

Access to Justice in Detention

Training Materials on Access to Justice
for Migrant Children, Module 2

FAIR Project, April 2018

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Access to Justice in Detention - Training Materials on Access to Justice for Migrant Children, Module 2

© Copyright International Commission of Jurists - European Institutions

Published in April 2018

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

The FAIR (Fostering Access to Immigrant children's Rights) project has been implemented by the International Commission of Jurists - European Institutions in 2016-2018 and supported by the Rights, Equality and Citizenship (REC) Programme of the European Union and Open Society Foundations.



Access to Justice in Detention

Training Materials on Access to Justice
for Migrant Children, Module 2

FAIR Project, April 2018

Table of Contents

I. The Right to Liberty in International Law	5
a) What is deprivation of liberty?	6
b) Prescription by law, arbitrariness, necessity and proportionality	8
c) Detention of particularly vulnerable persons	10
II. The rights and principles related to the detention of migrant children	10
III. Procedural rights and protection	20
1. Reasons for detention	20
2. Rights following arrest or detention	23
a) Right of access to and assistance of a lawyer	23
b) Right to medical examination and medical treatment	25
c) Right to inform others of detention	25
d) Right of access to UNHCR	25
3. Judicial review of detention	26
Requirements of effective judicial review of detention	28
IV. Detention conditions and treatment of detainees	29
1. Appropriateness of place of detention, in particular for children and families	32
2. Conditions of detention	33
a) Cumulative effect of poor conditions	34
b) Overcrowding	35
c) Access to healthcare	37
d) Protection from ill-treatment, including in detention and during deportation	39
V. Detention conditions and treatment of vulnerable persons	40
1. Children	40
2. Detainees with serious illness, mental illness or disabilities	42
3. Survivors of torture	45
4. Rights of detained women and girls	45
VI. Duration of detention	46
Annex - Training tools	50

COLOR CODE:

RED BOX	INTERNATIONAL AND EU LAW AND STANDARDS
GREEN BOX	NON-BINDING SOURCES
BLUE BOX	FURTHER INFORMATION AND SOURCES
TEXT	ICJ SUMMARIES AND EXPLANATIONS

This training module on *Access to justice for migrant children in detention* (a part of a series of training materials¹ relevant to protecting the rights of migrant children) provides an overview of rights of migrant children in relation to administrative detention. It aims to serve as a practical handbook for migrant children in EU Member States and their lawyers.

I. The Right to Liberty in International Law

General Principles

Under international human rights law, everyone has the right to liberty and security of person (Article 5 ECHR, Article 9 ICCPR, Article 6 EU Charter). Detention of asylum seekers or undocumented migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out on grounds and in accordance with procedures set out in the law. The law governing detention must be consistent with international law (*A and others v. United Kingdom*, ECtHR, Application No. 3455/05, Judgment of 19 February 2009, para 164).

International standards establish that detention in the context of control of migration should be the exception rather than the rule, and should be a measure of last resort,² to be imposed only when, following a thorough assessment of all relevant facts and circumstances in the individual case, it is demonstrably necessary in the individual case, proportionate and other less restrictive alternatives, such as reporting requirements or restrictions on residence are not feasible (*Saadi v. United Kingdom*).³

Article 31 of the [Refugee Convention](#) and associated standards and guidance,⁴ establishes a presumption against detention, and the principle that detention must be justified as necessary in a particular case. In accordance with these principles, detention of asylum seekers and refugees:

- must never be automatic,
- should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case,
- should never be used as a punishment.

The detention of migrant children in migration must be considered in light of the principle of the best interests of the child. Several authoritative international standards provide that, in light of the best interests of the child principle, children should never be detained for the purposes of migration control (*See below II.*).

¹ These training materials on access to justice for migrant children were developed as part of the FAIR (Fostering Access to Immigrant children's Rights) project and include the following training modules:

0. Guiding principles and definitions,
 - I. Access to fair procedures including the right to be heard and to participate in proceedings,
 - II. Access to justice in detention,
 - III. Access to justice for economic, social and cultural rights,
 - IV. Access to justice in the protection of their right to private and family life,
 - V. Redress through international human rights bodies and mechanisms,
 - VI. Practical handbook for lawyers when representing a child.

Note: It is recommended that these training materials be read together with the [ICJ Practitioners Guide No. 6 on Migration and International Human Rights Law](#), Geneva 2014

² UN Working Group on Arbitrary Detention (WGAD), *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82; *European Guidelines on accelerated asylum procedures*, CMCE, principle XI.1.

³ *Saadi v. United Kingdom*, ECtHR, Application No. 13229/03, 29 January 2008, paras. 70-74

⁴ the *Geneva Convention Relating to the Status of Refugees* of 1951, and its *Protocol Related to the Status of Refugees* of 1967 (altogether, the *Geneva Refugee Convention*), UNHCR Guidelines Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention

International Covenant on Civil and Political Rights

Article 9.1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

International Convention on the Rights of Migrant Workers and Members of Their Families

Article 16. 1. Migrant workers and members of their families shall have the right to liberty and security of person. ...4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. ...

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (ECHR)

Article 5 – Right to liberty and security 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

UNHCR, **Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention** (2012)

Guideline 3: Detention must be in accordance with and authorised by law

Guideline 4: Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances

- Guideline 4.1: Detention is an exceptional measure and can only be justified for a legitimate purpose
 - to protect public order:
 - o to prevent absconding and/or in cases of likelihood of non-cooperation;
 - o in connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
 - o for initial identity and/or security verification;
 - o in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention;
 - to protect public health;
 - to protect national security.
- Guideline 4.2: Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose
- Guideline 4.3: Alternatives to detention need to be considered

Guideline 5: Detention must not be discriminatory

a) What is deprivation of liberty?

In international human rights law not all restrictions of a person's freedom of movement are considered to amount to a deprivation of liberty tantamount to detention.

The identification of whether restrictions of freedom of movement amount to deprivation of liberty in human rights law does not depend solely on the classification/characterization accorded by

national law, but rather takes into account the reality of the quality and cumulative effect of the restrictions imposed on the individual concerned.⁵

Persons accommodated at a facility classified as a "reception", "holding" or "accommodation" centre may, depending on the nature of the restrictions placed on their freedom of movement, and the cumulative impact of such restrictions, be considered to be deprived of their liberty.

In assessing whether restrictions on liberty amount to deprivation of liberty under international human rights law, relevant factors include the type of restrictions imposed; their duration; their effects on the individual; and the manner of implementation of the measure (*Engel and Others v. Netherlands*, ECtHR, Plenary, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1986, para. 59; *Guzzardi v. Italy*, ECtHR, Plenary, Application No. 7367/76, Judgment of 6 November 1980, para. 92). There is no clear line between restrictions on freedom of movement and deprivation of liberty: the difference is one of degree or intensity, not one of nature or substance (*Guzzardi v. Italy*, ECtHR, Plenary, Application No. 7367/76, Judgment of 6 November 1980, paras 92 and 93).

***Guzzardi v. Italy*, ECtHR, Application No. 7367/76, Judgment of 6 November 1980**

92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation and 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 (...).

93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 (...) depends.

***Amuur v. France*, ECtHR, Application No. 19776/92, Judgment of 25 June 1996**

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. ... Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty - inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty. In that connection account should be taken of the fact 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. ... Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal

⁵ *Peers v. Greece*, ECtHR, Application No. 28524/95, Judgment of 19 April 2001, paras. 67-75; *Ilascu and Others v. Russia and Moldova*, ECtHR, GC, Application No. 48787/99, Judgment of 8 July 2004; *M.S.S. v. Belgium and Greece*, ECtHR, paras. 366-368

liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.

b) Prescription by law, arbitrariness, necessity and proportionality

An essential safeguard against arbitrary detention is that all detentions must be adequately prescribed by law. This means:

- That the grounds for detention and procedures for imposing it must have a clear basis in national law;
- that national law and procedures should be of sufficient quality to protect the individual from arbitrariness (*Čonka v. Belgium*, ECtHR, para. 39). This requires that the law should be accessible, precise and foreseeable.

In addition to having a clear basis in law, detention must not be arbitrary, unnecessary or disproportionate.

- The ICCPR prohibits any detention that is "arbitrary" (Article 9)⁶
- The ECHR provides for the lawfulness of detention on a series of specified legitimate purposes of detention. In relation to immigration detention, it permits detention in three specific situations:
 - To prevent unauthorized entry to the country (Article 5.1.f)
 - Pending deportation or extradition (Article 5.1.f).
 - The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law (Article 5.1.b).⁷

Under Article 9 of the ICCPR, as well as in international refugee law in regards to asylum seekers, the State must show that the detention was reasonable, necessary and proportionate in the circumstances of the individual case, in order to establish that detention is not arbitrary.

The European Court of Human Rights has held that, in order to avoid arbitrariness, immigration detention must, in addition to complying with national law:

- (a) be carried out **in good faith** and not involve deception on the part of the authorities;
- (b) be closely connected to a **permitted ground**;
- (c) the **place and conditions** of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to people who have fled from their own country, often in fear of their lives, so the specific vulnerable situation of the person must be taken into consideration (*M.S.S. v. Belgium and Greece*, ECtHR, Application No. 30696/09, 21 January 2011);
- (d) the **length of the detention must not exceed that reasonably required** for the purpose pursued.

Saadi v. United Kingdom, ECtHR, Application No. 13229/03, 29 January 2008

The applicant, an Iraqi Kurd asylum seeker, was detained in the UK in a centre used for asylum seekers considered unlikely to abscond and whose applications could be dealt with by the "fast-track" procedure, after he was granted "temporary admission". He was given a standard form with the reasons for his detention and his rights, but which did not explain that he was being detained under the "fast-track" procedure. The applicant's asylum claim was initially refused, but after being released, he was subsequently

⁶ *F.K.A.G. et al. v. Australia*, Human Rights Committee, Communication No. 2094/2011, Views of 28 October 2013, UN Doc. CCPR/C/108/D/2094/2011 (2013), para. 9.3.

⁷ See *O.M. v. Hungary* (Application no. 9912/15), 5 July 2016, paras. 42 – 44 and 48.

granted asylum after successfully appealing. The Court interpreted Article 5(1)(f) ("detention of a person to prevent his effecting an unauthorized entry") as covering those who had surrendered themselves to the authorities and had applied for permission to enter, whether by way of asylum or otherwise. The Court found that seven-day detention of a "temporarily admitted" asylum seeker under the "fast-track" procedure was non-arbitrary and consistent with Article 5(1). The 76-hour delay in providing the individual with the real reasons for his detention did not satisfy the promptness requirement of Article 5(2). General statements – such as parliamentary announcements – could not replace the need for the individual being directly informed.

Para. 65: "On this point, the Grand Chamber agrees [...] that, until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to "prevent his effecting an unauthorised entry". It does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f)."

Para. 74: "To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, 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" (see *Amuur*, cited above, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued."

Para. 84: "The Chamber found a violation of this provision, on the grounds that the reason for detention was not given sufficiently "promptly". It found that general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention."

***Suso Musa v. Malta*, ECtHR, Application No. 42337/12, 23 July 2013**

This case concerned an asylum seeker from Sierra Leone. The applicant complained in particular that his detention had been unlawful and that he had not had an effective means to have the lawfulness of his detention reviewed.

Examining the applicant's complaints of unlawful detention and lack of access to effective remedies, the Court found a violation of Articles 5(1) and 5(4) of the Convention.

61. The Court finds it appropriate to point out that, as the applicant and the third-party intervener have submitted, had these remedies been effective in terms of their scope and speed, issues in relation to accessibility might also arise, particularly in respect of constitutional court proceedings. The Court notes the apparent lack of a proper system enabling immigration detainees to have access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of a detainee under the Immigration Act making use of legal aid – despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade and who, as submitted by the Government, have no means of subsistence – appears merely to highlight this deficiency. The Court notes that, although the authorities are not obliged to provide free legal aid in the context of detention proceedings (...), the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy (...).

***Popov v. France*, ECtHR, Application Nos. 39472/07 and 39474/07, (19 January 2012)**

124: However, the Court notes that the law does not provide for the possibility of placing minors in administrative detention. As a result, children "accompanying" their parents find themselves in a legal vacuum, preventing them from using any remedies available to their parents. In the present case, there had been no order of the prefect for their removal that they could have challenged before the courts. Similarly, there had been no decision ordering their placement in administrative detention and the liberties and detention judge was therefore unable to review the lawfulness of their presence in the administrative

detention centre. The Court thus finds that they were not guaranteed the protection required by the Convention.¹²⁵ Accordingly, there has been a violation of Article 5 § 4 of the Convention in respect of the children.

UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)

Guideline 7: Indefinite detention is arbitrary and maximum limits on detention should be established in law

c) Detention of particularly vulnerable persons

Deprivation of liberty for immigration control must not be imposed without an examination of the particular situation of the individuals concerned, including a detailed **assessment of their potential vulnerabilities**.⁸

Detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the circumstances of the individual case, **violate the prohibition against torture and other cruel, inhuman or degrading treatment** (enshrined in international standards including article 7 of the ICCPR, article 3 of the ECHR, article 4 of the EU Charter of Fundamental Rights, article 37(a) of the Convention on the Rights of the Child and articles 1 and 16 of the Convention against Torture).

⁸Saadi v. the United Kingdom [GC], App. No 13229/03 (29 January 2008), para.66; Mohamad v. Greece, App. No. 70586/11, (11 December 2014), para. 44, Muskhadzhiyeva and Others v. Belgium, App. No. 41442/07, (19 January 2010); Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. No 13178/03, (12 October 2006). See also Report of the Special Rapporteur on the human rights of migrants on his mission to Greece, UN Doc A/HRC.35/25/ Add.2 para 52, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/25/Add.2

II. The rights and principles related to the detention of migrant children

Migrant children⁹ should be first and foremost **treated as children**. Persons who claim to be children should be treated as such until proven otherwise (PACE res 2020(2014), para 9.4).

The best interests of the child should be a primary consideration in all actions concerning children (Article 3 CRC), these must be protected and respected by states.

A Joint General Comment of the CPRMW and the CRC of 2017 provides that: "States parties [to the CRC and CMW] should assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status. Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration."¹⁰

Convention on the rights of the child

Article 37: States Parties shall ensure that: ... (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; ...

The second sentence of Art 37 (b) CRC, permitting detention of children as a measure of last resort, is not applicable in immigration proceedings as unauthorized entry or stay in a country should not constitute a criminal offence and cannot have the same consequences as a criminal offence (see joint GC 4 and 23 of CRC and CMW, below, para 10).

The **Committee on the Rights of the Child** has made it clear that detention of children for the purposes of immigration control is **never in their best interests and is not justifiable**. Children should never be criminalized or subject to punitive measures because of their or their parent's migration status; the detention of a child for these reasons constitutes a violation of the rights of the child. (joint GC 4 and 23 of CRC and CMW, below, para 5; CRC *Report of the 2012 Day of General Discussion- The Rights of all children in the context of international migration, 2012*,).

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return

Right to liberty (articles 16 and 17 CMW; article 37 CRC)

5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.

⁹ Children are persons under the age of 18 (for more information on the definitions, please see the Training module 0. Principles and definitions).

¹⁰ Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, para 32(e).

6. Immigration detention is understood by the Committees as any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents', migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty. "Reasons related to migration status" is understood by the Committees to be a person's migratory or residence status, or the lack thereof, whether relating to irregular entry or stay or not, consistent with the Committees' previous guidance.

7. In addition, both the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents' migration status. Irregular entry and stay do not constitute crimes per se against persons, property or national security. Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.

8. The Committee on the Rights of the Child, in relation to unaccompanied and separated children, stated in 2005 that children should not be deprived of their liberty and that 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.

9. The Committees emphasize the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, even when they are detained for a short period of time or with their families. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that "within the context of administrative immigration enforcement ... 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".

10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.

11. Instead, States should adopt solutions 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 their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family.

12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social

and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children's holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced.

Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion - The Rights of All Children in the Context of International Migration*, (2012)

32. Immigration detention and it being a clear violation of the Convention was a subject that was repeatedly discussed and underscored. It was emphasised that regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable. It was highlighted that international research supports this view. Recommendations: (...)

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

Furthermore, the UN Committee on the Rights of the Child, the UN Special Rapporteur on the human rights of migrants (Statement of 16 May 2016) and resolutions of the Parliamentary Assembly (PACE resolutions 1707(2010), 1810(2011), 2020(2014), para 9.1) of the Council of Europe all make it clear that immigration detention of migrant children is **not in their best interest** and that detention of vulnerable individuals, including unaccompanied children is prohibited in international law.

Report of the Special Rapporteur on the human rights of migrants on his mission to Greece, 24 April 2017, UN Doc A/HRC/35/25/Add.2

103. Overall, as determined by the Committee on the Rights of the Child, administrative detention based on the immigration status of the child or of his or her parents can never be in the best interest of a child. Given the incalculable detrimental effects that detention has on children's mental and physical health and development, it is utterly unacceptable for children to be detained simply because of an administrative status.

UN Special Rapporteur on the human rights of migrants: Follow up country visit to Greece, Statement of 16 May 2016

... As determined by the Committee on the Rights of the Child, **detention can never ever be in the best interest of a child**. Even under the guise of "protective custody", it is utterly unacceptable for children to be administratively detained. Alternatives to detention in the form of open shelters for families and unaccompanied minors, with appropriate counseling and services, must be established as a matter of urgent priority.

The UN Special Rapporteur on Torture¹¹ said that " (...) 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. 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. (...) States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status."

¹¹ UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, [Report on Children Deprived of Liberty](#), UN Doc. A/HRC/28/68 (2015), para 80

UNHCR Guidelines also provide that child **asylum seekers or refugees** should not be detained.

UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997)

7.6 Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.

7.7 States which, regrettably and contrary to the preceding recommendation, may keep children seeking asylum in detention, should, in any event, observe Article 37 of the Convention of the Rights of the Child, according to which detention shall be used only as a measure of last resort and for the shortest appropriate period of time. If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and, placed in other appropriate accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families. The underlying approach to such a programme should be 'care' and not 'detention'. Facilities should not be located in isolated areas where culturally-appropriate community resources and legal access may be unavailable.

7.8 During detention, children have the right to education which should optimally take place outside the detention premises in order to facilitate the continuance of their education upon release. Under the UN Rules for Juveniles Deprived of their Liberty E-38, States are required to provide special education programmes to children of foreign origin with particular cultural or ethnic needs.

A number of standards also establish that vulnerable people should not, as a rule, be placed in detention **and specifically, unaccompanied minors should never be detained** (CoE PACE Resolution 1707 (2010), para 9.1.9).

Parliamentary Assembly of the Council of Europe, *Resolution 1707 (2010), Detention of asylum seekers and irregular migrants in Europe*, paras 9, 9.1 and 9.19

9. In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

9.1. follow 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible. These principles aim to ensure that: [...]

9.1.9. vulnerable people should not, as a rule, be placed in detention and specifically unaccompanied minors should never be detained;

Parliamentary Assembly of the Council of Europe, *Resolution 1810 (2011) Unaccompanied children in Europe: issues of arrival, stay and return*, para 5.9

5. The Assembly believes that child protection rather than immigration control should be the driving concern in how countries deal with unaccompanied children. With this in mind, it establishes the following set of 15 common principles, which it invites member states to observe and work together to achieve:[...]

5.9. **no detention of unaccompanied children on migration grounds should be allowed.** Detention should be replaced with appropriate care arrangements, preferably foster care, with living conditions suitable for children's needs and for the appropriate period of time. Where children are accommodated in centres, they must be separated from adults;

Parliamentary Assembly of the Council of Europe, *Resolution 2020 (2014), The alternatives to immigration detention of children*, para 3, 9.1

3. The Assembly recalls its position expressed in Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return, which states that unaccompanied children should never be

detained. The detention of children on the basis of their or their parents' immigration status is contrary to the best interests of the child and constitutes a child rights violation as defined in the United Nations Convention on the Rights of the Child.

9. The Assembly considers that it is urgent to put an end to the detention of migrant children and that this requires concerted efforts from the relevant national authorities. The Assembly therefore calls on the member States to:

9.1. acknowledge that it is never in the best interests of a child to be detained on the basis of their or their parents' immigration status;

Some international standards, including those of the Human Rights Committee, fall short of requiring that children should never be detained, but provide that a child should only be detained as a **last resort and for the shortest** appropriate period of time (Art 37(b) CRC, Human Rights Committee, General Comment 35, para 18 expresses this principle in the context of immigration detention of a child; see also article 11(2) of the EU Reception Conditions Directive (*below*).

UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention*, 2012

Guideline 9.2: Children

51. General principles relating to detention outlined in these Guidelines apply *a fortiori* to children, who should in principle not be detained at all. The United Nations Convention on the Rights of the Child (CRC) provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children:

- The **best interests of the child** shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22, CRC).
- There shall be **no discrimination** on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members (Article 2, CRC).
- Each child has a **fundamental right to life, survival and development** to the maximum extent possible (Article 6, CRC).
- Children should be assured the **right to express their views freely** and their views should be given "due weight" in accordance with the child's age and level of maturity (Article 12, CRC).
- Children have the right to **family unity** (*inter alia*, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to **special protection and assistance** provided by the State.
- Article 20(2) and (3) of the CRC require that States Parties shall, in accordance with their national laws, ensure **alternative care for such a child**. Such care could include, *inter alia*, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

- Article 22 of the CRC requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive **appropriate protection and assistance**.
- Article 37 of the CRC requires States Parties to ensure that the **detention of children be used only as a measure of last resort** and for the **shortest appropriate period of time**.
- Where separation of a child or children from their parents is unavoidable in the context of detention, both parents and child are entitled to essential information from the State on the whereabouts of the other unless such information would be detrimental to the child (Article 9(4), CRC).

52. Overall an **ethic of care**—and not enforcement—needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien”. States should *“utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”*

53. All appropriate alternative care arrangements should be considered in the case of **children accompanying their parents**, not least because of the well-documented deleterious effects of detention on children’s well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child.

54. As a general rule, **unaccompanied or separated children** should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent childcare authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child’s proper development (both physical and mental) while longer-term solutions are being considered. A primary objective must be the best interests of the child.

55. Ensuring accurate age assessments of asylum-seeking children is a specific challenge in many circumstances, which requires the use of appropriate assessment methods that respect human rights standards. Inadequate age assessments can lead to the arbitrary detention of children. It can also lead to the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.

56. Children who are detained benefit from the same **minimum procedural guarantees** as adults, but these should be tailored to their particular needs (see Guideline 9). An independent and qualified **guardian as well as a legal adviser** should be appointed for unaccompanied or separated children. During detention, children have a **right to education**, which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their **recreation and play, including with other children**, which is essential to a child’s mental development and will alleviate stress and trauma (see also Guideline 8).

57. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.

In its **General Comment 35** on article 9 of the ICCPR (the right to liberty and security of person) the Human Rights Committee underscored, in the context of its clarification of States Parties' obligations in relation to immigration detention that "children should not be deprived of liberty, **except as a measure of last resort and for the shortest appropriate period**" (para 18).

The **UN Human Rights Committee** has expanded at length on the meaning of "arbitrary deprivation of liberty", pursuant to article 9 of the ICCPR, in its **General Comment 35**. In respect of immigration detention:

18. (...) Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.¹²

Also relevant to detention of children in migration is States' obligation to take all appropriate measures to ensure that a migrant child is protected against all forms of **discrimination** or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. (Art 2(2) CRC, Art 24 ICCPR)

Furthermore, the detention of a migrant child may - depending on the circumstances - amount to a violation of the prohibition of cruel, inhuman or degrading treatment.

The European Court of Human Rights on 12 July 2016 issued five judgments¹³ in cases against France concerning administrative detention of children who were accompanying their parents during the deportation process. The Court concluded, that there was a violation of Article 3 ECHR (prohibiting torture) in view of the children's young age (which ranged from 7 months to 4 years, at the time of their detention) and the duration (up to 18 days) and conditions of their administrative detention. The Court considered that conditions in administrative detention centres were a source of anxiety for young children, even where material conditions in certain centres are appropriate, and held that only short term placements in centres adapted for children can be compatible with the European Convention on Human Rights. It further emphasised that States must ensure that placement in administrative detention of a child is a measure of last resort for which no alternative measure is available.

Alternatives to immigration detention of children must always be considered (HRC, *Bakhtiyari v Australia*).

***Bakhtiyari v. Australia*, Communication No. 1069/2002, Human Rights Committee, UN Doc. CCPR/C/79/D/1069/2002 (2003)**

9.3 Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

¹² 1050/2002, *D. and E. v. Australia*, para. 7.2; 794/1998, *Jalloh v. Netherlands*, paras. 8.2–8.3; see also Convention on the Rights of the Child, arts. 3, para. 1, and 37 (b).

¹³ of [A.B. and Others v France](#), [A.M. and Others v France](#), [R.C. and V.C. v France](#), [R.K. v France](#), [R.M. and Others v France](#)

EU law on the right to liberty and detention of children in migration

The EU Charter of Fundamental Rights provides among other things that everyone has the right to liberty and security of person (Article 6) and no one shall be subjected to torture or to inhuman or degrading treatment or punishment (Article 4; see also right to physical integrity (Article 3) and human dignity (Article 1)).

Charter of Fundamental Rights of the European Union

ARTICLE 6 - Right to liberty and security

Everyone has the right to liberty and security of person.

EU Directives do not exclude the detention of migrant children, where it is a measure of last resort and for the shortest possible period of time, and subject to the principle of the best interests of the child.

Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), (2013)

Article 11 Detention of vulnerable persons and of applicants with special reception needs

(...) 2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.

Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

...

6. In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the third subparagraph of paragraph 2, (...) when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 of Directive 2013/32/EU.

Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (**The Return Directive**)

Article 17. Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Directive 2011/95/EU 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 (**The Qualification Directive**)

Art 31 – Unaccompanied minors

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.
2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.
3. Member States shall ensure that unaccompanied minors are placed either:
 - (a) with adult relatives; or
 - (b) with a foster family; or
 - (c) in centres specialised in accommodation for minors; or
 - (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.
5. If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.
6. Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

Dublin Regulation

Article 28 - Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.
2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.
3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.

Where a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within the two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival.

Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).

When the requesting Member State fails to comply with the deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third subparagraph, the person shall no longer be detained. Articles 21, 23, 24 and 29 shall continue to apply accordingly.

4. As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.

III. Procedural rights and protection

1. Reasons for detention

A person who is arrested or detained for any reason, including for purposes of immigration control, has the right to be informed of the reason for the arrest and for detention, in a language that the person understands. Although Article 5(2) ECHR and Article 9 (2) ICCPR refer to "arrest", this obligation applies equally to all persons deprived of their liberty (*Abdolkhani and Karimnia v. Turkey*, ECtHR, paras. 136-137)

This right applies from the commencement of a deprivation of liberty, regardless of whether there is a formal order for detention. Human Rights Committee, General Comment No.35, para.28)

Reasons for arrest or detention should be provided promptly. Although whether information is conveyed sufficiently promptly will depend on the individual circumstances of each case, they should in general be provided within hours of detention. (Some delay may be permissible, for example, in order to enable the authorities to ensure that the information is provided in a language the person understands. (Human Rights Committee GC 35, para 27)

Information provided on the reasons for arrest or detention must be in simple, non-technical language using words that can be easily understood by the person. (*Čonka v Belgium* ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 50.)

The information must include the essential legal and factual grounds for the detention. A "bare indication of the legal basis" for the detention is not sufficient; in addition, there must also be some indication of the factual basis for the detention. (*Fox, Campbell and Hartley v. United Kingdom*, ECtHR, Applications Nos. 12244/86; 12245/86; 12383/86, 30 August 1990, para. 41)

The information provided must include the legal and factual grounds, in sufficient detail so as to allow the person to challenge the reasons (and legality) of his or her arrest or detention, including before a court. (*Čonka v Belgium*)

When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives. (HRC GC 35, para 28)

In addition to information about the reasons, a person who is arrested or detained should be informed of his or her rights, and the remedies available.¹⁴

International Covenant on Civil and Political Rights

Article 9.2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (...)

Convention on the Rights of the Child

Article 37: States Parties shall ensure that:... (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

International Convention on the Rights of Migrant Workers and Members of Their Families

Article 16.5. Migrant workers and members of their families who are arrested shall be informed at the time

¹⁴ See also, WGAD, *Annual Report 1998*, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999*, Principles 1 and 8.

of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 5.2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him.

Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, (1998), para. 69

Criteria for determining whether or not the custody is arbitrary

69. In order to determine the arbitrary character or otherwise of the custody, the Working Group considers whether or not the alien is able to enjoy all or some of the following guarantees:

Guarantee 1

To be informed, at least orally, when held for questioning at the border, or in the territory concerned if he has entered illegally, in a language which he understands, of the nature of and grounds for the measure refusing admission at the border, or permission for temporary residence in the territory, that is being contemplated with respect to him.

Guarantee 5

Written and reasoned notification of the measure of custody in a language understood by the applicant.

Abdolkhani and Karimnia v. Turkey, ECtHR, Application No. 30471/08, 22 September 2009

136. The Court reiterates that Article 5 § 2 contains the elementary safeguard that any person arrested should know why he or she is being deprived of liberty. This provision is an integral part of the scheme of protection afforded by Article 5: ... any person arrested must be told, in simple, non-technical language that can be easily understood, the essential legal and factual grounds for the arrest, so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features. ...

Eminbeyli v. Russia, ECtHR, Application No. 42443/02, 26 February 2009

66. ... The notion of "promptly" in the latter provision indicates greater urgency than that of "speedily" in Article 5 § 4 [...]. Even so, a period of approximately five months from the lodging of the application for release to the final judgment does appear, prima facie, difficult to reconcile with the notion of "speedily". However, in order to reach a firm conclusion, the special circumstances of the case have to be taken into account

67. ... the Court reiterates that Article 5 § 4 of the Convention imposes on Contracting States the duty to organise their judicial system in such a way that their courts can meet the obligation to examine detention matters speedily

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988)

Principle 11.2

A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible

for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

UNHCR, [*Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*](#) (2012)

Guideline 7

47. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees: (i) to be informed at the time of arrest or detention of the reasons for their detention and their rights in connection with the order, including review procedures, in a language and in terms which they understand.

Committee of Ministers of the Council of Europe, [*Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures*](#) (2009)

Guideline XI.5

Detained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies. They should be given the immediate possibility of contacting a person of their own choice to inform him/her about their situation, as well as availing themselves of the services of a lawyer and a doctor.

Human Rights Committee, General Comment No.35, para.28:

(...) "arrest" means the commencement of a deprivation of liberty, that requirement applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.¹⁵ For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives.¹⁶

EU law

EU law allows for detention to be ordered by judicial or administrative authorities (Article 15(2) of the Returns Directive and Article 9(2) of the recast Reception Directive). "Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based."(Reception Conditions Directive, para 9(2)).

Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (**The [Return Directive](#)**)

Article 15 Detention

(...) 2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

- (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;
- (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as

¹⁵ HRC, General Comment No 35, para 24.

¹⁶ HRC, General Comment No 35, para 28, HRC 1402/2005, *Krasnov v. Kyrgyzstan*, para. 8.5; general comment No. 32, para. 42; see Committee on the Rights of the Child, general comment No. 10, para. 48.

possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings. The third-country national concerned shall be released immediately if the detention is not lawful.

2. Rights following arrest or detention

a) Right of access to and assistance of a lawyer

Migrants who are detained have the right to prompt access to a lawyer, and must be promptly informed of this right.

In addition, international standards also clarify that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter.¹⁷

Where necessary, free legal assistance should be provided.

Translation of key legal documents, as well as interpretation during consultations with the lawyer and during proceedings must be provided if the individual does not speak or understand the language used by the authorities.

Convention on the Rights of the Child

Article 37. (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Committee on the Rights of the Child, General Comment No. 6, *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6 (2005)

36. In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

63. (...) In order to effectively secure the rights provided by article 37 (d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988)

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

¹⁷ *A. v. Australia*, Human Rights Committee Communication No. 560/1993, Views of 30 April 1997, UN Doc. CCPR/C/59/D/560/1993 (1997), para. 9.3, 9.5

UNHCR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#) (2012), 47 (ii)

Guideline 7

47. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees: (...) (ii) to be informed of the right to legal counsel. Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights. Communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting.

Although Article 5 ECHR does not expressly provide for the right of detainees to have access to a lawyer, the European Court of Human Rights has held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate Article 5.4 ECHR where they prevent the detainee from effectively challenging the lawfulness of detention (Ocalan v Turkey, para. 72, endorsed by the judgment of the Grand Chamber, para. 70; Suso Musa v Malta)

[Suso Musa v. Malta](#), ECtHR, Application No. 42337/12, Judgment of 23 July 2013

Suso Musa, a Sierra Leone national entered Malta in an irregular manner by boat and was arrested by the police. He was placed in detention and presented with a document containing both a Return Decision and a Removal Order. Following that he applied for asylum. His application was rejected by the Office of the Refugee Commissioner and on appeal by the Refugee Appeals Board. Meanwhile, pending the above asylum proceeding, he challenged the legality of his detention before the Immigration Appeals Board (IAB). His application was rejected more than a year after. The ECtHR found a violation of Article 5 § 1 on account of the duration of the applicant's detention coupled with the inadequate conditions at the barracks where he was held and a violation of Article 5 § 4 on account of the fact that none of the remedies available in Malta could be considered speedy for the purposes of that provision.

61. (...) although the authorities are not obliged to provide free legal aid in the context of detention proceedings [...], the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy.

EU law

[Reception Conditions Directive](#)

[Article 5\(1\)](#)

1. Member States shall inform applicants, within a reasonable time not exceeding 15 days after they have lodged their application for international protection, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.

Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, in a language that the applicant understands or is reasonably supposed to understand. Where appropriate, this information may also be supplied orally.

b) Right to medical examination and medical treatment

On first entering into detention, there is also a right of prompt access to a doctor of one's choice, who can assess for physical health conditions as well as mental health issues which may affect justification of any detention, place of detention, or medical treatment or psychological support required during detention.¹⁸

c) Right to inform others of detention

All persons deprived of their liberty, including children deprived of their liberty in connection with their immigration status, have a right to notify or have notified a family member, friend, or other person with a legitimate interest in the information, of the fact and place of detention, and of any subsequent transfer, is an essential safeguard against arbitrary detention, consistently protected by international standards. (Article 17.2(d) CPED; Article 10.2, *UN Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 16, *Body of Principles for the Protection of all persons deprived of their liberty*; WGAD, *Annual Report 1998*, para. 69, Guarantee 6)

Committee of Ministers of the Council of Europe, *Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures* (2009)

Guideline XI.5.

Detained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies. They should be given the immediate possibility of contacting a person of their own choice to inform him/her about their situation, as well as availing themselves of the services of a lawyer and a doctor.

d) Right of access to UNHCR

Persons seeking asylum have the right, following detention, "to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available." (*UNHCR Guidelines on Detention*, Guideline 7(vii))

They should be informed of this right promptly following detention, as it is established by the *UN Body of Principles for the Protection of all Persons Deprived of their liberty*.

The *Council of Europe Guidelines on Accelerated Asylum Procedures* also affirm that this right must be applied in accelerated asylum procedures.

UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)

Guideline 7

47. (vii) (...) Access to other bodies, such as an available national refugee body or other agencies including ombudsman offices, human rights commissions or NGOs, should be available as appropriate. The right to communicate with these representatives in private, and the means to make such contact, should be made available.

¹⁸ *Algür v. Turkey*, ECtHR, Application No. 32574/96, Judgment of 22 October 2002, para. 44. *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 24: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." See also, *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 119, Guideline XI.5.

Guideline 8

48. (vii) Asylum-seekers in detention should be able to make **regular contact** (including through telephone or internet, where possible) and receive visits from **relatives, friends, as well as religious, international and/ or non-governmental organisations**, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988)

Principle 16

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. Judicial review of detention

The right to independent judicial review of the lawfulness of the decision to detain and to have the necessity and proportionality of continuing detention reviewed by a court at regular intervals are fundamental protections against arbitrary detention, as well as against torture or ill-treatment in detention. These rights are of vital importance to detained migrants.

The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, including to detained migrants. The right requires that there be prompt access to court when a person is first detained, but also that thereafter there are regular judicial reviews of the lawfulness of the detention.¹⁹

The right of a person to take proceedings to challenge the legality of their detention, serves among other things to protect against arbitrary detention and torture and other ill-treatment- and thus may not be restricted including on grounds of national security (Kurt v Turkey, ECtHR, para.123, Al-Nashif v Bulgaria, ECtHR, para.94)

International Covenant on Civil and Political Rights

Article 9.4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Convention on the Rights of the Child

Article 37. (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 5.4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful..

¹⁹ [A. v. Australia](#), Human Rights Committee Communication No. 560/1993, Views of 30 April 1997, UN Doc. CCPR/C/59/D/560/1993 (1997), para. 9.3, 9.5

UN Convention on the Rights of Migrant Workers and Members of Their Families

Article 16.6. Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.

... **8.** Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

Popov v. France, ECtHR, Application Nos. 39472/07 and 39474/07, (19 January 2012) paras 119, 124-125

124: However, the Court notes that the law does not provide for the possibility of placing minors in administrative detention. As a result, children “accompanying” their parents find themselves in a legal vacuum, preventing them from using any remedies available to their parents. In the present case, there had been no order of the prefect for their removal that they could have challenged before the courts. Similarly, there had been no decision ordering their placement in administrative detention and the liberties and detention judge was therefore unable to review the lawfulness of their presence in the administrative detention centre. The Court thus finds that they were not guaranteed the protection required by the Convention.¹²⁵ Accordingly, there has been a violation of Article 5 § 4 of the Convention in respect of the children.

Al-Nashif v. Bulgaria, ECtHR, Application No. 50963/99, Judgment of 20 June 2002

92. The Court reiterates that everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement. The Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals as well as their personal security. [...]

94. [...] National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved [...].

Kurt v. Turkey, ECtHR, Case No. 15/1997/799/1002, Judgment of 25 May 1998

123. It must also be stressed that the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention [...]. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

UNHCR Guideline 7, para 47 (v)

(v) irrespective of the reviews in (iii) and (iv), either personally or through a representative, the right to challenge the lawfulness of detention before a court of law at any time needs to be respected. The burden of proof to establish the lawfulness of the detention rests on the authorities in question. As highlighted in Guideline 4, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case.

Under UNCHR Guidelines, in addition to the right to challenge the lawfulness of detention, asylum-seekers have the right to be brought promptly before a judge or other independent authority for review of detention, automatically. (Guideline 8 para 47(iii) UNHCR Guidelines). Under the ECHR and ICCPR provisions this right is guaranteed only to those deprived of their liberty in connection with a criminal offence.

The Guidelines also provide that asylum-seekers have the right to periodic review of the continuing need for detention at regular intervals (UNCHR Guideline 8, para 47 (iv))

UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)

Guideline 8 para 47(iii) UNHCR Guidelines

to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release.

Guideline 7, para 47 (iv)

following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.

Requirements of effective judicial review of detention

In each such proceeding, the individual and his or her representative must have the opportunity to be heard before the court. (See *FAIR Training materials I. on Procedural rights and the right to be heard*).

The right to judicial review of detention must be set out in the law.²⁰

In order to comply with the requirements of international human rights law, judicial review of detention must:

- Be carried out by an independent and impartial judicial body. (HRC, GC 35, para 45, HRC, *Rameka v. New Zealand*, para. 7.4)
- Be of sufficient scope and have sufficient powers to be effective.
- It requires real and not merely formal review of the grounds and circumstances of detention, and judicial discretion to make a legally binding order for release (*A v Australia*²¹)

²⁰ *S.D. v. Greece*, ECtHR, para.73

²¹ *A. v. Australia*, Human Rights Committee Communication No. 560/1993, Views of 30 April 1997, UN Doc. CCPR/C/59/D/560/1993 (1997)

- Meet standards of due process appropriate to the type and duration of the deprivation of liberty (including the principle of equality of arms and the right to be heard).
- Result in a hearing and decision without delay on the legality of detention.²²
- Result on the release of the detainee if the detention is unlawful (ZNS v Turkey, APP NO.. , Kadem v. Malta, no. 55263/00, 9 January 2003, para 41, Djalti v Bulgaria, Application no. 31206/05, 12 March 2013, para 68)

Z.N.S. v. Turkey, ECtHR, Application No. 21896/08, 19 January 2010

60. ...the purpose of Article 5 § 4 is to guarantee to persons who are arrested and detained the right to the judicial supervision of the lawfulness of the measure to which they are thereby subjected A remedy must be made available during a person's detention to allow that person to obtain a speedy judicial review of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy ... must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision

A. and others v. The United Kingdom, ECtHR, Application No. 3455/05, 19 February 2009

202. Article 5 § 4 ... entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. ... The review should ... be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 [...]. The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful [...].

203. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question204. Thus, the proceedings must be adversarial and must always ensure "equality of arms" between the parties

C. v. Australia, Human Rights Committee Communication No. 900/1999, Views of 13 November 2002, UN Doc. CCPR/C/76/D/900/1999 (2002)

8.3 ... the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court ... to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention ... constitutes a violation of article 9, paragraph 4.

²² Shakurov v. Russia, ECtHR, Application No. 55822/10, Judgment of 5 June 2012, para. 187.

IV. Detention conditions and treatment of detainees

In addition to regulating the grounds and procedures for detention of migrants, international human rights law imposes duties on the authorities to respect the rights of persons the State decides to hold in detention, including in relation to their immigration status. These obligations pertain, among other things to the treatment of people who are detained and the conditions of their detention.

In particular, under international law, States are required to ensure that detained persons are treated with humanity and respect for their dignity (article 10.1 of the ICCPR, article 37(c) of the CRC, Article 1 ECHR, Article 4 EU Charter of Fundamental Rights) and that they are not subjected to torture and other cruel, inhuman and degrading treatment (article 7 ICCPR, article 37(a) of the CRC, art 3 ECHR, articles 1 and 16 of CAT, article 4 of the EU Charter of Fundamental Rights). Moreover, in accordance with article 37(c) every child deprived of his or her liberty must be treated "in a manner which takes into account the account of the needs of persons of his or her age".

Furthermore, with the exception of proportionate restrictions that are necessitated by the deprivation of a person's liberty, the human rights of a detainee, including the right to health, must be respected and protected, without discrimination including on the basis of the detainee's immigration status. For example, restrictions on a detainee's rights to family life, to manifest religious or other beliefs and freedom of expression may be prescribed by law, and must be both necessary and proportionate to achieve an aim that is considered to be legitimate under international human rights standards.

States should ensure that places where people are detained are monitored by bodies that are independent of the detaining authorities. (Article 2 of the European Convention for the Prevention of Torture, Principle 29 of the Body of Principles for the Treatment of All Persons under Any Kind of Detention or Imprisonment)

Indeed, States that are Party to the Optional Protocol to the Convention against Torture²³ are required to establish one or more independent national mechanisms for the prevention of torture and cruel, inhuman or degrading treatment or punishment with powers of access to detention centres, as well as granting access of the SPT to all places where people are deprived of their liberty.²⁴

International standards on conditions of detention including immigration detention, aimed at ensuring respect for the rights of detainees, are set out in: the [UN Standard Minimum Rules on the Treatment of Prisoners](#) (known as the Nelson Mandela Rules); the UN [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#); the [United Nations Rules for the Protection of Juveniles Deprived of their Liberty](#); and the [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, UNHCR Guidelines on Detention](#) The standards of the [CPT](#) (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)) [standards](#).

International Covenant on Civil and Political Rights

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

²³ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT)

²⁴ The *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and, in the European system, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) have established independent committees of experts – respectively the UN Subcommittee on Prevention of Torture (SPT) and the European Committee for the Prevention of Torture (CPT) - with mandates to visit all places where people are deprived of their liberty by the State or its agents without limitations.

Article 10.1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 2(1): Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Article 16(1): Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture ..., when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ...

Convention on the rights of the child

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. ...

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; ...

Article 9.4. Where ... separation [from parents] results from any action initiated by a State Party, such as the detention, imprisonment, ... of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

International Convention on the Rights of Migrant Workers and Members of Their Families

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 16.2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

Article 17

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.

4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.

7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.

8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

[Convention on the Rights of Persons with Disabilities](#)

Article 15.1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. Article 17. Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

UNHCR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#) (2012)

Guideline 6: Conditions of detention must be humane and dignified

Committee of Ministers of the Council of Europe, [Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures](#) (2009)

Guideline XI.3

In those cases where other vulnerable persons are detained, they should be provided with adequate assistance and support.

1. Appropriateness of place of detention, in particular for children and families

In those exceptional cases where children are detained, they should be held in facilities and conditions appropriate to their age (see, [Art 37 CRC](#); see also [Aerts v Belgium](#), ECtHR, Application No. 25357/94, (1998) , para 46).

Detention of children in inappropriate facilities may, depending on the circumstances, constitute a violation of the prohibition of torture and other cruel, inhuman or degrading treatment and the right to liberty. (see Box below about the case of [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#)).

While detention of a migrant at an airport upon their arrival, may be acceptable for a short period of a few hours, more prolonged detention without appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment.²⁵

Police stations and prisons are generally considered unsuitable locations for people detained in relation to their immigration status to be detained. It should not be punitive in nature (Guideline 8, para 48(iii) of the UNHCR detention guidelines, Human Rights Committee, Consideration of reports submitted by States Parties under article 40 of the Covenant, [Concluding observations of the Human Rights Committee: Austria](#), UN Doc. CCPR/C/AUT/CO/4 (2007), para. 17.).

²⁵European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (*CPT Standards*, CPT/Inf/E (2002) 1 – Rev. 2010, page 54.

Given that the conditions in police stations are generally inadequate for prolonged periods of detention, the time a detainee spends there should be kept to the absolute minimum (*Charahili v. Turkey*, ECtHR, Application No. 46605/07, Judgment of 13 April 2010, paras. 76-78)

CPT Standards, Extract from the 10th General Report [CPT/Inf (2000) 13]

Page 78, para 27. (...) examples of pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynaecological examinations and/or delivery. Such an approach is completely unacceptable, and could certainly be qualified as inhuman and degrading treatment. Other means of meeting security needs can and should be found.

Furthermore, international standards clarify that asylum seekers and migrants detained on grounds related to their migration status should be held separately from persons detained in connection with criminal charges (including those detained pending charge or trial or following conviction).

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, Application No. 13178/03, Judgment of 12 October 2006

Mubilanzila Mayeka and Kaniki Mitunga v. Belgium concerned an unaccompanied child held in detention. A five-year-old child was detained in a transit centre for adults for two months without appropriate support. The child had travelled from the Democratic Republic of Congo without the necessary travel papers in the hope of being reunited with her mother, who had obtained refugee status in Canada. The child was subsequently returned to the Democratic Republic of Congo, despite the fact that she had no family members waiting there to care for her. The ECtHR ruled that in the absence of any risk of the child seeking to evade the supervision of the Belgian authorities, detaining her in a closed centre for adults had been unnecessary. The ECtHR also noted that other measures – such as placing her in a specialised centre or with foster parents – could have been taken that would have been more conducive to the best interest of the child as enshrined in Article 3 of the CRC. Detention of a five year old unaccompanied asylum seeker in an adult detention centre without proper arrangements for her care violated Article 3 ECHR, since the conditions of detention were not adapted to her position of extreme vulnerability; the Court also found a violation of her mother's Article 3 rights because of anxiety and uncertainty in relation to her daughter's detention.

The ECtHR found violations of Articles 3, 5 and 8 of the ECHR.

Other cases, finding a violation of the prohibition of torture and other ill-treatment based on the conditions of confinement, where the migrant child was detained along with a parent, include:

In *Muskhadzhiyeva and Others v. Belgium* the ECtHR ruled that the month-long detention in a closed transit centre of a mother and her four children, aged between seven months and seven years, constituted a violation of Article 3 of the ECHR. In reaching its conclusions, the Court drew attention to the fact that the centre was "ill-equipped to receive children", with serious consequences for their mental health.

The European Court of Human Rights ruling in the case of Popov v. France concerning the administrative detention of a family for two weeks pending their deportation to Kazakhstan, is consistent with this ruling. The ECtHR ruled that the State violated article 3 of the ECHR insofar as the French authorities had not measured the inevitably harmful effects on the two children (who were five months and three years old) of being held in a detention centre in conditions that were "ill-adapted to the presence of children".

Similarly, in *Kanagaratnam v. Belgium* the European Court of Human Rights held that the detention of an asylum-seeking mother and her three children in a closed centre for aliens in an irregular situation for four months amounted to a breach of articles 3 and 5 of the ECHR. Despite the fact that the children were accompanied by their mother, the Court considered that, by placing them in a closed centre, the Belgian authorities had exposed them to feelings of anxiety and inferiority and had, in full knowledge of the facts, risked compromising their development.

2. Conditions of detention

Facilities where migrants are detained must be sufficiently clean, safe, and healthy to be compatible with the rights to be free from torture or other cruel, inhuman or degrading treatment and to be treated with humanity and with respect for the inherent dignity of the human person, and the right to health (Article 10 ICCPR).

In the context of increasing use of immigration detention and detaining ever-larger numbers of migrants in poor conditions and in overcrowded facilities,²⁶ have regularly been found by international human rights courts and human rights bodies to violate the right to be free from cruel, inhuman or degrading treatment.

Although detention by its nature imposes a certain level of hardship, the general principle to be applied is that conditions of detention should be compatible with human dignity and not subject detainees to a level of suffering beyond that inherent in detention.²⁷ Furthermore, economic pressures or difficulties caused by an influx of migrants do not justify a failure to comply with the prohibition of torture and other ill-treatment, given its absolute nature or the right of detainees to be treated with dignity. (*M.S.S. v Belgium and Greece*, ECtHR, Application No. 30696/09, (2011) paras 221-222, see Box below)

M.S.S. v. Belgium and Greece, ECtHR, Application No. 30696/09, 21 January 2011

221. Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured

223. The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. ... However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision.

Suso Musa v. Malta, ECtHR, Application No. 42337/12, Judgment of 23 July 2013101. ... the Court is concerned about the appropriateness of the place and the conditions of detention endured. Various international reports have expressed concerns on the matter [...]. Both the CPT and the ICJ considered that the conditions in question could amount to inhuman and degrading treatment under Article 3 of the Convention; furthermore, those conditions must surely have been exacerbated during the Libyan crisis, a time when the applicant was in detention. In that light, the Court finds it difficult to consider such conditions as appropriate for persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country.

EU law

Article 10 of the Recast Reception Conditions Directive that should be read in light of the obligations under the EU Charter *inter alia* Articles 1 and 4 sets a number of requirements, including:

- detention of applicants shall normally take place in specialized detention facilities;
- the applicants should have access to open-air
- the applicants should have an opportunity to communicate with family members, UNHCR, legal advisers or counsellors and persons representing relevant non-governmental organizations.

²⁶ *CPT Standards, Safeguards for Irregular Migrants Deprived of their Liberty*, Extract from the 19th General Report [CPT/Inf (2009) 27], p. 61, paras. 85-89.

²⁷ *S.D. v. Greece*, ECtHR, Application No. 53541/07, Judgment of 11 June 2007, para. 45; *M.S.S. v. Belgium and Greece*, ECtHR, para.221.

a) Cumulative effect of poor conditions

The cumulative effect of a number of poor conditions may lead to violation of the prohibition on ill-treatment.²⁸ Furthermore, the longer the period of detention, the more likely that poor conditions will cross the threshold of acceptable treatment and amount to ill-treatment. The test is an objective one. Whether conditions are cruel, inhuman or degrading must also be seen in the context of the individual – it may depend on the sex, age or health of the individual detainee. The conditions may be found to be inhuman or degrading irrespective of the absence of particular evidence of an intent of the authorities to humiliate or degrade.²⁹

For those held in immigration detention, it is also relevant that they are not charged with or convicted of any crime, which should be reflected in the conditions of detention and facilities at the detention centre.

M.S.S. v. Belgium and Greece, ECtHR, Application No. 30696/09, 21 January 2011

231. The Court reiterates that it has already considered that such conditions, which are found in other detention centres in Greece, amounted to degrading treatment within the meaning of Article 3 of the Convention In reaching that conclusion, it took into account the fact that the applicants were asylum-seekers.

232. The Court ... does not regard the duration of the two periods of detention imposed on the applicant – four days in June 2009 and a week in August 2009 – as being insignificant. In the present case, the Court must take into account that the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.

233. On the contrary, in the light of the available information on the conditions at the holding centre next to Athens International Airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker.

Riad and Idiab v. Belgium, ECtHR, Applications Nos. 29787/03 and 29810/03, 24 January 2008

107. It has not been established that there was a genuine intention to humiliate or debase the applicants. However, the absence of any such purpose cannot rule out a finding of a violation of Article 3 The Court considers that the conditions which the applicants were required to endure while being detained for more than ten days caused them considerable mental suffering, undermined their dignity and made them feel humiliated and debased. On the assumption that it is true, and in so far as the applicants were given the relevant information, the mere possibility that they could be given three meals a day cannot alter that finding.

b) Overcrowding

Detaining a person in severely overcrowded facilities has been determined by international tribunals to amount to a violation of the detainee's right to freedom from cruel, inhuman or degrading treatment. Even when overcrowding is less severe, it may facilitate or contribute to violations of freedom from cruel, inhuman or degrading treatment when considered in conjunction with other conditions of detention,

²⁸ *Dougoz v. Greece*, ECtHR, Application No. 40907/98, Judgment of 6 March 2001; *Z.N.S. v. Turkey*, ECtHR, Application No. 21896/08, Judgment of 19 January 2010; *Charahili v. Turkey*, ECtHR,; *M.S.S. v. Belgium and Greece*, ECtHR, , paras. 230-233.

²⁹ *Riad and Idiab v. Belgium*, ECtHR, Applications Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para.107.

including poor ventilation or access to natural light or air, poor heating, inadequate food, poor sanitation or lack of a minimum of privacy (*Aden Ahmed v. Malta*, ECtHR, Application No. 55352/12, Judgment of 23 July 2013, paras. 87-88, *Peers v. Greece*, ECtHR, Application No. 28524/95, Judgment of 19 April 2001, paras. 70-7).

UN Special Rapporteur on Torture, *Annual Report to the Commission on Human Rights*, UN Doc. E/CN.4/2004/56 (2003) para 49.

49. The Special Rapporteur notes that one of the most frequent obstacles to the respect of the human dignity and to the prohibition of torture and other forms of ill-treatment in places of detention is overcrowding. In order to improve the conditions of detention and in accordance with international standards, including rule 1 (5) of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), the Special Rapporteur encourages States to avoid holding people in custody where possible. This is particularly applicable in cases of pre-trial detention and detention of children, asylum-seekers and refugees.

***A.A. v Greece*, ECtHR, Application no. 12186/08, 22 July 2010**

The European Court of Human Rights held that there was a violation of Article 3 of the Convention with regards to the applicant's living conditions in the detention centre of Samos and the authorities' lack of diligence to provide him with the appropriate medical assistance.

A.A. was detained for three months in the detention centre in Samos. International organisations and NGOs (the European Commission, the LIBE Committee, UNCHR Greece and ProAsyl) confirmed the overcrowding, the poor hygiene conditions, the lack of infrastructure for leisure or meals and the inappropriateness of sanitary installations (paras. 58-60). Therefore, the Court considered the applicant's detention conditions in Samos combined with the duration of three months as treatment contrary to Article 3 (para 63).

***Dougoz v. Greece*, ECtHR, Application No. 40907/98, 6 March 2001**

45. In the present case the Court notes that the applicant was first held for several months at the Drapetsona police station, which is a detention centre for persons held under aliens legislation. He alleges, inter alia, that he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. It was even impossible for him to read a book because his cell was so overcrowded. In April 1998 he was transferred to the police headquarters in Alexandras Avenue, where conditions were similar to those at Drapetsona and where he was detained until 3 December 1998, the date of his expulsion to Syria.

The Court observes that the Government did not deny the applicant's allegations concerning overcrowding and a lack of beds or bedding.

46. The Court considers that conditions of detention may sometimes amount to inhuman or degrading treatment. In the "Greek case" (...) the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. In the present case, although the Court has not conducted an on-site visit, it notes that the applicant's allegations are corroborated by the conclusions of the CPT report of 29 November 1994 regarding the police headquarters in Alexandras Avenue. In its report the CPT stressed that the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling. Although the CPT had not visited the Drapetsona detention centre at that time, the Court notes that the Government had described the conditions in Alexandras as being the same as at Drapetsona, and the applicant himself conceded that the former were slightly better with natural light, air in the cells and adequate hot water. (...)

48. In the light of the above, the Court considers that the conditions of detention of the applicant at the Alexandras police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.

Kantjrev v. Russia, ECtHR, Application No. 37213/02, 21 June 2007

50. The applicant argued that he was detained in the cells with 12 inmates. It follows that in the smaller cell of 12 square metres inmates were afforded 1 square metre of personal space. In two bigger cells of 18.7 square metres detainees had less than 1.6 square metres of personal space.

51. In this connection the Court notes that it has frequently found a violation of Article 3 of the Convention in a number of cases against Russia on account of a lack of personal space afforded to detainees

UN Special Rapporteur on Torture, ***Annual Report to the Commission on Human Rights***, UN Doc. E/CN.4/2004/56 (2003) – emphasis added

49. The Special Rapporteur notes that one of the most frequent obstacles to the respect of the human dignity and to the prohibition of torture and other forms of ill-treatment in places of detention is overcrowding. ... the Special Rapporteur encourages States to avoid holding people in custody where possible. This is particularly applicable in cases of pre-trial detention and detention of children, asylum-seekers and refugees.

c) Access to healthcare

States are under an obligation to respect and protect the physical and mental health of all persons who are deprived of their liberty, including detained migrants. This duty requires that the authorities not only to ensure healthy living conditions in places of detention but also, among other things to provide adequate medical care treatment and medicines appropriate to the health condition of the detainee (*Hurtado v. Switzerland*, ECtHR, Application No. 17549/90, Judgment of 28 January 1994; ; *Mouisel v. France*, ECtHR, Application No. 67263/01, Judgment of 14 November 2002, para. 40; *Keenan v. United Kingdom*, ECtHR, Application No. 27229/95, Judgment of 3 April 2001, para. 111).

The failure to provide adequate medical care, and drugs necessary to detainees, including those with HIV, or epilepsy, leading to exacerbation of their conditions, can undermine the dignity of the detainee, and cause anguish and hardship beyond that normally inherent in detention, in violation of Article 3 ECHR.³⁰ Such a violation may occur even in the absence of demonstrated deterioration of the health condition of a detainee.³¹

Inadequate healthcare or access to essential medicines for detainees may also violate the freedom from cruel, inhuman or degrading treatment, either on its own or in conjunction with other factors. Security measures applied during medical treatment must also be designed so far as possible to respect the dignity of the detainee. Issues in this regard may be raised by the use of handcuffs or the imposition of other restraints during treatment.³²

Under international law and standards enshrining the right to health, all persons, irrespective of their nationality, resid0y health care, psychological counseling included (See Guideline 8 UNHCR Guidelines below); this applies equally to persons held in context of detention.

³⁰ *Kaprykowski v. Poland*, ECtHR, Application No. 23052/05, Judgment of 3 February 2009; *Kotsaftis v. Greece*, ECtHR, Application No. 39780/06, Judgment of 12 June 2008. See also, *Mouisel v. France*, ECtHR, paras. 40-42.

³¹ *Kotsaftis v. Greece*, ECtHR, Application No. 39780/06, Judgment of 12 June 2008.

³² *Henaf v. France*, ECtHR, Application No. 65436/01, Judgment of 27 November 2003, paras. 49-60.

Guideline 8

48. (vi) **Appropriate medical treatment must be provided where needed**, including psychological counselling. Detainees needing medical attention should be transferred to appropriate facilities or treated on site where such facilities exist. A medical and mental health examination should be offered to detainees as promptly as possible after arrival, and conducted by competent medical professionals. While in detention, detainees should receive periodic assessments of their physical and mental well-being. Many detainees suffer psychological and physical effects as a result of their detention, and thus periodic assessments should also be undertaken even where they presented no such symptoms upon arrival. Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release.

[Convention on the Rights of the Child](#)

Article 3(3)

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Mouisel v. France, ECtHR, Application No. 67263/01, 14 November 2002

40. Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (...). The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment (...).

Henaf v. France, ECtHR, Application No. 65436/01, 27 November 2003

55. In this connection, the Court reiterates that, "having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions'" (...), it has held: "... certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (...).

56. In the instant case, having regard to the applicant's age, his state of health, the absence of any previous conduct giving serious cause to fear that he represented a security risk, the prison governor's written instructions recommending normal and not heightened supervision and the fact that he was being admitted to hospital the day before an operation, the Court considers that the use of restraints was disproportionate to the needs of security, particularly as two police officers had been specially placed on guard outside the applicant's room. ...

59. In the final analysis, the Court considers that the national authorities' treatment of the applicant was not compatible with the provisions of Article 3 of the Convention. It concludes in the instant case that the use of restraints in the conditions outlined above amounted to inhuman treatment.

Committee on Economic, Social and Cultural Rights, General Comment No. 14, ***The Right to the Highest Attainable Standard of Health (Art. 12)***, UN Doc. E/C.12/2000/4 (2000)

34. In particular, States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; ...

d) Protection from ill-treatment, including in detention and during deportation

Physical or sexual assaults, or excessive or inappropriate use of physical restraint techniques violate rights including the right to life and freedom from torture or cruel, inhuman or degrading treatment and rights to physical integrity.

In addition, where the State authorities know or ought to know that particular individuals held in detention face a real or immediate threat from private actors to their life, freedom from cruel, inhuman or degrading treatment, or physical integrity, there is an obligation to take all reasonable measures to prevent or end the situation (*Osman v. United Kingdom*).³³ This arises as part of the general positive obligations on States to exercise due diligence and take reasonable measures to prevent, protect against and investigate acts of private persons in violation of these rights (CCPR, *General Comment No. 31*, para. 8).

Obligations to protect are heightened for persons held in detention, in respect of whom the State has a special duty of care.³⁴

³³ *Osman v. United Kingdom*, ECtHR, GC, Application No. 23452/94, Judgment of 28 October 1998.

³⁴ *Salman v. Turkey*, ECtHR,

In situations where there is clear potential for gender or ethnic violence in detention, for example, appropriate preventive and security measures must be put in place. In *Rodić and 3 others v. Bosnia-Herzegovina*,³⁵ the ECtHR held that two Serb prisoners held in open, crowded conditions in an ethnic Bosnian dominated prison, and subjected to violence by fellow prisoners, without any adequate security measures being taken by the authorities, suffered mental anxiety as a result of the threat and anticipation of violence that amounted to a violation of Article 3 ECHR.

Women in detention may face particular risks of sexual or gender-based violence, either from officials or from private actors. States are required to take measures to prevent and protect detainees from all sexual violence in detention, including by making it a criminal offence, and enforcing the criminal law. Certain forms of sexual violence in detention, such as rape, amount to torture (*Aydin v. Turkey*).³⁶

***Raninen v. Finland*, ECtHR, Application No. 20972/92, Judgment of 16 December 1997**

56. As regards the kind of treatment in question in the present case, the Court is of the view that handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence.

General Assembly, *UN Rules for the Protection of Juveniles Deprived of their Liberty*, UN Doc. A/RES/45/113 (1990)

63. Recourse to instruments of restraint and to force for any purpose should be prohibited, except as set forth in rule 64 below.

64. Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority.

³⁵ *Rodić and 3 others v. Bosnia-Herzegovina*, ECtHR, Application No. 22893/05 1 December 2008, para 73.

³⁶ *Aydin v. Turkey*, ECtHR, (57/1996/676/866), paras. 83-86.

V. Detention conditions and treatment of vulnerable persons

1. Children

In exceptional cases that a migrant child is detained, whether he or she is unaccompanied or with members of his or her family, the state has a duty to ensure that the treatment of the child and the conditions of detention is appropriate to the best interests of the child. Indeed, in addition to ensuring that detained children are treated with humanity and respect for the inherent dignity and needs of persons of his or her age and respect for the absolute prohibition against torture and other ill-treatment, the authorities must ensure that all decisions concerning all aspects of the child's detention are guided by consideration of the child's best interest. (Article 3 CRC).³⁷

Committee on the Rights of the Child, General Comment No. 6, *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6 (2005)

63. In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37 (a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. Indeed, the underlying approach to such a programme should be "care" and not "detention". Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make **regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian**. They should also be provided with the opportunity to **receive all basic necessities as well as appropriate medical treatment** and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37 (d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with prompt and **free access to legal and other appropriate assistance, including the assignment of a legal representative**.

Access to education and play in immigration detention

Children held in immigration detention continue to enjoy the right to education, which must be provided to them on an equal basis with children who are at liberty, and without discrimination on grounds of race, religion, nationality or legal status (Article 2 Protocol 1 ECHR; Article 28 CRC; Article 5(e)(v) ICERD; Article 13 ICESCR).

The education of a detained child migrant should preferably take place outside the place where they are being detained.³⁸

Committee on Economic, Social and Cultural Rights, General Comment No. 13, *The right to education (Art.13)*, UN Doc. E/C.12/1999/10 (1999)

4. The Committee (...) confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, and irrespective of their legal status.

³⁷ Committee on the Rights of the Child, Consideration of reports submitted by States Parties under article 44 of the Convention, *Concluding observations: Australia*, UN Doc. CRC/C/15/Add.268 (2005), paras. 62(b) and 64(c).

³⁸ *UNHCR Guidelines on Detention* Guideline 9.2; and CRC, *General Comment No. 6*, para. 63. The *UN Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 38).

General Assembly, UN Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. A/RES/45/113 (1990)

38. Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.

39. Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.

Children have the right to recreation and play, including when detained (Article 31 CRC, CRC GC 6 para. 63, UNHCR Guidelines, para 56, Article 11 Reception Conditions Directive, Article 17 Return Directive).

UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012)

Guideline 9.2: Children

(...) 56. Children who are detained benefit from the same minimum procedural guarantees as adults, but these should be tailored to their particular needs (see Guideline 9). An independent and qualified guardian as well as a legal adviser should be appointed for unaccompanied or separated children. During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play, including with other children, which is essential to a child's mental development and will alleviate stress and trauma (see also Guideline 8).

Committee on the Rights of the Child, General Comment No.6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6 (2005)

63. (...) During their period in detention, children have **the right to education** which ought, ideally, to take place outside the detention premises in order **to facilitate the continuance of their education upon release**. They also have the right to **recreation and play** as provided for in article 31 of the Convention. (...)

2. Detainees with serious illness, mental illness or disabilities

The treatment of people held in immigration detention who suffer from mental health conditions, including as a result of traumatic experiences, requires particular consideration. Their detention raises questions as to (a) whether the person should be detained at all or whether more suitable alternatives can be found; and, if detention is warranted and there are no suitable alternatives to it, (b) the appropriate form of detention, conditions of detention, and provision of medical care.³⁹

Dybeku v Albania, ECtHR, Application no. 41153/06, 02 June 2008, paras. 47, 51

In *Dybeku v Albania*, the ECtHR found that the feeling of inferiority and powerlessness, which is typical of persons who suffer from a mental disorder, calls for increased vigilance in reviewing whether the

³⁹ ICJ Practitioners Guide on Migration and International Human Rights law, Updated edition 2014, p. 152.

Convention has been complied with. It found that the applicant's specific medical condition (a chronic mental disorder) made him more vulnerable in detention, which exasperated his feelings of distress and fear. Given the fact that no action was taken to improve the conditions, and given the state of the conditions that the applicant was subjected to, the Court found a breach of Article 3. It found that considering 'the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on his health are sufficient to be qualified as inhuman and degrading'.

C. v. Australia, Human Rights Committee Communication No. 900/1999, Views of 13 November 2002, UN Doc. CCPR/C/76/D/900/1999 (2002)

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

Recommendation R(1998)7 of the Committee of Ministers [of the Council of Europe] to member states concerning the ethical and organizational aspects of health care in prison, (8 April 1998)

Prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff.

Musial v. Poland, ECtHR, Application No. 28300/06, Judgment of 20 January 2009

96. Undeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. Because of that an increased vigilance is called for in reviewing whether the Convention has been complied with. While it is for the authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used to preserve the physical and mental health of patients who are incapable of deciding for themselves, and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3.

The Court accepts that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention in the conditions described above, with the exception of the two short periods in 2005 and 2007 when the applicant was an in-patient in a prison hospital, may have exacerbated to a certain extent his feelings of distress, anguish and fear. In this connection, the Court considers that the failure of the authorities to hold the applicant during most of his detention in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward has unnecessarily exposed him to a risk to his health and must have resulted in stress and anxiety.

Moreover, the Court finds that the fact that for the most part the applicant has received the same attention as the other inmates, notwithstanding his particular state of health, shows the failure of the authorities' commitment to improving the conditions of detention in compliance with the recommendations of the Council of Europe. In particular, the Court notes that the recommendations of the Committee of Ministers to the member States, namely Recommendation No. R (98) 7 concerning the ethical and organisational

aspects of health care in prison and Recommendation on the European Prison Rules provide that prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff (see paragraphs 62 and 63 above). In recent judgments the Court has drawn the authorities' attention to the importance of this recommendation, notwithstanding its non-binding nature for the member States (see *Dybeku v. Albania*, no. [41153/06](#), § 48, 18 December 2007; *Rivière*, cited above, § 72; and *Naumenko*, cited above, § 94).

Cases of seriously physically ill persons have been considered by the ECtHR. In case of *Yoh-Ekale Mwanje v. Belgium*,⁴⁰ 20 December 2011, the ECtHR observed that the applicant had a serious and incurable disease, which the Belgian authorities were aware of, and which had worsened while she was detained. There was a delay in the applicant being examined by hospital specialists and in administering appropriate treatment. The Court considered that the authorities had not acted with due diligence in taking all measures reasonably expected of them to protect the applicant's health and prevent its deterioration whilst she was detained. This exposed her to suffering over and above that expected for someone detained, with HIV, facing deportation, which constituted inhuman and degrading treatment. In addition to protection from the acts of officials or fellow detainees, the State also has an obligation to take reasonable measures within its power to protect detained persons from acts of self-harm or suicide.

***Rodic and Others v. Bosnia and Herzegovina*, ECtHR, Application No. 22893/05, Judgment of 27 May 2008**

73. The Court concludes that the applicants' physical well-being was not adequately secured in the period from their arrival in Zenica Prison until they were provided with separate accommodation in the Zenica Prison hospital unit (a period which lasted between one and ten months depending on the applicant). Furthermore, the Court considers that the hardship the applicants endured, in particular the constant mental anxiety caused by the threat of physical violence and the anticipation of such (see, *mutatis mutandis*, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 16-17, § 33), must have exceeded the unavoidable level inherent in detention and finds that the resulting suffering went beyond the threshold of severity under Article 3 of the Convention.

There has accordingly been a violation of Article 3 of the Convention in this respect.

When disabled people are detained, the authorities of the State must take measures to ensure that conditions of detention are appropriate to their disability (*Price v. United Kingdom*, ECtHR, Application No. 33394/96, Judgment of 10 July 2001, paras. 25-30, Human Rights Committee, Communication No. 616/1995, *Hamilton v. Jamaica*, UN Doc. CCPR/C/50/D/333/1988 (1999), *Farbtuhs v. Latvia*, ECtHR, Application No. 4672/02, Judgment of 2 December 2004, *para. 61*).⁴¹

***Convention on the Rights of Persons with Disabilities*, New York, 13 December 2006**

Article 2

(...) *Reasonable accommodation (means)* "all means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." (...)

Article 14

(...) 2. *States parties must* "ensure that if persons with disabilities are deprived of their liberty they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law

⁴⁰ *Yoh-Ekale Mwanje v. Belgium*, ECtHR, Application No. 10486/10, 20 March 2012.

⁴¹ *Asalya v. Turkey*, ECtHR, Application No. 43875/09, 15 April 2014; *Price v. United Kingdom*, ECtHR, Application No. 33394/96, 10 July 2001, paras. 25-30; *Farbthus v. Latvia*, ECtHR, para. 56; *Hamilton v. Jamaica*, CCPR, Communication No. 616/1995, Views of 23 July 1999, paras 3.1 and 8.3.

and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.”

Minimum standards for the provision of medical care to people deprived of their liberty also include the following:

- [The UN Standard Minimum Rules for the Treatment of Prisoners](#) (Nelson Mandela Rules) (Rules 24-35 Health care services)
- Committee for the Prevention of Torture, [3rd General Report on the CPT's activities covering the period 1 January to 31 December 1992](#), CPT/Inf (93) 12, para. 31.
- UNHCR, [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention](#) (2012), Guideline 10 (v);
- General Assembly, [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), UN Doc. A/RES/43/173 (1988), Principles 22 to 26;
- General Assembly, [UN Rules for the Protection of Juveniles Deprived of their Liberty](#), UN Doc. A/RES/45/113 (1990), Section H;
- General Assembly, [UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\)](#), UN Doc. A/C.3/65/L.5 (2010).

Please see also the FAIR training module III. On Economic, Social and Cultural Rights.

3. Survivors of torture

Being a victim of torture/traumatized person is a personal circumstance which has to be taken into account when examining the necessity and proportionality of detention. Detaining someone who is a victim of torture/traumatized asylum seeker might have severe consequences on his/her mental health,⁴² which might be disproportionate to any legitimate objective pursued by the government when detaining such a person.

Detention is more likely to amount to degrading treatment when the person detained has also previously suffered from torture.⁴³

Where a person is unlawfully killed or subjected to cruel, inhuman or degrading treatment while in detention, there is a presumption that State agents are responsible, and the onus is on the State to provide a satisfactory and convincing explanation to the contrary ([Demiray v. Turkey](#), ECtHR, Application No. 27308/95, Judgment of 21 November 2000.⁴⁴

In addition, where the State authorities know or ought to know that particular individuals held in detention face a real or immediate threat from private actors to their life, freedom from cruel, inhuman or degrading treatment, or physical integrity, there is an obligation to take all reasonable measures to prevent or end the situation ([Osman v. The United Kingdom](#), ECtHR, GC, Application No. 23452/94, Judgment of 28 October 1998).⁴⁵

⁴² Jesuit Refugee Service, *Becoming Vulnerable in Detention* (the DEVAS Project), June 2010 <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf>, FRA, <http://bit.ly/1RxJAsc> and Odysseus, <http://bit.ly/1JX4hMm>

⁴³ [S.D. v. Greece](#), ECtHR, Application No. 53541/07, Judgment of 11 June 2007, para. 45, 52-53

⁴⁴ [Anguelova v. Bulgaria](#), ECtHR, Application No. 38361/97, Judgment of 13 June 2002, paras. 110-111; [Salman v. Turkey](#), ECtHR, GC, Application No. 21986/93, Judgment of 27 June 2000, para. 100; [Demiray v. Turkey](#), ECtHR, Application No. 27308/95, Judgment of 21 November 2000.

⁴⁵ See, [Osman v. United Kingdom](#), ECtHR, GC, Application No. 23452/94, Judgment of 28 October 1998; [Anguelova v. Bulgaria](#), ECtHR, *op. cit.*, fn. 797; [Pueblo Bello Massacre v. Colombia](#), IACtHR, Series C No. 140, Judgment of 31 January 2006, para. 123. On obligations to protect against inter-prisoner violence in detention: [Edwards v. United Kingdom](#), ECtHR, Application No. 46477/99, Judgment of 14 March 2002.

4. Rights of detained women and girls

States must ensure respect and protection of the rights of migrant women and ensure that they are not subjected to gender based discrimination and other violations of their rights. Furthermore they must make provisions to address the particular gender based needs of women, including in relation to health care and hygiene, without discrimination (*Aden Ahmed v. Malta*, ECtHR, Application No. 55352/12, Judgment of 23 July 2013, paras. 91-100).

"States parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeeding mothers as well as women in ill health have access to appropriate services." (CEDAW, General Recommendation No 26. *Women migrant workers*, UN Doc. CEDAW/C/2009/WP.1/R (2008), para 26(j))

Consideration of the particular needs of women and girls must be taken into account when making decisions about the necessity and proportionality of their detention.

Women and girls held in immigration detention often face particular gender based violations of their rights. These include being subjected to gender-based violence or harassment by both State actors and other detainees; absence of childcare; inadequate and inappropriate provision of healthcare, goods and services needed by women, as well as other forms of gender discrimination.

The UNHCR Guidelines on detention (Guideline 9.3) state that pregnant women and nursing mothers should not be detained (*Mahmundi and others v. Greece*, 31 July 2012).

Alternatives to detention should take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation.

The Guideline 9 of the UNHRC Detention Guidelines also specifies that "Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available."

UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)

Guideline 9.3 Women

52. As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.
53. Where detention is unavoidable for women asylum-seekers, facilities and materials are required to meet women's specific hygiene needs. The use of female guards and warders should be promoted. All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.
54. Women asylum-seekers in detention who report abuse are to be provided immediate protection, support and counselling, and their claims must be investigated by competent and independent authorities, with full respect for the principle of confidentiality, including where women are detained together with their husbands/partners/other relatives. Protection measures should take into account specifically the risks of retaliation.
55. Women asylum-seekers in detention who have been subjected to sexual abuse need to receive appropriate medical advice and counselling, including where pregnancy results, and are to be provided with the requisite physical and mental health care, support and legal aid.

CPT Standards, Extract from the 10th General Report [CPT/Inf (2000) 13]

Page 78, para 27. (...) examples of pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynaecological examinations and/or delivery. Such an approach is completely unacceptable, and could certainly be qualified as inhuman and degrading treatment. Other means of meeting security needs can and should be found.

Human Rights Committee, General Comment No. 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (1988)

8. (...) Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

VI. Duration of detention

International law

Under international law, the permissible duration of detention, including for the purposes of Article 5.1.f of the ECHR will need take account of national law together with an assessment of the particular facts of the case. Time limits are an essential component of precise and foreseeable law governing the deprivation of liberty.

Both the ICCPR and the ECHR require that where detention is permitted at all, the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.⁴⁶

“States parties ... need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases.”⁴⁷

“Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.”⁴⁸

Excessive length of detention, or uncertainty as to its duration, may also constitute cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.⁴⁹

In *Saadi v. United Kingdom*, factors such as the numbers of asylum seekers seeking entry to the country, administrative difficulties, and the fact that the UK authorities were using detention in good faith as a way of speedily processing asylum seekers through accelerated procedures, helped to justify seven days’ detention in suitable conditions.⁵⁰

EU law

For asylum seekers Article 9 (1) of the revised [Reception Conditions Directive](#)⁵¹ as well as Article 28 (3) of the [Dublin III. Regulation](#)⁵² stipulate that detention must be for the shortest period possible. Reduced time limits for submitting and responding to transfer requests apply when asylum seekers are detained under the Dublin Regulation.

⁴⁶ Working Group on Arbitrary Detention, *Annual Report 1998*, para. 69, Guarantee 10.

⁴⁷ HRC, General Comment 35, para 15

⁴⁸ HRC, General Comment 35, para 18

⁴⁹ *Concluding Observations on Sweden*, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12: detention should be for the shortest possible time; *Concluding Observations on Costa Rica*, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 expressed concern at failure to limit the length of administrative detention of non-nationals. CAT recommended: “the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite.”

⁵⁰ *Saadi v. United Kingdom*, ECtHR, Application No. 13229/03, 29 January 2008, paras. 76-80.

⁵¹ 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)

⁵² REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

Annex - Training tools:

A Quiz⁵³

Please note that one or more answers can be correct

Detention of children is allowed

- a) As a last measure
- b) In view of deportation
- c) Never for refugee and asylum seeking children

Arbitrary detention is

- a) Prohibited in international law
- b) Allowed for a reasonable and justifiable time period
- c) Never carried out in good faith

Unaccompanied children in detention have a right to

- a) Appointment of a guardian
- b) Appointment of a legal adviser
- c) Play with other children

Children can be detained with adults

- a) When it is in their best interest
- b) Never
- c) In extraordinary circumstances of pressure on the asylum system of the country

⁵³ Please note: The quiz is designed to start discussion among participants in trainings on the specific issues, not to give simplified answers to the complex issues in question.

Case of Adam

Adam B. was born in 2001, he left his country Ashokistan to flee armed conflicts there in early 2016, travelled for 3 months through a number of countries and arrived in Hellenia, an EU Member state, where he was arrested on 15 April 2016.

He was immediately placed in a detention centre pending an order for his deportation and was held there until 17 April 2016. He was placed in a room together with 10 other people, there were two toilets in the building for 200 people and only one working shower. Adam didn't find a blanket for himself and slept on a mattress on the floor.

When detained, Adam received an information brochure from the authorities, outlining some of the available remedies. It mentioned the possibility of making a complaint to the chief of police but did not indicate the procedure to be followed or whether the chief of police was required to respond to complaints and, if so, within what period. It was written in a language spoken in Ashokistan but not in the mother tongue of Adam and so he did not understand its content. He also doesn't speak any Hellenic. He was however interviewed in his mother tongue.

A deportation order was issued on 16 April 2016, which mentioned that Adam's cousin, Elias, 18 years old, was accompanying him. On his release Adam was not offered any assistance by the authorities, no guardian or legal adviser has been appointed to assist Adam. He was homeless for several days and subsequently, with the aid of a local NGO, found accommodation in a hostel.

In June 2016 an application he made for political asylum was rejected; his appeal is still pending.

Applicable law

Hellenia: UN Member, party to the 1949 Geneva Conventions and Protocols, all major UN treaties, and to the Rome Statute of the ICC. It is a party to the Optional Protocol 1 and 2 to the ICCPR, has accepted the individual communication mechanism under CAT, and is party to all the Optional Protocols to the CRC. Party to the 1951 Geneva Refugee Convention and its Additional Protocol and recognising its universal application. It is a EU Member State, with no opt-outs. It is party to the ECHR and all its Protocols and a member of the Council of Europe. It is party to the revised European Social Charter but does not accept article 19.

Task

It is 1 July 2016. Contacted by an NGO alerted on the situation of Adam B., you were asked to advise in Adam's case.

1. Provide a legal assessment of any international and EU law applicable to the situation of Adam B. and decide on the avenues and legal strategies to pursue to seek remedy for violations of Adam's rights.
2. Prepare a case to an international mechanism:

Group A: Prepare an individual communication to the Committee on the Rights of the Child

Group B: Prepare a case in front of the ECtHR

Case of Kolan

In December 15th 2002, Ms. Marketa Kolan arrived in Paridia from Astania, to seek asylum. On June 10th 2003, her husband Mr. Erik Kolan joined her. They alleged that they were the victims of recurrent persecution in Astania because of their origin and faith. On January 20th 2004, they were denied refugee status by the administrative authorities. On May 31st 2005, their appeal to the administrative court of Paridia was rejected. Subsequently another application for refugee status was made by them.

On August 27th 2007, the applicants and their two children, born in Paridia, (five months and 3 years old) were arrested at their home and detained in police custody on an investigation for "illegal stay". They were then detained in a hotel.

The following day they were transferred to an airport to be flown back to Astania. The flight was cancelled, however, and they never boarded the plane. The whole family was then taken to an administrative detention centre.

On 29 August 2007 the liberties and detention judge ordered a two-week extension of their detention. The applicants were taken back to the airport on 11 September 2007, but this second attempt to deport them also failed.

Noting that the applicants were not to blame for that failure, the judge ordered their release on September 12th 2007. On July 16th 2009, they were granted refugee status.

As a lawyer representing Mr and Mrs Kolan and their two children, what would be the basis for your complaint to the European Court of Human Rights? How would you argue?

Commission Members

February 2018 (for an updated list, please visit www.icj.org/commission)

Acting President:

Prof. Robert Goldman, United States

Vice-President:

Prof. Carlos Ayala, Venezuela

Acting Vice-President:

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

(Chair) Justice Azhar Cachalia, South Africa

Ms Roberta Clarke, Barbados-Canada

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Adolfo Azcuna, Philippines

Mr Muhannad Al-Hasani, Syria

Mr Abdelaziz Benzakour, Morocco

Justice Ian Binnie, Canada

Sir Nicolas Bratza, UK

Mr Reed Brody, United States

Prof. Miguel Carbonell, Mexico

Dame Silvia Cartwright, New Zealand

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Justice Elisabeth Evatt, Australia

Mr Roberto Garretón, Chile

Prof. Jenny E. Goldschmidt, Netherlands

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Mr. Shawan Jabarin, Palestine

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Prof. David Kretzmer, Israel

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Mr Kathurima M'Inoti, Kenya

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Ms Karinna Moskalenko, Russia

Justice Willy Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Justice Michèle Rivet, Canada

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Mr Raji Sourani, Palestine

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org