

**Alternatives to Immigration Detention:  
Overview of EU Practice with Recommendations for Model Development in the  
Republic of Croatia**

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## 1 Why we advocate alternatives to detention?

At the end of 2016, there were 65.6 million forcibly displaced persons (of which 40.3 million internally displaced persons and 22.3 million refugees) in the world<sup>1</sup>. It is the highest number of forcibly displaced persons ever recorded, and a sharp increase compared to 2014 when the total number of forcibly displaced persons was 5.8 million<sup>2</sup>. Such a course of events has also had an impact on European countries which recorded a dramatic increase in the number of international protection seekers even though Europe holds only 6% of displaced persons compared to, for example, Turkey (2.5 million refugees), Lebanon (1.1 million refugees) and Jordan (664,100 refugees) which took in the highest number of displaced persons in the world. In the 2016, 1.2 million international protection applications were recorded in the European Union (28)<sup>3</sup>. In addition, there was a noticeable increase in irregular migration, particularly along the routes through central and east Mediterranean. In 2014, Europe recorded nearly 225,000 migrants arriving along those routes.

Limiting the freedom of individuals has **negative consequences on the physical, emotional and mental state of a person**, particularly for vulnerable groups: children, pregnant women, breastfeeding women, persons who have been subjected to torture and trauma, victims of trafficking, elderly people, persons with disabilities, and persons with physical and mental difficulties. Secondly, **placement in detention may lead to family separation, it has a negative effect on the local community**, it makes it difficult for the non-governmental and governmental sector to provide humane support to persons in detention and it causes disproportionately high costs. Furthermore, limiting the freedom of movement for persons in migration may be **contrary to international and national legislative frameworks**, whereby international law advocates detention as the last resort that should be used only if necessary, justified and proportionate. There is also the issue of monitoring detention facilities, wherein most countries lack systematic and objective monitoring which leads to questions regarding human rights protection standards and access to seeking international protection. Finally, it is important to emphasize that **limiting the freedom of movement for persons without valid documents upon entering the country should not be a justified practice. Persons without valid documents are often unable to enter another country regularly and irregular border crossing is often their only option of gaining protection in another**

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<sup>1</sup> UNHCR (2017). Annual Global Trends report

<sup>2</sup> IOM (2015). Global migration trends Factsheet. Berlin: IOM.

<sup>3</sup> European Commission, News Release (2017).

**country.** It is important to underline that irregular migrants would not opt for such means of travel which are more dangerous, expensive and physically and psychologically harder if they had the option of crossing the border with valid documents.

### **1.1. The legal framework of detention in the Republic of Croatia**

In the Republic of Croatia, the [Foreigners Act](#)<sup>4</sup> prescribes that a foreigner is any person who is not a Croatian national and who has a nationality of another country or has no nationality and differentiates between foreigners with regulated residence (persons who are not nationals of the country where they reside, but who possess a residence or work permit in that country) and those without regulated residence (persons who are not nationals of the country where they reside and who do not possess a residence or work permit in that country). Article 131 of the Act states that third country nationals may be placed in a Detention Centre for Foreigners<sup>5</sup> in order to restrict their freedom of movement and ensure forceful removal and return, if the same purpose cannot be achieved using lesser measures (deposit of travel documents and travel tickets, deposit of certain financial means, prohibition to leave a specific place of accommodation, reporting to a police station at specified times). This shows that the possibility of detention arises only after applying the aforementioned lesser measures. Detention is defined as a deprivation of liberty in migration-related proceedings and it differs from detention on grounds of criminal offences or misdemeanors<sup>6</sup>, with explicit emphasis that it equally includes prisons, camps, detention centres, airports and other places where an individual's freedom of movement is restricted<sup>7</sup>.

In terms of the international legal framework, the core document for the protection of human rights and freedoms at the European level is the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) which, through the European Court of Human Rights case law, sets standards for the protection of foreigners. Thus, although the states independently decide on the issues of entry, residence and deportation or expulsion of foreigners, the provisions of the Convention, with particular emphasis on the right to freedom and security of persons, must be complied with in the application of measures restricting the freedom of movement for foreigners.

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<sup>4</sup> Official Gazette "Narodne novine", Foreigners Act, 130/11, 74/13, 69/17, Article 2

<sup>5</sup> The Republic of Croatia has one Detention Centre for foreigners (officially called Reception Centre for Foreigners) located in Ježevo near Zagreb. In addition to that, the state opened two transit centres in border areas: in Tovarnik at the border with the Republic of Serbia and in Trilj at the border with Bosnia and Herzegovina.

<sup>6</sup> International Detention Coalition (2016.) What is immigration detention? And other frequently asked questions.

<sup>7</sup> UNHCR (1999.) UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers.

[The 1951 Convention and Protocol Relating to the Status of Refugees](#)<sup>8</sup> states that *each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, except in cases of restriction to the freedom of movement. Such restriction of freedom of movement must be based in law, necessary and non-discriminatory, and only applicable until the status of the person is resolved.* Likewise, the [Universal Declaration of Human Rights](#)<sup>9</sup> states that, in the application of restriction to the freedom of movement, the state must demonstrate the existence of a legal basis, as well as the justification, proportionality and necessity. The [Council Directive on Reception Conditions](#)<sup>10</sup> also states that the freedom of movement of international protection seekers and refugees may be restricted only when it is necessary on the basis of the circumstances of each case and in accordance with the national legislation of the state implementing the measure, whereby detention must be as short as possible. Furthermore, the [European Return Directive](#)<sup>11</sup> notes that the EU Member States should apply detention only if there are no other sufficient but less restrictive measures. The Directive prescribes the longest possible detention duration in a return procedure of six (6) months, with the possibility of extension by another twelve (12) months.

This text offers an overview of a number of alternatives to detention<sup>12</sup>, the application of which is possible in the Republic of Croatia, whereby the alternative to detention is defined as any legal solution, practice or policy which enables free movement to migrants, asylum seekers and refugees during the period pending the resolution of their status or deportation, i.e. leaving the country where they were found as having irregular residence<sup>13</sup>.

DOCUMENT	LEGAL SCOPE
<b>The Foreigners Act</b>	<ul style="list-style-type: none"> <li>- Defines the status of foreigners</li> <li>- Defines situations in which a foreigner's freedom of movement is restricted</li> </ul>

<sup>8</sup> The 1967 Protocol Relating to the Status of Refugees.

<sup>9</sup> The Universal Declaration of Human rights, Official Gazette "Narodne novine" no. 12/2009.

<sup>10</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

<sup>11</sup> 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.

<sup>12</sup> In the whole text, the term "alternatives to detention" has to be intended as "alternatives to immigration detention".

<sup>13</sup> International Detention Coalition, 2011. Legal Framework and Standards Relating to the Detention of Refugees, Asylum- Seekers and Migrants. Melbourne: 2011

<p><b>The European Convention for the Protection of Human Rights and Fundamental Freedoms</b></p>	<ul style="list-style-type: none"> <li>- Defines standards for the protection of foreigners</li> </ul>
<p><b>The 1951 Convention Relating to the Status of Refugees</b></p>	<ul style="list-style-type: none"> <li>- Defines that the restriction of freedom of movement must be based in law, necessary and non-discriminatory, and only applicable until the status of the person is resolved</li> </ul>
<p><b>The Universal Declaration of Human rights</b></p>	<ul style="list-style-type: none"> <li>- Defines that, in the application of restriction to the freedom of movement, the state must demonstrate the existence of a legal basis, as well as the justification, proportionality and necessity of such restriction</li> </ul>
<p><b>The Council Directive on Reception Conditions</b></p>	<ul style="list-style-type: none"> <li>- Defines that the freedom of movement of international protection seekers and refugees may be restricted only when it is necessary on the basis of the circumstances of each case and in accordance with the national legislation of the state implementing the measure, whereby detention must be as short as possible</li> </ul>
<p><b>The European Return Directive</b></p>	<ul style="list-style-type: none"> <li>- Defines that the EU Member States should apply detention only if there are no other sufficient but less restrictive measures</li> <li>- Prescribes the longest possible detention duration in a return procedure of six (6) months, with the possibility of extension by another twelve (12) months</li> </ul>

### 3 The obligation to examine alternatives to detention: EU legislation

#### 3.1 Administrative detention of migrants and asylum seekers in the EU legislation: overview

The European Union has had legal competences in migration and asylum since the [Treaty of Amsterdam](#)<sup>14</sup> (1999), further reinforced by the treaties of [Nice\(2003\)](#)<sup>15</sup> and [Lisbon\(2009\)](#)<sup>16</sup>. Regarding asylum, the aim has been to create a Common European Asylum System providing a single asylum procedure and a uniform protection status throughout the European Union. To this end, the European Union has undertaken legislative harmonisation efforts (with Regulations and Directives), practical cooperation efforts (with the creation of a European Asylum Support Office, EASO), and financial solidarity (for example through the Asylum, Migration and Integration Fund). Detention is regulated through a series of directives which apply to either asylum seekers or irregular migrants, that are defined as two separate groups.

The so-called [Reception Conditions Directive \(RCD\)](#) regulates detention of asylum seekers through an exhaustive list of detention grounds, guarantees for detained asylum seekers and rules regarding detention conditions<sup>17</sup>. More specifically, it establishes an explicit obligation to examine less coercive measures before recurring to detention, and to lay down in national law rules concerning alternatives to detention<sup>18</sup>.

##### 3.1.1 Detention as a last resort

According to International human rights law and standards, immigration detention should be used only as a last resort, in exceptional cases, after all other options have been shown to be inadequate in the individual case. Moreover, detention of people in an administrative procedure is highly controversial due to its negative impact on health, well-being and human rights. Detention should then be avoided for vulnerable individuals - it goes without saying that the majority of individuals subjected to immigration detention are by definition vulnerable.

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<sup>14</sup> <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>

<sup>15</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12001C%2FTXT>

<sup>16</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT>

<sup>17</sup> 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, Art. 8 – 11.

<sup>18</sup> 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, Art. 8, paragraphs 2 and 4.

If detention is to be used in accordance with international law, several preconditions must be met. It must be:

- Lawful
- Necessary and reasonable in the circumstances
- For a legitimate purpose
- Proportionate to achieve that legitimate purpose
- Applied without discrimination
- The last resort based on evidence there are no alternatives that can achieve that legitimate purpose

Authorities must, therefore, be able to demonstrate that the reasons for the detention have been evaluated through an accurate and exhaustive assessment of the individual without discrimination, proving that all other options have been explored. In such cases, detention in appropriate conditions, of limited duration and with regular judicial or other independent review in line with international standards, may be considered the last resort<sup>19</sup>.

### 3.1.2 Immigration detention as an administrative and disciplinary measure

Unfortunately, the use of immigration detention as a disciplinary tool is widely used in all Member States of European Union. The most striking example is the broad interpretation of Article 5.1 (f) of the [European Convention on Human Rights](#) (from now on **ECHR**) by the European Court of Human Rights (from now on **ECtHR**) itself. More specifically, it states that no-one shall be deprived of his/her liberty, except in the case of detention of a person “against whom the action is being taken with a view to deportation or extradition”<sup>20</sup>. Several legal commentators concluded from this that the use of immigration detention had to be restricted to its “administrative function”<sup>21</sup>. In 1996, however, in the case of *Chahal vs United Kingdom*, the ECtHR ruled that: “This provision [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....”<sup>22</sup>. By explicitly stating that

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<sup>19</sup> International Detention Coalition, *There are Alternatives*: revised edition, 2015.

<sup>20</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5.1, subparagraph (f) of paragraph 1.

<sup>21</sup> Noll, G ‘Rejected Asylum Seekers: The Problems of Return’, *International Migration*, 37(1): 281. 1999. <http://onlinelibrary.wiley.com/doi/10.1111/1468-2435.00073/pdf>

<sup>22</sup> Case of *Chahal vs United Kingdom* of 15 November 1996, Application no. 70/1995/576/662, paragraph 112.

immigration detention need not be restricted to preventing individuals from absconding, and without delimiting how else it could be used, the Court opened up the possibility of its use for disciplinary purposes.

Another explicit confirmation of the use of immigration detention as a disciplinary measure can be found in the so-called [Return Directive](#)<sup>23</sup>. Article 15.1(b), combined with Article 15.5, states that detention may be ordered in the case where the individual concerned obstructs the removal process, for a limited period that can not exceed six months. Article 15.6(a), moreover, states that in the event of a lack of cooperation by the person concerned, detention may be extended by a further 12 months. In other words, both the grounds for detention and the maximum period of detention provided for in the Return Directive corroborate the use of detention for disciplinary purposes. In this regard, it can be said that the limitation of the detention period to a maximum of 18 months is a key rule fixed by the Return Directive. Nevertheless, as shown by the [European Commission's evaluation of the transposition of the Return Directive](#)<sup>24</sup>, this has had mixed effects, with 12 countries reducing detention periods and 8 increasing them<sup>25</sup>. Similarly, several Member States such as Lithuania and Hungary have introduced new grounds for detention of asylum seekers in anticipation of the transposition of the recast Reception Condition Directive (which should have been transposed by the Member States into national law by July 2015) without always adopting the accompanying safeguards.

If we look at the use of immigration detention as a disciplinary tool, we can then easily give an explanation to governments' lack of interest and will in implementing alternatives to detention. As pointed out by Clement de Senarclens, all the alternatives to pre-removal detention aim only to guarantee – by various means – that the person concerned is present when the decision to remove them is enforced. These measures range from release on bail to the use of electronic tags, house arrest or an obligation to report to the authorities at regular intervals. These are less restrictive and also less expensive ways of guaranteeing the individual's presence when due for removal. But proponents of the disciplinary approach believe that it is the disciplinary nature of detention which is most significant in bringing about a successful removal. In their view, the less restrictive, more liberal measures are less effective in bringing about the desired final result. The prevalence of the disciplinary approach in the use of detention,

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<sup>23</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115>

<sup>24</sup> <http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=10737855>

<sup>25</sup> Commission, 'Communication from the Commission to the Council and the Parliament on the return Policy' COM (2014) 199 final.

therefore, helps to explain States' reluctance to opt for alternatives<sup>26</sup>. More elements and evaluations on alternatives to detention will be explored in chapter 4.

It can be said that detention is used also for the purposes of migration control, with States using a wide range of arguments to justify its use:

- Practical considerations, such as having the migrant at the disposal of the authorities for identity checks or public health screenings at arrival;
- Enforcement-related motivations, such as securing public order or forced return of irregular migrants;
- Political arguments, such as to deter any further arrivals or to protect host societies.

### 3.2 The international legal background on alternatives to detention

This section explores the international and European legal basis on which detention and alternatives to detention are applied, and analyses the implications of the right to liberty and security and the principle of freedom of movement in EU law. The basis used are primarily:

- The [1951 Refugee Convention](#)<sup>27</sup>
- The [International Covenant on Civil and Political Rights](#)<sup>28</sup> (ICCPR)
- The aforementioned ECHR and EU law

First of all, it's essential to distinguish between *deprivation of liberty* and *restrictions on the freedom of movement*. Some alternatives to detention, and even open reception centres in some cases, may involve restrictions on the freedom of movement of asylum seekers and migrants. RCD contemplates some restrictions, which may be permissible as long as they comply with international and European human rights law. Nevertheless, the difference between deprivation of liberty and restrictions on the freedom of movement is one of degree or intensity, not of kind. Thus, what may seem to national authorities as a cumulation of permissible restrictions might, in fact, lead to a regime that deprives asylum applicants or migrants of their liberty. It is thus necessary to analyse the legal frameworks underpinning both the principle of freedom of movement and the right to freedom and security.

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<sup>26</sup> Clement de Senarclens, State reluctance to use alternatives to detention, forced migration review, 2013.

<sup>27</sup> <http://www.unhcr.org/en-us/1951-refugee-convention.html>

<sup>28</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

European asylum policy must always respect the **1951 Refugee Convention**, in accordance with the European Union treaties and the [European Union Charter of Fundamental Rights](#)<sup>29</sup>. This is confirmed by the Council Directive 20084/83/EC, the so-called [Qualification Directive](#)<sup>30</sup>, as well as by the Court of Justice of the European Union (CJEU). All Member States of the European Union are also signatories to the aforementioned [ECHR](#)<sup>31</sup>. Moreover, Member States are also bound by international law obligations to respect human rights: this means that, where international law establishes a higher level of protection, neither obligations under the Charter, nor those under the ECHR can negate it.

### 3.2.1 Freedom of movement

Both the **ICCPR**<sup>32</sup> and the **ECHR**<sup>33</sup> set up the general principle of freedom of movement within a State. The **1951 Refugee Convention** contains specific protections of this right for refugees<sup>34</sup>. **European Union law** establishes specific rules regarding asylum applicants<sup>35</sup> and individuals subject to a return procedure<sup>36</sup>. All of these norms determine the scope of Member States' legal obligations regarding detention and alternatives to detention. In this regard, we can have a more thorough consideration of article 12 **ICCPR**, which provides the right to freedom of movement and freedom to choose his/her residence to "everyone lawfully within the territory of a State", thus being applied without discrimination between citizens and foreigners. The Human Rights Committee has noted that: "the question whether a foreigner is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of a foreigner to the territory of a State to restrictions, provided they are in compliance with the State's international obligations".

### 3.3 The responsibility of Member States to examine alternatives to detention

Following the essential preamble on freedom of movement, it is then crucial to focus on the Member States' obligation to examine alternatives to detention. Article 15 of the **Return Directive**, already mentioned and analysed, allows detention only if "other sufficient but less coercive measures cannot be

<sup>29</sup> [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm)

<sup>30</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>

<sup>31</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>32</sup> International Covenant on Civil and Political Rights, Art. 12.

<sup>33</sup> European Convention on Human Rights, Art. 2, Protocol No 4.

<sup>34</sup> 1951 Refugee Convention, Arts. 26 and 31.

<sup>35</sup> 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, Art. 7.

<sup>36</sup> See **Return Directive**

applied effectively in a specific case". The Member States thus must examine alternative measures before resorting to the detention of returnees. Still, unlike the **Reception Conditions Directive**, the **Return Directive** does not explicitly require Member States to establish national laws concerning alternative schemes, but it lists examples of alternatives to detention. However, Article 7 (relating to voluntary departure) states three measures that could be imposed on a third-country national subject to voluntary departure to avoid the risk of absconding. This provision stresses that "certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, a deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure". However, while the Member States may apply these measures to avoid the risk of absconding, they do not constitute an alternative to detention as, at this point, the persons concerned are not liable for detention.

If we take a look at the revised **Reception Conditions Directive**, we see how Article 8 requires the Member States to consider alternatives to detention before subjecting asylum seekers to detention. Paragraph 2 states that "when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively". Before that, Recital 15 emphasizes that "applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principles of necessity and proportionality with regard to both to the manner and the purpose of such detention". Even without considering this explicit obligation, however, **international law** and the **EU Charter of Human Rights** still require the Member States to examine alternatives in order to avoid arbitrary deprivation of liberty<sup>37</sup>. Under the **Reception Conditions Directive**, Member States must not only put in practice alternative approaches, but must also put in practice such approaches through their national laws transposing the Directive. The Directive suggests some of them in a list, and the Member States may contemplate further schemes. Finally, Recital 20 is of great importance, as it gives legal guidelines on the understanding of an alternative to detention under European Union law: "in order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants". The important added element of this recital lies in the fact that alternative measures should be "non-custodial": it means that any scheme whose application deprives the applicant of their *liberty* cannot be

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<sup>37</sup> EU Charter of Human Rights, Art. 6, Art. 52, Art. 53.

regarded as an alternative to detention. Not only should alternatives to detention be non-custodial but they should also respect the fundamental rights of asylum seekers as established in international legal texts. Consequently, the implementation of such schemes should not violate in particular the prohibition of torture, inhuman or degrading treatment, the right to human dignity, the right to private and family life and the right to an effective remedy.

#### 4 Existing alternative models in Europe and critical review

In reviewing the application of detention measures and alternative measures in the EU Member States, we have identified several models that are implemented in the certain Member States and outlined their advantages and shortcomings in order to have a more concrete understanding and a deeper reflection and considerations on the establishment of an appropriate alternative model in the Republic of Croatia.

<p><b>Model 1: Confiscation of documents and reporting to the police</b></p> <p><b>Model description:</b> It is mandatory to report to the competent police station at given time intervals (e.g. once a week). In such a case, a foreigner is usually obliged to ensure accommodation for himself/herself or the accommodation is provided by the guardian guaranteeing for the foreigner.</p> <p><b>States that apply it:</b> Greece, Bulgaria, Lithuania, Latvia, Hungary, Czech Republic, Malta</p>	
<b>ADVANTAGES</b>	<b>SHORTCOMINGS</b>
<ul style="list-style-type: none"> <li>- The foreigner has the right to freedom of movement in the country where they are located and is obliged to occasionally report to the competent authorities</li> <li>- Civil society organisations are available to the foreigner for support (it is more difficult for the foreigner to seek support from organisations in closed facilities)</li> </ul>	<ul style="list-style-type: none"> <li>- The foreigner has to ensure their own accommodation or find a person who will guarantee for them, which is not possible when facing financing and social scarcity</li> </ul>
<p><b>Model 2: House arrest</b></p> <p><b>Model description:</b> it is a program that consists in the restriction of the activities of an individual. The space restriction is applied in different manners depending on different countries. In Luxembourg for example, The Minister can take the decision to place a person under home custody for a maximum of 6 months if the execution of the obligation to leave the territory was postponed because of technical reasons and if the person can present the necessary guarantees to prevent the risk of absconding. The</p>	

person is obliged to stay at home during set hours in which a control can be made. In Germany it has the dimension of “obligation to reside at a specific address”, which can be implemented at four “levels of space”: limited to the federal state, limited to the district, obligation to reside at a specific address chosen by the authorities, or at a “departure facility”.

**States that apply it:** Greece, Luxembourg, France

**ADVANTAGES**

- Concerning Luxembourg, *home custody* envisaged as the obligation to be at home at certain hours can be acceptable, while *house arrest/home detention* (24/7 at home) is a clear deprivation of liberty. Still, it has a conditional “if” that is not sufficiently specified and it is at the discretion of the person judging the case to decide “if the person can present the necessary guarantees to prevent the risk of absconding”

**SHORTCOMINGS**

- Home custody can be divided in different ways, time and space limits.
- The vagueness of national law is often a tool used to go beyond these limits.

**Model 3: Accommodation in open-type facilities such as Reception Centers<sup>38</sup>**

**Model description:** The foreigner is placed in the same facilities as people seeking international protection, meaning in open-type facilities, but they have an obligation to report to the competent authorities if they leave the facility. By placing them in these types of facilities, the rights of international protection seekers and irregular migrants are equated and irregular migrants have greater access to support (such as the one available to international protection seekers).

**States that apply it:** Greece, Netherlands

**ADVANTAGES**

- Residence in open facilities which guarantees the freedom of movement within a particular country
- A more humane approach and a greater level of support available in those types of facilities (legal help, healthcare, counselling and psychosocial aspects)
- A greater level of rights of individuals with

**SHORTCOMINGS**

<sup>38</sup> Here Reception Centers are to be intended as facilities where people seeking international protection live during the evaluation of their request

<p>the status of an irregular migrant</p> <ul style="list-style-type: none"> <li>- A decrease in the number of people with an irregular status due to greater support in regulating the case</li> </ul>	
<p><b>Model 4: “Departure facilities” with individual case management</b></p> <p><b>Model description:</b> Open-type facilities accommodating families with underage children that do not have a residence permit in the country and families that have applied for asylum. Specifically in Belgium, “Departure facilities” are individual houses or flats in which each family receives the support of a case manager whose primary role is to empower the family for a voluntary return to the country of origin. Their role, depending on the case, may also include exploring the opportunities for the family to legally stay in the country. In addition, case managers provide legal aid to the family, care for their basic needs and develop a relationship of trust and personal support. Family members can move freely within the area where they are located under the condition that in two-parent families one parent must always stay at the house and that all family members must be present at the house during the night.</p> <p><b>The state that applies it:</b> Belgium</p>	
<p><b>ADVANTAGES</b></p>	<p><b>SHORTCOMINGS</b></p>
<ul style="list-style-type: none"> <li>- Freedom of movement and the opportunity for integration</li> <li>- Individual approach to each family</li> <li>- Developing a relationship of trust between the case manager and the family</li> <li>- Comprehensive support (providing information and advisory legal aid, help with supplies, provision of food stamps, conversation...)</li> <li>- Objective provision of information about the case</li> <li>- Satisfactory living conditions</li> </ul>	<ul style="list-style-type: none"> <li>- The space in which they reside lacks content that could affect the feeling of passing time which the families spend waiting</li> <li>- Some families had very negative experiences with lawyers employed by the state who are often not specialised in immigration and refugee law and often lack sufficient experience as attorneys</li> </ul>
<p><b>Model 5: Electronic tags</b></p> <p><b>Model description:</b> The model is often described as "electronic residence monitoring" - which does not mean using "electronic tags" exclusively but also includes the obligation to phone the authorities and to use voice detection systems. Electronic tags shall only be used "in agreement with the immigrant".</p> <p><b>States that apply it:</b> UK, Germany</p>	
<p><b>ADVANTAGES</b></p>	<p><b>SHORTCOMINGS</b></p>

<p><b>We do not see any advantages of this model.</b></p>	<ul style="list-style-type: none"> <li>- Even if it could be applied as a non-custodial measure, thus enabling the person to be outside detention, it still further contributes to the negative image of migrants in our society</li> <li>- The stigmatization effect and social exclusion are more than expected.</li> <li>- It is clearly inspired by the criminal context, and it is a highly constraining method</li> <li>- Electronic tags are to be considered the most corrective measure more prone to violation of human rights - the psychological distress is definitely high</li> </ul>
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**Model 6: Deposit of a financial guarantee**

**Model description:** The model works in such a way that a third-country national must deposit a financial guarantee for their residence in the country in the amount prescribed for third-country nationals. The guarantee is deposited to the account of the police and the foreigner is obliged to regularly report their location to the police alongside the guarantee. The guarantee may also be paid by the family or a friend of the foreigner. Police officials would be obliged to repay the guarantee in the event of an agreement violation or a voluntary return to the country of origin.

**A state that applies it:** Slovakia, Poland, Netherlands, Czech Republic, Malta, Hungary

<p><b>ADVANTAGES</b></p>	<p><b>SHORTCOMINGS</b></p>
<p><b>We do not see any advantages of this model.</b></p>	<ul style="list-style-type: none"> <li>- The financial background required is almost unattainable. For example, the minimum income in Slovakia in 2015 was €198. Accordingly, the question is how can a third-country national who has no work permit or any other way of obtaining money have €56 per day? Or we can compare the obligation of an adult migrant to possess €1680 for a period of 30 days. The amount of the financial guarantee is almost ten times higher than the minimum income of an average Slovak citizen. The outcomes of this alternative model are not promising precisely because of conditions that can hardly be fulfilled.</li> </ul>

	<ul style="list-style-type: none"> <li>- This model depends exclusively on the financial background of an individual (the amount varies from €500 to €5000), which makes it more available to wealthier people and unavailable to those with a poorer social status and is thus discriminatory on social grounds and it has very limited application in practice.</li> </ul>
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## 5. Proposal of alternatives to detention’s model for Croatia

The overview of immigration detention in this text provided an insight into the position of persons who reside in foreign countries without proper and appropriate documents. As noted above, such individuals are referred to as “illegal, unlawful, undocumented” in laws of many EU Member States. But contrary to such qualification of human beings, there are also arguments challenging it with questions such as “If one’s action is unlawful or illegal, does it mean that the person performing it is equally unlawful?” Many activists and lobbying groups such as the networks [No Border Network](http://www.noborder.org/)<sup>39</sup> and No One is Illegal in different countries around the world (e.g. [No One is Illegal UK](http://www.noii.org.uk/)<sup>40</sup>), [MigrEurop](http://www.migreurop.org/)<sup>41</sup>, [International Detention Coalition](https://idcoalition.org/)<sup>42</sup>, advocate the abolition of practices like labelling human beings illegal/unlawful and the questioning of policies in certain countries that place individuals in unfavourable and inhumane positions because they do not possess valid and appropriate/prescribed documents (putting special emphasis on vulnerable groups such as children and the elderly, but also refugees who are often without documents).

The Republic of Croatia does not yet have any developed alternative to detention’s model even though the possibility of it is mentioned in the legislative framework in [Article 132 of the Foreigners Act](#)<sup>43</sup> in the form of a lesser measure than placement in detention, i.e. the Centre for Foreigners: deposit of travel documents and travel tickets, deposit of certain financial means, prohibition to leave a specific place of accommodation and reporting to a police station at specified times. Certain civil society organisations visit the Detention Centre for Foreigners and monitor the migrant detention practice, but the [reports](#)<sup>44</sup> they

<sup>39</sup> <http://www.noborder.org/>

<sup>40</sup> <http://www.noii.org.uk/>

<sup>41</sup> <http://www.migreurop.org/article643.html?lang=fr>

<sup>42</sup> <https://idcoalition.org/>

<sup>43</sup> Official Gazette “Narodne novine”, Foreigners Act, 130/11, 74/13, 69/17, Article 132.

<sup>44</sup> CMS (2017) Izvještaj o detenciji i pritvaranju stranaca u Republici Hrvatskoj: Svrha i uvjeti detencije stranaca tijekom 2016. godine u Prihvatnom centru za strance (Report on Detention of Foreigners in the Republic of Croatia: Purpose and Conditions of Foreigner Detention during 2016 in the Reception Centre for Foreigners), Zagreb

write do not mention any knowledge of the application of lesser measures introduced by the amendments to the Act in 2017.

Precisely because of these prerequisites prescribed by law and practice, we will present several proposals for the Croatian model of alternatives to detention. We believe it should be developed in several stages:

- A. Creating the model within the existing system
- B. Developing the model and the system
- C. Creating the optimal model

The research team that made this analysis consists of political scientists, sociologists, social pedagogues and social workers who approached model development from their fields, taking into account human rights protection (as primacy) and the preservation of human dignity (as the fundamental value of the EU).

#### **5.1.A short overview of the existing Croatian system in dealing with foreigners without valid documents**

The [Foreigners Act](#) regulates the conditions for entry, movement, residence and work of third country nationals and nationals of EEA Member States, as well as members of their families<sup>45</sup>. Most of the relevant provisions have been transposed from the [Directive 2008/115/EC \(Return Directive\)](#)<sup>46</sup>, but some of them prescribe less favourable conditions for foreigners than the Directive provisions. For example, detention shall be extended for additional 12 months if<sup>47</sup>:

- a) The foreigner refused to provide personal or other information and documents necessary for forcible removal or if the foreigner provided false information,
- b) The foreigner otherwise prevented or delayed forcible removal,
- c) The foreigner justifiably expects the delivery of travel and other documents required for forcible removal requested by the competent authorities of the other country.

The Return Directive allows the extension only when it is likely that, in spite of all justified efforts, the removal procedure will take longer due to:

- a) The lack of cooperation from the third-country national,

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<sup>45</sup> Official Gazette "Narodne novine", Foreigners Act, 130/11, 74/13, 69/17, Article 1

<sup>46</sup> <http://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A32008L0115>

<sup>47</sup> Official Gazette "Narodne novine", Foreigners Act, 130/11, 74/13, 69/17, Article 134

b) The delay in obtaining the necessary documentation from third countries.

The national legislation allows the detention of foreigners for whom there is reasonable doubt that they are underaged. The application of such a restrictive measure is not acceptable solely on the basis of the standard of reasonable doubt that the foreigner is not a minor and it is not clear what the standard means in practice and how it is monitored<sup>48</sup>.

The Foreigners Act does not define undocumented migrants, but it does define unlawful entry into the Republic of Croatia. Unlawful entry into the Republic of Croatia refers to the following acts of third-country nationals:

1. The crossing of the state border other than at the place and time prescribed for state border crossing,
2. Avoiding border control,
3. Entry before the expiry of the ban on entry and residence in the Republic of Croatia or the EEA,
4. Entry on the basis of another's or counterfeit travel or other documents used in order to cross the state border, i.e. a visa or residence permit.<sup>49</sup>

The mechanism of administrative detention is used in Croatia in order to restrict the freedom of movement of a person (refugees, international protection seekers and other foreigners). The Ministry of the Interior decides on administrative detention in accordance with the acts that refer to migration and international protection<sup>50</sup>. According to Croatian legislation, the freedom of movement is restricted for a foreigner "in order to ensure their presence in the process of making an expulsion or detention decision, if the foreigner poses a threat to national security or if the foreigner was convicted of a criminal offence and prosecuted *ex officio*"<sup>51</sup>. The Detention Centre for Foreigners Ježevo serves this purpose and detention for the above reasons may not last longer than 3 months. When forcible removal is not possible, the foreigner may be kept in detention for 6 months. Exceptionally, detention may be extended for another 12 months (a total of 18 months of detention) if:

1. The foreigner refused to provide personal or other information and documents necessary for forcible removal or if the foreigner provided false information,
2. The foreigner otherwise prevented or delayed forcible removal,

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<sup>48</sup> Centre for Peace Studies, *Svrha i uvjeti detencije u Hrvatskoj* (The Purpose and Conditions of Detention in Croatia, 2016: p. 10

<sup>49</sup> Official Gazette "Narodne novine", Foreigners Act, 130/11, 74/13, 69/17, Article 39

<sup>50</sup> [Foreigners Act](#) and [International and Temporary Protection Act](#)

<sup>51</sup> Official Gazette "Narodne novine", Foreigners Act, 130/11, 74/13, 69/17, Article 130, Article 115.

3. The foreigner justifiably expects the delivery of travel and other documents required for forcible removal requested by the competent authorities of the other country.<sup>52</sup>

An international protection seeker's freedom of movement may also be restricted if all the facts and circumstances of the case lead to the assessment that it is necessary in order to:

1. Determine the facts and circumstances that form the basis of the international protection application, and which cannot be determined without restricting freedom of movement, especially if the assessment shows a risk of absconding,
2. Determine and verify identity or citizenship,
3. Protect national security or public order of the Republic of Croatia,
4. Prevent the misuse of the procedure if there is reasonable doubt, based on objective criteria including the possibility of access to the international protection approval procedure, that the intent was expressed during the forcible removal procedure in order to prevent further action.<sup>53</sup>

There are two facilities within the Detention Centre for Foreigners:

- a) The older one is used for adult accommodation,
- b) The newer one is used to accommodate unaccompanied minors and is in practice also used to accommodate women and families with children.

Persons in detention have restricted freedom of movement, they sleep in shared dormitories, have access to common areas and must abide by the [Rules of Residence at the Reception Centre for Foreigners](#) that govern all segments of residence at the Detention Centre. This includes a limited outdoor time (only a few hours a day) and very limited communication with the outside world (without mobile phones or the internet, through the use of telephone booths and through very limited visits).

Article 15.1 of the [European Return Directive](#)<sup>54</sup> also defines that the EU Member States should apply detention only if there are no other sufficient but less restrictive measures. At a meeting about the Return Directive held on 26 November 2010, the European Commission emphasized that the Member States should look at detention alternatives as a "win-win scenario" for both the Member States and migrants<sup>55</sup>. Alternatives to detention for the purposes of return has grounds in European legislation and should as such also be applied in Croatia.

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<sup>52</sup> Official Gazette "Narodne novine", Foreigners Act, 130/11, 74/13, 69/17, Article 134.

<sup>53</sup> International and Temporary Protection Act, Official Gazette "Narodne novine" no. 70/15, Article 54

<sup>54</sup> Directive 2008/115/EC, Article 15 paragraph 1

<sup>55</sup> <https://www.cms.hr/hr/publikacije/izvjestaj-o-detenciji-i-pritvaranju-stranaca-u-republici-hrvatskoj-svrha-i-uvjeti-detencije-stranaca-tijekom-2016-godine-u-prihvatnom-centru-za-strance>

## 6 General and specific recommendations for building a system of detention alternatives in the Republic of Croatia

### 6.1 Value starting points

- Detention of any human being is unacceptable.
- **Nobody deserves to be placed in detention** for not being in possession of identification documents. Failing to possess documents is not a crime. No person is illegal even though their actions may be illegal; but actions are often prescribed by laws with which we are not necessary obliged to agree and which are not necessarily just.
- Persons detained in detention centres are often not informed and do not understand the reasons for placement in detention centres. Such practice is carried out in a prison environment and provokes a sense of “serving a sentence” for criminal behaviour. In addition, detention facility employees do not know why people there have been detained and, during monitoring (experiences of organisations in other EU Member States), often stress that they would prefer to work in prison because they would know why the prisoners were there.
- The practice of detaining foreigners is a reflection of the criminalisation and dehumanisation of certain social groups and a reflection of the power of political institutions that maintain the system of social inequality and repression.
- Detention is unacceptable as a form of punishment that not only restricts the freedom of movement but also directly and indisputably shows that the Republic of Croatia and EU Member States continuously express political reluctance and incompetence in managing societies of diversity and equality.

### 6.2 General recommendations

- Alternatives to detention should always be analysed and considered within the specific socio-political context or national legislative frameworks and practices of specific countries.
- Before establishing an alternative to detention, it is important to determine the purpose, means and the use of detention, as well as shape concrete steps for establishing a detention alternative.
- Alternatives to detention must respect human rights.

- It is necessary to become acquainted with the existing financial frameworks, as well as human capacity (institutions, civil society, local communities) of an individual state within which it is desirable to establish a model of alternatives to detention.
- National authorities should reach a common understanding of what constitutes an alternative to detention on the basis of EU law and prevent the establishment of alternative forms of detention as alternatives to detention.
- It would be important to centralise data on both national and European level regarding:
  - 1) The number of people detained and the grounds for the detention decisions;
  - 2) The average length of time that individuals spend in detention and alternatives to detention;
  - 3) The number of individuals subjected to alternatives and the type of schemes;
  - 4) The cost of detention and alternatives to detention per individual;
  - 5) The absconding rates.

## 6.2 Specific recommendations/guidelines

### A. STAGE ONE – Creating the model within the existing system

- The competent institution for the establishment and implementation of a detention alternative should be the Ministry of the Interior because of its obligation to regulate and verify the status of foreigners, but the implementation itself is necessarily carried out in cooperation with other ministries depending on the sector.
- The Ministry of State Property should designate state-owned facilities that can be used as housing facilities intended for detention alternatives and open-type housing.
- Those facilities should be renovated in the form of residential communities and not in accordance with the prison system.
- The Ministry of Health has been involved in the process from the very beginning to provide healthcare to foreigners and, thus, to the local community where foreigners are located.
- During the process of establishing open-type centres, the Ministry of the Interior cooperates with representatives of local communities, civil society organisations and interested citizens to inform the public about foreigners and create/establish spaces for a type of integration.
- The Ministry of Demography, Family, Youth and Social Policy should be entitled of providing those services that are needed regarding the social care for the foreigners involved, with a particular attention to specific vulnerable groups involved as families and underage foreigners.

- Ensure continuous expert education in the field and direct financing from the budget and EU funds.

#### **B. TRANSITIONAL STAGE – Developing the model and the system**

- It is necessary to ensure funds from the state budget and EU funds in order to renovate state facilities for use in alternatives to detention. This would ensure the renovation of abandoned state property, create jobs for residents of local communities where those facilities would be opened and ensure dignified housing and care for foreigners with an irregular status.
- The Ministry of Science and Education is included in the second stage and it ensures educational programs for foreigners housed in open-type centres; especially in cases of children and persons who reside in the country for a long time due to specific circumstances (so that they would not lose time for education).
- Foreigners with irregular status would eventually gain the rights and accompanying obligations of persons with the status of an international protection seeker.
- The capacity of the Social Services Department needs to be strengthened by expanding the existing Sector for Policies, Disabled Persons and Adults (Within the Ministry of Demography, Family, Youth and Social Policy) and separating the existing Department for the Elderly and Infirm Persons, Persons with Addiction Problems and Asylees into two departments:
  - a. The Department for the Elderly and Infirm Persons
  - b. The Department for International Protection Seekers, Persons Granted International Protection and Irregular Foreigners <sup>56</sup>

#### **C. FINAL STAGE – Creation/establishment of an optimal model**

- In the final stage, the Detention Centre for Foreigners Ježevo should become a facility intended for individuals who pose a threat to the security of other people and for persons who violated the terms of an alternative to detention.
- In this stage, there is a series of open-type facilities accommodating foreigners who are trying to regulate their residence or return with the help of the professional staff.

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<sup>56</sup> This guideline focuses on the currently existing structure within the relevant ministry and, if there is a change in structure in the future, we deem as important to place the detention alternative area under the jurisdiction of the sector/department within the existing system that will care for the models and the practice.

- Together with representatives of institutions, civil society organisations and volunteers are also active in the centres.
- There are many actors involved in centre management, specialised for specific areas.
- The social services system eventually takes over the management of the centres from the Ministry of the Interior.

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## **LIST OF ACRONYMS**

RC	Return Directive
RCD	Reception Condition Directive
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
CJEU	Court of Justice of the European Union