully depart in safety and dignity. This should apply to all individuals in both the asylum and migration process, covering advice on possibilities for legal stay as well as on voluntary return.[452] In particular, the systematic provision of case management services at an early stage, and not only once forced removal decisions have been

[443] C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention*, 2013, p. 8.
[444] *Ibid.*
[445] *Ibid.*, pp. 22-24.
[446] IDC, *There are Alternatives*, 2015, p. 44.
[447] *Ibid.*, p. 45.
[448] C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention*, 2013, p. 22.
[449] J. Phelps, "Alternatives to detention in the UK: from enforcement to engagement," *Forced Migration Review*, 44, September 2013.
[450] UNHCR, *Detention Guidelines*, 2012, § 41; IDC, *There are Alternatives,* 2015, p. 47; O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, 2006, p. 59; A. Edwards, *Back to Basics,* 2011, p v.; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 99.
[451] C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention*, 2013, pp. 7 and 28; A. Edwards, *Back to Basics*, 2011, p. 86.
[452] Return Handbook, p. 68.

taken, is a key element.[453] Where individuals are engaged only at the end of the process, with the focus exclusively on return, levels of compliance have been disappointing.[454]

200. The case manager is meant to engage with the individual and all key stakeholders, including immigration authorities, health professionals, legal professionals and family members to help determine the individual's vulnerabilities, strengths and risks, and what kind of support they may need, including appropriate alternative to detention options.[455]

1.6. Safeguarding dignity and fundamental rights

201. Finally, a critical element of effective alternatives to immigration detention is ensuring the dignity of individuals, including an adequate standard of living and access to other fundamental rights, such as health, education, and family. Basic subsistence is important not only as a fundamental right, but also as a practical measure as it contributes to the individual's ability to comply with immigration procedures, including in preparation for return.[456] Persons in stable accommodation, with access to essential welfare, education, and health-care needs, are better supported and encouraged to maintain contact with the authorities.

202. Meanwhile, restricting access to these fundamental rights has not been statistically correlated with increased rates of independent departure or theories of deterrence,[457] and absconding rates may actually increase due to a lack of perceived legitimacy and trust building when such fundamental rights are not respected.[458]

2. Types of alternatives to immigration detention

203. Given the differences in the definition of alternatives to immigration detention and the varied national contexts and practices, there is no definitive or exhaustive list of types of alternative measures in the context of migration. A wide range of existing schemes has been identified in the course of research[459] and non-exhaustive lists have been produced by a range of bodies, including the Council of Europe Committee of Ministers[460] and the Parliamentary Assembly,[461] the EU,[462] and various UN bodies, in particular the UNHCR[463] and the Special Rapporteur on the human rights of migrants.[464]

204. There is a need to approach alternatives to detention from a "sliding scale" approach, and also to explore a broader range of available options, both restrictive and non-restrictive, that incorporate the essential elements of effective alternatives identified in the existing comparative studies. There is also a need for better understanding of the benefits and drawbacks of each of

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[453] *Ibid.*
[454] As for example in Glasgow 'Family Return Project' in the United Kingdom. See, A. Edwards, *Back to Basics,* 2011, p. 76.
[455] IDC, *There are Alternatives*, 2015*,* p. 50.
[456] A. Edwards, *Back to Basics*, 2011, p. 84.
[457] IDC, *There are Alternatives*, 2015, p. 28. See also, A. Edwards, *Back to Basics*, 2011, p. 54.
[458] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 73.
[459] See footnotes 418 and 419.
[460] Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6 § 1.
[461] Parliamentary Assembly, *Resolution 1707 (2010)*, §§ 9.3.4.1 - 9.3.4.6.
[462] Directive 2013/33/EU, Article 8 § 4.
[463] UNHCR, *Detention Guidelines*, 2012, § 40.
[464] *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, § 56.

the various approaches to ensure that they are specifically tailored to the individual strengths, needs, and vulnerabilities of the person concerned, as well as the particular national/regional context, thereby promoting compliance.

205. In the spirit of providing a useful overview, the following section highlights some of the central aspects at stake on a broad spectrum of possible alternative measures in different settings. The measures are approximately and roughly listed in an order of the least to the most restrictive options. No attempt is made to create a typology of alternatives to immigration detention and it is recognised that it may often be appropriate and important to make use of multiple or overlapping models depending upon the needs and risks associated with each individual case.[465] Simultaneously, it should be noted that the information on the advantages, challenges and human rights implications of each type of alternatives is primarily based on a variety of secondary sources and existing research in the field, as well as replies to the CDDH-MIG request for information.[466] Particular types listed may not necessarily be regarded by *all* member States or international instances as alternatives to detention, nor may the advantages and challenges listed necessarily reflect the views of particular authorities. Rather, a wide collection of sources and research is brought together in concise form to put forth certain significant findings that may be of use.

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[465] It is worth noting that "Release on one's own recognizance " also known as "non-detention" or "unconditional release" is characterised by some actors in the field as the "ultimate" alternative to detention and the starting point for any consideration of alternatives to detention. Edwards, *Back to Basics*, 2011, p. 53. *Release on one's own recognizance* requires simply that an individual is made aware of the relevant asylum or migration procedure, including the consequences of non-compliance, and is then expected to ensure his/her active participation in the relevant asylum or migration process. This might include such undertakings as appearing at immigration hearings or interviews, and respecting normal visa or residency requirements. However, FRA argues that alternatives to detention must be distinguished from unconditional release. FRA, "Alternatives to detention for asylum seekers and people in return procedures," p. 1.

[466] The information on the advantages, challenges and human rights implications of the types of alternatives to immigration detention listed in this Analysis is based mainly on the following sources: Replies to the CDDH-MIG request for information; UNHCR, *Baseline Report - Detention situation as of end 2013. Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees*, 2014-2019, August 2016, pp. 24-28; UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, pp. 10-15; UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, 2015, pp. 6-10; UNHCR, *Detention Guidelines,* 2012, Annex A, pp. 41-44; UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011, §§ 29-37; *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, A/HRC/20/24, 2 April 2012, §§ 57-65; UN General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 18 December 2009; FRA, "Alternatives to detention for asylum seekers and people in return procedures," 2015, pp. 1-2; IOM, *International Migration Law Information Note on International Standards on Immigration Detention and Non-Custodial Measures*, IOM Submission to the Working Group on Arbitrary Detention, November 2016, pp. 7-8; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, pp. 89-103; IDC, *There are Alternatives*, 2015, pp. 65-91; A. Edwards, *Back to Basics*, 2011, pp. 53-81; JRS, *From Deprivation to Liberty: Alternatives to detention in Belgium, Germany and the United Kingdom*, 2011; Heaven Crawley, *Ending the detention of children: developing an alternative approach to family returns*, Centre for Migration Policy Research (CMPR), June 2010, pp. 5-12; Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, 2009, pp. 11-15; IDC, "Case management as an alternative to immigration detention: the Australian Experience," June 2009; JRS, "Alternatives to Detention of Asylum Seekers," Working paper, October 2008, pp. 6-11; Van der Vennet, Laetitia, *Détention des enfants en famille en Belgique: analyse de la théorie et de la pratique, Plate-forme Mineurs en Exil*, 2015, pp. 95-96.

206. In this context, it is important to highlight that the ways in which alternatives are implemented may be just as significant as the actual type(s) chosen. While certain advantages and challenges of each type can be noted, the concrete process of engagement and practical implementation of alternatives may, ultimately, better determine the outcome rather than any intrinsic nature of the measure in question. Here, again, the essential elements of effectiveness come into play in the implementation process. Similarly, it is important to recognise that there is no "one size fits all" in the field. The design and implementation of alternatives needs to be based on the particular national and/or regional context as well as the diversity of the individuals concerned.[467]

2.1. Registration with authorities

207. When individuals enter a country without proper travel or visa documents, they may be asked to register with authorities and thereafter be provided with a piece of temporary documentation such as an "alien registration card." Such documents may contain a photograph of the individual and a statement of why the person is temporarily admitted to the territory of the State. Registration may be conducted upon arrival, or later, at the municipality of their residence for example. Such programmes have long been available in many countries and modern biometric advances have significantly reduced the ability of such temporary registration documents to be forged.

208. If deemed necessary, individuals may be asked to surrender existing travel or identity documents with the registration authorities.

Advantages

- Fully respects the right to liberty;
- A practical and readily available alternative for most persons arriving without documentation;
- Allows authorities to establish a central database with the information of the registered cases;
- Ensures that valid identity and travel documents are not lost or destroyed during the asylum or migration process.

Challenges and human rights implications

- May hamper access to basic human rights, such as education, housing and health care services if the documents are not recognised by officials in these other sectors;
- Concerns regarding forged documents;
- May lead to arrest and detention if all government authorities fail to respect or trust the registration and identification documents;
- Confiscating identity documents should not be taken lightly, as it may lead to even more precarious situations for the persons concerned.

2.2. Temporary residence permits

209. Temporary residence permits are a broad term covering any status granted or permits issued by a State which offer a right to legal stay. This might include "bridging visas," long-term visas, temporary humanitarian visas, or expired residence permits based on a still valid international protection status, among others.[468] Such documents can be granted for the

[467] See, for example, A. Edwards, *Back to Basics*, 2011, p. 52; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 119.
[468] Return handbook, 2015, p. 26.

duration of the period that an individual is engaged in an on-going asylum or migration process, or during preparation for return. They can be periodically renewed. The issuance of temporary residence permits may be dependent upon an individual being able to establish a place of residence and they may or may not have restrictions on the ability to work or to access health, educational or social services.

Advantages

- Fully respects the right to liberty;
- Provides more comprehensive protection from arrest and detention than simple registration with authorities;
- May allow work rights and better access to health, education and other fundamental rights associated with temporary residence.

Challenges and human rights implications

- If not associated with comparable work rights or social support, may leave individuals destitute.[469]

2.3. Case management or case worker support

210. Case management or case worker support is an individualised comprehensive support mechanism for individuals undergoing immigration procedures with the objective of achieving case resolution.[470] A common feature of this measure is the presence of a case manager responsible for assisting the individual (or families) throughout the immigration procedure, from initial claim until return or grant of status. The role of the case manager, who can be either a state or a civil society representative, is to ensure access to information, legal aid and representation in relation to immigration procedures. This can also entail basic survival mechanisms such as facilitating access to welfare services, health care, work or education.[471]

211. Case management is usually comprised of three key components: a) individual *assessment* to identify the needs and risks of the person; b) development of *case plans* to effectively address these needs; and c) *referral* which involves continuous monitoring to ensure that any changes are properly addressed.[472]

Advantages

- Can be used as a cross-cutting strategy in conjunction with many of the other alternative to detention models or approaches;
- Can increase trust and compliance with the decision-making process;
- Promotes integration in the community if the case is resolved and facilitates return if the case is refused;
- Facilitates exchange of information between the authorities and the individual and can lead to higher quality of decisions for both the authorities and the individual;
- Can be used effectively to manage higher risk individuals, particularly where there are histories of absconding or failure to engage with asylum or migration procedures;
- Is particularly suitable for vulnerable individuals and groups with higher support needs.

[469] In Australia, people on Bridging Visas have faced destitution, without the right to work, claim benefits or to access free health care, and community organisations and families of migrants have been known to incur high levels of debt to cover health care costs. See, for example, IDC, "Case management as an alternative to immigration detention: the Australian Experience," 2009, p. 4.

[470] IDC, *There Are Alternatives*, 2015, pp. 12-13, section 2.5, 2.5.3 and p.47ff, section 7, particularly at p.52, section 7.2.

[471] Return Handbook, 2015, p. 68.

[472] IDC, "Case management as an alternative to immigration detention: the Australian experience," p. 5.

Challenges and human rights implications

- Relatively expensive compared to other alternatives but remains cheaper than detention;
- Requires the engagement and/or training of qualified case management professionals;
- Can diminish trust in the asylum or migration process if the role and professional ethics of the case manager are not clearly defined to avoid any confusion between their role and the role of an enforcement authority;
- Can weaken compliance if case management support is only provided at a later stage, following a negative asylum or migration decision.

2.4. Alternative family-based accommodation

212. Alternative family-based accommodation is a general name for a range of alternative care options for unaccompanied or separated children that may include either formal or informal settings such as kinship care, foster care and other family-based or family-like settings that are not "residential" in nature.[473] Such arrangements help ensure that children are with the support and protection of a *legal guardian* or other recognised responsible adult or competent public body at all times.[474]

213. **Kinship care** is defined as "family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature."[475] Kinship care can include care provided by blood relations, legal kin or fictive kin. Blood relations mean there is a genetic relationship between the child and kin caregiver, as for example a maternal grandmother caring for her grandchildren. Legal kin are adults who marry into a family but have no genetic or biological relation, such as a step-grandmother. Fictive kin are adults unrelated by either birth or marriage, who nonetheless have an emotionally significant relationship with the child that would take on the characteristics of a family relationship (e.g. members of an ethnic community).[476]

214. **Foster care** is defined as "situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care." [477]

215. Other **family-like care settings** include any short or long term care arrangement other than kinship care or foster care whereby a child is placed in the domestic environment of a family where the carers have been selected and prepared to provide such care, and may receive financial or other support or compensation for doing so.[478]

Advantages

- Fully respects the right to liberty;

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[473] See generally, Better Care Network et al, Discussion Paper: Identifying Basic Characteristics of Formal Alternative Care Settings for Children, March 2013.
[474] See, for example, UNICEF, UNHCR and Save the Children, Separated Children in Europe Programme, *SCEP Statement of Good Practice*, 4th Revised Edition, March 2010.
[475] General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 18 December 2009, § 29 (c)(i).
[476] Better Care Network et al, Discussion Paper, March 2013, pp. 7-8.
[477] General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 18 December 2009, § 29 (c)(ii).
[478] Better Care Network et al, Discussion Paper, March 2013, p. 9.

- Ensures that children are at all times provided care and support, and not detained;
- Respects the principle of the best interests of the child.

Challenges and human rights implications

- Where family members are present, children should never be separated from their parents/families and placed in alternative family care unless it is deemed in the best interests of the child to do so – otherwise, this may violate the child's and parents' right to family life.

2.5. Residential accommodation

216. Residential accommodation, or residential care facilities, are small group living arrangements in specially designed or designated facilities typically organised to resemble, as much as possible, a family or small-group situation. Residential facilities are generally expected to take on a temporary care role while efforts are made to identify a more stable community-based or family-based arrangement.

217. Residential accommodation can include "any non-family-based group setting, such as places of safety for emergency care, **transit centres** in emergency situations, and all other short and long-term residential care facilities, including **group homes**."[479]

218. **Shelters** are a particular form of residential accommodation that may include heightened security due to the safety and/or security of the inhabitants – for example, shelters may be used in the case of trafficking victims or domestic workers fleeing abusive employers. They are not intended to be long-term solutions, but may be appropriate until a more permanent solution can be found in the individual case.

Advantages

- Provides heightened protection, support and care;
- Ensures that individuals in particularly vulnerable situations are not detained.

Challenges and human rights implications

- Relatively expensive, specialised environments which are limited to those in particular situations of vulnerability or need;
- Should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual concerned and in the best interests of any children involved;
- Safeguards must be in place to prevent against such arrangements becoming closed facilities or alternative *forms* of detention.

2.6. Open centres or semi-open centres

219. Open or semi-open centres, including in the form of asylum reception centres,[480] although they may also be available for migrants, provide temporary accommodation for asylum seekers and refugees both as individuals and families. Individuals may be required to remain in these facilities until their claims are processed, making them a form of directed residence. Once

[479] General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 18 December 2009, § 29 (c)(iv).

[480] In this context, it is important overall to note that such centres for asylum seekers may not be understood as alternatives to detention but a form of a reception arrangement. See UNHCR's definition of alternatives to immigration detention, § 19 above.

recognised as refugees, persons may often remain in such centres for a transition period in order to arrange for more permanent accommodation. Reception centres provide housing, food and basic health care for inhabitants, but the level and quality of these services often vary from one facility to another, both within a country and across different countries.

Advantages

- Provides immediate housing, support and registration which is useful especially in situations of large arrivals;
- Allows for relatively efficient processing of large numbers of asylum applicants.

Challenges and human rights implications

- Reception centres may sometimes become alternative *forms* of detention and in practice they may arbitrarily amount to *de facto* detention;
- The costs associated with hosting large numbers of persons in reception centres can be prohibitive and may lead to reception conditions which fall below minimum standards.

2.7. Regular reporting

220. Reporting conditions are among the most frequently applied alternatives to immigration detention in Europe,[481] and consist of an obligation to present oneself regularly to the competent authorities including police, immigration officers or other contracted agencies, such as child protection or welfare agencies.[482] Reporting can also be undertaken by telephone ("telephonic reporting") to avoid lengthy or expensive travel. The frequency of reporting can vary from daily to monthly (or less) and can also be scheduled to coincide with other official immigration appointments so as to lessen the reporting burden on those engaged in asylum or migration procedures.

Advantages

- Simple to implement;
- Does not require an extensive infrastructure;
- Ensures regular contact between the authorities and the individual;
- Ensures availability of the person concerned for interviews and other relevant procedures.

Challenges and human rights implications

- If the frequency or criteria for reporting are overly onerous – for example, requiring travel of long distances, or without reimbursement for the costs of transportation – it can set individuals up to fail and discourage compliance;
- May interfere with other rights, such as liberty of movement or the rights to private and family life;[483]
- May increase sentiments of anxiety and fear of detention, especially when reporting is conducted at police stations or other locations associated with enforcement.

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[481] EMN, *Synthesis Report*, 2014, p. 34; *Communication from the Commission to the Council and the European Parliament on EU Return Policy*, COM(2014) 199 final, 28.3.2014, p. 15.

[482] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, pp. 89-90.

[483] Interferences may, *inter alia*, include attendance to other immigration appointments, ability to care for dependent persons, employment etc.

2.8. Designated residence

221. Designated residence is also widely used in Europe[484] and entails the authorities designating a particular region or location where the individual is required to live. This measure may take various forms, including residence within a particular geographical area in the country, at a private address of the person or a guarantor, at an open or semi-open reception or asylum centre, or in a State-funded or State-run facility. In some cases, overnight absences from the place of designated residence are only permitted with prior approval of the migration authority, while other regimes allow for more flexibility and self-selection of the address or place of designated residence.[485]

222. Designated residence should be distinguished from registration with the authorities and/or release on one's own recognizance, which impose no restrictions on where an individual may reside within the boundaries of the State, so long as they remain in good standing with the relevant asylum or migration procedure. Designated residence should also be distinguished from open or semi-open centres where individuals are not required to reside, but may choose to reside of their own volition.

223. Designated residence may be used in conjunction with many of the other alternative placement options, such as supported accommodation, residential care or open centres for example, when the place of designated residence is the same as the location of the alternative placement.

Advantages

- Can be a relatively low-cost alternative;
- Can allow persons to live in the community near family and other support networks;
- Can make use of existing reception and alternative placement options within the community;
- Designated residence in a specific region can facilitate burden-sharing and fair allocation of resources between different regions in a given country.

Challenges and human rights implications

- When combined with curfews or other practical limitations on freedom of movement or is situated in physically remote or isolated locations, designated residence may amount to an alternative *form* of detention or interfere with other rights;
- Persons may face destitution and/or serious psychological and social consequences if they do not have any means to support themselves, work or access to financial or other kind of State mechanisms for survival.

2.9. Supervision

224. Community supervision arrangements involve the individual being allowed to reside freely in the community subject to supervision by the State or a designated representative, such as a non-governmental organisation, community or religious organisation. The supervision may take place via periodic home visits or check-ins by the State authorities or their designated representative, and may also include providing support for access to work, accommodation, education, legal assistance and/or other services or direct provision of goods.

[484] EMN, *Synthesis Report*, 2014, p. 34.
[485] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 96.

225. Supervision should be distinguished from reporting obligations, where the responsibility is on the individual to report to a designated State agency. It should also be distinguished from case management, which is provided by a neutral party, whereas supervision will be conducted by the State itself, or a designated representative, usually with an enforcement function.

Advantages

- Allows for direct observation of an individual's location and activities;
- Substantially increases the level of communication and contact between authorities and individuals going through asylum or migration procedures;
- Can facilitate access to social and legal support.

Challenges and human rights implications

- A resource-intensive alternative measure for the State or designated supervising agent;
- Can be an intrusive measure to ensure compliance.[486]

2.10. Return counselling

226. Voluntary return counselling allows individuals and families to be released from detention or not be detained in order to explore voluntary return, usually with intensive support, including financial incentives,[487] from State representatives or civil society organisations.[488] This involves, for example, advice and support around formal voluntary return programmes, such as those run by the International Organisation for Migration ("IOM") or other national or international programmes,[489] which provide pre-departure assistance, transit assistance and post-return support for arrival and reintegration. Such advice can address migrants' fears of destitution upon arrival or of being precluded from applying for a visa to return legally in the future.[490]

Advantages

- A humane alternative to detention and deportation;
- Allows a dignified and sustainable return and facilitates reintegration in the country of origin;
- May be cost-effective for governments;
- Less sensitive and problematic than forced return and detention.

Challenges and human rights implications

- Should be part of a broader system of early intervention, case management and legal support in order to be most effective;
- It can lead to lower levels of trust and increase risk of absconding if the focus is exclusively on return.[491]

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[486] It may, for example, include unannounced and/or frequent visits to the place of residence of the person concerned.
[487] IDC, *There are Alternatives*, 2015, p. 53.
[488] Replies to the CDDH-MIG request for information; EMN, *Synthesis Report*, 2014, p. 36.
[489] Replies to the CDDH-MIG request for information.
[490] IDC, *There are Alternatives*, 2015, p. 53.
[491] In Belgium, the 'return houses' have seen rapidly increasing rates of absconding as the increasing numbers of families accommodated have reduced the individualised support provided. Van der Vennet, Laetitia, *Détention des enfants en famille en Belgique: analyse de la théorie et de la pratique, Plate-forme Mineurs en Exil,* 2015, pp. 95-96.

2.11. Return houses / return centres

227. Return houses are an alternative to immigration detention that ideally combines case management support with the requirement to reside at a designated location in preparation for voluntary or enforced departure. Failed asylum seekers or people in return procedures are placed in open facilities and provided with individual coaches or counsellors to inform and advise them about their options and to help prepare them for departure.[492]

Advantages

- Can encourage trust building and help facilitate voluntary departure;
- Open accommodation facilitates engagement with NGOs, legal and other service providers.

Challenges and human rights implications

- When case management services are only provided after a removal order has been issued, the principle of early intervention is lacking and open return house models have tended to fail.

2.12. Bail, bond, guarantor or surety

228. The provision of bail, bond, guarantor or surety allows persons to be released from detention either on: a) payment of a financial deposit by themselves or a guarantor; b) a written agreement between the authorities and the individual, often alongside a deposit of financial surety; c) a guarantee provided by a third person, NGOs or other religious organisations vouching that the individual will comply with the procedure. Any financial surety provided is forfeited in case of absconding or non-compliance by the individual. Release could be to a family member, another individual, non-governmental, religious or community organisation.

Advantages

- Easier to apply in countries with large immigrant communities, or for individuals who have lived long periods in the country, as established community ties or sufficient financial resources will be more likely to exist;
- The use of a guarantor may be cost saving for States since he/she may usually have the obligation to cover the expenses for the individual concerned.

Challenges and human rights implications

- Inherent risk of discriminating against people without financial resources or contacts in the community and risk of exploitation of vulnerable persons;
- It has to be ensured that the amount fixed is reasonable in all the circumstances otherwise an excessive amount can result in detention or place other release conditions at risk of non-compliance.

2.13. Electronic monitoring

229. Electronic monitoring or "tagging" is rarely used in Europe[493] and refers to a form of surveillance meant to monitor or restrict a person's movements based on technology, such as GPS-enabled wrist or ankle bracelets. Electronic monitoring is primarily used in the context of

[492] FRA, "Alternatives to detention for asylum seekers and people in return procedures," 2015.
[493] *Communication from the Commission to the Council and the European Parliament on EU Return Policy*, COM(2014) 199 final, 28.3.2014, p. 16; EMN, *Synthesis Report*, 2014, p. 36.

criminal law,[494] and some claim it is therefore particularly inappropriate in the context of migration. Some instances likewise consider it to be a form of *de facto* detention and not a valid alternative to detention. The UNHCR,[495] the Special Rapporteur on the human rights of migrants,[496] the European Union Agency for Fundamental Rights ("FRA"),[497] and varied researchers in the field [498] consider it harsh and the most intrusive of the various alternative measures, especially given the criminal stigma involved, and discourage its use.

230. In at least one study, the compliance rate for electronic tagging was equal to that of individuals using telephonic reporting, suggesting that less intrusive measures could potentially be equally effective at ensuring compliance.[499] While electronic tagging has been criticised as being particularly harsh, phone reporting and the use of other modern technologies were seen as good practice (see above, Regular reporting), especially for individuals with mobility difficulties.[500]

Advantages

- Enables the authorities to know the whereabouts of the persons concerned at any time and may be a way to ensure contact with the authorities;
- Can monitor compliance with reporting restrictions.

Challenges and human rights implications

- It has been characterised as a particularly intrusive measure, severely restricting personal liberty and interfering with people's private and family lives, negatively affecting any children involved and potentially raising issues under the Convention;
- It may reduce trust in the decision-making process and may negatively affect compliance with returns;
- It may have stigmatising and negative psychological effects, potentially injuring personal dignity and contributing to social exclusion;
- It may not be fully effective given that the device is expensive and the management costs of such a system are rather high, and yet it could be relatively easily removed.

3. Benefits of effective alternatives to detention

231. It is well documented that when alternatives are implemented effectively this can bring a range of benefits, in terms of compliance with immigration procedures, cost-effectiveness and respect for human rights and welfare needs. Studies and actors in the field have consistently emphasised the added value of alternatives, including:

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[494] FRA, "Alternatives to detention for asylum seekers and people in return procedures," 2015, p. 2.
[495] UNHCR, *Detention Guidelines*, 2012, § 40. See also, UNHCR, Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, July 2011, § 21.
[496] *Report of the Special Rapporteur on the human rights of migrants*, François Crépeau, A/HRC/20/24, 2 April 2012, § 63.
[497] FRA, "Alternatives to detention for asylum seekers and people in return procedures," 2015, p. 2
[498] See, *inter alia*, A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, pp. 102-103; JRS, "Alternatives to Detention of Asylum Seekers," Working paper, October 2008, p. 9; IDC, *There are Alternatives*, 2015, p. 73.
[499] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 154.
[500] Summary Conclusions, Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, May 2011, § 21.

3.1. Respecting the rights and needs of individuals

232. The use of alternatives to immigration detention is necessary to meet human rights standards in particular cases, including European and international human rights law and the relevant jurisprudence of the Court, the CJEU and the CCPR. These standards require that special attention be given to vulnerable individuals and groups, particularly children.

233. Alternatives can prevent the serious consequences that detention can have on the physical and psychological health of migrants and asylum seekers.[501] Research has demonstrated the harm caused by detention to migrants' health, with rates of post-traumatic stress disorder as high as 50% in one study.[502] The detention of vulnerable individuals, especially children is particularly problematic in terms of respect for rights and welfare. It has further been noted that supporting a more systematic implementation of alternatives to detention could not only recall the non-punitive nature of immigration detention but also reduce discrimination and negative perceptions.[503]

234. The impact of detention on children can be particularly extreme, including life-long effects on their cognitive and emotional development.[504] These harmful consequences have been highlighted by, among others, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who has noted that "even very short periods of detention can undermine a child's well-being and compromise cognitive development, increasing risk of depression, anxiety, post-traumatic stress disorder, suicide and self-harm, mental disorder and developmental problems."[505] The Special Rapporteur has concluded that "[t]he detention of children, […], is inextricably linked – in fact if not in law – with the ill-treatment of children, owing to the particularly vulnerable situation in which they have been placed that exposes them to numerous types of risk."[506]

3.2. Compliance with migration procedures

235. Studies further suggest that alternatives to detention when implemented effectively can improve migration governance by promoting compliance with immigration procedures across a range of populations and settings. For example, one global survey of thirteen alternative to detention programmes found compliance rates of between 84% and 99.9%, with ten of the thirteen programs achieving rates of 94% or higher.[507] Another study focused on alternatives to

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[501] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, pp. 23-25.

[502] See, for example, Z. Steel, D. Silove, R. Brooks, S. Momartin, B. Alzuhairi and I. Susljik, "The impact of immigration detention and temporary protection on the mental health of refugees" (2008) 188, British journal of psychiatry 58; Physicians for Human Rights and The Bellevue/NYU program for survivors of torture, "From persecution to prison: the health consequences of detention for asylum seekers," June 2003. Further information on the negative effects caused by detention have been emphasised in other studies, such as JRS–Europe, *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; Dr Graham Durcan, Jessica Stubbs and Dr Jed Boardman, *Report*, *Immigration Removal Centres in England: A mental health needs analysis*, Centre for mental health, January 2017.

[503] See, ENNHRI's written contribution to the CDDH-MIG Analysis.

[504] IDC, *There are Alternatives,* 2015, p. 5.

[505] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* Juan E. Méndez, A/HRC/28/69, 5 March 2015, § 16.

[506] *Ibid.,* § 69.

[507] The survey identified several factors in achieving compliance including, *inter alia*, a) treating the individual with dignity, humanity; b) provision of an adequate standard of living and support; c) provision of clear and concise information at an early stage about the rights and duties as well as consequences of

immigration detention in the EU found that alternatives in Belgium, Sweden and the United Kingdom had compliance rates ranging from 77% to 96%.[508]

236. Additionally, alternatives have been shown to promote compliance in complex mixed migration transit contexts.[509] Because alternatives can help to stabilise individuals who are in an inherently vulnerable situation, research shows that they are more likely to remain engaged with immigration procedures if they can meet their basic needs in community-based alternatives, with access to advice and support, and without fear of the threat of immigration detention.[510] The European Commission has noted that the benefits of alternatives to immigration detention "may include higher return rates (including voluntary departure), improved co-operation with returnees in obtaining necessary documentation, financial benefits (less cost for the State) and less human cost (avoidance of hardship related to detention)."[511]

3.3. Cost-effectiveness

237. Information is rarely made publically available by States, hence making it difficult to calculate the precise costs.[512] The information that is accessible, however, points to the clear cost-effectiveness of alternatives.

238. According to available statistics, "family units" in Belgium cost half as much as comparable return detention.[513] Detention in Canada can cost as much as seventeen times more than existing alternatives,[514] while in Austria alternatives cost €17 to €24 per person per day, compared to €120 for detention.[515] Research in the United Kingdom found that £76 million per year could be saved by avoiding the long-term detention of migrants who are ultimately released, whereas providing alternatives to all such migrants would cost merely 44% of the total cost.[516]

239. It should be noted that the cost-benefits of more frequent recourse to alternatives to detention will only be realised if alternatives are used *in lieu of* detention, and ultimately help to reduce the overall detention estate. In fact, many of the benefits delineated above are inextricably linked to a reduction in the overall use of detention. If, on the other hand, alternatives to immigration detention are merely expanded *in addition to* maintaining or even expanding the existing immigration detention capacity of States, they will unavoidably increase overall costs and will not reduce the harm or impact of detention either. Such "net widening" has been roundly criticised within the criminal justice sector, for example, and works against some of

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non-compliance; d) access to legal advice; e) individualised case management services. A. Edwards, *Back to Basics,* 2011, pp. 82-83.

[508] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and asylum detention in the EU*, 2015, p. 114.

[509] An Australian project saw an independent departure rate of 60% of refused applicants while a voluntary return project in the Netherlands saw more than half of the migrants return. IDC, *There are Alternatives,* 2015, p. 52-54.

[510] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 114.

[511] Return Handbook, 2015, p. 68.

[512] Parliamentary Assembly, Report on the detention of asylum seekers and irregular migrants in Europe, Committee on Migration, Refugees and Population, Rapporteur: Ms Ana Catarina MENDONÇA, 11 January 2010, § 58.

[513] €90 per person per day, compared to €180-190. See, EMN, *Synthesis Report,* November 2014, p. 38.

[514] CA$179 per person per day, compared to CA$10-12. See, IDC, *There are Alternatives,* 2015, p. 11.

[515] *Ibid.*

[516] Matrix Evidence, *An economic analysis of alternatives to long-term detention*, 2012, pp. 4-5.

the very basic purposes of alternative measures, namely to lead to a systematic reduction in the use of unnecessary detention.[517]

IV. OVERVIEW OF POLICIES AND PRACTICES ON ALTERNATIVES TO IMMIGRATION DETENTION

240. This Chapter presents an overview of policies and practices on alternatives to detention in Council of Europe member States. It is mainly based on the replies received to the CDDH-MIG request for information on alternatives to detention in the context of migration and further enriched by other available reports and studies relevant for this analysis.

Obligation to consider alternatives to detention and legal framework

241. A large number of Council of Europe member States have established an obligation to consider alternative measures before resorting to immigration detention in their national legislation. In a minority of countries, however, this obligation extends only to certain groups, i.e. children and families with children, or is not established in law. As noted in the majority of the replies, the existing alternatives are regulated in the relevant domestic legislation on migration and asylum with a few member States indicating that these schemes are further specified in internal regulations.[518]

242. Notwithstanding the above, research in the field has found that alternatives to detention remain vague and/or poorly regulated in some member States.[519] Certain national laws and regulations do not provide sufficient guidance, leaving the choice of the alternative measure and/or the details around its implementation (i.e. conditions, criteria, etc.) to decision-making bodies or national judges.[520] The absence of clear guidelines on the use of these alternative measures in practice creates, in turn, challenges,[521] and at times raises questions as to the transparency of the implementation process in some member States.

Types of alternatives available and persons concerned

243. The types of alternatives are laid down in domestic legislation in the majority of members States, some of which specify that the list is non-exhaustive, thus allowing the relevant authorities to consider other measures in each case by way of discretion. The main existing types of alternatives listed by a majority of member States include: a) regular reporting; b) designated residence; c) surrender of documentation; and d) bail or surety. Other measures, such as return counselling; return houses; and/or voluntary return programmes - either as an

[517] See, for example, some discussion of "net widening" within the official UN Commentary to the adoption of the Tokyo Rules. UN Office at Vienna, Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (1993).
[518] Replies to the CDDH-MIG request for information; See, also, EMN, *Synthesis Report,* November 2014, p. 7; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and asylum detention in the EU*, 2015, p. 87.
[519] Parliamentary Campaign to End Immigration Detention of Children, *Study of immigration detention practices and the use of alternatives to immigration detention of children*, 2017, p. 19; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, pp. 118.
[520] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 87.
[521] Parliamentary Assembly, Report on the detention of asylum seekers and irregular migrants in Europe, Committee on Migration, Refugees and Population, Rapporteur: Ms Ana Catarina MENDONÇA, 11 January 2010, § 38.

alternative measure or as an additional component of a return programme - are also provided in some countries. A few member States have recently introduced new types of alternatives in the relevant legislation or are considering doing so.[522]

244. According to the replies received, alternatives apply to asylum seekers and persons in return procedures with some member States specifying that persons in Dublin and readmission procedures benefit from these schemes as well.[523] The existing types can be applied separately or combined depending on the particular circumstances of the individual. As further clarified by a large number of member States, the existing alternatives are not designed specifically for vulnerable individuals and groups, although this category is a major beneficiary of these schemes. Nevertheless, alternative measures for families with minor children such as return houses, family locations, and other arrangements have been provided while open reception centres or foster care arrangements for unaccompanied minors have also been developed in some member States.[524]

Responsible authorities and criteria/procedure for deciding whether to apply alternatives

245. The decision to apply alternative measures is usually taken either by the competent Ministries, the Police authorities, the border Guard or a judicial authority (court) and is based on an individual assessment in each case.[525] The criteria taken into consideration during the individual assessment procedure include, *inter alia*:[526]

i. principles of necessity and proportionality;
ii. vulnerability (i.e. age, health, particular circumstances of the individual, etc.);
iii. whether the measure would be feasible and/or sufficient in achieving the aim pursued;
iv. compliance with the measure and likelihood of absconding;
v. practical considerations, such as costs and availability of the particular scheme, social and family ties, possession of travel documents, accommodation, financial means, etc.

246. Research has, however, voiced concerns with regard to the initial quality of the decision-making process on detention and alternatives, including failure to properly apply the proportionality test and assess if alternatives could be applied instead of detention.[527] Decisions have been found at times stereotypical and lacking substantive arguments, escalating the risk of arbitrariness in decision-making.[528] Additionally, the need to improve individual assessment procedures or screening mechanisms, such as for identifying persons in a vulnerable situation has been repeatedly stressed, including from Council of Europe bodies.[529]

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[522] Replies to the CDDH-MIG request for information.
[523] *Ibid.*
[524] *Idem.*
[525] It should be noted, however, that the responsible authorities may differ depending on whether the person is undergoing asylum or removal procedures. *Idem.* See also, EMN, *Synthesis Report,* 2014, p. 24.
[526] Replies to the CDDH-MIG request for information. See also, EMN, *Synthesis Report,* 2014, pp. 22-24.
[527] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, pp. 73-74.
[528] *Ibid*., p. 117.
[529] Group of Experts on Action against Trafficking in Human Beings ("GRETA"), 5th General Report on GRETA'S activities, covering the period from 1 October 2014 to 31 December 2015, February 2016, §§ 99 and 103. See further, EMN, *Synthesis Report,* 2014, p. 27; FRA, *Monthly data collection on the current migration situation in the EU: Thematic focus: Disability*, August 2016 monthly report, pp. 8-10;

Persons in a vulnerable situation

247. Vulnerability is a key consideration during the assessment procedures and a few member States indicate that additional guidance on the identification of vulnerable persons has been issued.[530] Overall, national legislation permits the detention of vulnerable individuals and groups only in very exceptional circumstances.[531] As regards children in particular, the situation varies among member States. A number of countries do not permit detention of children under a certain age while others permit detention in very exceptional circumstances. Unaccompanied children in general or under a certain age are either exempt from detention, according to national legislation or practice, or are only exceptionally detained in a number of member States.[532] A recent report from FRA found, for example, that half of EU member States do not detain unaccompanied children in asylum and/or return procedures.[533] Detention of families with children is possible as an exceptional measure of last resort in most member States with some exceptions.[534]

248. With regard to unaccompanied children, a number of protection gaps have, however, been identified by other actors in the field. In particular, these gaps are associated with ineffective guardianship systems, age assessment procedures, mechanisms to ensure the child's best interests, and limited or non-existing places in specialised facilities for children.[535] Such gaps in systems of child protection risk hindering the prompt identification of children and their access to additional safeguards that prevent detention. This can result in unaccompanied children being detained for long periods in inadequate conditions instead of being placed in appropriate care arrangements and alternatives.[536]

Legal remedies and monitoring mechanisms

249. As regards the availability of legal remedies, some member States note that the decision to apply alternatives can be appealed before the relevant courts. In a few countries the appeal can only be lodged as part of another procedure.[537] Additionally, monitoring mechanisms and/or judicial oversight over the proper implementation of existing alternatives to detention seem to be lacking in a number of member States, although in some cases evaluations are carried out by the relevant authorities or NGOs.[538]

A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 117.

[530] Replies to the CDDH-MIG request for information.

[531] EMN, *Synthesis Report,* 2014, p. 20.

[532] Replies to the CDDH-MIG request for information. See also, EMN, *Synthesis Report,* 2014, p. 20.

[533] FRA, *European legal and policy framework on immigration detention of children*, 2017, p. 36.

[534] Replies to the CDDH-MIG request for information. See also, FRA, *European legal and policy framework on immigration detention of children*, 2017, p. 55.

[535] GRETA, 6th General Report on GRETA's Activities, covering the period from 1 January to 31 December 2016, §§ 109-113; UNICEF, *A child is a child - Protecting children on the move from violence, abuse and exploitation*, UNICEF, May 2017, p. 30; FRA, "Key migration issues: one year on from initial reporting," October 2016, pp. 4-5.

[536] FRA, "Key migration issues: one year on from initial reporting," October 2016, p. 8.

[537] Replies to the CDDH-MIG request for information. See also, A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 117.

[538] Replies to the CDDH-MIG request for information.

250. Research in the field by other actors seems to also point to the absence of a monitoring mechanism and/or lack of regular evaluation of alternatives.[539] In some member States, additional challenges include, also, the lack of regular or systematic review on the appropriateness of detention[540] which in turn can lead to cases of arbitrary or prolonged detention, already documented in a number of member States and the absence of time limits in the application of alternative measures.[541]

Legal and practical challenges

251. A major trend shared by the majority of member States is the fact that alternatives remain largely unused in practice or are only available to a small number of persons concerned.[542] The findings from various actors in the field, including the Council of Europe,[543] the UN[544] and the EU[545] as well as academic and expert research[546] seem to corroborate this trend.

252. There are different reasons for this, but among others it seems that member States are not convinced about the effectiveness of these measures in achieving compliance with immigration procedures and express concerns about the risk of absconding. This was indeed noted in the majority of replies, especially by member States characterised as "transit countries" which indicate that the majority of the migrant population may likely intend onward movements to other member States.[547]

253. The risk of absconding is considered crucial when deciding on whether to place a person in detention or to apply an alternative measure. The choice of a particular type of alternative in the individual case is also closely connected to the risk of absconding. Having sophisticated ways by which to assess the risk of absconding is, therefore, critical in order to arrive at the best decision in this context. In this regard, it seems that clear assessment indicators and/or criteria for assessing the risk of absconding could be further strengthened and supported in member States. The criteria which exist at national level could, *inter alia*, be improved in a number of cases through greater legal clarity and objectivity.[548] Effectively

[539] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 118.
[540] EMN, *Synthesis Report*, 2014, p. 27.
[541] Replies to the CDDH-MIG request for information. See also, A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 118.
[542] Replies to the CDDH-MIG request for information.
[543] Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017; Parliamentary Assembly, *Resolution 2020 (2014)*, § 8. As regards the lack of alternatives to detention for children see Thematic Report on migrant and refugee children, Prepared by the Special Representative of the Secretary General on migration and refugees, Information Documents, SG/Inf(2017)13, 10 March 2017.
[544] *Special Rapporteur on the human rights of migrants, François Crépeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrant*s, A/HRC/23/46, 24 April 2013, § 48.
[545] European Commission, *Communication from the Commission to the Council and the European Parliament* on EU Return Policy, COM(2014) 199 final, Brussels, 28.3.2014, p. 15.
[546] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 116.
[547] Replies to the CDDH-MIG request for information.
[548] M. Moraru, G. Renaudiere, *European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive – Pre-Removal Detention*, REDIAL RR 2016/05, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2016; EMN, *Synthesis*

assessing the risk of absconding and/or the factors that should be taken into account, can pose a number of challenges to the competent authorities. Strengthening the overall quality of the assessment procedures is, therefore, one of the keys to arriving at the most accurate decision on an appropriate alternative.[549]

254. Another issue raised is the fact that some types of alternative remain unused in practice, either because they are limited in scale or because the persons concerned cannot meet the requirements.[550] This is particularly highlighted in relation to bail or surety where the lack of financial means has been noted as a reason for not applying this scheme. Lack of accommodation and documentation has also been considered as creating challenges in implementing alternative measures in practice.[551]

255. However, practical considerations such as offering a bonding agent or the payment of a financial surety (bail) as an alternative to detention may be discriminatory or ineffective in practice for many migrants without friends, family, sufficient financial resources available in the country and/or access to non-governmental organisations.[552] Likewise, designated residence options may be completely ineffective if adequate residence options are not available. Regular reporting, when it is not close to the place of residence, may often be ineffective unless individuals are provided with free transportation to and from the places of regular meetings with migration authorities.[553]

256. In a few member States, diverging interpretations of the concept of alternatives to immigration detention itself have been found in the course of other studies, with some *de facto* detention practices (alternative *forms* of detention) being considered or promoted as viable alternatives to detention by State authorities.[554] Lack of budget resources may likewise render the implementation of certain schemes difficult in practice, even as the statistics available point to many alternatives being cheaper to implement than detention. The lack of a uniform approach on the length of the imposition of alternatives to immigration detention likewise raises concerns.[555]

257. Finally, even if efforts have been made to ensure effective access to information in some member States, obstacles still persist in relation to professional interpretation, diversification of communication channels and the accessibility, quality and language of supporting documents. Lack of investment in training detention and reception staff with a view to detecting persons in situations of vulnerability can likewise raise concern.[556]

Experiences and insights form the use of alternatives

258. The inclusion of alternative measures in general or specific schemes in national policy was reported as being a positive step by some member States. This is because alternatives can

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Report, 2014, p. 27; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 117.

[549] EMN, *Synthesis Report,* 2014, pp. 23 and 27.

[550] Replies to the CDDH-MIG request for information. See also, Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017.

[551] Replies to the CDDH-MIG request for information.

[552] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, pp. 94-95.

[553] *Ibid.*, pp. 68-69.

[554] *Ibid.*, p. 116.

[555] *Ibid.*, pp. 117-118.

[556] See, ENNHRI, written contribution to CDDH-MIG Analysis.

ensure that the principle of proportionality is properly applied or that persons are no longer detained while still cooperating with the authorities.[557] In relation to the specific types of alternatives used, positive experience is noted by some member States in relation to a) residence requirement; b) reporting obligation; and c) assisted voluntary programmes or return counselling.[558] Notwithstanding the above, insufficient experience to report positive outcomes and insights due to the very limited use of alternatives in practice is also highlighted.[559]

Statistical information and evaluation of effectiveness

259. Statistical information on persons to whom alternatives have been applied, impact on human rights, compliance with immigration procedures and costs tends to be limited in scale and/or not available.[560] Overall, only some member States provide this kind of information and usually it is either limited to the number of persons subject to alternatives or those who were detained, costs related to detention or alternatives. The limited statistical information does not, therefore, allow for drawing general conclusions and/or making explicit comparisons.

260. The regular evaluation of existing schemes is, however, considered important in addressing persisting challenges and improving the functioning and effectiveness of alternative measures in practice.[561] In this regard, the Parliamentary Assembly, among others, has stressed the need to carry out empirical research and analysis on alternatives to detention, including their use, effectiveness and best practice, while making a distinction between those that allow for freedom of movement and those which curtail freedom of movement.[562] Thus, more expansive methods of evaluating the effective functioning of alternatives in different settings would be useful in this regard. Additionally, consistent and publically available information on the effectiveness of certain models or approaches in ensuring compliance, reducing costs, and safeguarding the rights and well-being of migrants would surely enhance advancement in the field. Significantly, it appears that greater involvement of civil society in the implementation process could be of concrete benefit when ensuring effectiveness.[563]

261. Generally speaking member States could be better supported in addressing persisting legal and practical challenges and make greater use of alternatives to detention. This is particularly important given that the majority of member States have already established a legal obligation to consider alternatives and have taken steps in this regard. However, comprehensive guidance on how to effectively implement these measures in practice would further support member States in their endeavors.

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[557] Replies to CDDH-MIG request for information.

[558] It should be noted that assisted voluntary programmes or return counselling may not always be considered an alternative to detention within the strict meaning of the term but rather constitute a part of a return programme.

[559] *Ibid.*

[560] Replies to CDDH-MIG request for information; Commissioner for Human Rights, Human Rights Comment, High time for states to invest in alternatives to migrant detention, 31/01/2017; EMN, *Synthesis Report,* 2014, p. 41; A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 118.

[561] *Report of the Special Rapporteur on the human rights of migrants, François Crépeau,* A/HRC/20/24, 2 April 2012, § 74; O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, 2006, § 175.

[562] Parliamentary Assembly, *Resolution 1707 (2010)*, § 9.3.4.

[563] A. Bloomfield, E. Tsourdi and J. Pétin, *Alternatives to Immigration and Asylum Detention in the EU*, 2015, p. 119.

V. THE WAY FORWARD: EVALUATING THE NEED FOR FUTURE WORK BY THE CDDH – ADDED VALUE AND NEXT STEPS

1. The need for future work

262. As illustrated at the beginning of this analysis, there is a well-established obligation at the European and international level in considering and implementing alternatives to immigration detention. This obligation has been consistently emphasised in international human rights standards, statements, recommendations and country specific work where member States have been called upon to give priority to alternative measures.

263. A number of member States have undertaken legislative or policy reforms to limit the use of immigration detention, especially for vulnerable persons, and to provide for alternatives to immigration detention in their national legislation. Additionally, steps have been taken to actively explore alternative measures particular to their national context and/or a particular migration population. Certain Council of Europe member States are also participating in the UNHCR *Global Strategy: Beyond Detention*,[564] as well as other relevant activities and projects at the national level.[565]

264. A growing momentum and commitment towards a more purposeful implementation of alternatives to immigration detention is confirmed in the *New York Declaration for Refugees and Migrants,* adopted at the UN High Level Summit in September 2016. There, States committed to, *inter alia*, pursuing alternatives to detention and working to end the practice of detaining children for immigration related purposes.[566]

265. Notwithstanding these commitments and positive developments, persisting legal and practical challenges seem to seriously limit the systematic implementation of alternatives to immigration detention. A number of significant gaps still exist which need to be addressed in order for alternatives to be truly effective.

266. This analysis has, *inter alia*, provided a list of available alternatives for consideration, listing some main strengths and weaknesses of different types. Global comparative research on alternatives to immigration detention indicates, however, that no single model nor even a "menu of options" provides sustainable solutions if these are pursued without giving due weight to certain crucial ingredients of effectiveness. Overall, one of the critical take-aways from existing evidence points to the overarching need to consider certain essential elements that must be in place in order for any alternative to be effective in terms of compliance, human rights benefits and costs. Getting these essential elements right may be more important even than the type or

[564] UNHCR launched the *Global Strategy: Beyond Detention 2014-19* in June 2014 which aims at, *inter alia*, ensuring that alternatives to detention are available in law and implemented in practice and putting an end to the immigration detention of children. For further information see, UNHCR, 2014 -2019 *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees*, 2014. The following Council of Europe member States joined the Strategy in June 2014: Hungary, Lithuania, Malta and the United Kingdom. In December 2016 it was announced that four other Council of Europe members would engage in the Strategy namely, Belgium, Bulgaria, the Czech Republic and "The former Yugoslav Republic of Macedonia." See, UNHCR, *Contribution to the Fifteenth Coordination Meeting on International Migration*, UN/POP/MIG-15CM/2017/14, 10 February 2017, §§ 22-24.

[565] Various activities and pilot projects on alternatives to detention are taking place in several Council of Europe member States.

[566] General Assembly, *New York Declaration for Refugees and Migrants*, § 33.

model of the alternative that is used, or the amount of financial resources that a member State expends on a given model.

267. While this means that there are no easy solutions, it seems possible to incorporate these essential elements across a wide range of practices and approaches. It also means that there may be an opportunity to develop innovative approaches that both strengthen "effectiveness" while expanding current ideas of what is possible. In this context, it is important to recognise that the practices of both immigration detention and alternatives to that detention are relatively new in historical terms. In other words, the understanding of how alternatives to immigration detention actually function best and become genuinely effective, is bound to still be an on-going learning process for most stakeholders. Along this path of trial and error, however, it is critical to support States in recognising not only their legal obligations, but also strengthen their capacity to share practical know-how and concrete methods in the field that up to now have proven their value.

268. The existing lists of available alternative options in Europe demonstrate that in the field at large there may be an opportunity to focus more on engagement rather than enforcement. Compliance, benefits and enforcement may be more likely to follow practices that *engage* effectively with the persons concerned from the outset. In other words, practices based on successful *engagement* may, ultimately, lead to better *enforcement* of migration management policies and be profoundly more apt to upholding human rights.

269. In conclusion, first, despite alternatives to detention having largely been established in law, a systematic implementation at the national level could be strengthened; second, where alternatives are implemented at the national level, their scale across a sufficiently broad or diverse range of options could be significantly expanded; third, much greater attention could be given to certain essential elements of effectiveness when implementing and developing alternatives to detention and ensuring their success.

2. Possible next steps

270. In light of the above, it seems that States could benefit from further support in developing and implementing alternatives that are truly effective in their particular national contexts. General guidance on the essential elements of effective alternatives to immigration detention, including guidance on how to use these essential elements to address existing legal and practical challenges, could be of added value. Specific guidance on how to apply the essential elements to a particular migrant population or to a particular alternative to detention initiative within a State could be beneficial as well. This might include more broadly and widely promoting the essential elements of successful alternatives across Council of Europe member States.

271. Additional support may also be needed on how to productively involve key actors such as National Human Rights Institutions (NHRIs) and civil society organisations in the exploration and development of effective alternatives to immigration detention, especially as they have proven to be key partners in meeting the various objectives of "effectiveness."

272. In the context of criminal justice, the United Nations Standard Minimum Rules for Non-Custodial Measures ("The Tokyo Rules") provide guidance on a wide range of issues relating to alternative measures, including such issues as initial planning, implementation, legal safeguards, training, evaluation and research. Such a comprehensive set of guidance still does not exist in the migration context.

273. Clearly, there are some important elements in the Tokyo Rules that could be analogously applied in the migration (administrative law) context and might provide a useful starting point for developing a comprehensive set of rules. It is essential, however, to distinguish between minimum standards applying in the criminal context and those applying to migration governance. At the Council of Europe, the Committee of Experts on Administrative Detention of Migrants ("CJ-DAM") is currently codifying rules relating to the conditions of detention of migrants.

274. Overall, there is no clear or comprehensive framework at the European level on effective alternatives to immigration detention covering all persons concerned under article 5 § 1(f) and, under certain circumstances, 5 § 1(b) of the Convention. There is a need for a proper legal framing of alternatives in the migration context with clear and comprehensive safeguards that will not only ensure the respect for human rights standards but also their effective implementation, while simultaneously upholding compliance to migration procedures.

275. The Council of Europe could bring its expertise and in particular its human rights perspective in the field to provide guidance as to how alternatives could be effectively framed. Member states could be supported in developing and implementing a wider range of alternative to detention models building upon the essential elements of effectiveness and engagement-based approaches. This could contribute to the on-going efforts undertaken by its member States and simultaneously complement the work currently carried out by other European and international stakeholders in the field.

276. As a concrete suggestion for future work, and in light of the mandate of the CDDH for the next biennium, a step-by-step strategy for the near future might be most apt for success. In the first instance, the added value provided could take the form of a practical and user-friendly handbook for authorities on effectively implementing alternatives to immigration detention. Crucially, such a handbook should not only address legal aspects but draw upon the essential elements of effectiveness and good practice to provide guidance on the successful implementation of alternatives and lessons learnt. Alongside such work, the Council of Europe could, *inter alia*, explore possibilities of pursuing specific cooperation projects in the field with interested member States on a voluntary basis. A conceivable second step in the follow-up process to the current work might, for example, be a consideration of guidelines on effective alternatives to immigration detention, possibly focusing on children in particular. Exchange of information on the impact of measures taken could be an integral part of the ensuing work. For any future follow-up to be as useful as possible, it should illustrate the relevant human rights standards and the essential elements of effective alternatives to immigration detention in a user-friendly, accessible and practical manner.

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APPENDIX

REQUEST FOR INFORMATION
on alternatives to detention in the context of migration
sent on 10 October 2016

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Introduction

The Committee of Ministers has tasked the Steering Committee for Human Rights (CDDH) to conduct an analysis of the legal and practical aspects of specific migration-related human rights issues, in particular effective alternatives to detention, and explore the need for further work in the field.

To carry out this work, CDDH set up a Drafting Group on Migration and Human Rights (CDDH-MIG), which held its first meeting on 14 - 16 September 2016. To enlighten further the on-going analysis, it was considered important at the outset to invite member States to provide information on certain legal and practical aspects of alternatives to immigration detention in their diverse national circumstances.

In light of the above, you are invited to send your replies to the attached questions to the Secretariat (to: lilja.gretarsdottir@coe.int; cc.: theodora.kristofori@coe.int) **by Friday 18 November 2016 at the latest.**

Any further information you may wish to provide on the subject in addition to this particular enquiry would of course be welcome.

NOTE

This request for information applies exclusively to immigration detention. It refers only to persons who may be deprived of their liberty in accordance with Article 5§1(f) of the European Convention on Human Rights, namely to prevent them from effecting an unauthorised entry into the country or against whom action is being taken with a view to deportation or extradition.

“Alternatives to immigration detention” may refer to various non-custodial and/or less severe measures than detention such as, for example, reporting requirements, registration with the authorities, surrender of documentation, community supervision arrangements, bail or other financial guarantees, case management, specialised centres and foster placement, etc.

1. Please describe briefly the types of alternatives to immigration detention currently in use in your country. Indicate also if any of these alternatives were designed *exclusively* for the context of migration, i.e. as alternatives to *immigration detention* in particular, and which of these were designed specifically for vulnerable individuals and groups.

2. Is there a legal, regulatory and/or policy framework governing the use of alternatives to immigration detention in your country? If yes, please specify, and indicate any legal obligation to consider alternative measures before resorting to immigration detention.

3. What is the criteria/procedure for deciding whether to apply an alternative to immigration detention and which are the procedural safeguards to be respected? Please specify if and how the procedure includes a screening process to identify vulnerable individuals and groups.

4. Is there a monitoring mechanism of and/or judicial oversight over the proper implementation of existing alternatives to immigration detention? If yes, please specify. Indicate also the legal remedies available to challenge the alternative to immigration detention applied in the individual case.

5. Please describe the following within your country´s specific context:[567]

    a) Alternatives to immigration detention which have been considered to have positive outcomes and why;

    b) Legal and/or practical challenges that may have been encountered when considering/implementing alternatives to immigration detention, and if/how these challenges have been addressed or remain unresolved;

    c) Any available statistics/information that may be available on the impact on human rights, compliance with immigration procedures and costs of existing types of alternatives to immigration detention as compared to detention.

    d) Other relevant experiences, insights or lessons learnt you would like to share on alternatives to immigration detention.

[567] It may also be helpful to consider such aspects as, for example, individual assessment/support; vulnerability; access to basic services; prompt and fair resolution of immigration and asylum cases; facilitation of voluntary and/or enforced returns; guidance and/or rules on the application of alternatives to immigration detention; criteria to assess the risk of absconding or other risks; civil society's contribution to the implementation of alternatives to immigration detention; cooperation/coordination between the various authorities and actors involved; existing research/data/monitoring tools to evaluate the effectiveness of existing types of alternatives to immigration detention, etc.