COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

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COMMITTEE OF EXPERTS ON
ADMINISTRATIVE DETENTION OF MIGRANTS
(CJ-DAM)

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COMPILATION OF LEGAL INSTRUMENTS RELATING TO THE ADMINISTRATIVE DETENTION OF MIGRANTS, REFUGEES AND ASYLUM-SEEKERS

(EXTRACTS)

Document prepared by the Secretariat
Directorate General of Human Rights and Rule of Law – DGI

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Part I:

COLLECTION OF TEXTS OF

THE COUNCIL OF EUROPE

A. TREATIES

Convention for the Protection of Human Rights and Fundamental Freedoms [1]

Articles 2 - 6 of the Convention

As amended by Protocols No. 11 and No. 14, Rome, 4th November 1950.

The governments signatory hereto, being members of the Council of Europe,

[…]

Have agreed as follows:

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I – Rights and freedoms

Article 2 - Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[1] Text available at:
http://www.echr.coe.int/Documents/Convention_ENG.pdf

Article 4 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

[…]

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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(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.

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

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[…]

Article 13 - Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 - Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[…]

Protocol No. 4 Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 46)[1]

Strasbourg, 16th September 1963

The governments signatory hereto, being members of the Council of Europe,

[…]

Have agreed as follows:

[…]

Article 2 – Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

[…]

Article 4 – Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

[…]

[1] Text available at:
http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm

Protocol No. 7 Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 117)[1]

Strasbourg, 22.XI.1984

[…]

Have agreed as follows:

Article 1 – Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a. to submit reasons against his expulsion,

b. to have his case reviewed, and

c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

[…]

[1] Text available at:
http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/090000168007a082

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 177)[1]

Rome, 4.XI.2000

[…]

Have agreed as follows:

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

[…]

[1] Text available at:
http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/0900001680080622

Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) [1]

Warsaw, 16.V.2005

Chapter III
Measures to protect and promote the rights of victims, guaranteeing gender equality

Article 10 – Identification of the victims

1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.

4. As soon as an unaccompanied child is identified as a victim, each Party shall:

   a. provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;

   b. take the necessary steps to establish his/her identity and nationality;

   c. make every effort to locate his/her family when this is in the best interests of the child.

[1] Text available at:
http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d

[…]

Article 12 – Assistance to victims

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;

b. access to emergency medical treatment;

c. translation and interpretation services, when appropriate;

d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;

f. access to education for children.

2. Each Party shall take due account of the victim's safety and protection needs.

3. In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.

4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.

5. Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

6. Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

7. For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the

special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

Article 13 – Recovery and reflection period

1. Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2. During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

3. The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.

Article 14 – Residence permit

1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

a. the competent authority considers that their stay is necessary owing to their personal situation;

b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

2. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

3. The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.

4. If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.

[…]

Article 15 – Compensation and legal redress

1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.

4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

Article 16 – Repatriation and return of victims

1. The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.

2. When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

3. At the request of a receiving Party, a requested Party shall verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party.

4. In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.

5. Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including reintegration into the education system and the labour market,

in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.

6. Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental organisations, legal professions able to provide counselling and social welfare agencies.

7. Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.

[…]

Chapter IV – Substantive criminal law

Article 26 – Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

Convention on preventing and combating violence against women and domestic violence (CETS No. 210) [1]

Istanbul, 11.V.2011

[…]

Chapter IV – Protection and support

Article 19 – Information

Parties shall take the necessary legislative or other measures to ensure that victims receive adequate and timely information on available support services and legal measures in a language they understand.

Article 20 – General support services

1. Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment.

2. Parties shall take the necessary legislative or other measures to ensure that victims have access to health care and social services and that services are adequately resourced and professionals are trained to assist victims and refer them to the appropriate services.

Article 21 – Assistance in individual/collective complaints

Parties shall ensure that victims have information on and access to applicable regional and international individual/collective complaints mechanisms. Parties shall promote the provision of sensitive and knowledgeable assistance to victims in presenting any such complaints.

Article 22 – Specialist support services

1 Parties shall take the necessary legislative or other measures to provide or arrange for, in an adequate geographical distribution, immediate, short- and long-term specialist support services to any victim subjected to any of the acts of violence covered by the scope of this Convention.

2 Parties shall provide or arrange for specialist women's support services to all women victims of violence and their children.

[1] Text available at:
http://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e

Article 23 – Shelters

Parties shall take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out pro-actively to victims, especially women and their children.

Article 25 – Support for victims of sexual violence

Parties shall take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centres for victims in sufficient numbers to provide for medical and forensic examination, trauma support and counselling for victims.

Article 26 – Protection and support for child witnesses

1. Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention.

2. Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.
[…]

Chapter VII – Migration and asylum

Article 60 – Gender-based asylum claims

1. Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.

2. Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

3. Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

Article 61 – Non-refoulement

1. Parties shall take the necessary legislative or other measures to respect the principle of non-refoulement in accordance with existing obligations under international law.

2. Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

[…]

B. COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

Recommendation Rec(2003)5 [1]
of the Committee of Ministers to Member States
on measures of detention of asylum seekers

Adopted by the Committee of Ministers on 16th April 2003, at the 837th meeting of the Ministers' Deputies) [2]

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

[…]

Recommends to the governments of the member states to apply the following principles in their legislation and administrative practice:

Definition and scope of application

1. In the context of this recommendation, "measures of detention of asylum seekers" means any confinement of asylum seekers within a narrowly bounded or restricted location, where they are deprived of liberty. Persons who are subject to restrictions on domicile or residence are not generally considered to be subject to detention measures.

2. This recommendation does not concern measures of detention of asylum seekers on criminal charges or rejected asylum seekers detained pending their removal from the host country.

General provisions

3. The aim of detention is not to penalise asylum seekers. Measures of detention of asylum seekers may be resorted to only in the following situations:

- when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state;
- when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained;

[1] In conformity with Article 10.2c of the Rules of Procedure of the Ministers' Deputies, Ireland made the following statement: "With regard to paragraph 10 of the recommendation, Ireland wishes to point out that in exceptional circumstances it may not be possible for Ireland to keep asylum seekers separate from convicted criminals and prisoners on remand at all times."
[2] Text available at https://wcd.coe.int/ViewDoc.jsp?id=2121&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383ChromeHTML.BJHBOW5NQ4EEWMPSZKSJKAD4RA\Shell\Open\Command

- when a decision needs to be taken on their right to enter the territory of the state concerned, or
- when protection of national security and public order so requires.

4. Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights.

5. Measures of detention of asylum seekers, reviewed regularly by a court in accordance with Article 5, paragraph 4, of the European Convention on Human Rights, should be applied only under the conditions and maximum duration provided for by law. If a maximum duration has not been provided for by law, the duration of the detention should form part of the review by the above-mentioned court.

6. Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.

7. Measures of detention should not constitute an obstacle to asylum seekers being able to submit and pursue their application for asylum.

8. Asylum applications from persons in detention should be prioritized for the purposes of processing. This is especially the case where a person is held in detention because of reasons resulting from the law pertaining to foreigners.

9. Measures of detention should be implemented in a humane manner, respecting the inherent dignity of the person and in accordance with applicable norms of international law and international standards.

10. The place of detention should be appropriate and, wherever possible, be provided for the specific purpose of detaining asylum seekers. In principle, asylum seekers should not be detained in prison. If special detention facilities are not available, asylum seekers should at least be separated from convicted criminals and prisoners on remand.

11. The basic needs and requirements of detained asylum seekers to ensure a standard of living adequate for their health and well-being should be met.

12. Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them.

13. Appropriate medical treatment and, where necessary, psychological counselling should be provided. This is particularly relevant for persons with special needs: minors, pregnant women, elderly people, persons with physical or mental disabilities and people who have been seriously traumatised, including torture victims.

14. Separate accommodation within the detention facilities between men and women, as well as between children and adults should, as a rule, be ensured, except when the persons concerned are part of a family unit, in which case they should be accommodated together. The right to a private and family life should be ensured.

15. Detained asylum seekers should be allowed to practice their religion and to observe any special diet in accordance with their religion.

16. Detained asylum seekers should have the right to contact a UNHCR office and the UNHCR should have unhindered access to asylum seekers in detention.

17. Detained asylum seekers should also have the right to contact a legal counsellor or a lawyer and to benefit from their assistance.

18. Asylum seekers should be allowed to contact and, wherever possible, receive visits from relatives, friends, social and religious counsellors, non-governmental organisations active in the field of human rights or in the protection of refugees or asylum seekers, and to establish communication with the outside world.

19. Asylum seekers should be guaranteed access to a complaints mechanism concerning the conditions of detention.

Additional provisions for minors

20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time.

21. Minors should not be separated from their parents against their will, nor from other adults responsible for them whether by law or custom.

22. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, special arrangements must be made which are suitable for children and their families.

23. For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time.

Recommendation CM/Rec(2010)5
of the Committee of Ministers to member states
on measures to combat discrimination on grounds of sexual orientation or gender identity

Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies [1]

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

[…]

Recommends that member states:

[…]

4. be guided in their legislation, policies and practices by the principles and measures contained in the appendix to this recommendation;

[…]

Appendix to Recommendation CM/Rec(2010)5

I. Right to life, security and protection from violence

A. "Hate crimes" and other hate-motivated incidents

[…]

4. Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons.

[…]

[1] Text available at https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383ChromeHTML.BJHBOW5NQ4EEWMPSZKSJKAD4RA\Shell\Open\Command

X. Right to seek asylum

[…]

44. Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.

[…]

Twenty Guidelines on Forced Return [1]

Adopted by the Committee of Ministers on 4th May 2005, at the 925th Meeting of the ministers' Deputies [2]

The Committee of Ministers,

[…]

3. Adopts the attached guidelines and invites member states to ensure that they are widely disseminated amongst the national authorities responsible for the return of aliens.

[…]

Chapter III
Detention pending removal

Guideline 6 - Conditions under which detention may be ordered

1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.

2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.

Guideline 7 - Obligation to release where the removal arrangements are halted

Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible.

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[1] When adopting this decision, the Permanent Representative of the United Kingdom indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with Guidelines 2, 4, 6, 7, 8, 11 and 16.

[2] Text available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)40&Ver=final&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

Guideline 8 - Length of detention

1. Any detention pending removal shall be for as short a period as possible.

2. In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.

Guideline 9 - Judicial remedy against detention

1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful.

2. This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.

Guideline 10 - Conditions of detention pending removal

1. Persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.

2. Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a “carceral” environment. Organised activities should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation.

3. Staff in such facilities should be carefully selected and receive appropriate training. Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.

4. Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.

5. National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.

6. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.

7. Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organization for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.

Guideline 11 - Children and families

1. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.

3. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities appropriate to their age. The provision of education could be subject to the length of their stay.

4. Separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.

5. The best interest of the child shall be a primary consideration in the context of the detention of children pending removal.

[…]

Chapter V
Forced removals

Guideline 15 - Cooperation with returnees

1. In order to limit the use of force, host states should seek the cooperation of returnees at all stages of the removal process to comply with their obligations to leave the country.

2. In particular, where the returnee is detained pending his/her removal, he/she should as far as possible be given information in advance about the removal arrangements and the information given to the authorities of the state of return. He/she should be given an opportunity to prepare that return, in particular by making the necessary contacts both in the host state and in the state of return, and if necessary, to retrieve his/her personal belongings which will facilitate his/her return in dignity.

Guideline 16 - Fitness for travel and medical examination

1. Persons shall not be removed as long as they are medically unfit to travel.

2. Member states are encouraged to perform a medical examination prior to removal on all returnees either where they have a known medical disposition or where medical treatment is required, or where the use of restraint techniques is foreseen.

3. A medical examination should be offered to persons who have been the subject of a removal operation which has been interrupted due to their resistance in cases where force had to be used by the escorts.

4. Host states are encouraged to have “fit-to-fly” declarations issued in cases of removal by air.

Guideline 17 - Dignity and safety

While respecting the dignity of the returnee, the safety of the other passengers, of the crew members and of the returnee himself/herself shall be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.

Guideline 18 - Use of escorts

1. The authorities of the host state are responsible for the actions of escorts acting on their instruction, whether these people are state employees or employed by a private contractor.

2. Escort staff should be carefully selected and receive adequate training, including in the proper use of restraint techniques. The escort should be given adequate information about the returnee to enable the removal to be conducted safely, and should be able to communicate with the returnee. Member states are encouraged to ensure that at least one escort should be of the same sex as that of the returnee.

3. Contact should be established between the members of the escort and the returnee before the removal.

4. The members of the escort should be identifiable; the wearing of hoods or masks should be prohibited. Upon request, they should identify themselves in one way or another to the returnee.

Guideline 19 - Means of restraint

1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.

2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used.

3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks linked to the use of each technique, as part of their specialised training. If training is not offered, as a minimum regulations or guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.

4. Medication shall only be administered to persons during their removal on the basis of a medical decision taken in respect of each particular case.

Guideline 20 - Monitoring and remedies

1. Member states should implement an effective system for monitoring forced returns.

2. Suitable monitoring devices should also be considered where necessary.

3. The forced return operation should be fully documented, in particular with respect to any significant incidents that occur or any means of restraint used in the course of the operation. Special attention shall be given to the protection of medical data.

4. If the returnee lodges a complaint against any alleged ill-treatment that took place during the operation, it should lead to an effective and independent investigation within a reasonable time.

[…]

Guidelines on human rights protection in the context of accelerated asylum procedures [1]

Adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies

The Committee of Ministers,

Reaffirming that asylum seekers enjoy the guarantees set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) in the same way as any other person within the jurisdiction of states parties, in accordance with Article 1 of the Convention;

[…]

1. Adopts the attached guidelines and invites member states to ensure that they are widely disseminated amongst all national authorities involved in the implementation of the various stages of accelerated procedures, including those responsible for the return of aliens;

2. Notes that none of the guidelines imply any new obligations for Council of Europe member states.

III. Vulnerable persons and complex cases

1. The vulnerability of certain categories of persons such as unaccompanied and/or separated minors/children, victims of torture, sexual violence or human trafficking and persons with mental and/or physical disabilities should be duly taken into account when deciding whether to apply accelerated asylum procedures. In the case of children, their best interests are paramount.

2. International human rights obligations as regards the rights of specific vulnerable groups shall be duly taken into account when applying accelerated asylum procedures and in the manner of application.

3. When it becomes apparent that a case is particularly complex and that this complexity falls to be addressed by the state where the application was lodged, it should be excluded from the accelerated procedure.

IV. Procedural guarantees

1. When accelerated asylum procedures are applied, asylum seekers should enjoy the following minimum procedural guarantees:

[1] Text available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805b15d2

a. the right to lodge an asylum application with state authorities, including but not limited to, at borders or in detention;
b. the right to be registered as asylum seekers in any location within the territory of the state designated for this purpose by the competent authorities;
c. the right to be informed explicitly and without delay, in a language which he/she understands, of the different stages of the procedure being applied to him/her, of his/her rights and duties as well as remedies available to him/her;
d. the right, as a rule, to an individual interview in a language which he/she understands where the merits of the claim are being considered and, in cases referred to in Guideline I.2, the right to be heard on the grounds of admissibility;
e. the right to submit documents and other evidence in support of the claim and to provide an explanation for absence of documentation, if applicable;
f. the right to access legal advice and assistance, it being understood that legal aid should be provided according to national law;
g. the right to receive a reasoned decision in writing on the outcome of the proceedings.

2. Authorities shall take action to ensure that a representative of the interests of a separated or unaccompanied minor is appointed throughout the whole proceedings.

3. Authorities shall respect the confidentiality of all aspects of an asylum application, including the fact that the asylum seeker has made such an application, in as much as it may jeopardise protection of the asylum seeker or the liberty and security of his/her family members still living in the country of origin. Information on the asylum application as such which may thus jeopardise protection shall not be disclosed to the country of origin.

[…]

VII. Non-refoulement and return

1. The state receiving an asylum application is required to ensure that return of the asylum seeker to his/her country of origin or any other country will not expose him/her to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment, persecution, or serious violation of other fundamental rights which would, under international or national law, justify granting protection.

2. In all cases, the return must be enforced with respect for the integrity and human dignity of the person concerned, excluding any torture or inhuman or degrading treatment or punishment.

3. Collective expulsion of aliens is prohibited.

[…]

X. Right to effective and suspensive remedies

1. Asylum seekers whose applications are rejected shall have the right to have the decision reviewed by a means constituting an effective remedy.

2. Where asylum seekers submit an arguable claim that the execution of a removal decision could lead to a real risk of persecution or the death penalty, torture or inhuman or degrading treatment or punishment, the remedy against the removal decision shall have suspensive effect.

XI. Detention

1. Detention of asylum seekers should be the exception.

2. Children, including unaccompanied minors, should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance.

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

4. Asylum seekers may only be deprived of their liberty if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the state in which the asylum application is lodged have concluded that the presence of the asylum seekers for the purpose of carrying out the accelerated procedure cannot be ensured as effectively by another, less coercive measure.

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.

6. Detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance.

7. Detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy.

XII. Social and medical assistance

Asylum seekers shall be provided with necessary social and medical assistance, including emergency treatment.

XIII. Protection of private and family life

Asylum seekers and their family members within the state's jurisdiction are entitled to respect for their private and family life at all stages of the accelerated asylum procedure in accordance with Article 8 of the European Convention on Human Rights. Whenever possible, family unity should be guaranteed.

XIV. Role of the United Nations High Commissioner for Refugees (UNHCR)

Even when accelerated asylum procedures are applied, member states shall allow the UNHCR to:

a. have access to asylum seekers, including those in detention and border zones such as airport or port transit zones;

b. have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, as well as to person-specific information, provided that the asylum seeker agrees thereto;

c. present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

[…]

C. PARLIAMENTARY ASSEMBLY

OF THE COUNCIL OF EUROPE

Resolution 1509 (2006) [1]
Human Rights of irregular migrants

Text adopted by the Assembly on 27 June 2006 (18th Sitting) [2]

Parliamentary Assembly

[…]

12. In terms of civil and political rights, the Assembly considers that the European Convention on Human Rights provides a minimum safeguard and notes that the Convention requires that its contracting parties take measures for the effective prevention of human rights violations against vulnerable persons such as irregular migrants. The following minimum rights merit highlighting:

12.1. the right to life should be enjoyed and respected. Unreasonable force should not be used to prevent the entry of non-nationals into a country. A duty exists on the authorities to endeavour to save those whose life may be in danger in seeking to enter a country;

12.2. irregular migrants should be protected from torture and inhuman or degrading treatment or punishment. The return process of irregular migrants should be carried out respecting fully the right to dignity of returnees, taking into account, *inter alia*, their age, sex, state of health
and eventual disabilities. Coercive measures during expulsion should be kept to an absolute minimum;

[…]

12.4. detention of irregular migrants should be used only as a last resort and not for an excessive period of time. Where necessary, irregular migrants should be held in special detention facilities and separately from convicted prisoners. Children should only be detained as a measure of last resort and then for the shortest possible period of time. Detention or holding of other vulnerable persons (pregnant women, mothers with young children, the elderly, people with disabilities) should be avoided whenever possible. Suitable accommodation should be available to lodge families, but otherwise men and women should be housed separately. Detainees should have the right to contact anyone of their choice (lawyers, family members, NGOs, UNHCR,

[1] Assembly debate on 27 June 2006 (18th Sitting) (see Doc. 10924, report of the Committee on Migration, Refugees and Population, rapporteur: Mr van Thijn).
[2] Text available at http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17456&lang=en

etc.), have access to adequate medical care and access to an interpreter and free legal aid where appropriate;

12.5. detention of irregular migrants must be judicially authorised. Independent judicial scrutiny of the legality and need for continued detention should be available. Those detained should be expressly informed, without delay and in a language they understand, of their rights and the procedures applicable to them. They should be entitled to take proceedings before a court to challenge speedily the lawfulness of their detention;

12.6. irregular migrants in detention also have the right to communicate with the consular posts of their country of origin and to be informed, by the authorities of the state where they are detained, of their rights under the 1963 Vienna Convention on Consular Relations;

12.7. those whose right to enter a country is disputed should have the right to a hearing, with the assistance of an interpreter if necessary, in order to explain the reasons for entering the country and should be able to lodge an application for asylum if appropriate;

[…]

12.9. an irregular migrant being removed from a country should be entitled to an effective remedy before a competent, independent and impartial authority. The remedy should have a suspensive effect when the returnee has an arguable claim that, if returned, he or she would be subjected to treatment contrary to his or her human rights. Interpretation and legal aid should be available;

[…]

12.12. the right to respect for private and family life should be observed. Removal should not take place when the irregular person concerned has particularly strong family or social ties with the country seeking to remove him or her and when the removal is likely to lead to the conclusion that expulsion would violate the right to private and/or family life of the person concerned;

[…]

Resolution 1521 (2006) [1]
Mass arrival of irregular migrants on Europe's Southern shores

Text adopted by the Assembly on 5 October 2006 (29th Sitting).[2]

Parliamentary Assembly

[…]

16. The Assembly therefore considers it necessary to remind member states of their human rights and humanitarian obligations and calls on member states to:

16.1. protect the right to life, refrain from using unreasonable force on those seeking to enter Europe and to rescue those whose life may be in danger;

16.2. respect the right to human dignity by providing adequate reception conditions covering accommodation, health care and other basic needs;

16.3. provide a hearing, with an interpreter if necessary, to anyone whose right of entry is disputed in order to allow them to explain the reasons for entering the country and to lodge an application for asylum if appropriate;

16.4. use detention only as a last resort and not for an excessive period. Irregular migrants should be held in special detention facilities and not with convicted prisoners. Children should not be detained, unless this is unavoidable. In such cases it must be for the shortest possible time. The same applies for other vulnerable persons, including victims of torture, pregnant women, the elderly, etc.;

16.5. provide detainees with the right to contact anyone of their choice (lawyer, family members, a non-governmental organisation, the Office of the United Nations High Commissioner for Refugees – UNHCR, consular services, etc.);

16.6. ensure that detention is judicially authorised and that there is an independent judicial review of the lawfulness and need for continued detention. Detainees should be expressly informed, without delay and in a language they understand of their rights and the procedures applicable to them;

[1] Assembly debate on 5 October 2006 (29th Sitting) (see Doc. 11053, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Chope).
[2] Text available at :
http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17479&lang=en

16.7. guarantee freedom from torture, inhuman or degrading treatment or punishment, including in the return process;

[…]

16.10. provide an effective remedy before an independent and impartial authority, with a suspensive effect when a returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights if returned;

16.11. pay particular attention to the needs of unaccompanied and separated minors, pregnant women, the elderly, the disabled, victims of torture or of trafficking and others in a vulnerable situation;

16.12. ensure that unaccompanied minors have effective access to available protection mechanisms, including asylum procedures.

[…]

Resolution 1637 (2008) [1]
Europe's "boat people": mixed migration flows by sea into southern Europe

Text adopted by the Standing Committee, acting on behalf of the Assembly, on 28 November 2008.[2]

Parliamentary Assembly

[…]

9. The Assembly calls on Mediterranean member states of the Council of Europe receiving mixed flows of irregular migrants, refugees and asylum seekers to:

9.1. comply fully with and, when applicable, implement international and regional human rights law, including the European Convention on Human Rights (ETS No. 5), international refugee law, and European Union legislation, including Council Directives 2003/9/EC (laying down minimum standards for the reception of asylum seekers), 2004/83/EC ("refugee qualification directive") and 2005/85/EC ("refugee procedures directive");

[…]

9.3. progressively proscribe administrative detention of irregular migrants and asylum seekers, drawing a clear distinction between the two groups, and in the meantime allow detention only if it is absolutely necessary to prevent unauthorised entry into the country or to ensure deportation or extradition, in accordance with the European Convention on Human Rights;

9.4. ensure that detention is authorised by the judiciary and is used only if it is necessary and if there is no suitable alternative. Furthermore, detention must be for the shortest possible period of time. Malta should re-examine its policy of systematic and excessive periods of detention which can be for up to eighteen months for irregular migrants and twelve months for asylum seekers;

9.5. comply fully with their obligation not to detain irregular migrants, refugees and asylum seekers with ordinary prisoners and to ensure that when detention takes place it is in a non-carceral environment;

[1] Text adopted by the Standing Committee, acting on behalf of the Assembly, on 28 November 2008 (see Doc. 11688, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Østergaard). See also Recommendation 1850 (2008).
[2] Text available at:
http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17692&lang=en

9.6. respect the principle that vulnerable persons should not be detained. Vulnerable persons include unaccompanied minors, pregnant women, families with minors, persons with medical or other special needs, the elderly, victims of torture and sexual violence and victims of trafficking. In all circumstances, adequate assistance must be granted to vulnerable persons and particular attention must be paid to the situation of unaccompanied minors in view of worrying reports concerning their treatment in Spain, Greece and other countries in the region;

9.7. close unsuitable reception and detention centres, and construct new centres which are adequate and appropriate for the length of time irregular migrants and asylum seekers are to be detained. Detention facilities in Malta and Greece are in particular need of review, with many people being accommodated in tents or in facilities totally unsuited for anything other than immediate urgent reception;

9.8. ensure that all reception centres or detention centres provide:

9.8.1. appropriate food and sufficient quantities of drinking water;

9.8.2. adequate clothing and change of clothing, bedding, blankets, toiletries, etc.;

9.8.3. adequate furniture, such as beds, chairs and tables, as well as lockers to allow private items to be stored and kept safely;

9.8.4. separate accommodation and separate sanitation for men, women and unaccompanied minors;

9.8.5. adequate sanitation facilities which are kept clean and in serviceable operation;

9.8.6. regular access to the open air during substantial parts of the day;

9.8.7. sufficient recreational activities (television, reading, exercise, games, etc.);

9.9. ensure that those in detention or reception centres have access to the outside world, including access to family, civil society, in particular specialised NGOs dealing with the rights of migrants and asylum seekers, lawyers, the Red Cross and Red Crescent and international organisations such as the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM). Such access should be available both directly and by telephone, including both outgoing and incoming calls;

9.10. guarantee to irregular migrants, refugees and asylum seekers access to their fundamental rights and procedural rights, including:

9.10.1. prompt provision of information on their rights and the relevant procedures applicable to them and prompt provision of information concerning their detention and the internal rules of the detention centre in which they are being held. Interpretation or translations should also be provided whenever necessary;

[…]

9.10.4. automatic judicial control of detention and an effective remedy against deportation, with a suspensive effect before an independent and impartial authority;

9.10.5. access to a lawyer when detention or deportation is challenged. Free legal aid is required at least during the appeal process and the quality of this aid needs to be of an acceptable standard, which is often not the case in Spain and other countries;

9.11. ensure that staff working in reception and detention centres are carefully selected, properly trained and fully respected in their work and that they have the support of a sufficient number of interpreters and cultural mediators to carry out their work;

9.12. ensure that border staff are sufficiently trained to deal with refugees, asylum seekers and their requests for asylum;

9.13. guarantee to irregular migrants, refugees and asylum seekers not only emergency health care, which includes essential treatment that cannot reasonably be delayed and necessary care such as vaccinations and follow-up, but also basic health care, including essential dental care. Psychological assistance should also be provided for those with particular needs, such as victims of torture and violence, including sexual violence;

9.14. allow, when applicable, the monitoring of reception centres and detention centres by ombudspersons and national human rights commissions, parliamentarians and other national or international monitoring bodies. Where specialised monitoring bodies do not exist, they should be created. Where they do exist, their members should be selected and appointed carefully and should be trained in carrying out their functions. The media should also be granted reasonable access to detention centres from time to time to ensure transparency and accountability, without encroaching, however, on detainees' right to privacy; *[…]*

Resolution 1707 (2010) [1]
The detention of asylum seekers and irregular migrants in Europe

Text adopted by the Assembly on 28 January 2010 (7th Sitting).[2]

Parliamentary Assembly

[…]

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:

9.1.1. detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative;

9.1.2. detention shall distinguish between asylum seekers and irregular migrants; asylum seekers must be protected from penalties on account of their unauthorised entry or presence;

9.1.3. detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review;

9.1.4. detention shall be ordered only for the specific purpose of preventing unauthorised entry into a state's territory or with a view to deportation or extradition;

9.1.5. detention shall not be arbitrary;

9.1.6. detention shall only be used when necessary;

9.1.7. detention shall be proportionate to the objective to be achieved;

[1] Assembly debate on 28 January 2010 (7th Sitting) (see Doc. 12105, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Mendonça). See also Recommendation 1900 (2010).
[2] Text available at:
http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17813&lang=en

9.1.8. the place, conditions and regime of detention shall be appropriate;

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

9.1.10. detention must be for the shortest time possible;

9.2. put into law and practice 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers to ensure that:

9.2.1. persons deprived of their liberty shall be treated with dignity and respect for their rights;

9.2.2. detainees shall be accommodated in centres specifically designed for the purpose of immigration detention and not in prisons;

9.2.3. all detainees must be informed promptly, in simple, non-technical language that they can understand, of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention; during detention, detainees must be provided with the opportunity to make a claim for asylum or complementary/subsidiary protection, and effective access to a fair and satisfactory asylum process with full procedural safeguards;

9.2.4. legal and factual admission criteria shall be complied with, including carrying out appropriate screening and medical checks to identify special needs. Proper records concerning admissions, stay and departure of detainees must be kept;

9.2.5. the material conditions for detention shall be appropriate to the individual's legal and factual situation;

9.2.6. the detention regime must be appropriate to the individual's legal and factual situation;

9.2.7. the detention authorities shall safeguard the health and well-being of all detainees in their care;

9.2.8. detainees shall be guaranteed effective access to the outside world (including access to lawyers, family, friends, the Office of the United Nations High Commissioner for Refugees (UNHCR), civil society, religious/spiritual representatives) and the right to receive frequent visits from the outside world;

9.2.9. detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge;

9.2.10. detainees must be able periodically to effectively challenge their detention before a court and decisions regarding detention should be reviewed automatically at regular intervals;

9.2.11. the safety, security and discipline of detainees shall be taken into account in order to maintain the good order of detention centres;

9.2.12. detention centre staff and immigration officers shall not use force against detainees except in cases of self-defence or in cases of attempted escape or active physical resistance to a lawful order, and always as a last resort and in a manner proportionate to the situation;

9.2.13. detention centre management and staff shall be carefully recruited, provided with appropriate training and operate to the highest professional, ethical and personal standards;

9.2.14. detainees shall have ample opportunity to make requests or complaints to any competent authority and be guaranteed confidentiality when doing so;

9.2.15. independent inspection and monitoring of detention centres and of conditions of detention shall take place;

9.3. consider alternatives to detention and:

9.3.1. provide for a presumption in favour of liberty under national law;

9.3.2. clarify the framework for the implementation of alternatives to detention and incorporate into national law and practice a proper legal institutional framework to ensure that alternatives are considered first, if release or temporary admission is not granted;

9.3.3. ensure that their application is non-discriminatory, proportionate and necessary and that the individual circumstances and vulnerabilities of those to whom they are applied are taken into account and that the possibility of review by an independent judicial body or other competent authority is provided for;

Resolution 1741 (2010) [1]
Readmission agreements: a mechanism for returning irregular migrants

Text adopted by the Assembly on 22 June 2010 (22nd Sitting).[2]

The Parliamentary Assembly,

[…]

6. It is essential to negotiate and apply readmission agreements which take fully into account the human rights of the irregular migrants concerned. Furthermore, it is crucial, in order to better understand and evaluate these instruments, to collect data on their effects and implementation. The Parliamentary Assembly therefore calls upon Council of Europe member states to:

6.1. conclude readmission agreements only with countries that comply with relevant human rights standards and with the 1951 Geneva Convention, that have functioning asylum systems in place and that protect their citizens' right to free movement, neither criminalising unauthorised entry into, nor departure from, the country in question;

6.2. comply fully with their obligations under the European Convention on Human Rights, and in particular Article 3 thereof, the 1951 Geneva Convention and other relevant human rights instruments and to follow the 20 Guidelines on Forced Return of the Committee of Ministers when readmitting an irregular migrant under a readmission agreement, or when requesting the enforcement of a decision to return an irregular migrant under such an agreement;

6.3. ratify and abide fully and effectively by Protocol No. 4 to the European Convention on Human Rights (ETS No. 46) which, inter alia, prohibits collective expulsion of aliens;

6.4. abide by the Council of Europe Guidelines on human rights protection in the context of accelerated asylum procedures;

6.5. ensure that, before a readmission agreement is put to use, asylum seekers have had the possibility to submit an asylum application, and the right to an effective remedy with suspensive effect, which implies a review of facts and law by an independent national authority;

[1] Assembly debate on 22 June 2010 (22nd Sitting) (see Doc. 12168, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Strik). See also Recommendation 1925 (2010).
[2] Text available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17874&lang=en

6.6. verify that, if the member state applies the concept of "safe third country" with regard to asylum seekers whose claims are not assessed substantially, the country of destination is safe for that particular asylum seeker, implying that it will respect the human rights of the person concerned, provide access to a proper asylum procedure and comply with the 1951 Geneva Convention;

6.7. include a provision in readmission agreements which requires that a sending country always first tries to return a person concerned to his or her country of origin before requesting readmission by a country through which that person has merely transited;

6.8. include a provision into readmission agreements which requires that the requesting country, prior to requesting readmission by a third country, verifies that the readmitting third country will grant the person concerned access to minimum social rights. If this cannot be verified, readmission must not take place and the requesting country shall instead give the person concerned access to such rights as long as he or she stays in that country;

6.9. ensure that a readmitted third-country national does not become stranded in a readmitting transit country without the possibility to go back to his or her country of origin;

[…]

6.11. take care that readmission agreements contain appropriate legal safeguards to protect the migrants against any abuse of their human rights and that the agreements are specific about their rights, in particular as concerns vulnerable categories;

6.12. ensure that the country of origin of the person concerned will not receive any evidence of or information on an asylum claim lodged in the sending country;

[…]

6.14. phase out older bilateral readmission agreements, replacing them with more modern ones which fully respect the Council of Europe's human rights standards;

[…]

6.15. carry out quantitative and qualitative studies on the functioning and impact of readmission agreements to which they are parties, in readmitting as well as sending countries, in order to ascertain whether they might result in human rights abuses;

6.16. ensure that readmission agreements are always made public;

6.17. avoid using informal readmission arrangements, or at least ensure that the recommendations set out in this resolution are also applied with regard to such arrangements;

[…]

6.19. set up training schemes for border guards, civil servants and others involved in the implementation of readmission agreements, in both sending and readmitting countries;

6.20. consider regularisation programmes as an alternative to the return of irregular migrants, where appropriate.

[…]

Resolution 1810 (2011) [1]
Unaccompanied children in Europe: issues of arrival, stay and return

Text adopted by the Assembly on 15 April 2011 (18th Sitting).[2]

Parliamentary Assembly

[…]

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:

5.1. unaccompanied children must be treated first and foremost as children, not as migrants;

5.2. the child's best interests must be a primary consideration in all actions regarding the child, regardless of the child's migration or residence status;

5.3. no child should be denied access to the territory or be summarily turned back at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest;

5.4. child victims of human trafficking should benefit from special arrangements in terms of identification, reception and protection. These should be adapted to their needs and ensure their protection in line with the Council of Europe Conventions on Action against Trafficking in Human Beings (CETS No. 197) and on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201);

5.5. every unaccompanied child should be provided immediately with a guardian mandated to safeguard his or her best interest. The legal guardian should be independent and should have the necessary expertise in the field of childcare. Every guardian should receive regular training and undergo regular and independent check-ups/monitoring;

[1] Assembly debate on 15 April 2011 (18th Sitting) (see Doc. 12539, report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Reps; and Doc. 12558, opinion of the Social, Health and Family Affairs Committee, rapporteur: Ms Coleiro Preca). See also Recommendation 1969 (2011).
[2] Text available at http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17991&lang=en

5.6. legal, social and psychological assistance should be provided without delay to unaccompanied children. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications;

5.7. all interviews with an unaccompanied child concerning his or her personal details and background should be conducted individually by specialised and well-trained staff and in the presence of the child's guardian;

5.8. access to asylum and international protection procedures must be made unconditionally available to all unaccompanied children. A harmonised, child-sensitive asylum system needs to be established, including procedures that take into consideration the additional difficulties children may have in withstanding trauma and in expressing coherently what has happened to them and their child-specific experiences of persecution. Asylum applications by unaccompanied children should be given priority and processed within the shortest appropriate time frame, while allowing children sufficient time to understand and prepare for the process. All unaccompanied children in asylum proceedings must be represented by a lawyer in addition to a guardian, provided free of charge by the state and be able to challenge before a court decisions regarding their protection claims;

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;

5.10. age assessment should only be carried out if there are reasonable doubts about a person being underage. The assessment should be based on the presumption of minority, involve a multidisciplinary evaluation by an independent authority over a period of time and not be based exclusively on medical assessment. Examinations should only be carried out with the consent of the child or his or her guardian. They should not be intrusive and should comply with medical ethical standards. The margin of error of medical and other examinations should be clearly indicated and taken into account. If doubts remain that the person may be underage, he or she should be granted the benefit of the doubt. Assessment decisions should be subject to administrative or judicial appeal;

5.11. the child's views should be heard and given due weight in all relevant procedures, in accordance with his or her age and maturity. Administrative and judicial procedures within member states should be conceived and applied in a child-friendly manner;

5.12. finding a durable solution should be the ultimate goal from the first contact with the unaccompanied child. It should include family tracing if requested by the child or his or her guardian – where it is safe to do so and will not put family members in danger – and an individualised best-interest assessment that examines all options for durable solutions on an equal basis. A durable solution may be the child's integration into the host country, family reunification in a third country, or return and reintegration in the country of origin. An individual life project should be identified jointly by the authorities, the legal guardian and the child concerned, and monitored throughout the accomplishment of the project in line with Committee of Ministers Recommendation CM/Rec(2007)9 on life projects for unaccompanied migrant minors. Pending identification of a durable solution, the child should benefit from legal residence status in the host country. This should be valid throughout the duration of the child's personal life project conducted in the host country, even if the project extends to the age of adulthood;

5.13. access to adequate accommodation, education, vocational training and health care must be guaranteed to all unaccompanied children, regardless of their migration status and under the same conditions as to child nationals. Moreover, unaccompanied children should be able to benefit from comprehensive child welfare programmes. These should, where necessary, take into consideration their emotional needs following traumatic experiences and should, beyond the immediate psychological assistance to be provided (see paragraph 5.6), comprise measures such as targeted educational assistance, placement in foster families or specialised residential care, or integration assistance for children with disabilities;

5.14. family reunification possibilities should be extended beyond the country of origin and approached from a humanitarian perspective exploring wider family links in the host country and third countries, guided by the principle of the child's best interest. The Dublin II Regulation should only be applied to unaccompanied children if transfer to a third country is in the child's best interests;

5.15. the best interests of the child should be taken into account in all steps leading to the return of the child to his or her country of origin. Return is not an option if it risks leading to the violation of the child's fundamental human rights. If no parents or members of the extended family are identified, return should only take place with advance secure, concrete, and adequate care and reintegration

arrangements in the country of origin. Return to institutional care should not in and of itself be viewed as a durable solution. A professional child-protection body should conduct the assessment of return conditions. A follow-up plan should be established in order to ascertain that the protection of the child is guaranteed following the return. Non-rights-based arguments such as those relating to general migration control, must not override best interest consideration in return decisions. Returns to countries where the child's security, protection – including against *refoulement* – and welfare cannot be guaranteed, must not be envisaged. Children in return proceedings must be represented by lawyers in addition to guardians. They must be granted access to the return case file and be able to challenge return decisions before a court; their appeals must have suspensive effect on the return.

[…]

Resolution 1821(2011)[1]
The interception and rescue at sea of asylum seekers, refugees and irregular migrants

Text adopted by the Assembly on 21 June 2011 (22nd Sitting).[2]

Parliamentary Assembly

1. The surveillance of Europe's southern borders has become a regional priority. The European continent is having to cope with the relatively large-scale arrival of migratory flows by sea from Africa, reaching Europe mainly through Italy, Malta, Spain, Greece and Cyprus.

2. Migrants, refugees, asylum seekers and others risk their lives to reach Europe's southern borders, mostly in unseaworthy vessels. These journeys, always undertaken illicitly, mostly on board flagless vessels, putting them at risk of falling into the hands of migrant smuggling and trafficking rings, reflect the desperation of the passengers, who have no legal means and, above all, no safer means of reaching Europe.

3. Although the number of arrivals by sea has fallen drastically in recent years, resulting in a shift of migratory routes (particularly towards the land border between Turkey and Greece), the Parliamentary Assembly, recalling, inter alia, its Resolution 1637 (2008) on Europe's boat people: mixed migration flows by sea into southern Europe, once again expresses its deep concern over the measures taken to deal with the arrival by sea of these mixed migratory flows. Many people in distress at sea have been rescued and many attempting to reach Europe have been pushed back, but the list of fatal incidents – as predictable as they are tragic – is a long one and it is currently getting longer on an almost daily basis.

4. Furthermore, recent arrivals in Italy and Malta following the turmoil in North Africa confirm that Europe must always be ready to face the possible large-scale arrival of irregular migrants, asylum seekers and refugees on its southern shores.

5. The Assembly notes that measures to manage these maritime arrivals raise numerous problems, of which five are particularly worrying:

5.1. despite several relevant international instruments which are applicable in this area and which satisfactorily set out the rights and obligations of states and individuals applicable in this area, interpretations of their content appear to differ. Some states do not agree on the nature and extent of their responsibilities in specific situations and some states also call into question the application of the principle of non-refoulement on the high seas;

[1] Assembly debate on 21 June 2011 (22nd Sitting) (see Doc. 12628, report of the Committee on Migration, Refugees and Population, rapporteur: Mr Díaz Tejera). See also Recommendation 1974 (2011).
[2] Text available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18006&lang=en

5.2. while the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a “place of safety”, the notion of “place of safety” does not appear to be interpreted in the same way by all member states. Yet it is clear that the notion of “place of safety” should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights;

5.3. divergences of this kind directly endanger the lives of the people to be rescued, in particular by delaying or preventing rescue measures, and they are likely to dissuade seafarers from rescuing people in distress at sea. Furthermore, they could result in a violation of the principle of non-refoulement in respect of a number of persons, including some in need of international protection;

5.4. although the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations it co-ordinates;

5.5. finally, these sea arrivals place a disproportionate burden on the states located on the southern borders of the European Union. The goal of responsibilities being shared more fairly and greater solidarity in the migration sphere between European states is far from being attained.

6. The situation is rendered more complex by the fact that these migratory flows are of a mixed nature and therefore call for specialised and tailored protection-sensitive responses in keeping with the status of those rescued. To respond to sea arrivals adequately and in line with the relevant international standards, the states must take account of this aspect in their migration management policies and activities.

7. The Assembly reminds member states of their obligations under international law, including the European Convention on Human Rights (ETS No. 5), the United Nations Convention on the Law of the Sea of 1982 and the 1951 Geneva Convention relating to the Status of Refugees, and particularly reminds them of the principle of non-refoulement and the right to seek asylum. The Assembly also reiterates the obligations of the states parties to the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue.

8. Finally and above all, the Assembly reminds member states that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of non-refoulement is equally applicable on the high seas. The high seas are not an area where states are exempt

from their legal obligations, including those emerging from international human rights law and international refugee law.

9. Accordingly, the Assembly calls on member states, when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, be it in the exercise of de jure or de facto jurisdiction, to:

9.1. fulfil without exception and without delay their obligation to save people in distress at sea;

9.2. ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders;

9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of non-refoulement, regardless of whether interception measures are implemented within their own territorial waters, those of another state on the basis of an ad hoc bilateral agreement, or on the high seas;

9.4. refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas, in keeping with the UNHCR's interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights;

9.5. carry out as a priority action the swift disembarkation of rescued persons to a "place of safety" and interpret a "place of safety" as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of "safety" extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation;

9.6. guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection;

9.7. guarantee access to protection and assistance, including to asylum procedures, for those intercepted who are victims of human trafficking or at risk of being trafficked;

9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories – regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in

Assembly Resolution 1707 (2010) on the detention of asylum seekers and irregular migrants in Europe;

9.9. suspend any bilateral agreements they may have concluded with third states if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring;

9.10. sign and ratify, if they have not already done so, the aforementioned relevant international instruments and take account of the International Maritime Organization (IMO) Guidelines on the Treatment of Persons Rescued at Sea;

9.11. sign and ratify, if they have not already done so, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and the so-called "Palermo Protocols" to the United Nations Convention against Transnational Organized Crime (2000);

9.12. ensure that maritime border surveillance operations and border control measures do not affect the specific protection afforded under international law to vulnerable categories such as refugees, stateless persons, women and unaccompanied children, migrants, victims of trafficking or at risk of being trafficked, or victims of torture and trauma.

10. The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union states and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations co-ordinated by that agency. While the Assembly welcomes the proposals presented by the European Commission to amend the rules governing that agency, with a view to strengthening guarantees of full respect for fundamental rights, it considers them inadequate and would like the European Parliament to be entrusted with the democratic supervision of the agency's activities, particularly where respect for fundamental rights is concerned.

11. The Assembly also considers it essential that efforts be made to remedy the prime causes prompting desperate individuals to risk their lives by boarding boats bound for Europe. The Assembly calls on all member states to step up their efforts to promote peace, the rule of law and prosperity in the countries of origin of potential immigrants and asylum seekers.

12. Finally, in view of the serious challenges posed to coastal states by the irregular arrival by sea of mixed flows of individuals, the Assembly calls on the international community, particularly the IMO, the UNHCR, the International Organization for Migration

(IOM), the Council of Europe and the European Union (including Frontex and the European Asylum Support Office) to:

12.1. provide any assistance required to those states in a spirit of solidarity and sharing of responsibilities;

12.2. under the auspices of the IMO, make concerted efforts to ensure a consistent and harmonised approach to international maritime law through, inter alia, agreement on the definition and content of the key terms and norms;

12.3. establish an inter-agency group with the aim of studying and resolving the main problems in the area of maritime interception, including the five problems identified in the present resolution, setting clear policy priorities, providing guidance to states and other relevant actors, and monitoring and evaluating the use of maritime interception measures. The group should be made up of members of the IMO, the UNHCR, the IOM, the Council of Europe, Frontex and the European Asylum Support Office.

Resolution 2020 (2014) [1]
The alternatives to immigration detention of children

Text adopted by the Assembly on 3 October 2014 (36th Sitting).[2]

Parliamentary Assembly

[…]

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;

9.2. introduce legislation prohibiting the detention of children for immigration reasons, if it has not yet been done, and ensure its full implementation in practice;

9.3. refrain from placing unaccompanied or separated children in administrative detention;

9.4. ensure that children are treated as children first and foremost, and that persons who claim to be children are treated as such until proven otherwise;

9.5. develop child-friendly age-assessment procedures for migrant children;

[1] *Assembly debate* on 3 October 2014 (36th Sitting) (see Doc. 13597, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Tinatin Bokuchava). See also Recommendation 2056 (2014).
[2] Text available at:
http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21295&lang=en

9.6. continue efforts to make their legislation on foreign nationals conform with the best international standards, while taking into account the best interests of the child as enshrined in Article 3 of the United Nations Convention on the Rights of the Child and promoting various forms of internationally recognised alternatives to detention;

9.7. adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved;

9.8. provide necessary resources in order to develop alternatives to the detention of migrant children;

[…]

D.

COMMISSIONER FOR HUMAN RIGHTS

Recommendation CommDH (2001)19
of the Commissioner for Human Rights
concerning the rights of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders

Strasbourg, 19th September 2001 [1]

The Commissioner for Human Rights, acting in accordance with Resolution (99) 50 of the Committee of Ministers on the Council of Europe Commissioner for Human Rights adopted on 7 May 1999 ("the Resolution"),

[…]

Would like to issue the following recommendations:

[…]

I. Rights of aliens on their arrival at the border of a member State

[…]

3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre.

4. Detained foreigners must be given the right to contact anyone of their choice in order to notify that person of their situation.

II. Detention conditions

5. As far as possible, member States should bring their national legislation into line in terms of the procedural guarantees available to foreigners being held and the maximum period of detention permitted at each stage of the proceedings.

[1] Text available at:
https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2365891&SecMode=1&DocId=957946&Usage=2

6. Member States should avoid holding unaccompanied minors, pregnant women, mothers with young children, the elderly, and people with disabilities in waiting areas. Where appropriate, unaccompanied minors must be placed in specialised centres, and the courts immediately informed of their situation. Members of the same family should not be separated.

7. Aliens held pending authorisation of entry must be placed in a specialized centre, and under no circumstances during their detention must they be placed with ordinary prisoners. The same applies to aliens awaiting enforcement of an expulsion order except, of course, in the case of persons expelled on having served their sentence and persons detained at the border with a view to being extradited.

8. All detainees, however long they are held, must have the right to emergency medical care as required by their state of health.

9. On no account must holding centres be viewed as prisons.

10. Governments must guarantee maximum transparency in respect of how holding centres operate, by ensuring at least that independent national commissions, ombudsmen and NGOs, lawyers and close relatives of detainees have access to them. In particular, their operation must be regularly monitored through the courts.

11. It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the ECHR is alleged.

III. Implementation of expulsion measures

12. Where forced expulsion is unavoidable, it must be carried out with complete transparency in order to ensure that fundamental human rights have been respected at all stages.

[…]

14. When expulsion orders are to be enforced, it is crucial at every stage of the procedure to inform the persons concerned of what lies ahead so that they can prepare themselves psychologically for their return. In accordance with Article 4 of Protocol No 4 to the ECHR, collective expulsion is prohibited.

15. Threats must not be used to persuade persons subject to an expulsion order to board any form of transport. The wearing of masks making it impossible to identify staff executing forced expulsion orders must be banned outright.

16. Holding centre staff and immigration and expulsion officers must receive proper training so as to minimise the risk of violence.

17. The following must be prohibited outright:

- use of any means which may cause asphyxia or suffocation (adhesive tape, gags, helmets, cushions etc) and use of incapacitating or irritant gas; use of restraints which may induce postural asphyxia must also be avoided;

- use of tranquillisers or injections without prior medical examination or a doctor's prescription;

18. For safety reasons, the use during aircraft take-off and landing of handcuffs on persons resistant to expulsion should be prohibited.

[…]

E.

EUROPEAN COMMITTEE

FOR THE PREVENTION OF TORTURE AND

INHUMAN OR DEGRADING TREATMENT OP PUNISHMENT

(CPT)

CPT STANDARDS ON IMMIGRATION DETENTION [1]

[…]

Foreign nationals detained under aliens legislation

Extract from the 7th General Report [CPT/Inf (97) 10]

[…]

A. Preliminary remarks

24. CPT visiting delegations frequently encounter foreign nationals deprived of their liberty under aliens legislation (hereafter "immigration detainees"): persons refused entry to the country concerned; persons who have entered the country illegally and have subsequently been identified by the authorities; persons whose authorisation to stay in the country has expired; asylum-seekers whose detention is considered necessary by the authorities; etc.

In the following paragraphs, some of the main issues pursued by the CPT in relation to such persons are described. The CPT hopes in this way to give a clear advance indication to national authorities of its views concerning the treatment of immigration detainees and, more generally, to stimulate discussion in relation to this category of persons deprived of their liberty. *[…]*

B. Detention facilities

25. CPT visiting delegations have met immigration detainees in a variety of custodial settings, ranging from holding facilities at points of entry to police stations, prisons and specialised detention centres. As regards more particularly transit and "international" zones at airports, the precise legal position of persons refused entry to a country and placed in such zones has been the subject of some controversy. On more than one occasion, the CPT has been confronted with the argument that such persons are not "deprived of their liberty" as they are free to leave the zone at any moment by taking any international flight of their choice.

For its part, the CPT has always maintained that a stay in a transit or "international" zone can, depending on the circumstances, amount to a deprivation of liberty within the meaning of Article 5 (1)(f) of the European Convention on Human Rights, and that consequently such zones fall within the Committee's mandate. The judgement delivered on 25 June 1996 by the European Court of Human Rights in the case of Amuur against France can be considered as vindicating this view. In that case, which concerned four asylum seekers held in the transit zone at Paris-Orly Airport for 20 days, the Court stated that "The mere fact

[1] Text available at CPT/Inf/E (2002) 1-Rev. 2015, Part IV.

that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction ("atteinte") on liberty ...." and held that "holding the applicants in the transit zone .... was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty".

26. Point of entry holding facilities have often been found to be inadequate, in particular for extended stays. More specifically, CPT delegations have on several occasions met persons held for days under makeshift conditions in airport lounges. It is axiomatic that such persons should be provided with suitable means for sleeping, granted access to their luggage and to suitably-equipped sanitary and washing facilities, and allowed to exercise in the open air on a daily basis. Further, access to food and, if necessary, medical care should be guaranteed.

27. In certain countries, CPT delegations have found immigration detainees held in police stations for prolonged periods (for weeks and, in certain cases, months), subject to mediocre material conditions of detention, deprived of any form of activity and on occasion obliged to share cells with criminal suspects. Such a situation is indefensible.

The CPT recognises that, in the very nature of things, immigration detainees may have to spend some time in an ordinary police detention facility. However, conditions in police stations will frequently - if not invariably - be inadequate for prolonged periods of detention. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum.

28. On occasion, CPT delegations have found immigration detainees held in prisons. Even if the actual conditions of detention for these persons in the establishments concerned are adequate -which has not always been the case - the CPT considers such an approach to be fundamentally flawed. A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence.

Admittedly, in certain exceptional cases, it might be appropriate to hold an immigration detainee in a prison, because of a known potential for violence. Further, an immigration detainee in need of in-patient treatment might have to be accommodated temporarily in a prison health-care facility, in the event of no other secure hospital facility being available. However, such detainees should be held quite separately from prisoners, whether on remand or convicted.

29. In the view of the CPT, in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel. *[…]*

Obviously, such centres should provide accommodation which is adequately-furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to

avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.

The staff of centres for immigration detainees have a particularly onerous task. Firstly, there will inevitably be communication difficulties caused by language barriers. Secondly, many detained persons will find the fact that they have been deprived of their liberty when they are not suspected of any criminal offence difficult to accept. Thirdly, there is a risk of tension between detainees of different nationalities or ethnic groups. Consequently, the CPT places a premium upon the supervisory staff in such centres being carefully selected and receiving appropriate training. As well as possessing well-developed qualities in the field of interpersonal communication, the staff concerned should be familiarised with the different cultures of the detainees and at least some of them should have relevant language skills. Further, they should be taught to recognise possible symptoms of stress reactions displayed by detained persons (whether post-traumatic or induced by socio-cultural changes) and to take appropriate action.

C. Safeguards during detention

30. Immigration detainees should - in the same way as other categories of persons deprived of their liberty - be entitled, as from the outset of their detention, to inform a person of their choice of their situation and to have access to a lawyer and a doctor. Further, they should be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them.

The CPT has observed that these requirements are met in some countries, but not in others. In particular, visiting delegations have on many occasions met immigration detainees who manifestly had not been fully informed in a language they understood of their legal position. In order to overcome such difficulties, immigration detainees should be systematically provided with a document explaining the procedure applicable to them and setting out their rights. This document should be available in the languages most commonly spoken by those concerned and, if necessary, recourse should be had to the services of an interpreter.

31. The right of access to a lawyer should apply throughout the detention period and include both the right to speak with the lawyer in private and to have him present during interviews with the authorities concerned.

All detention facilities for immigration detainees should provide access to medical care. Particular attention should be paid to the physical and psychological state of asylum seekers, some of whom may have been tortured or otherwise ill-treated in the countries from which they have come. The right of access to a doctor should include the right - if a detainee so wishes - to be examined by a doctor of his choice; however, the detainee might be expected to cover the cost of such a second examination.

More generally, immigration detainees should be entitled to maintain contact with the outside world during their detention, and in particular to have access to a telephone and to receive visits from relatives and representatives of relevant organisations.

[…]

E. Means of coercion in the context of expulsion procedures

[…]

36. The CPT recognises that it will often be a difficult task to enforce an expulsion order in respect of a foreign national who is determined to stay on a State's territory. Law enforcement officials may on occasion have to use force in order to effect such a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely, unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as punishment for not having done so. Further, the Committee must emphasise that to gag a person is a highly dangerous measure.

The CPT also wishes to stress that any provision of medication to persons subject to an expulsion order must only be done on the basis of a medical decision and in accordance with medical ethics.

Deportation of foreign nationals by air

Extract from the 13th General Report [CPT/Inf (2003) 35]

[…]

27. As from the beginning of its activities, the CPT has examined the conditions of detention of persons deprived of their liberty under aliens legislation, and this issue was dealt with in a section of the CPT's 7th General Report (CPT/Inf (97) 10, paragraphs 24 to 36). The CPT set out in that report some basic rules concerning the use of force and means of restraint in the context of procedures for the deportation of immigration detainees.

28. The CPT's visits since that report have enabled it to flesh out its knowledge of practices concerning the deportation of foreign nationals by air. During its visits, the CPT has concentrated on procedures involving forcible departure with an escort[1], and on a number of cases brought to its attention, in particular because of the death of the deported person, the extent of the means of restraint used and/or allegations of ill-treatment. The CPT did not confine its examination to the procedure followed when the person concerned boarded the plane and during the flight; it also monitored many other aspects, such as detention prior to deportation, steps taken to prepare for the immigration detainee's return to the country of destination, measures to ensure suitable selection and training of escort staff, internal and external systems for monitoring the conduct of staff responsible for deportation escorts, measures taken following an abortive deportation attempt, etc.

29. In order to be able to make a detailed study of the procedures and means used during deportation operations, the CPT obtained copies of the relevant instructions and directives. It also obtained copies of many other documents (statistics on deportation operations, escort assignment orders, escort assignment reports, incident reports, reports in the context of legal proceedings, medical certificates, etc.) and examined the restraint equipment used during deportation operations. It also had detailed interviews in various countries with those in charge of units responsible for deportation operations and with prospective deportees met on the spot, some of whom had been brought back to holding facilities after an abortive deportation attempt.

30. After its visits, the CPT drew up a number of guidelines, which it recommended the countries concerned to follow. In order to promote widespread application of these guidelines in all the States Parties to the Convention, the Committee has decided to group together the most important principles and comment on them below.

[1] Deportation procedures tend to be classified according to a number of factors, such as the extent to which force is used, the type of means of restraint employed, and the number of persons escorting the deportee. For example, one of the countries visited recently distinguished between departures in which no resistance was offered, forcible departures without an escort and forcible departures with an escort. In general, the most problematic procedures were those involving the combined use of force, several means of restraint and a large number of escort staff until the deportee's arrival in the country of final destination.

Of course, what follows must be read in the light of a State's fundamental obligation not to send a person to a country where there are substantial grounds for believing that he/she would run a real risk of being subjected to torture or ill-treatment.

31. The CPT recognizes that it will often be a difficult and stressful task to enforce a deportation order in respect of a foreign national who is determined to stay on a State's territory. It is also clear, in the light of all the CPT's observations in various countries – and particularly from an examination of a number of deportation files containing allegations of ill-treatment – that deportation operations by air entail a manifest risk of inhuman and degrading treatment. This risk exists both during preparations for deportation and during the actual flight; it is inherent in the use of a number of individual means/methods of restraint, and is even greater when such means/methods are used in combination.

32. At the outset it should be recalled that it is entirely unacceptable for persons subject to a deportation order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so. The CPT welcomes the fact that this rule is reflected in many of the relevant instructions in the countries visited. For instance, some instructions which the CPT examined prohibit the use of means of restraint designed to punish the foreigner for resisting or which cause unnecessary pain.

33. Clearly, one of the key issues arising when a deportation operation is carried out is the use of force and means of restraint by escort staff. The CPT acknowledges that such staff are, on occasion, obliged to use force and means of restraint in order to effectively carry out the deportation; however, the force and the means of restraint used should be no more than is reasonably necessary. The CPT welcomes the fact that in some countries the use of force and means of restraint during deportation procedures is reviewed in detail, in the light of the principles of lawfulness, proportionality and appropriateness.

34. The question of the use of force and means of restraint arises from the moment the detainee concerned is taken out of the cell in which he/she is being held pending deportation (whether that cell is located on airport premises, in a holding facility, in a prison or a police station). The techniques used by escort personnel to immobilise the person to whom means of physical restraint – such as steel handcuffs or plastic strips – are to be applied deserve special attention. In most cases, the detainee will be in full possession of his/her physical faculties and able to resist handcuffing violently. In cases where resistance is encountered, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. Keeping a detainee in such a position, in particular with escort staff putting their weight on various parts of the body (pressure on the ribcage, knees on the back, immobilisation of the neck) when the person concerned puts up a struggle, entails a risk of positional asphyxia[2].

[2] See, in particular, "Positional Asphyxia – Sudden Death", US Department of Justice, June 1995, and the proceedings of the "Safer Restraint" Conference held in London in April 2002 under the aegis of the UK Police Complaints Authority (cf. www.pca.gov.uk).

There is a similar risk when a deportee, having been placed on a seat in the aircraft, struggles and the escort staff, by applying force, oblige him/her to bend forward, head between the knees, thus strongly compressing the ribcage. In some countries, the use of force to make the person concerned bend double in this way in the passenger seat is, as a rule, prohibited, this method of immobilisation being permitted only if it is absolutely indispensable in order to carry out a specific, brief, authorised operation, such as putting on, checking or taking off handcuffs, and only for the duration strictly necessary for this purpose.

The CPT has made it clear that the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned.

35. The CPT has noted with interest the directives in force in certain countries, according to which means of restraint must be removed during the flight (as soon as take-off has been completed). If, exceptionally, the means of restraint had to be left in place, because the deportee continued to act aggressively, the escort staff were instructed to cover the foreigner's limbs with a blanket (such as that normally issued to passengers), so as to conceal the means of restraint from other passengers.

On the other hand, instructions such as those followed until recently in one of the countries visited in connection with the most problematic deportation operations, whereby the persons concerned were made to wear nappies and prevented from using the toilet throughout the flight on account of their presumed dangerousness, can only lead to a degrading situation.

36. In addition to the avoidance of the risks of positional asphyxia referred to above, the CPT has systematically recommended an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or wholly. Serious incidents that have occurred in various countries over the last ten years in the course of deportations have highlighted the considerable risk to the lives of the persons concerned of using these methods (gagging the mouth and/or nose with adhesive tape, putting a cushion or padded glove on the face, pushing the face against the back of the seat in front, etc.). The CPT drew the attention of States Parties to the Convention to the dangers of methods of this kind as far back as 1997, in its 7th General Report. It notes that this practice is now expressly prohibited in many States Parties and invites States which have not already done so to introduce binding provisions in this respect without further delay.

37. It is essential that, in the event of a flight emergency while the plane is airborne, the rescue of the person being deported is not impeded. Consequently, it must be possible to remove immediately any means restricting the freedom of movement of the deportee, upon an order from the crew.

Account should also be taken of the health risks connected with the so-called "economy-class syndrome" in the case of persons who are confined to their seats for long periods[3].

38. Two particular points were of concern to the CPT after visits to certain countries: the wearing of masks by deportation escorts and the use, by the latter, of incapacitating or irritant gases to remove immigration detainees from their cells in order to transfer them to the aircraft.

In the CPT's opinion, security considerations can never serve to justify escort staff wearing masks during deportation operations. This practice is highly undesirable, since it could make it very difficult to ascertain who is responsible in the event of allegations of ill-treatment.

The CPT also has very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to the aircraft. The use of such gases in very confined spaces, such as cells, entails manifest risks to the health of both the detainee and the staff concerned. Staff should be trained in other control techniques (for instance, manual control techniques or the use of shields) to immobilise a recalcitrant detainee.

39. Certain incidents that have occurred during deportation operations have highlighted the importance of allowing immigration detainees to undergo a medical examination before the decision to deport them is implemented. This precaution is particularly necessary when the use of force and/or special measures is envisaged.

Similarly, all persons who have been the subject of an abortive deportation operation must undergo a medical examination as soon as they are returned to detention (whether in a police station, a prison or a holding facility specially designed for foreigners). In this way it will be possible to verify the state of health of the person concerned and, if necessary, establish a certificate attesting to any injuries. Such a measure could also protect escort staff against unfounded allegations.

[3] See, in particular, "Frequency and prevention of symptomless deep-vein thrombosis in long-haul flights: a randomised trial", John Scurr et al, *The Lancet*, Vol. 357, 12 May 2001.

40. During many visits, the CPT has heard allegations that immigration detainees had been injected with medication having a tranquillising or sedative effect, in order to ensure that their deportation proceeded without difficulty. On the other hand, it also noted in certain countries that instructions prohibited the administration, against the will of the person concerned, of tranquillisers or other medication designed to bring him or her under control. The CPT considers that the administration of medication to persons subject to a deportation order must always be carried out on the basis of a medical decision taken in respect of each particular case. Save for clearly and strictly defined exceptional circumstances, medication should only be administered with the informed consent of the person concerned.

41. Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the family, work and psychological fronts. It is essential that immigration detainees be informed sufficiently far in advance of their prospective deportation, so that they can begin to come to terms with the situation psychologically and are able to inform the people they need to let know and to retrieve their personal belongings. The CPT has observed that a constant threat of forcible deportation hanging over detainees who have received no prior information about the date of their deportation can bring about a condition of anxiety that comes to a head during deportation and may often turn into a violent agitated state. In this connection, the CPT has noted that, in some of the countries visited, there was a psycho-social service attached to the units responsible for deportation operations, staffed by psychologists and social workers who were responsible, in particular, for preparing immigration detainees for their deportation (through ongoing dialogue, contacts with the family in the country of destination, etc.). Needless to say, the CPT welcomes these initiatives and invites those States which have not already done so to set up such services.

42. The proper conduct of deportation operations depends to a large extent on the quality of the staff assigned to escort duties. Clearly, escort staff must be selected with the utmost care and receive appropriate, specific training designed to reduce the risk of ill-treatment to a minimum. This was often far from being the case in the States Parties visited. In some countries, however, special training had been organised (methods and means of restraint, stress and conflict management, etc.). Moreover, certain management strategies had had a beneficial effect: the assignment of escort duties to staff who volunteered, combined with compulsory rotation (in order to avoid professional exhaustion syndrome and the risks related to routine, and ensure that the staff concerned maintained a certain emotional distance from the operational activities in which they were involved) as well as provision, on request, of specialised psychological support for staff.

43. The importance of establishing internal and external monitoring systems in an area as sensitive as deportation operations by air cannot be overemphasised. The CPT observed that in many countries, specific monitoring systems had, unfortunately, been introduced only after particularly serious incidents, such as the death of deportees.

44. Deportation operations must be carefully documented. The establishment of a comprehensive file and a deportation record, to be kept for all operations carried out by the units concerned, is a basic requirement. Information on abortive deportation attempts should receive special attention and, in particular, the reasons for abandoning a deportation operation (a decision taken by the escort team on managerial orders, a refusal on the part of the captain of the aircraft, violent resistance on the part of the deportee, a request for asylum, etc.) should be systematically recorded. The information recorded should cover every incident and every use of means of restraint (handcuffs; ankle cuffs; knee cuffs; use of self-defence techniques; carrying the deportee on board; etc.).

Other means, for instance audiovisual, may also be envisaged, and are used in some of the countries visited, in particular for deportations expected to be problematic. In addition, surveillance cameras could be installed in various areas (corridors providing access to cells, route taken by the escort and the deportee to the vehicle used for transfer to the aircraft, etc.).

45. It is also beneficial if each deportation operation where difficulties are foreseeable is monitored by a manager from the competent unit, able to interrupt the operation at any time. In some of the countries visited, the CPT found that there were spot checks, both during preparations for deportation and during boarding, by members of internal police supervisory bodies. What is more, in an admittedly limited number of cases, members of the supervisory bodies boarded aircraft incognito and thus monitored the deportee and the escort until arrival at the destination. The CPT can only welcome these initiatives, which are all too rare at present in Europe.

Further, the CPT wishes to stress the role to be played by external supervisory (including judicial) authorities, whether national or international, in the prevention of ill-treatment during deportation operations. These authorities should keep a close watch on all developments in this respect, with particular regard to the use of force and means of restraint and the protection of the fundamental rights of persons deported by air.

Safeguards for irregular migrants deprived of their liberty

Extract from the 19th General Report [CPT/Inf (2009) 27]

[…]

Preliminary remarks

75. In the substantive section of its 7th General Report, published in 1997, the CPT described in some detail its position in relation to safeguards and conditions for foreign nationals deprived of their liberty under aliens legislation ("immigration detainees"), as well as its views concerning the expulsion of such persons.[1] In the intervening period, the CPT has carried out frequent visits to dedicated immigration detention centres as well as to police stations and prison establishments, in which immigration detainees continue to be held in a number of countries. These visits have, all too often, reinforced the Committee's opinion that immigration detainees are particularly vulnerable to various forms of ill-treatment, whether at the moment of apprehension, during the period of custody or while being deported.

Given the vulnerable nature of this group of persons, the CPT has, in the course of many of its visits, focused its attention on the treatment of immigration detainees. Further, the Committee has continued to develop its own standards, for example by the elaboration in the 13th General Report of guidelines on the deportation of foreign nationals by air, including immigration detainees.[2]

76. In this 19th General Report, the CPT is setting out its views on the safeguards that should be afforded to detained irregular migrants, with an additional special emphasis on children.[3] "Detained irregular migrants" is the term used to denote persons who have been deprived of their liberty under aliens legislation either because they have entered a country illegally (or attempted to do so) or because they have overstayed their legal permission to be in the country in question.

It should be noted that asylum seekers are not irregular migrants, although the persons concerned may become so should their asylum application be rejected and their leave to stay in a country rescinded. Whenever asylum seekers are deprived of their liberty pending the outcome of their application, they should be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants which are set out in the following paragraphs.[4]

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[1] See paragraphs 24 to 36 of doc. CPT/Inf (97) 10.
[2] See paragraphs 27 to 45 of doc. CPT/Inf (2003) 35.
[3], This is not to suggest that children are the only vulnerable group. Elderly persons and unaccompanied women, for instance, are also vulnerable.
[4] For asylum seekers, certain international safeguards originate under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol. Further, European Union legislation, in particular Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers,

Deprivation of liberty of irregular migrants

77. In the course of its visits, the CPT has noted that a number of member States of the Council of Europe have made a concerted effort to improve the conditions of detention for irregular migrants. However, there are still far too many instances where the CPT comes across places of deprivation of liberty for irregular migrants, and on occasion asylum seekers, which are totally unsuitable. An illustrative example of such a place would be a disused warehouse, with limited or no sanitation, crammed with beds or mattresses on the floor, accommodating upwards of a hundred persons locked in together for weeks or even months, with no activities, no access to outdoor exercise and poor hygiene. CPT delegations also continue to find irregular migrants held in police stations, in conditions that are barely acceptable for twenty-four hours, let alone weeks.

In some States, irregular migrants are detained in prisons. In the CPT's opinion, a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence. Interestingly, prison managers and staff in the various establishments visited by the CPT often agree that they are not appropriately equipped or trained to look after irregular migrants. In this context, the CPT wishes to reiterate that staff working in centres for irregular migrants have a particularly onerous task. Consequently, they should be carefully selected and receive appropriate training.

78. Despite the existence of many detention facilities for irregular migrants in Council of Europe member States, there is still no comprehensive instrument covering the whole of the European continent[5] and setting out the minimum standards and safeguards for irregular migrants deprived of their liberty, in line with the specific needs of this particular group of persons.

The 2006 European Prison Rules apply to those irregular migrants who are detained in prisons. However, it is stressed in the Commentary to the Rules that immigration detainees should in principle not be held in prison. Therefore, the Rules do not address the special needs and status of irregular migrants, such as those issues related to the preparation and execution of deportation procedures. It should be noted here that in accordance with Article 5 (1) f of the European Convention on Human Rights, irregular migrants may be deprived of their liberty either when action is being taken with a view to deportation or in order to prevent an unauthorised entry into the country. The purpose of deprivation of liberty of irregular migrants is thus significantly different from that of persons held in prison either on remand or as convicted offenders.

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has established a number of guarantees; however, the applicability of this legislation is limited to EU member States. Reference should also be made to the Guidelines on human rights protection in the context of accelerated asylum procedures, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009.

[5] Directive 2008/115/EC of the European Parliament and of the Council of the European Union of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals provides, inter alia, standards related to irregular migrants deprived of their liberty. The Directive is applicable in most EU member States and some other countries and should be transposed into national legislation by the end of 2010.

79. Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible. Even when conditions of detention in prisons meet these requirements – and this is certainly not always the case – the CPT considers the detention of irregular migrants in a prison environment to be fundamentally flawed, for the reasons indicated above.

80. More generally, in certain countries, authorities routinely resort to administrative detention of irregular migrants pending deportation, sometimes with no time limitation or judicial review. It is clear that automatic administrative detention under such conditions runs the risk of being in contradiction with, inter alia, the case law of the European Court of Human Rights. In the CPT's view, States should be selective when exercising their power to deprive irregular migrants of their liberty; detention should only be resorted to after a careful examination of each individual case.

Basic rights at the initial stages of deprivation of liberty

81. The CPT considers that detained irregular migrants should, from the very outset of their deprivation of liberty, enjoy three basic rights, in the same way as other categories of detained persons. These rights are: (1) to have access to a lawyer, (2) to have access to a medical doctor, and (3) to be able to inform a relative or third party of one's choice about the detention measure.

82. The right of access to a lawyer should include the right to talk with a lawyer in private, as well as to have access to legal advice for issues related to residence, detention and deportation. This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to legal aid.

Further, all newly arrived detainees should be promptly examined by a doctor or by a fully-qualified nurse reporting to a doctor. The right of access to a doctor should include the right – if an irregular migrant so wishes – to be examined by a doctor of his/her choice; however, the detainee might be expected to meet the cost of such an examination.

Notifying a relative or third party of one's choice about the detention measure is greatly facilitated if irregular migrants are allowed to keep their mobile phones during deprivation of liberty or at least to have access to them.

83. In addition to these three basic rights, international treaties recognise the right of a detained irregular migrant to ask for consular assistance. However, as not all irregular migrants may wish to contact their national authorities, the exercise of this right must be left to the person concerned.

84. It is essential that newly arrived irregular migrants be immediately given information on these rights in a language they understand. To this end, they should be systematically provided with a document explaining the procedure applicable to them and setting out their rights in clear and simple terms. This document should be available in the languages most commonly spoken by the detainees and, if necessary, recourse should be had to the services of an interpreter.

General safeguards during deprivation of liberty

85. Every instance of deprivation of liberty should be covered by a proper individual detention order, readily available in the establishment where the person concerned is being held; and the detention order should be drawn up at the outset of the deprivation of liberty or as soon as possible thereafter. This basic requirement applies equally to irregular migrants who are deprived of their liberty. Further, the fundamental safeguards of persons detained by law enforcement agencies are reinforced if a single and comprehensive custody record is kept for every such person, recording all aspects of his/her custody and all action taken in connection with it.

86. Detained irregular migrants should benefit from an effective legal remedy enabling them to have the lawfulness of their deprivation of liberty decided speedily by a judicial body. This judicial review should entail an oral hearing with legal assistance, provided free of charge for persons without sufficient means, and interpretation (if required). Moreover, detained irregular migrants should be expressly informed of this legal remedy. The need for continued detention should be reviewed periodically by an independent authority.

87. Arrangements should be made enabling detained irregular migrants to consult a lawyer or a doctor on an ongoing basis, and to receive visits from NGO representatives, family members or other persons of their choice, and to have telephone contact with them.

If members of the same family are deprived of their liberty under aliens legislation, every effort should be made to avoid separating them.

88. It is in the interests of both irregular migrants and staff that there be clear house rules for all detention facilities, and copies of the rules should be made available in a suitable range of languages. The house rules should primarily be informative in nature and address the widest range of issues, rights and duties which are relevant to daily life in detention. The house rules should also contain disciplinary procedures and provide detainees with the right

to be heard on the subject of violations that they are alleged to have committed, and to appeal to an independent authority against any sanctions imposed. Without such rules, there is a risk of an unofficial (and uncontrolled) disciplinary system developing.

In case of the application of a segregation measure for security reasons or for the irregular migrant's own protection, these procedures should be accompanied by effective safeguards. The person concerned should be informed of the reasons for the measure taken against him/her, be given the opportunity to present his/her views on the matter prior to the measure being implemented, and be able to contest the measure before an appropriate authority.

89. Independent monitoring of detention facilities for irregular migrants is an important element in the prevention of ill-treatment and, more generally, of ensuring satisfactory conditions of detention. To be fully effective, monitoring visits should be both frequent and unannounced. Further, monitoring bodies should be empowered to interview irregular migrants in private and should examine all issues related to their treatment (material conditions of detention, custody records and other documentation, the exercise of detained persons' rights, health care, etc.).

Health-related safeguards

90. The assessment of the state of health of irregular migrants during their deprivation of liberty is an essential responsibility in relation to each individual detainee and in relation to a group of irregular migrants as a whole. The mental and physical health of irregular migrants may be negatively affected by previous traumatic experiences. Further, the loss of accustomed personal and cultural surroundings and uncertainty about one's future may lead to mental deterioration, including exacerbation of pre-existing symptoms of depression, anxiety and post-traumatic disorder.

91. At a minimum, a person with a recognised nursing qualification must be present on a daily basis at all centres for detained irregular migrants. Such a person should, in particular, perform the initial medical screening of new arrivals (in particular for transmissible diseases, including tuberculosis), receive requests to see a doctor, ensure the provision and distribution of prescribed medicines, keep the medical documentation and supervise the general conditions of hygiene.

92. Obviously, medical confidentiality should be observed in the same way as in the outside community; in particular, irregular migrants' medical files should not be accessible to non-medical staff but, on the contrary, should be kept under lock and key by the nurse or doctor. Moreover, all medical examinations should be conducted out of the hearing and – unless the doctor concerned requests otherwise in a particular case – out of the sight of custodial staff.

Whenever members of the medical and/or nursing staff are unable to make a proper diagnostic evaluation because of language problems, they should be able to benefit without delay from the services of a qualified interpreter. Further, detained irregular migrants should be fully informed about the treatment being offered to them.

Three other important safeguards

93. The prohibition of torture and inhuman or degrading treatment or punishment entails the obligation not to send a person to a country where there are substantial grounds for believing that he or she would run a real risk of being subjected to torture or other forms of ill-treatment. Accordingly, irregular migrants should have ready access to an asylum procedure (or other residence procedure) which guarantees both confidentiality and an objective and independent analysis of the human rights situation in other countries; an individual assessment of the risk of ill-treatment in case of deportation to the country of origin or a third country should be carried out. The CPT is concerned that in certain countries the time-limit for submitting an application for asylum is limited by law to a number of days from the date of arrival in the country or in a detention facility; applications submitted after the deadline are not considered. Such an approach increases the possibility of persons being sent to a country where they run a real risk of being subjected to torture or other forms of ill-treatment.

94. In this context, the CPT has grave misgivings about the policy adopted by certain countries of intercepting, at sea, boats transporting irregular migrants and returning the persons concerned to North or North-West Africa. A practice with similar implications allegedly takes place at certain European land borders.

Countries that implement such policies or practices could well be at risk of breaching the fundamental principle of “non-refoulement”, a principle which forms part of international human rights law as well as of European Union law. This is particularly the case when the countries to which irregular migrants are sent have not ratified or acceded to the 1951 Geneva Convention relating to the Status of Refugees.

95. In line with the Twenty guidelines on forced return adopted by the Committee of Ministers on 4 May 2005, removal orders should be issued in each and every case based on a decision following national laws and procedures, and in accordance with international human rights obligations. The removal order should be handed over in writing to the person concerned. Moreover, there should be the possibility to appeal against the order, and the deportation should not be carried out before the decision on any appeal has been delivered. The assistance of a lawyer and an interpreter should be guaranteed also at this stage of the procedure.

96. Thirdly, in respect of any place where persons are deprived of their liberty by a public authority, the CPT consistently recommends that any sign of injury to a person who alleges ill-treatment, as well as the relevant statements made by the person concerned and the

doctor's conclusions (as to the degree of consistency between the person's statement and the injuries observed), be duly recorded by the doctor on a form designed for that purpose. A similar record should be made even in the absence of a specific allegation, when there are grounds to believe that ill-treatment may have occurred. Procedures should be in place to ensure that whenever injuries are recorded by a doctor which are consistent with allegations of ill-treatment made by the person concerned (or which, even in the absence of an allegation, are clearly indicative of ill-treatment), the record is systematically brought to the attention of the competent judicial or prosecuting authorities.

Additional safeguards for children

97. The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor.[6] Following the principle of the "best interests of the child", as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children,[7] is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status.

When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; all efforts should be made to allow the immediate release of unaccompanied or separated children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives.

98. As soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person should conduct an initial interview, in a language the child understands. An assessment should be made of the child's particular vulnerabilities, including from the standpoints of age, health, psychosocial factors and other protection needs, including those deriving from violence, trafficking or trauma. Unaccompanied or separated children deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.

[6] In case of uncertainty about whether a particular irregular migrant is a minor (i.e. under 18 years of age), the person in question should be treated as if he or she is a minor until the contrary is proven.

[7] "Unaccompanied children" (also called unaccompanied minors) are children who have been separated from both parents and other relatives and who are not being cared for by an adult who, by law or custom, is responsible for doing so. "Separated children" are children who have been separated from both parents, or from their previous legal or customary primary carer, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

99. Steps should be taken to ensure a regular presence of, and individual contact with, a social worker and a psychologist in establishments holding children in detention. Mixed-gender staffing is another safeguard against ill-treatment; the presence of both male and female staff can have a beneficial effect in terms of the custodial ethos and foster a degree of normality in a place of detention. Children deprived of their liberty should also be offered a range of constructive activities (with particular emphasis on enabling a child to continue his or her education).

100. In order to limit the risk of exploitation, special arrangements should be made for living quarters that are suitable for children, for example, by separating them from adults, unless it is considered in the child's best interests not to do so. This would, for instance, be the case when children are in the company of their parents or other close relatives. In that case, every effort should be made to avoid splitting up the family.

PART II:

COLLECTION OF TEXTS OF

THE EUROPEAN UNION

Charter of Fundamental Rights of the European Union (2012/C 326/02) [1]

The [European] Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. - (Article 6 paragraph 1 of the Treaty of Lisbon)

The European Parliament, the Council and the Commission solemnly proclaim the text below as the Charter of Fundamental Rights of the European Union.

[…]

Title I
Dignity

Article 1 - Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2 - Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

[…]

Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 - Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.

[1] Text available at :
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT

[…]

Title II
Freedoms

[…]

Article 7 - Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

[…]

Article 10 - Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

[…]

Article 14 - Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

[…]

Article 18 - Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

[…]

Article 19 - Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III
Equality

[…]

Article 21 - Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

[…]

Article 23 - Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24 - The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

[…]

TITLE V
Citizens' Rights

Article 41 - Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

[…]

TITLE VI
Justice

Article 47 - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[…]

Regulation (EU) No. 604/2013 of the European Parliament and of the Council 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 persons *(Dublin Regulation III)* [1]

of 26th June 2013

The European Parliament and the Council of the European Union,

[…]

Have adopted this regulation:

[…]

Chapter I
Subject matter and definitions

Article 1 - Subject matter

This Regulation lays down 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 (‘the Member State responsible’).

Chapter VI
Procedures for taking charge and taking back

Section IV
Procedural Safeguards

Article 27 - Remedies

[…]

5. Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.

[1] Text available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0604&from=en

6. Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision.

In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation.

Procedures for access to legal assistance shall be laid down in national law.

Section V
Detention for the purpose of transfer

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).

[…]

Section VI
Transfers

Article 29 - Modalities and time limits

1. *[…]*

If transfers to the Member State responsible are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity.

[…]

Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [1]

of 16th December 2008

The European Parliament and the Council of the European Union,

[…]

Whereas:

(1) The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.

(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

(3) On 4 May 2005 the Committee of Ministers of the Council of Europe adopted 'Twenty guidelines on forced return'.

(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

(5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.

[1] Text available at : http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0115&from=EN

(7) The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.

(8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.

(9) In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status[2], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

(10) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.

(11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary.

(12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who

[2] OJ L 326, 13.12.2005, p. 13.

are subjects of individual removal orders[3]. Member States should be able to rely on various possibilities to monitor forced return.

(14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.

(15) It should be for the Member States to decide whether or not the review of decisions related to return implies the power for the reviewing authority or body to substitute its own decision related to the return for the earlier decision.

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

(18) Member States should have rapid access to information on entry bans issued by other Member States. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)[4].

(19) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices should accompany the implementation of this Directive and provide European added value.

(20) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle

[3] OJ L 261, 6.8.2004, p. 28.
[4] OJ L 381, 28.12.2006, p. 4.

of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(21) Member States should implement this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

(22) In line with the 1989 United Nations Convention on the Rights of the Child, the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.

(23) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

[…]

Have adopted this Directive:

Chapter I
General provisions

Article 1 - Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2 - Scope

1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

[…]

Article 3 - Definitions

For the purpose of this Directive the following definitions shall apply:

1. ‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code;

2. ‘illegal stay’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

3. ‘return’ means the process of a third-country national going back - whether in voluntary compliance with an obligation to return, or enforced - to:

- his or her country of origin, or

- a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

- another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. ‘return decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. ‘removal’ means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. ‘entry ban’ means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

7. ‘risk of absconding’ means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;

8. ‘voluntary departure’ means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

9. ‘vulnerable persons’ means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

[…]

Article 5 - Non-refoulement, best interests of the child, family life and state of health

When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

Chapter II
Termination of illegal stay

Article 6 - Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with

this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.

Article 7 - Voluntary departure

1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Article 8 - Removal

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use - as a last resort - coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

6. Member States shall provide for an effective forced-return monitoring system.

Article 9 - Postponement of removal

1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted in accordance with Article 13(2).

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:

(a) the third-country national's physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.

Article 10 - Return and removal of unaccompanied minors

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Article 11 - Entry ban

1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[5] shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

4. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement [6].

5. Paragraphs 1 to 4 shall apply without prejudice to the right to international protection, as defined in Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[7], in the Member States.

Chapter III
Procedural safeguards

Article 12 - Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

[5] OJ L 261, 6.8.2004, p. 19.
[6] OJ L 239, 22.9.2000, p. 19.
[7] OJ L 304, 30.9.2004, p. 12.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.

Article 13 - Remedies

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Article 14 - Safeguards pending return

1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory is maintained;

(b) emergency health care and essential treatment of illness are provided;

(c) minors are granted access to the basic education system subject to the length of their stay;

(d) special needs of vulnerable persons are taken into account.

2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.

Chapter IV
Detention for the purpose of removal

Article 15 - Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

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 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.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Article 16 - Conditions of detention

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

2. Third-country nationals in detention shall be allowed - on request - to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

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.

Article 18 - Emergency situations

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

[…]

Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection [1]

of 26 June 2013

The European Parliament and the Council of the European Union,

[…]

Whereas:

(1) A number of substantive changes are to be made to Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status [2]. In the interest of clarity, that Directive should be recast.

[…]

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

[…]

(12) The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union.

[…]

(15) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.

(16) It is essential that decisions on all applications for international protection be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection.

[1] Text available at : http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=FR
[2] OJ L 326, 13.12.2005, p. 13.

[…]

(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

(19) In order to shorten the overall duration of the procedure in certain cases, Member States should have the flexibility, in accordance with their national needs, to prioritise the examination of any application by examining it before other, previously made applications, without derogating from normally applicable procedural time limits, principles and guarantees.

(20) In well-defined circumstances where an application is likely to be unfounded or where there are serious national security or public order concerns, Member States should be able to accelerate the examination procedure, in particular by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive.

[…]

(22) It is also in the interests of both Member States and applicants to ensure a correct recognition of international protection needs already at first instance. To that end, applicants should be provided at first instance, free of charge, with legal and procedural information, taking into account their particular circumstances. The provision of such information should, inter alia, enable the applicants to better understand the procedure, thus helping them to comply with the relevant obligations. It would be disproportionate to require Member States to provide such information only through the services of qualified lawyers. Member States should therefore have the possibility to use the most appropriate means to provide such information, such as through non-governmental organisations or professionals from government authorities or specialised services of the State.

(23) In appeals procedures, subject to certain conditions, applicants should be granted free legal assistance and representation provided by persons competent to provide them under national law. Furthermore, at all stages of the procedure, applicants should have the right to consult, at their own cost, legal advisers or counsellors admitted or permitted as such under national law.

[…]

(25) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure. Moreover, the procedure in which an application for international protection is examined should normally provide an applicant at least with: the right to stay pending a decision by the determining authority; access to the services of an interpreter for submitting his or her case if interviewed by the authorities; the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) and with organisations providing advice or counselling to applicants for international protection; the right to appropriate notification of a decision and of the reasons for that decision in fact and in law; the opportunity to consult a legal adviser or other counsellor; the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or is reasonably supposed to understand; and, in the case of a negative decision, the right to an effective remedy before a court or a tribunal.

(26) With a view to ensuring effective access to the examination procedure, officials who first come into contact with persons seeking international protection, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks, should receive relevant information and necessary training on how to recognise and deal with applications for international protection, inter alia, taking due account of relevant guidelines developed by EASO. They should be able to provide third-country nationals or stateless persons who are present in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and who make an application for international protection, with relevant information as to where and how applications for international protection may be lodged. Where those persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined in accordance with this Directive.

(27) Given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under this Directive and 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[3]. To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible.

[3] See page 96 of this Official Journal.

(28) In order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the possibility to apply for international protection. Basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements.

(29) Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

(30) Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from those procedures. The need for special procedural guarantees of a nature that could prevent the application of accelerated or border procedures should also mean that the applicant is provided with additional guarantees in cases where his or her appeal does not have automatic suspensive effect, with a view to making the remedy effective in his or her particular circumstances.

(31) National measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence, including acts of sexual violence, in procedures covered by this Directive may, inter alia, be based on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

(32) With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.

(33) The best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor’s well-being and social development, including his or her background.

(34) Procedures for examining international protection needs should be such as to enable the competent authorities to conduct a rigorous examination of applications for international protection.

(35) When, in the framework of an application being processed, the applicant is searched, that search should be carried by a person of the same sex. This should be without prejudice to a search carried out, for security reasons, on the basis of national law.

(36) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the res judicata principle.

(37) With respect to the involvement of the personnel of an authority other than the determining authority in conducting timely interviews on the substance of an application, the notion of 'timely' should be assessed against the time limits provided for in Article 31.

(38) Many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to provide for admissibility and/or substantive examination procedures which would make it possible for such applications to be decided upon at those locations in well-defined circumstances.

(39) In determining whether a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure that they obtain precise and up-to-date information from relevant sources such as EASO, UNHCR, the Council of Europe and other relevant international organisations. Member States should ensure that any postponement of conclusion of the procedure fully complies with their obligations under Directive 2011/95/EU and Article 41 of the Charter, without prejudice to the efficiency and fairness of the procedures under this Directive.

(40) A key consideration for the well-foundedness of an application for international protection is the safety of the applicant in his or her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he or she presents counter-indications.

[…]

(60) This Directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter and has to be implemented accordingly.

[…]

Have adopted this Directive:

Chapter I
General provisions

Article 1 - Purpose

The purpose of this Directive is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95/EU.

Article 2 - Definitions

For the purposes of this Directive:

[…]

(b) ‘application for international protection’ or ‘application’ means a request made by a third- country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately;

[…]

(f) ‘determining authority’ means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases;

(l) ‘minor’ means a third-country national or a stateless person below the age of 18 years;

(m) ‘unaccompanied minor’ means an unaccompanied minor as defined in Article 2(l) of Directive 2011/95/EU;

(n) ‘representative’ means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;

[…]

(p) ‘remain in the Member State’ means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined;

[…]

Article 3 - Scope

1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.

[…]

3. Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of Directive 2011/95/EU.

Article 4 - Responsible authorities

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.

2. Member States may provide that an authority other than that referred to in paragraph 1 shall be responsible for the purposes of:

(a) processing cases pursuant to Regulation (EU) No 604/2013; and

(b) granting or refusing permission to enter in the framework of the procedure provided for in Article 43, subject to the conditions as set out therein and on the basis of the reasoned opinion of the determining authority.

3. Member States shall ensure that the personnel of the determining authority referred to in paragraph 1 are properly trained. To that end, Member States shall provide for relevant training which shall include the elements listed in Article 6(4)(a) to (e) of Regulation (EU) No 439/2010. Member States shall also take into account the relevant training established and developed by the European Asylum Support Office (EASO). Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants’ ability to be interviewed, such as indications that the applicant may have been tortured in the past.

4. Where an authority is designated in accordance with paragraph 2, Member States shall ensure that the personnel of that authority have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

[…]

Chapter II
Basic principles and guarantees

Article 6 - Access to the procedure

1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

5. Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit laid down in paragraph 1, Member States may provide for that time limit to be extended to 10 working days.

Article 7 - Applications made on behalf of dependants or minors

1. Member States shall ensure that each adult with legal capacity has the right to make an application for international protection on his or her own behalf.

2. Member States may provide that an application may be made by an applicant on behalf of his or her dependants. In such cases, Member States shall ensure that dependent adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependent adult is conducted. Before consent is requested, each dependent adult shall be informed in private of the relevant procedural consequences of the lodging of the application on his or her behalf and of his or her right to make a separate application for international protection.

3. Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.

4. Member States shall ensure that the appropriate bodies referred to in Article 10 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals[4] have the right to lodge an application for international protection on behalf of an unaccompanied minor if, on the basis of an individual assessment of his or her personal situation, those bodies are of the opinion that the minor may have protection needs pursuant to Directive 2011/95/EU.

5. Member States may determine in national legislation:

(a) the cases in which a minor can make an application on his or her own behalf;

(b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 25(1)(a);

[4] OJ L 348, 24.12.2008, p. 98.

(c) the cases in which the lodging of an application for international protection is deemed to constitute also the lodging of an application for international protection for any unmarried minor.

Article 8 - Information and counselling in detention facilities and at border crossing points

1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

2. Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.

Article 9 - Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant [5] or otherwise, or to a third country or to international criminal courts or tribunals.

3. A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect refoulement in violation of the international and Union obligations of that Member State.

[5] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

[…]

Article 11 - Requirements for a decision by the determining authority

1. Member States shall ensure that decisions on applications for international protection are given in writing.

2. Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Member States need not provide information on how to challenge a negative decision in writing in conjunction with a decision where the applicant has been provided with such information at an earlier stage either in writing or by electronic means accessible to the applicant.

3. For the purposes of Article 7(2), and whenever the application is based on the same grounds, Member States may take a single decision, covering all dependants, unless to do so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution. In such cases, a separate decision shall be issued to the person concerned.

Article 12 - Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

(a) they shall be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13;

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in

other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds;

(c) they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

(d) they and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), shall have access to the information referred to in Article 10(3)(b) and to the information provided by the experts referred to in Article 10(3)(d), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application;

(e) they shall be given notice in reasonable time of the decision by the determining authority on their application. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him or her instead of to the applicant;

(f) they shall be informed of the result of the decision by the determining authority in a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other counsellor. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 11(2).

2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in paragraph 1(b) to (e).

[…]

Article 14 - Personal interview

1. Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. Personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. This subparagraph shall be without prejudice to Article 42(2)(b).

Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it impossible in practice for the determining authority to conduct timely interviews on the substance of each application, Member States may provide that the personnel of another authority be temporarily involved in conducting such interviews. In such cases, the personnel of that other authority shall receive in advance the relevant training which shall include the elements listed in Article 6(4)(a) to (e) of

Regulation (EU) No 439/2010. Persons conducting personal interviews of applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed, such as indications that the applicant may have been tortured in the past.

Where a person has lodged an application for international protection on behalf of his or her dependants, each dependent adult shall be given the opportunity of a personal interview.

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

2. The personal interview on the substance of the application may be omitted where:

(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or

(b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature.

Where a personal interview is not conducted pursuant to point (b) or, where applicable, with the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

3. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for international protection.

4. The absence of a personal interview pursuant to paragraph 2(b) shall not adversely affect the decision of the determining authority.

5. Irrespective of Article 28(1), Member States, when deciding on an application for international protection, may take into account the fact that the applicant failed to appear for the personal interview, unless he or she had good reasons for the failure to appear.

Article 15 - Requirements for a personal interview

1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

(b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;

(e) ensure that interviews with minors are conducted in a child-appropriate manner.

4. Member States may provide for rules concerning the presence of third parties at a personal interview.

Article 16 - Content of a personal interview

When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 of Directive 2011/95/EU as completely as possible. This shall include the

opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements.

Article 17 - Report and recording of personal interviews

1. Member States shall ensure that either a thorough and factual report containing all substantive elements or a transcript is made of every personal interview.

2. Member States may provide for audio or audiovisual recording of the personal interview. Where such a recording is made, Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant's file.

3. Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision. To that end, Member States shall ensure that the applicant is fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter if necessary. Member States shall then request the applicant to confirm that the content of the report or the transcript correctly reflects the interview.

When the personal interview is recorded in accordance with paragraph 2 and the recording is admissible as evidence in the appeals procedures referred to in Chapter V, Member States need not request the applicant to confirm that the content of the report or the transcript correctly reflects the interview. Without prejudice to Article 16, where Member States provide for both a transcript and a recording of the personal interview, Member States need not allow the applicant to make comments on and/or provide clarification of the transcript.

4. Where an applicant refuses to confirm that the content of the report or the transcript correctly reflects the personal interview, the reasons for his or her refusal shall be entered in the applicant's file.

Such refusal shall not prevent the determining authority from taking a decision on the application.

5. Applicants and their legal advisers or other counsellors, as defined in Article 23, shall have access to the report or the transcript and, where applicable, the recording, before the determining authority takes a decision.

Where Member States provide for both a transcript and a recording of the personal interview, Member States need not provide access to the recording in the procedures at first instance referred to in Chapter III. In such cases, they shall nevertheless provide access to the recording in the appeals procedures referred to in Chapter V.

Without prejudice to paragraph 3 of this Article, where the application is examined in accordance with Article 31(8), Member States may provide that access to the report or the transcript, and where applicable, the recording, is granted at the same time as the decision is made.

Article 18 - Medical examination

1. Where the determining authority deems it relevant for the assessment of an application for international protection in accordance with Article 4 of Directive 2011/95/EU, Member States shall, subject to the applicant's consent, arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm. Alternatively, Member States may provide that the applicant arranges for such a medical examination.

The medical examinations referred to in the first subparagraph shall be carried out by qualified medical professionals and the result thereof shall be submitted to the determining authority as soon as possible. Member States may designate the medical professionals who may carry out such medical examinations. An applicant's refusal to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

Medical examinations carried out in accordance with this paragraph shall be paid for out of public funds.

2. When no medical examination is carried out in accordance with paragraph 1, Member States shall inform applicants that they may, on their own initiative and at their own cost, arrange for a medical examination concerning signs that might indicate past persecution or serious harm.

3. The results of the medical examinations referred to in paragraphs 1 and 2 shall be assessed by the determining authority along with the other elements of the application.

Article 19 - Provision of legal and procedural information free of charge in procedures at first instance

1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information - in addition to that given in accordance with Article 11(2) and Article 12(1)(f) - in order to clarify the reasons for such decision and explain how it can be challenged.

2. The provision of legal and procedural information free of charge shall be subject to the conditions laid down in Article 21.

Article 20 - Free legal assistance and representation in appeals procedures

1. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.

2. Member States may also provide free legal assistance and/or representation in the procedures at first instance provided for in Chapter III. In such cases, Article 19 shall not apply.

3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.

Article 21 - Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation

1. Member States may provide that the legal and procedural information free of charge referred to in Article 19 is provided by non-governmental organisations, or by professionals from government authorities or from specialised services of the State.

The free legal assistance and representation referred to in Article 20 shall be provided by such persons as admitted or permitted under national law.

2. Member States may provide that legal and procedural information free of charge referred to in Article 19 and free legal assistance and representation referred to in Article 20 are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that the free legal assistance and representation referred to in Article 20 is granted only for appeals procedures in accordance with Chapter V before a court or tribunal of first instance and not for any further appeals or reviews provided for under national law, including rehearings or reviews of appeals.

Member States may also provide that the free legal assistance and representation referred to in Article 20 is not granted to applicants who are no longer present on their territory in application of Article 41(2)(c).

3. Member States may lay down rules concerning the modalities for filing and processing requests for legal and procedural information free of charge under Article 19 and for free legal assistance and representation under Article 20.

4. Member States may also:

(a) impose monetary and/or time limits on the provision of legal and procedural information free of charge referred to in Article 19 and on the provision of free legal assistance and representation referred to in Article 20, provided that such limits do not arbitrarily restrict access to the provision of legal and procedural information and legal assistance and representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

Article 22 - Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

2. Member States may allow non-governmental organisations to provide legal assistance and/or representation to applicants in the procedures provided for in Chapter III and Chapter V in accordance with national law.

Article 23 - Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:

(a) make access to such information or sources available to the authorities referred to in Chapter V; and

(b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected.

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant, in accordance with Article 10(4) and Article 18(2)(b) and (c) of Directive 2013/33/EU.

3. Member States shall allow an applicant to bring to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

Member States may stipulate that the legal adviser or other counsellor may only intervene at the end of the personal interview.

4. Without prejudice to this Article or to Article 25(1)(b), Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure.

Member States may require the presence of the applicant at the personal interview, even if he or she is represented under the terms of national law by a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

Without prejudice to Article 25(1)(b), the absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting a personal interview with the applicant.

Article 24 - Applicants in need of special procedural guarantees

1. Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees.

2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of Directive 2013/33/EU and need not take the form of an administrative procedure.

3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).

4. Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

Article 25 - Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, Member States shall:

(a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a

representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU;

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of 18 before a decision at first instance is taken.

3. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;

(b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

4. Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant’s age. If, thereafter, Member States are still in doubt concerning the applicant’s age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and

(c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

6. The best interests of the child shall be a primary consideration for Member States when implementing this Directive.

Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may:

(a) apply or continue to apply Article 31(8) only if:

(i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or

(ii) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or

(iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law;

(b) apply or continue to apply Article 43, in accordance with Articles 8 to 11 of Directive 2013/33/EU, only if:

(i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or

(ii) the applicant has introduced a subsequent application; or

(iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; or

(iv) there are reasonable grounds to consider that a country which is not a Member State is a safe third country for the applicant, pursuant to Article 38; or

(v) the applicant has misled the authorities by presenting false documents; or

(vi) in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.

Member States may apply points (v) and (vi) only in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions referred to in points (v) and (vi), including by consulting with his or her representative;

(c) consider the application to be inadmissible in accordance with Article 33(2)(c) if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38, provided that to do so is in the minor's best interests;

(d) apply the procedure referred to in Article 20(3) where the minor's representative has legal qualifications in accordance with national law.

Without prejudice to Article 41, in applying Article 46(6) to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) in all cases.

Article 26 - Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.

2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU.

[…]

Article 29 - The role of UNHCR

1. Member States shall allow UNHCR:

(a) to have access to applicants, including those in detention, at the border and in the transit zones;

(b) to have access to information on individual applications for international protection, on the course of the procedure and on the decisions taken, provided that the applicant agrees thereto;

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.

2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

[…]

Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection [1]

of 26th June 2013

The European Parliament and the Council of the European Union,

[…]

Whereas:

(1) A number of substantive changes are to be made to Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[2]. In the interests of clarity, that Directive should be recast.

[…]

(8) In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.

(9) In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.

(10) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.

(11) Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

(12) The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.

[1] Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=EN
[2] OJ L 31, 6.2.2003, p. 18

(13) With a view to ensuring equal treatment amongst all applicants for international protection and guaranteeing consistency with current EU asylum acquis, in particular with Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [3], it is appropriate to extend the scope of this Directive in order to include applicants for subsidiary protection.

(14) The reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs.

(15) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.

(16) With regard to administrative procedures relating to the grounds for detention, the notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.

(17) The grounds for detention set out in this Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the third country national’s or stateless person’s application for international protection.

(18) Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. In particular, Member States should ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied.

[3] OJ L 337, 20.12.2011, p. 9.

(19) There may be cases where it is not possible in practice to immediately ensure certain reception guarantees in detention, for example due to the geographical location or the specific structure of the detention facility. However, any derogation from those guarantees should be temporary and should only be applied under the circumstances set out in this Directive. Derogations should only be applied in exceptional circumstances and should be duly justified, taking into consideration the circumstances of each case, including the level of severity of the derogation applied, its duration and its impact on the applicant concerned.

(20) In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.

(21) In order to ensure compliance with the procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.

(22) When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.

(23) In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market.

[…]

(25) The possibility of abuse of the reception system should be restricted by specifying the circumstances in which material reception conditions for applicants may be reduced or withdrawn while at the same time ensuring a dignified standard of living for all applicants.

(26) The efficiency of national reception systems and cooperation among Member States in the field of reception of applicants should be secured.

[…]

(28) Member States should have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.

(29) In this spirit, Member States are also invited to apply the provisions of this Directive in connection with procedures for deciding on applications for forms of protection other than that provided for under Directive 2011/95/EU.

[…]

(35) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.

(36) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2003/9/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.

[…]

Have adopted this Directive:

Chapter I
Purpose, definitions and scope

Article 1 - Purpose

The purpose of this Directive is to lay down standards for the reception of applicants for international protection (‘applicants’) in Member States.

Article 2 - Definitions

For the purposes of this Directive:

(a) ‘application for international protection’: means an application for international protection as defined in Article 2(h) of Directive 2011/95/EU;

(b) ‘applicant’: means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

(c) ‘family members’: means, in so far as the family already existed in the country of origin, the following members of the applicant’s family who are present in the same Member State in relation to the application for international protection:

- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals;

- the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law;

- the father, mother or another adult responsible for the applicant whether by law or by the practice of the Member State concerned, when that applicant is a minor and unmarried;

(d) 'minor': means a third-country national or stateless person below the age of 18 years;

(e) 'unaccompanied minor': means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

(f) 'reception conditions': means the full set of measures that Member States grant to applicants in accordance with this Directive;

(g) 'material reception conditions': means the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance;

(h) 'detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

(i) 'accommodation centre': means any place used for the collective housing of applicants;

(j) 'representative': means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;

(k) 'applicant with special reception needs': means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.

Article 3 - Scope

1. This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.

3. This Directive shall not apply when the provisions of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [4] are applied.

[…]

Chapter II
General provisions on reception conditions

Article 5 - Information

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.

Article 6 - Documentation

1. Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his or her own name certifying his or her status as an applicant or testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined.

[4] OJ L 212, 7.8.2001, p. 12.

If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify that fact.

2. Member States may exclude application of this Article when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State. In specific cases, during the examination of an application for international protection, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

3. The document referred to in paragraph 1 need not certify the identity of the applicant.

4. Member States shall adopt the necessary measures to provide applicants with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain on the territory of the Member State concerned.

5. Member States may provide applicants with a travel document when serious humanitarian reasons arise that require their presence in another State.

6. Member States shall not impose unnecessary or disproportionate documentation or other administrative requirements on applicants before granting them the rights to which they are entitled under this Directive for the sole reason that they are applicants for international protection.

Article 7 - Residence and freedom of movement

1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.

3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.

4. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 3 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively

and impartially and reasons shall be given if they are negative. The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.

5. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

Article 8 - Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection[5].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals[6], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

[5] See page 60 of this Official Journal.
[6] OJ L 348, 24.12.2008, p. 98.

(f) in accordance with Article 28 of 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[7].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

Article 9 - Guarantees for detained applicants

1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. 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.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant. When conducted ex officio, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

[7] See page 31 of this Official Journal.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.

7. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

8. Member States may also:

(a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

9. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant’s financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

10. Procedures for access to legal assistance and representation shall be laid down in national law.

Article 10 - Conditions of detention

1. Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply.

As far as possible, detained applicants shall be kept separately from other third-country nationals who have not lodged an application for international protection.

When applicants cannot be detained separately from other third-country nationals, the Member State concerned shall ensure that the detention conditions provided for in this Directive are applied.

2. Detained applicants shall have access to open-air spaces.

3. Member States shall ensure that persons representing the United Nations High Commissioner for Refugees (UNHCR) have the possibility to communicate with and visit applicants in conditions that respect privacy. That possibility shall also apply to an organisation which is working on the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

4. Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.

5. Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. This derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU.

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

1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.

Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

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.

4. Detained families shall be provided with separate accommodation guaranteeing adequate privacy.

5. Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.

Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.

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, paragraph 4 and the first subparagraph of paragraph 5, 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.

Article 12 - Families

Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant's agreement.

Article 13 - Medical screening

Member States may require medical screening for applicants on public health grounds.

Article 14 - Schooling and education of minors

1. Member States shall grant to minor children of applicants and to applicants who are minors access to the education system under similar conditions as their own nationals for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.

The Member State concerned may stipulate that such access must be confined to the State education system.

Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

2. Access to the education system shall not be postponed for more than three months from the date on which the application for international protection was lodged by or on behalf of the minor.

Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the education system as set out in paragraph 1.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State concerned shall offer other education arrangements in accordance with its national law and practice.

Article 15 - Employment

1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

Article 16 - Vocational training

Member States may allow applicants access to vocational training irrespective of whether they have access to the labour market.

Access to vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market in accordance with Article 15.

Article 17 - General rules on material reception conditions and health care

1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.

Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.

3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when those basic needs were being covered, Member States may ask the applicant for a refund.

5. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive.

Article 18 - Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

(a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;

(b) accommodation centres which guarantee an adequate standard of living;

(c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:

(a) applicants are guaranteed protection of their family life;

(b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies;

(c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.

3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).

4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).

5. Member States shall ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.

6. Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers or counsellors of the transfer and of their new address.

7. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.

8. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.

9. In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:

(a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;

(b) housing capacities normally available are temporarily exhausted.

Such different conditions shall in any event cover basic needs.

Article 19 - Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

Chapter III
Reduction or withdrawal of material reception conditions

Article 20 - Reduction or withdrawal of material reception conditions

1. Member States may reduce or, in exceptional and duly justified cases, withdraw material reception conditions where an applicant:

(a) abandons the place of residence determined by the competent authority without informing it or, if requested, without permission; or

(b) does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law; or

(c) has lodged a subsequent application as defined in Article 2(q) of Directive 2013/32/EU.

In relation to cases (a) and (b), when the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the material reception conditions withdrawn or reduced.

2. Member States may also reduce material reception conditions when they can establish that the applicant, for no justifiable reason, has not lodged an application for international protection as soon as reasonably practicable after arrival in that Member State.

3. Member States may reduce or withdraw material reception conditions where an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions.

4. Member States may determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour.

5. Decisions for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.

6. Member States shall ensure that material reception conditions are not withdrawn or reduced before a decision is taken in accordance with paragraph 5.

Chapter IV
Provisions for vulnerable persons

Article 21 - General principle

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

Article 22 - Assessment of the special reception needs of vulnerable persons

1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.

3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to Directive 2011/95/EU.

Article 23 - Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

2. In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development, taking into particular consideration the minor's background;

(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;

(d) the views of the minor in accordance with his or her age and maturity.

3. Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities.

4. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

5. Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.

Article 24 - Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary.

Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

2. Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed:

(a) with adult relatives;

(b) with a foster family;

(c) in accommodation centres with special provisions for minors;

(d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult applicants, if it is in their best interests, as prescribed in Article 23(2).

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.

3. Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. 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, so as to avoid jeopardising their safety.

4. Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Article 25 - Victims of torture and violence

1. Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.

2. Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Chapter V
Appeals

Article 26 - Appeals

1. Member States shall ensure that decisions relating to the granting, withdrawal or reduction of benefits under this Directive or decisions taken under Article 7 which affect applicants individually may be the subject of an appeal within the procedures laid down in national law. At least in the last instance the possibility of an appeal or a review, in fact and in law, before a judicial authority shall be granted.

2. In cases of an appeal or a review before a judicial authority referred to in paragraph 1, Member States shall ensure that free legal assistance and representation is made available on request in so far as such aid is necessary to ensure effective access to justice. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant.

3. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that free legal assistance and representation not be made available if the appeal or review is considered by a competent authority to have no tangible prospect of success. In such a case, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Member States may also:

(a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favorable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

6. Procedures for access to legal assistance and representation shall be laid down in national law.

Chapter VI
Actions to improve the efficiency of the reception system

Article 27 - Competent authorities

Each Member State shall notify the Commission of the authorities responsible for fulfilling the obligations arising under this Directive. Member States shall inform the Commission of any changes in the identity of such authorities.

Article 28 - Guidance, monitoring and control system

1. Member States shall, with due respect to their constitutional structure, put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control of the level of reception conditions are established.

[…]

Article 29 - Staff and resources

1. Member States shall take appropriate measures to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants.

2. Member States shall allocate the necessary resources in connection with the national law implementing this Directive.

[…]

European Commission Recommendation C(2015) 6250 final[1]
establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks

of 1.10.2015

The European Commission,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) Directive 2008/115/EC of the European Parliament and of the Council1 lays down common standards and procedures in Member States for returning illegally staying third-country nationals.

(2) There is a need to ensure that those common standards and procedures are implemented in a uniform way in all Member States. For that purpose, therefore, a "Return Handbook" containing common guidelines, best practices and recommendations should be established.

(3) The "Return Handbook" should be addressed to all Member States bound by the Directive 2008/115/EC.

(4) In order to ensure its optimal use by all relevant Member States' authorities, the Return Handbook should be available to Member States in electronic form, together with any other available factual information needed to perform return related tasks, such as lists of contact points and standard forms.

(5) The Return Handbook should be updated regularly.

(6) In order to enhance the uniform implementation of common Union return standards, Member States should instruct their national authorities competent for carrying out return related tasks to use the Return Handbook as the main tool when performing their duties,

Hereby recommends:

1. Member States should:

[1] Text available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/commission_recommendation_establishing_a_return_handbook_for_member_states_competent_authorities_to_deal_with_return_related_tasks_en.pdf

(a) transmit the Return Handbook set out in the Annex to their national authorities competent for carrying out return related tasks;
(b) instruct those authorities to use the Return Handbook as the main tool for return related tasks.

2. Member States should use the Return Handbook for the purpose of training all the personnel involved in return related tasks.

3. The Return Handbook should serve as a tool for the training of experts participating in Schengen Evaluation Missions.

[…]

ANNEX

RETURN HANDBOOK[2]

[…]

1.8. Vulnerable persons

Legal Basis: Return Directive - Article 3(9)

Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Contrary to the definition of vulnerable persons used in the asylum acquis (see for instance: Article 21 of the Reception Conditions Directive 2013/33/EU or Article 20(3) of the Qualification Directive 2011/95/EU), the definition in the Return Directive is drafted as an exhaustive list. The need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, not limited to the categories of vulnerable persons expressly enumerated in Article 3(9). The Commission recommends that Member States should also pay attention to other situations of special vulnerability, such as those mentioned in the asylum acquis: being a victim of human trafficking or of female genital mutilation, being a person with serious illness or with mental disorders.

Likewise, the need to pay specific attention to the situation of vulnerable persons should not be limited to the situations expressly referred to by the Return Directive (during the period of voluntary departure, during postponed return and during detention). The Commission

[2] Text available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf

therefore recommends that Member States should pay attention to the needs of vulnerable persons in all stages of the return procedure.

[…]

12. Procedural Safeguards

12.1. Right to good administration and right to be heard

Right to good administration is a fundamental right recognised as a general principle of EU law and enshrined in the CFR, which forms an integral part of the EU legal order. This right includes the right of every person to be heard before any individual measure which would affect him adversely or which significantly affect their interests is taken, which also is inherent in respect for the rights of the defence, another general principle of EU law.In its judgements in G & R and Boudjlida, the ECJ provided important clarification on the right to be heard in relation to return and detention decisions. These judgements imply that Member States must always comply with the safeguards below when taking decisions related to return (i.e. return decision, entry-ban decisions, removal decisions, detention order etc…) even though this may not be expressly specified in the relevant Articles of the Return Directive:

1) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

2) the right of every person to have access to his or her file, to analyse all the evidence relied on against him or her which serves to justify a decision by the competent national authority, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

3) the right of every person to have recourse to a legal adviser prior to the adoption of a return decision, provided that the exercise of that right does not affect the due progress of the return procedure and does not undermine the effective implementation of the directive. This obligations does not entail an obligation upon Member States to bear the costs of that assistance;

4) the obligation of the administration to pay due attention to the observations by the person concerned and examine carefully and impartially all the relevant aspects of the individual case;

5) the obligation of the administration to give reasons for its decisions.

Member States enjoy a significant margin of discretion how to grant the right to be heard in practice: The non-respect of this right renders a decision invalid only insofar as the outcome

of the procedure would have been different if the right was respected. (ECJ in *G & R*, C-383/13). A Member State authority may fail to hear a third-country national specifically on the subject of a return decision where, after that authority has determined that the third-country national is staying illegally in the national territory within a preceding asylum procedure which fully respected that person's right to be heard, it is contemplating the adoption of a return decision. (ECJ in *Mukarubega*, C-166/13). The logic set out in *Mukarubega*: "*The right to be heard before the adoption of a return decision cannot be used in order to re-open indefinitely the administrative procedure, for the reason that the balance between the fundamental right of the person concerned to be heard before the adoption of a decision adversely affecting that person and the obligation of the Member States to combat illegal immigration must be maintained"* can also be applied in different case constellations, such as those mentioned in Article 6(6) (decision on ending of legal stay combined with return decision).

The **right to be heard** includes a right to be heard on the possible application of Articles 5 and 6(2) to (5) of the directive and on the detailed arrangements for return, such as the period allowed for voluntary departure and whether return is to be voluntary or forced. The authority must, however, not warn the third-country national, prior to the interview, that it is contemplating adopting a return decision, or disclose information on which it intends to rely as justification for that decision, or allow a period of reflection, provided that the third-country national has the opportunity effectively to present his point of view on the subject of the illegality of his stay and the reasons which might, under national law, justify that authority refraining from adopting a return decision. (ECJ in *Boudjlida*, C-249/13).

The procedural safeguards contained in Articles 12 and 13 should be applied to all decisions related to return and must not be limited to the three types of decisions mentioned in Article 12(1

Collection of information on smuggling: In line with the priorities established in the *EU Action Plan against Migrant Smuggling 2015-2020* (COM(2015)285) and in particular the need to improve gathering and sharing of information, the Commission recommends that Member States put in place adequate mechanisms in order to ensure systematic information gathering from migrants apprehended in an irregular situation, in full respects of fundamental rights and EU asylum acquis: When granting the right to be heard before adopting a return decision, Member States are encouraged to invite returnees to share information they may have related to modus operandi and routes of smuggling networks, as well as links with trafficking in human beings and other crimes, and on financial transfers. Information obtained in this context should be collected and exchanged between relevant (immigration, border, police) authorities and agencies, both at national and EU level in accordance with national law and best practices exchanged in relevant EU fora.

[…]

12.4. Legal remedies

Legal Basis: Return Directive – Article 13(1) and (2)

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

Effective remedies should be provided as regards all decisions related to return. The term "decisions related to return" should be understood broadly, covering decisions on all issues regulated by the Return Directive, including return decisions, decisions granting or extending a period of voluntary departure, removal decisions, decisions on postponement of removal, decisions on entry bans as well as on suspension or withdrawal of entry bans. The remedies applicable in case of detention decisions as well as prolongation of detention are regulated in more detail in Article 15, dealing with detention (see below).

Nature of reviewing body: In line with Article 6 and 13 ECHR and Article 47 CFR, the appeals body must in substance be an independent and impartial tribunal. Article 13(1) is closely inspired by CoE Guideline 5.1 and it should be interpreted in accordance with relevant ECtHR case-law. In line with this case-law the reviewing body can also be an administrative authority provided this authority is composed of members who are impartial and who enjoy safeguards of independence and that national provisions provide for the possibility to have the decision reviewed by a judicial authority, in line with the standards set by Article 47 CFR on the right to an effective remedy.

Several safeguards exist to counter the risk of an eventual abuse of the possibility to appeal: Article 13 does not provide for an automatic suspensive effect in all circumstances (para 2) and free legal assistance may be limited if the appeal is unlikely to succeed (para 4). Attention should also be paid to the general principle of Union law of "res judicata" – as expressly referred to in recital 36 of the recast Asylum Procedures Directive 2013/32/EU: "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the res judicata principle."

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

Suspensive effect: The appeals body must have the power to suspend the enforcement in individual cases. It should be clearly provided for in national legislation that the reviewing

body itself (the body reviewing the decision related to return) has the power to suspend within the frame of one procedure.

Obligation to grant suspensive effect in case of risk of refoulement: ECtHR case-law requires automatic suspensive effect in cases in which there are substantial grounds for believing that the person, if returned, will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR (risk of torture or inhuman or degrading treatment upon return) is at stake (see Rule 39, Rules of the ECtHR). Article 13 Return Directive – interpreted in conjunction with Articles 5 and 9 of the Return Directive – thus obliges the reviewing body to grant *ipso jure* suspensive effect in line with this requirement if the principle of non-refoulement is at stake. When the appeal refers to other reasons (e.g. procedural shortcomings, family unity, social rights) and no irreparable damage to life is at stake, it may be legitimate in certain constellations not to grant suspensive effect.

Obligation to grant suspensive effect in case of risk of grave and irreversible deterioration of state of health: In its judgement in *Abdida*, C-562/13, para 53, the ECJ confirmed: *"Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the Charter, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health."*

12.5. Linguistic assistance and free legal aid

Legal Basis: Return Directive – Article 13(3) and (4); Articles 20 and 21 of recast Asylum Procedures Directive 2013/32/EU (replacing Article 15(3) to (6) of Asylum Procedures Directive 2005/85/EC);

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

Linguistic assistance implies not only an obligation to provide for a translation of a decision (this is already covered by Article 12(2)) but also an obligation to make available assistance by interpreters in order to allow the third-country national to exercise the procedural rights afforded to him/her under Article 13. In this context it should be recalled that in the case of Conka v. Belgium (Judgment of 5 February 2002, No. 51564/99) the ECtHR identified the availability of interpreters as one of the factors which affect the accessibility of an effective remedy. The rights of the thirdcounty national to receive linguistic assistance should be granted by Member States in a way which provides the person concerned with a concrete and practical possibility to make use of it ("effet utile" of the provision).

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules

regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Legal assistance and legal representation: Paragraph 4 specifies in which cases and under which conditions Member States have to cover the costs for legal advice and representation - referring in essence to the conditions enumerated in the Asylum Procedures Directive. Member States must provide both legal assistance and legal representation free of charge if the conditions foreseen in the Directive and national implementing legislation are met.

The request for free legal assistance and/or legal representation can be made by the returnee or his/her representative at any appropriate moment of the procedure.

Provision of legal advice by administrative authorities: Legal advice may in principle be offered also by the administrative authorities responsible for issuing the return decisions, if the information provided for is objective and unbiased ("effet utile"). It is important that the information be provided by a person who acts impartially/independently so as to avoid possible conflicts of interests. This information cannot be provided therefore by the person deciding on or reviewing the case, for instance. A good practice, already in use in some Member States, is to separate between the decision making authorities and those providing legal and procedural information. However, should a Member State decide to allocate the latter responsibility to the decision making authorities, a clear separation of tasks should be ensured for the personnel involved (e.g. by creating a separate and independent section in charge only of providing legal and procedural information).

Conditions which may be imposed – reference to Article 15(3) to (6) of Directive 2005/85/EC: The reference in the Return Directive to certain conditions/limitations which Member States may foresee in respect of free legal aid is a dynamic reference and must now be read as reference to Articles 20 and 21 of the recast Asylum Procedures Directive 2013/32/EU.

Possible conditions which can be imposed by Member States: In accordance with the abovementioned provisions, Member States *may* (but need not) provide that the free legal assistance and representation is only granted:

- where the appeal is considered by a court or tribunal or other competent authority to have tangible prospect of success;
- to those who lack sufficient resources;
- through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants;
- in first instance appeal procedures and not for further appeals or reviews.

Member States may also:

- impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to this right;

- provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance;

- demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

Effective remedy against refusal to grant free legal aid: Where a decision not to grant free legal assistance and representation is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision. The right to an effective remedy and to a fair trial is among the fundamental rights forming an integral part of the European Union legal order and observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement.

13. Safeguards pending return

Legal Basis: Return Directive – Article 14(1)

Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory is maintained;

(b) emergency health care and essential treatment of illness are provided;

(c) minors are granted access to the basic education system subject to the length of their stay;

(d) special needs of vulnerable persons are taken into account.

Historic reminder/explanation: The Return Directive leaves Member States the choice of either issuing return decisions to illegally staying third-country nationals or to grant permits

(regularise) these persons. This approach should help to reduce grey areas. It may, however, also increase in practice the absolute number of cases in which Member States issue return decisions which cannot be enforced due to practical or legal obstacles for removal (e.g. delays in obtaining the necessary papers from third countries and non-refoulement cases). In order to avoid a legal vacuum for these persons, the Commission had proposed to provide for a minimum level of conditions of stay for those illegally staying thirdcountry nationals for whom the enforcement of the return decision has been postponed or who cannot be removed by referring to the substance of a set of conditions already laid down in Articles 7 to 10, Article 15 and Articles 17 to 20 of the Reception Conditions Directive 2003/9/EC, covering – in essence – four basic rights: 1. family unity; 2. health care, 3. schooling and education for minors and 4. respect for special needs of vulnerable persons. Other important rights under the Reception Conditions Directive, such as access to employment and material reception conditions were not referred to. Following negotiations, in the course of which concern was expressed that references to the Reception Conditions Directive might be perceived as an "upgrading" of the situation of irregular migrants and thus send a wrong policy message, a "self-standing" list of rights was established.

The scope of situations covered by Article 14(1) is broad: It covers the period of voluntary departure as well as any period for which removal has been formally or de-facto postponed in accordance with Article 9 Return Directive (appeal with suspensive effect; possible violation of non-refoulement principle; health reasons, technical reasons, failure of removal efforts due to lack of identification and others). Periods spent in detention are expressly excluded – since the related safeguards are regulated elsewhere (see section 15 - detention conditions).
The provision of emergency health care is a basic minimum right and access to it must not be made dependent on the payment of fees.

Access to education: The limitation of “subject to the length of their stay” should be interpreted restrictively. In cases of doubt about the likely length of stay before return, access to education should rather be granted than not be granted. A national practice where access to the education system is normally only established if the length of the stay is more than fourteen days may be considered as acceptable. As regards practical problems, such as cases in which the minor does not have a document proving the education already obtained in other countries or cases in which the minor does not speak any language in which education can be provided in the Member State, appropriate answers need to be found at national level, taking into account the spirit of the Directive and relevant international law instruments such as the 1989 Convention on the Rights of the Child and General Comment No. 6 thereto. Inspiration may also be drawn from the asylum acquis (in particular Article 14 of the Reception Conditions Directive 2013/33).

Other basic needs: In its judgement in case *Abdida* (C-562/13), the ECJ found that Member States are obliged to also cover other basic needs , in order to ensure that emergency health care and essential treatment of illness are in fact made available during the period in which that Member State is required to postpone removal. It is for the Member States to determine

the form in which such provision for the basic needs of the third country national concerned is to be made.

The logic upon which the ECJ relied to establish this obligation was that the requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) may be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. Based on this logic developed by the ECJ, and in light of the indications provided for in relevant case-law of the ECtHR, it can be derived that enjoyment of the other rights enumerated in Article 14(1) (such as in particular: access to education and taking into account needs of vulnerable persons) also give rise to a concomitant requirement to make provision for the basic needs of the third country national concerned.

Even though there is no general legal obligation under Union law to make provision for the basic needs of *all* third country nationals pending return, the Commission encourages Member States to do so under national law, in order to assure humane and dignified conditions of life for returnees

[…]

14. Detention

As already set out above, the procedural safeguards listed in Articles 12 (form and translation) and Article 13 (effective remedy and free legal aid) of the Return Directive are express manifestations of the fundamental right to good administration, the fundamental right of defence and the fundamental right to an effective remedy and to a fair trial (Article 47 CFR), all forming an integral part of the European Union legal order. Observance of those rights is thus required also with regard to detention decisions.

On top of these general requirements, Article 15 of the Return Directive sets out certain requirements specifically applicable in relation to detention decisions.

14.1. Circumstances justifying detention

Legal Basis: Return Directive – Article 15(1)

Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Imposing detention for the purpose of removal is a serious intrusion into the fundamental right of liberty of persons and therefore subject to strict limitations.

Obligation to impose detention only as a measure of last resort: Article 8(1) of the Return Directive obliges Member States to take "all necessary measures to enforce the return decision". The possibility to impose detention is one of the possible measures which may be used by Member States as a measure of last resort. The ECJ has in this context expressly highlighted in *El Dridi*, C61/11, para 41 that the Return Directive foresees a "*a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility*." An obligation on Member States to apply detention therefore only exists in situations in which it is clear that the use of detention is the only way to make sure that the return process can be prepared and the removal process can be carried out. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Reasons for detention: The sole legitimate objective of detention under the Return Directive is to prepare the return and/or to carry out the removal process, in particular when there is 1) a risk of absconding or; 2) avoidance or hampering of the preparation of return or the removal process by the returnee. Even though the wording of the Return Directive is phrased as an indicative listing ("in particular"), these two concrete case constellations cover the main case scenarios encountered in practice which appear such as to justify detention in order to prepare the return and/or to carry out the removal process. The existence of a specific reason for detention - and the non-availability of less coercive measures – must be individually assessed in each case. A refusal of entry at the border, the existence of a SIS record, lack of documentation, lack of residence, absence of cooperation and other relevant indications/criteria need to be taken into account when assessing whether there is a risk of absconding and a resulting need for detention, but do not *per se* necessarily justify a detention measure (see section 1.6. above).

No detention for public order reasons: The possibility of maintaining or extending detention for public order reasons is not covered by the text of the Directive and Member States are not allowed to use immigration detention for the purposes of removal as a form of "light imprisonment". The primary purpose of detention for the purposes of removal is to assure that returnees do not undermine the execution of the obligation to return by absconding. It is not the purpose of Article 15 to protect society from persons which constitute a threat to public policy or security. The - legitimate - aim to "protect society" should rather be

addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. See also ECJ in *Kadzoev*, C-357/09, para 70: "*The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court (aggressive conduct; no means of support; no accommodation) can therefore constitute in itself a ground for detention under the provisions of that directive."* The past behaviour/conduct of a person posing a risk to public order and safety (e.g. non-compliance with administrative law in other fields than migration law or infringements of criminal law) may, however, be taken into account when assessing whether there is a risk of absconding (see section 1.6. above): If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify a prognosis that there is a risk of absconding.

Obligation to provide for alternatives to detention: Article 15(1) must be interpreted as requiring each Member State to provide in its national legislation for alternatives to detention; this is also consistent with the terms of Recital 16 to the Directive ("*..if application of less coercive measures would not be sufficient*"). In *El Dridi*, C-61/11, para 39, the ECJ confirmed: *"..it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him."*

[…]

Further clarification :

- Being subject of return procedures: The formal requirement to "be subject of a return procedure" in Article 15(1) is not synonymous with "to be subject of a return decision". Detention may already be imposed – if all conditions of Article 15 are fulfilled - before a formal return decision is taken (e.g. while the preparations of the return decision are under way and a return decision has not yet been issued).

[…]

14.2. Form and initial review of detention

Legal Basis: Return Directive – Article 15(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 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.

Judicial authorities may consist of judges, but need not necessarily be composed of judges. In line with relevant ECtHR case-law they must have characteristics of independence, impartiality and offer judicial guarantees of an adversarial procedure.

Scope of judicial review: The review must assess all aspects expressly referred to in Article 15, taking into account both the questions of law (correctness of the detention procedure and of the decision on detention from the procedural/legal point of view) and questions of facts (the personal situation of the detainee,, family links in the country, guarantees of the departure from the territory, reasonable prospect of removal etc.)

Maximum duration of "speedy judicial review": The text of the Return Directive is inspired by the wording of Article 5(4) ECHR which requires a "speedy judicial review by a Court". Pertinent ECtHR case law clarifies that an acceptable maximum duration ("reasonable time") cannot be defined in the abstract. It must be determined in the light of the circumstances of each case, taking into account the complexity of the proceedings as well as the conduct by the authorities and the applicant. Taking a decision within *less than one week* can certainly be considered as *best practice* which is compliant with the legal requirement of speediness.

Requirement of written decision also applies to prolongation decisions: The requirement to issue a written decision with reasons also applies to decisions concerning prolongation of detention. In *Mahdi*, C-146/14, the ECJ expressly clarified (para 44): "*The requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention, given that (i) detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process and (ii) in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him.*"

All the safeguards inherent to the respect of the right to be heard apply to detention decisions and decisions on prolongation of detention. However, the non-respect of this right renders a

decision invalid only insofar as the outcome of the procedure would have been different if the right was respected. See ECJ in *G & R*, C-383/13: *"…European Union law, in particular Article 15(2) and (6) of Directive 2008/115/EC, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different."* (See also introduction to section 12).

14.3. Regular review of detention

Legal Basis: Return Directive – Article 15(3)

In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio.
No written review decision required under Article 15(3) 1st sentence: This was clarified by the ECJ in *Mahdi*, C-146/14, para 47: "*the provisions of Article 15 of Directive 2008/115 do not require the adoption of a written 'review measure' …. The authorities which carry out the review of a thirdcountry national's detention at regular intervals pursuant to the first sentence of Article 15(3) of the directive are therefore not obliged, at the time of each review, to adopt an express measure in writing that states the factual and legal reasons for that measure.*" Member States are, however, free to adopt a written review decision in accordance with national law.

Combined review and prolongation decisions must be adopted in writing: In its judgement *Mahdi*, C-146/14, the ECJ clarified (para 48): "*In such a case, the review of the detention and the decision on the further course to take concerning the detention occur in the same procedural stage. Consequently, that decision must fulfil the requirements of Article 15(2) of Directive 2008/115*." *In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*

Meaning of "prolonged detention": Article 15(3) 2nd sentence requires an ex-officio judicial control/supervision in cases of "prolonged detention". This implies the need for action by judicial authorities, also in those cases in which the concerned person does not appeal. Based on a linguistic comparison of the term "prolonged detention" (DE: "Bei längerer Haftdauer"; FR: "En cas de périodes de rétention prolongées"; NL: In het geval van een lange periode van bewaring ES: En caso de periodos de internamiento prolongados IT: Nel caso di periodi di trattenimento prolungati;….) it is clear that this term refers in substance to "a long period of detention" independently of the fact that a formal decision on prolongation was already taken or not. The Commission considers that an interval of 6 months for the first ex-officio judicial review is certainly too long, whilst a three monthly ex-officio judicial review may be

considered at the limit of what might still be compatible with 15(3), provided that there is also a possibility to launch individual reviews upon application if needed.

Powers of the supervising judicial authority: A review mechanism which only examines questions of law and not questions of fact is not sufficient. The judicial authority must have the power to decide both on the facts and legal issues. See ECJ in *Mahdi*, C-146/14, para 62: *"… the judicial authority having jurisdiction must be able to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the thirdcountry national. Furthermore, that authority must be able to consider any other element that is relevant for its decision should it so deem necessary…."*

14.4. Ending of detention

Legal Basis: Return Directive – Article 15(4)-(6)

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Detention must be ended and the returnee released in a number of different situations, such as in particular if

– there is no more reasonable prospect of removal for legal or other considerations;

– removal arrangements aren´t properly followed up by the authorities; – the maximum time limits for detention have been reached.

Furthermore an end should be given to detention on a case by case basis if alternatives to detention become an appropriate option.

14.4.1. Absence of reasonable prospect of removal

Absence of reasonable prospect of removal: In *Kadzoev*, C-357/09, para 67, the ECJ provided a clarifying interpretation of the meaning of "reasonable prospect": *Only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal. That reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.*
Absence of reasonable prospect" is not the same as "impossibility to enforce": "Impossibility to enforce" is a more categorical assertion and more difficult to demonstrate than “absence of reasonable prospect" which refers to certain degree of likeliness only.

Periods of detention which should be taken into account when assessing the "reasonable prospect of removal": Given the emphasis put by Article 15 (as well as recital 6) on a concrete individual caseby-case assessment for determining the proportionality of deprivation of liberty, regard must always be taken of the maximum detention periods for the concerned individual in the concrete case. This means that the maximum periods laid down by national law of the concerned Member State are relevant. This also implies that a returnee should not be detained in a Member State if it appears unlikely from the beginning that the person concerned will be admitted to a third country within the maximum detention period allowed under the legislation of that Member State. (NB: In *Kadzoev*, C357/09, the ECJ referred to the maximum periods under the Directive, since these were the same as the maximum periods under the applicable legislation in the concerned Member State.)

Once the maximum periods of detention have been reached, Article 15(4) isn´t applicable anymore and the person must in any event be released immediately. See ECJ in *Kadzoev*, C-357/09, paras 60 and 61: *"It is clear that, where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115 has been reached, the question whether there is no longer a ‘reasonable prospect of removal’ within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately. Article 15(4) of Directive 2008/115 can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired."*

[…]

14.4.2. Reaching the maximum period of detention

Article 15(5) and (6) obliges Member States to fix under national law[3] maximum time limits for detention which shall not exceed 6 months (in regular cases) or 18 months (in two qualified cases: lack of cooperation by the returnee or delays in obtaining the necessary documentation from third countries).

The – sometimes shorter – maximum detention periods fixed by national law prevail over the 6/18 months deadline provided for by the Return Directive: In the handling of concrete cases, the maximum periods fixed by national law (in compliance with the Return Directive) and not the maximum periods fixed by the Return Directive must be applied. This implies that a Member State which has fixed a national maximum of e.g. 12 months for non-cooperating returnees cannot maintain detention beyond 12 months, even though Article 15(6) provides for a frame of up to 18 months.

[…]

Further clarification:
Taking into account periods of detention as an asylum seeker: When calculating the period of detention for the purpose of removal, periods of detention as asylum seeker need not be taken into account, since detention for removal purposes and detention of asylum seekers fall under different legal rules and regimes. If, however, due to administrative shortcomings or procedural mistakes no proper decision on imposing asylum related detention was taken and the person remained in detention based on the national rules on detention for the purpose of removal, then this period must be taken into account (see ECJ in *Kadzoev*, C-357/09, paras 45 and 48: *"Detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules. Consequently, … a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115."* And para 47*: "Should it prove to be the case that no decision was taken on Mr Kadzoev's placement in the detention centre in the context of the procedures opened following his applications for asylum, referred to in paragraph 19 above, so that his detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of Directive 2008/115, Mr Kadzoev's period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in Article 15(5) and (6) of Directive 2008/115."*

[3] An overview on the different time-limits applicable under national law can be found at: http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=10737855 (page 44-50). This overview reflects the situation of December 2013 and some national rules have changed in the meantime.

Taking into account periods of detention pending preparation of Dublin transfer: The same logic as set out above (in relation to periods of detention as asylum seeker) applies.

Taking into account periods of detention during which an appeal with suspensive effect is pending: Such periods must be taken into account. See ECJ in *Kadzoev*, paras 53-54: *"The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must … be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115. If it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States".*

Taking into account periods of detention for the purpose of removal spent in (another) Member State A, immediately followed by pre-removal detention in Member State B (Such a situation may for instance arise in the context of the transfer of an irregular migrant from Member State A to Member State B under a bilateral readmission agreement covered by Article 6(3)): The Commission considers that the absolute 18 months threshold of uninterrupted pre-removal detention should not be exceeded, in view of the need to respect the effet utile of the maximum time limit fixed by Article 15(6). An exchange of information between Member States on periods of detention already spent in another Member State as well as an eventual possibility for Member State B to refuse transfer from Member State A if Member State A made the request excessively late should be addressed under the relevant bilateral readmission agreements.

Taking into account periods of detention completed before the rules in the Return Directive became applicable: Such periods must be taken into account (see ECJ in *Kadzoev*, C-357/09, paras 36-38).

14.5. Re-detention of returnees

The maximum deadlines for detention prescribed by the Return Directive must not be undermined by re-detaining returnees immediately, following their release from detention.

Re-detention of the same person at a later stage may only be legitimate if an important change of relevant circumstance has taken place (for instance the issuing of necessary papers by a third country or an improvement of the situation in the country of origin, allowing for safe return), if this change gives rise to a "reasonable prospect of removal" in accordance with Article 15(4) and if all other conditions for imposing detention under Article 15 are fulfilled.

14.6. Application of less coercive measures after ending of detention

Less coercive measures, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed as long as and to the extent that they can still be considered a "necessary measure" to enforce return. While there are no absolute maximum time limits foreseen for the application of less coercive measures, the scope and duration of such measures shall be subject to a thorough assessment as to their proportionality.

Moreover, if the nature and intensity of a less coercive measures is similar or equal to deprivation of liberty (such as the imposition of an unlimited obligation to stay at a specific facility, without possibility to leave such facility) it must be considered as a *de facto* continuation of detention and the time limits foreseen in Article 15(5) and (6) apply.

15. Detention conditions

Legal Basis: Return Directive – Article 16

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4

15.1. Initial Police custody

Initial police arrest for identification purposes is covered by national law. This is expressly highlighted in Recital 17 of the Return Directive: *"Without prejudice to the initial*

apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities". This clarifies that during an initial period national law may continue to apply. Even though this is no legal obligation, Member States are encouraged to make sure already at this stage that irregular migrants are kept separated from ordinary prisoners.

Length of the initial apprehension period during which suspected irregular migrants may be kept in police custody: A brief, but reasonable time for the purpose of identifying the person under constraint and researching the information enabling it to be determined whether that person is an illegally-staying third-country national. See answer provided by ECJ in *Achughbabian* (point 31): *" It should be held, in that regard, that the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee. That being so, the competent authorities are required, in order to prevent the objective of Directive 2008/115, as stated in the paragraph above, from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned."* Even though there is no detailed binding timeframe, the Commission encourages Member States to make sure that a transfer to a specialised detention facility for irregular migrants normally takes place within 48 hours after apprehension (exceptionally, longer periods may be admissible in case of remote geographic locations).

15.2. Use of specialised facilities as a general rule

Use of specialised facilities is the general rule: Returnees are no criminals and deserve treatment different from ordinary prisoners. The use of specialised facilities is therefore the general rule foreseen by the Return Directive. Member States are required to detain illegally staying thirdcountry nationals for the purpose of removal in specialised detention facilities, and not in ordinary prisons. This implies an obligation on Member States to make sure that sufficient places in specialised detention facilities are available, in order to tackle foreseeable irregular migration challenges.

Exceptions to the general rule: The derogation foreseen in Article 16(1) which allows Member States to house pre-removal detainees in exceptional cases in ordinary prisons must be interpreted restrictively. This was expressly confirmed by the ECJ in *Bero* (C-473/13) and *Bouzalmate* (C514/13) para 25*: "The second sentence of ... Article 16(1) … lays down a derogation from that principle, which, as such, must be interpreted strictly (see, to this effect, the judgment in Kamberaj, C-571/10, EU:C:2012:233, paragraph 86).* Full consideration shall be given to fundamental rights when making use of such derogation, giving due consideration to elements such as situations of overcrowding, the need to avoid repeated

transfers and possible detrimental effects on the returnee's wellbeing, particularly in the case of vulnerable persons.

Unpredictable peaks in the number of detainees: The derogation foreseen in Article 16(1) may be applied when unforeseen peaks in the number of detainees caused by unpredictable quantitative fluctuations inherent to the phenomenon of irregular migration (not yet reaching the level of an "emergency situation" expressly regulated in Article 18) cause a problem to place detainees in special facilities in a Member State which otherwise disposes of an adequate/reasonable number of specialised facilities.

Aggressive detainees: In line with relevant ECtHR case-law, Member States are under the obligation to protect returnees in detention from aggressive or inappropriate behaviour of other returnees or detainees. Member States are encouraged to look for practical ways for addressing this challenge within the specialised facilities and without resorting to prison accommodation. Possible solutions might include reserving certain parts/wings of detention centres to aggressive persons, or to have special detention centres reserved for this category of persons.

Absence of special detention facilities in a regional part of a Member State: The absence of special detention facilities in a regional part of a Member State - while in another part of the same Member State they exist - cannot justify per se a stay in an ordinary prison. This was expressly confirmed by the ECJ in *Bero*, C-473/1) and *Bouzalmate*, C-514/13, (para 32) "*Article 16(1) of Directive 2008/115 must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility."*

Brief detention periods: The fact that detention is likely to last for a brief period (such as 7 days) only, is no legitimate reason to exceptionally resort to prison accommodation.

Detention in closed medical/psychiatric institutions: Pre-removal detention in closed medical/psychiatric institutions or together with persons detained on medical grounds is not envisaged by Article 16(1) and would run contrary to its effet utile, unless, in light of the medical condition and state of health of the person concerned, the detention in or transfer to a specialised or adapted facility appears necessary in order to provide him or her with adequate and constant specialised medical supervision, assistance and care, with a view to avoiding deterioration of his or her health.

15.3. Separation from ordinary prisoners

Obligation to keep returnees and prisoners separated is an absolute requirement: The Return Directive provides for an unconditional obligation requiring Member States to ensure that illegally staying third-country nationals are always kept separated from ordinary prisoners

when a Member State cannot provide, exceptionally, accommodation for those third-country nationals in specialised detention facilities.

Ex-prisoners subject to subsequent return: Once the prison sentence has come to an end and the person should have been normally released, rules for detention for the purpose of removal (including the obligation under Article 16(1) to carry out detention in specialised facilities) start applying. If the preparation for removal and possibly also the removal itself is carried out in a period still covered by the prison sentence, prison accommodation can be maintained (since this is still covered by the sentence for the previously committed crime). Member States are encouraged to start the identification process necessary for removal already well in advance while persons are still serving their prison sentence in a prison.

Aggressive detainees: Aggressive or inappropriate behaviour of returnees does not justify to detain these persons together with ordinary prisoners unless an act of aggression is qualified as crime and a related prison sentence was imposed by a Court.
The term “ordinary prisoners” covers both convicted prisoners and prisoners on remand: This is confirmed by Guideline 10 paragraph 4 of the "20 Guidelines on forced return" of the Committee of Ministers of the Council of Europe, 4.5.2005, which explicitly highlights that "*persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, convicted or on remand."* Detainees must therefore also be separated from prisoners on remand.

Agreement by returnee to be detained together with prisoners is not possible: In *Pham*, C-474/13, paras 21 and 22, the ECJ expressly confirmed: "*In that regard, the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, laid down in the second sentence of Article 16(1) of that directive, is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive. In this context, a Member State cannot take account of the wishes of the third-country national concerned.*"

15.4. Material detention conditions

Return Directive – Article 16; CoE Guideline on forced return No 10 ("conditions of detention pending removal"); CPT standards; 2006 European Prison Rules;

The Return Directive itself provides for a number of concrete safeguards. Member States are obliged:

- to provide emergency health care and essential treatment of illness.

- to pay attention to the situation of vulnerable persons, which also implies ensuring, more generally, due consideration of elements such

as the age, the disability, the health and mental health conditions of the person concerned;

– to provide detainees with information which explains the rules applied in the facility and sets out their rights and obligations. It is recommended that this information should be given as soon as possible and not later than 24 hours after arrival;

– to allow detainees to establish contact with legal representatives, family members and competent consular authorities;

– to provide relevant and competent national, international and non-governmental organisations and bodies the possibility to visit detention facilities. This right must be granted directly to the concerned bodies, independently of a concrete invitation from the detainee.

As regards those issues which are not expressly regulated by the Return Directive, Member States need to comply with relevant Council of Europe standards, in particular the "CPT standards": The Return Directive does not regulate certain material detention conditions, such as the size of rooms, access to sanitary facilities, access to open air, nutrition, etc. during detention. Its recital 17 confirms, however, that detainees must be treated in a 'humane and dignified manner' with respect for their fundamental rights and in compliance with international law. Whenever Member States impose detention for the purpose of removal, this must be done under conditions that comply with Article 4 CFR, which prohibits inhuman or degrading treatment. The practical impact of this obligation on Member States is set out in more detail in particular in:

1) the Council of Europe Guideline on forced return No 10 ("conditions of detention pending removal");

2) the standards established by the Council of Europe Committee on the Prevention of Torture ('CPT standards', document CPT/Inf/E (2002) 1 — Rev. 2013), addressing specifically the special needs and status of irregular migrants in detention;

3) the 2006 European Prison Rules (Recommendation Rec(2006)2 of the Committee of Ministers to Member States) as basic minimum standards on all issues not adressed by the abovementioned standards;

4) the UN Standard Minimum Rules for the Treatment of Prisoners (approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977).

These standards represent a generally recognised description of the detention-related obligations which should be complied with by Member States in any detention as an absolute minimum, in order to ensure compliance with ECHR obligations and obligations resulting from the CFR when applying EU law:

16. Detention of minors and families

Legal Basis: Return Directive – Article 17

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.

Also in the context of detention of minors and families, the principles already applicable according to the general rules on detention in Article 15 (detention only as a measure of last resort, preference to be given to alternatives, individual assessment of each case,…) should be scrupulously applied. The best interests of the child must always be a primary consideration in the context of detention of minors and families.

The text of Article 17 of the Return Directive corresponds closely to the text of *CoE Guideline 11. – Children and families*. Further concrete guidance can be found in the commentary to this Guideline:

[…]

As regards detention of children, the ‘CPT standards’ provide for the following rules which should be respected by Member States whenever they apply – exceptionally and as a measure of last resort – detention:

[…]

17. Emergency situations

Legal Basis: Return Directive – Article 18

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.
3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

Scope of possible derogations limited to three provisions: Article 18 provides for a possibility for Member States not to apply three detention related provisions of the Directive (namely: the obligation to provide for a speedy initial judicial review of detention; the obligation to detain only in specialised facilities and the obligation to provide separate accommodation guaranteeing adequate privacy to families) in emergency situations involving the sudden arrival of large numbers of irregular migrants. Derogations to other rules contained in the Return Directive are not possible.

Transposition into national law is a precondition for a possible application of the emergency clause: Article 18 describes and limits the situations covered, as well as the scope of possible derogations and information obligations to the Commission. If a Member State wishes to have the option to apply this safeguard clause in case of emergency situations, it must have properly transposed it beforehand – as a possibility and in line with the criteria of Article 18 – into its national legislation. (NB: contrary to safeguard clauses contained in Regulations (e.g. those in the SBC related to the reintroduction of internal border control) safeguard clauses in Directives must be transposed into national law before they can be used.)

Information concerning a possible use of the emergency clause should be passed by Member States to the Commission by means of the usual official channels, i.e. via the Permanent Representation to the Secretariat General of the European Commission.

[…]

PART III:

COLLECTION OF TEXTS OF

THE UNITED NATIONS

A.

GENERAL ASSEMBLY OF THE UNITED NATIONS

Universal Declaration of Human Rights [1]

Adopted by the UN General Assembly on 10th December 1948.

Preamble

[…]

Article 3

Everyone has the right to life, liberty and security of person.

[…]

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

[…]

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

[…]

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

[1] Text available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

[…]

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[…]

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

[…]

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. *[…]*

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. *[…]*

[…]

Convention relating to the Status of Refugees [1]

Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

Preamble

The High Contracting Parties,

[…]

Have agreed as follows :

Chapter I
General provisions

Article 1 - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[1] Text available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B.

(1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

[…]

Article 3 - Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4 - Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

[…]

Article 6 - The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7 - Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8 - Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality.

Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9 - Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10 - Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11 - Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II
Juridical status

Article 12 - Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State,

provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

[…]

Article 16 - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi .

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

[…]

Chapter IV
Welfare

Article 20 - Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21 - Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22 - Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular,

as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23 - Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24 - Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V
Administrative measures

Article 25 - Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26 - Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27 - Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28 - Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

[…]

Article 31 - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32 - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34 - Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

[…]

International Convention on the protection of the Rights of all Migrant Workers and Members of Their Families [1]

Adopted by General Assembly resolution 45/158 of 18th December 1990

Preamble

The States Parties to the present Convention,

[…]

Have agreed as follows:

Part I: Scope and Definitions

Article 1

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

[…]

Article 3

The present Convention shall not apply to:

[…]

(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

[1] Text available at http://www.refworld.org/docid/3ae6b3980.html

[…]

Article 5

For the purposes of the present Convention, migrant workers and members of their families:

(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

[…]

Part II:
Non-discrimination with Respect to Rights

Article 7

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Part III:
Human Rights of All 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 11

1. No migrant worker or member of his or her family shall be held in slavery or servitude.

2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.

[…]

Article 14

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, , correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

[…]

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.

[…]

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 o their liberty except on such grounds and in accordance with such procedures as are established by law.

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

[…]

7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:

(a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;

(b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

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.

[…]

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.

[…]

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 23

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.

Article 24

Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.

[…]

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

[…]

Article 30

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

[…]

Article 39

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.

2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

[…]

Part VI:
Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

[…]

Article 65

1. States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, inter alia :

(a) The formulation and implementation of policies regarding such migration;

(b) An exchange of information. consultation and co-operation with the competent authorities of other States Parties involved in such migration;

[…]

(d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

2. States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

[…]

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

[…]

Article 69

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

[…]

Convention on the Rights of the Child [1]

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49.

PART I

[…]

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

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 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.
Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

[1] Text available at:
http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) 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.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

[…]

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;

(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;

(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.

Convention on the Rights of Persons with Disabilities [1]

Text adopted by the United Nations General Assembly on 13 December 2006. The Convention is opened for signature on 30 March 2007

[…]

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

   a) Enjoy the right to liberty and security of person;

   b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

[…]

[1] Text available at http://www.un.org/disabilities/convention/conventionfull.shtml

Vienna convention on consular relations [1]

Convention adopted on 22 April 1963. Entry into force on 19 March 1967

[…]

Article 36 - Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

[1] Text availalbe at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

Article 37 - Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

(a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;

(c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

[…]

International Covenant on Economic, Social and Cultural Rights [1]

Adopted by General Assembly resolution on 16 December 1966

[…]

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

[1] Text available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[…]

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. [1]

Preamble

The States Parties to the present Covenant,

[…]

Agree upon the following articles:

[…]

Part II

Article 2

[…]

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

[…]

[1] Text available at http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf

PART III

[…]

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.

[…]

Article 9 [2]

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.

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.

[…]

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.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

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.

[…]

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

[2] See also General comment No 8 (1982) of the Human Rights Committee on Article 9.

[…]

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

[…]

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks

[…]

Body of Principles for the Protection of all persons under any forms of detention or imprisonment [1]

Adopted by General Assembly resolution 43/173 of 9 December 1988

Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.

Use of Terms

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

[…]

[1] Text available at: http://www.globaldetentionproject.org/fileadmin/docs/The-Body-of-Principles-for-the-Protection-of-All-Persons-under-Any-Form-of-Detention-or-Imprisonment.pdf

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[2] No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

[2] The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

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

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

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.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

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. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for reasonable period where exceptional needs of the investigation so require.

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.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

[…]

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.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph l of the present principle, subject to reasonable conditions to ensure security and good order in such places.

[…]

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph l of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

[…]

Declaration on the human rights of individuals who are not nationals of the country in which they live [1]

Adopted by the General Assembly in its resolution 47/144 on 13 December 1985

[…]

Article 5

1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

(d) The right to choose a spouse, to marry, to found a family;

(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

(f) The right to retain their own language, culture and tradition;

(g) The right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations.

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights

[1] Text available at http://www.un.org/documents/ga/res/40/a40r144.htm

recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights:

(a) The right to leave the country;

(b) The right to freedom of expression;

(c) The right to peaceful assembly;

(d) The right to own property alone as well as in association with others, subject to domestic law.

3. Subject to the provisions referred to in paragraph 2, aliens lawfully in the territory of a State shall enjoy the right to liberty of movement and freedom to choose their residence within the borders of the State.

4. Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien.

Article 6

No alien shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, in particular, no alien shall be subjected without his or her free consent to medical or scientific experimentation.

Article 7

An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.

[…]

Article 10

Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a, national in the State where he or she resides.

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) [1]

The General Assembly,

[…]

ANNEX

Preliminary observations

[…]

4. These rules are inspired by principles contained in various United Nations conventions and declarations and are therefore consistent with the provisions of existing international law. They are addressed to prison authorities and criminal justice agencies (including policymakers, legislators, the prosecution service, the judiciary and the probation service) involved in the administration of non-custodial sanctions and community-based measures.

[…]

12. Some of these rules address issues applicable to both men and women, prisoners, including those relating to parental responsibilities, some medical services, searching procedures and the like, although the rules are mainly concerned with the needs of women and their children. However, as the focus includes the children of imprisoned mothers, there is a need to recognize the central role of both parents in the lives of children. Accordingly, some of these rules would apply equally to male prisoners and offenders who are fathers.

Introduction

13. The following rules do not in any way replace the Standard Minimum Rules for the Treatment of Prisoners and the Tokyo Rules. Therefore, all provisions contained in those two sets of rules continue to apply to all prisoners and offenders without discrimination.

14. Section I of the present rules, covering the general management of institutions, is applicable to all categories of women deprived of their liberty, including criminal or civil, untried or convicted women prisoners, as well as women subject to “security measures” or corrective measures ordered by a judge.

[1] Text available at:
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/526/28/PDF/N1052628.pdf?OpenElement

I. Rules of general application

1. Basic principle

[*Supplements rule 6 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 1

In order for the principle of non-discrimination, embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.

2. Admission

Rule 2

1. Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives; access to legal advice; information about prison rules and regulations, the prison regime and where to seek help when in need in a language that they understand; and, in the case of foreign nationals, access to consular representatives as well.

2. Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children.

3. Register

[*Supplements rule 7 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 3

1. The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status.

2. All information relating to the children’s identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interests of the children.

[…]

5. Personal hygiene

[*Supplements rules 15 and 16 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 5

The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.

6. Health-care services

[*Supplements rules 22-26 of the Standard Minimum Rules for the Treatment of Prisoners*]

(a) Medical screening on entry
[*Supplements rule 24 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 6

The health screening of women prisoners shall include comprehensive screening to determine primary health-care needs, and also shall determine:

a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling;

b) Mental health-care needs, including post-traumatic stress disorder and risk of suicide and self-harm;

c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues;

d) The existence of drug dependency;

e) Sexual abuse and other forms of violence that may have been suffered prior to admission.

Rule 7

1. If the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be

informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance.

2. Whether or not the woman chooses to take legal action, prison authorities shall endeavour to ensure that she has immediate access to specialized psychological support or counselling.

3. Specific measures shall be developed to avoid any form of retaliation against those making such reports or taking legal action.

Rule 8

The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times.

Rule 9
If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.

(b) Gender-specific health care

Rule 10

1. Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.

2. If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.

Rule 11

1. Only medical staff shall be present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff as indicated in rule 10, paragraph 2 above.

2. If it is necessary for non-medical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity and confidentiality.

(c) Mental health and care

Rule 12

Individualized, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health-care needs in prison or in non-custodial settings.

Rule 13

Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support.

(d) HIV prevention, treatment, care and support

Rule 14

In developing responses to HIV/AIDS in penal institutions, programmes and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission. In this context, prison authorities shall encourage and support the development of initiatives on HIV prevention, treatment and care, such as peer-based education.

(e) Substance abuse treatment programmes

Rule 15

Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

(f) Suicide and self-harm prevention

Rule 16

Developing and implementing strategies, in consultation with mental health-care and social welfare services, to prevent suicide and self-harm among women prisoners and providing appropriate, gender-specific and specialized support to those at risk shall be part of a comprehensive policy of mental health care in women’s prisons.

(g) Preventive health-care services

Rule 17

Women prisoners shall receive education and information about preventive health-care measures, including from HIV, sexually transmitted diseases and other, blood-borne diseases, as well as gender-specific health conditions.

Rule 18

Preventive health-care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, shall be offered to women prisoners on an equal basis with women of the same age in the community.

7. Safety and security

[*Supplements rules 27-36 of the Standard Minimum Rules for the Treatment of Prisoners*]

(a) Searches

Rule 19

Effective measures shall be taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.

Rule 20

Alternative screening methods, such as scans, shall be developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches.

Rule 21

Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners.

(b) Discipline and punishment

[*Supplements rules 27-32 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 22

Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.

Rule 23
Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.

(c) Instruments of restraint
[*Supplements rules 33-34 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 24

Instruments of restraint shall never be used on women during labour, during birth and immediately after birth.

(d) Information to and complaints by prisoners; inspections
[*Supplements rules 35 and 36 and, with regard to inspection, rule 55 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 25

1. Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation.

2. Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.

3. In order to monitor the conditions of detention and treatment of women prisoners, inspectorates, visiting or monitoring boards or supervisory bodies shall include women members.

8. Contact with the outside world
[*Supplements rules 37-39 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 26

Women prisoners' contact with their families, including their children, their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes.

Rule 27

Where conjugal visits are allowed, women prisoners shall be able to exercise this right on an equal basis with men.

Rule 28

Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.

9. Institutional personnel and training

[*Supplements rules 46-55 of the Standard Minimum Rules for the Treatment of Prisoners*]

Rule 29

Capacity-building for staff employed in women's prisons shall enable them to address the special social reintegration requirements of women prisoners and manage safe and rehabilitative facilities. Capacity-building measures for women staff shall also include access to senior positions with key responsibility for the development of policies and strategies relating to the treatment and care of women prisoners.

Rule 30

There shall be a clear and sustained commitment at the managerial level in prison administrations to prevent and address gender-based discrimination against women staff.

Rule 31

Clear policies and regulations on the conduct of prison staff aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment shall be developed and implemented.

Rule 32

Women prison staff shall receive equal access to training as male staff, and all staff involved in the management of women's prisons shall receive training on gender sensitivity and prohibition of discrimination and sexual harassment.

Rule 33

1. All staff assigned to work with women prisoners shall receive training relating to the gender-specific needs and human rights of women prisoners.

2. Basic training shall be provided for prison staff working in women's prisons on the main issues relating to women's health, in addition to first aid and basic medicine.

3. Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.

Rule 34

Capacity-building programmes on HIV shall be included as part of the regular training curricula of prison staff. In addition to HIV/AIDS prevention, treatment, care and support, issues such as gender and human rights, with a particular focus on their link to HIV, stigma and discrimination, shall also be part of the curriculum.

Rule 35

Prison staff shall be trained to detect mental health-care needs and risk of self-harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists.

10. Juvenile female prisoners

Rule 36

Prison authorities shall put in place measures to meet the protection needs of juvenile female prisoners.

Rule 37

Juvenile female prisoners shall have equal access to education and vocational training that are available to juvenile male prisoners.

Rule 38

Juvenile female prisoners shall have access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence. They shall receive education on women's health care and have regular access to gynaecologists, similar to adult female prisoners.

Rule 39

Pregnant juvenile female prisoners shall receive support and medical care equivalent to that provided for adult female prisoners. Their health shall be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.

[…]

Resolution on Protection of migrants (70/147) [1]

Text adopted by the General Assembly on 17 December 2015

The Parliamentary Assembly,

[…]

4. Also reaffirms the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their migration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party, and therefore:

(a) Calls upon all States to respect the human rights and inherent dignity of migrants, to put an end to arbitrary arrest and detention and, in order to avoid excessive detention of irregular migrants, to review, where necessary, detention periods and to use alternatives to detention, where appropriate, including measures that have been successfully implemented by some States;

(b) Encourages States to put in place, if they have not yet done so, appropriate systems and procedures in order to ensure that the best interests of the child are a primary consideration in all actions or decisions concerning migrant children, regardless of their migration status, and to use, when applicable, alternatives to the detention of migrant children;

[…]

(d) Urges all States to adopt effective measures to prevent and punish any form of illegal deprivation of liberty of migrants by individuals or groups;

(e) Requests States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, and to adequately train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with their obligations under international human rights law;

[…]

(g) Calls upon States to analyse and implement, where appropriate, mechanisms for the safe and orderly administration of returning migrants, with particular attention to the human rights of migrants, in accordance with their obligations under international law;

[1] Text available at http://www.refworld.org/docid/56d7ea2c4.html

(h) Calls upon States to prosecute, in conformity with applicable law, acts of violation of the human rights of migrants and their families, such as arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from the country of origin to the country of destination and vice versa, including transit across national borders;

(i) Recognizes the particular vulnerability of migrants in transit situations, including through national borders, and the need to ensure full respect for their human rights also in these circumstances;

[…]

(k) Reaffirms emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, 10 in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention;

[…]

(o) Recalls that the Universal Declaration of Human Rights recognizes tha t everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him or her;

[…]

5. Emphasizes the importance of protecting persons in vulnerable situations, and in this regard:

[…]

(c) Calls upon States, within the framework of applicable international law, to take steps to ensure that their national procedures at international borders include adequate safeguards to protect the dignity, safety and human rights of all migrants;

(g) Encourages all States to develop international migration policies and programmes that include a gender perspective, in order to adopt the measures necessary to better protect women and girls against dangers and abuse during migration;

[…]

B.

OFFICE OF THE UNITED NATIONS

HIGH COMMISSIONER FOR REFUGEES

(UNHCR)

Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention [*]

UNHCR issues the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines replace UNHCR, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999.

These Guidelines are intended to provide guidance to governments, parliamentarians, legal practitioners, decision-makers, including the judiciary, as well as other international and national bodies working on detention and asylum matters, including non-governmental organisations, national human rights institutions and UNHCR staff.

Introduction

1. The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement. While acknowledging the array of contemporary challenges to national asylum systems caused by irregular migration as well as the right of States to control the entry and stay of non-nationals on their territory, subject to refugee and human rights standards[1], these Guidelines reflect the current state of international law relating to the detention of asylum-seekers and are intended to guide:

(a) governments in their elaboration and implementation of asylum and migration policies which involve an element of detention; and
(b) decision-makers, including judges, in making assessments about the necessity of detention in individual cases.

2. In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each

[*] Text available at: http://www.refworld.org/docid/503489533b8.html

[1] United Nations Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, para. 5, available at: http://www.unhcr.org/refworld/docid/45139acfc.html. See, also, *Moustaquim v. Belgium*, (1991), Council of Europe: European Court of Human Rights (ECtHR), App. No. 26/1989/186/246, para. 43, available at: http://www.unhcr.org/refworld/docid/3ae6b7018.html and *Vilvarajah and Others v. the United Kingdo*m, (1991), ECtHR, App. No. 45/1990/236/302-306, para. 103, available at: http://www.unhcr.org/refworld/docid/3ae6b7008.html.

individual case. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers, including safe, dignified and human rights-compatible treatment.[2]

3. There are various ways for governments to address irregular migration – other than through detention – that take due account of the concerns of governments as well as the particular circumstances of the individual concerned.[3] In fact, there is no evidence that detention has any deterrent effect on irregular migration[4]. Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain. Apart from ensuring compliance with human rights standards, governments are encouraged to review their detention policies and practices in light of the latest research in relation to alternatives to detention (some of which is documented in these Guidelines). UNHCR stands ready to assist governments in devising alternative to detention programmes.

Scope

4. These Guidelines reflect the state of international law relating to detention – on immigration-related grounds – of asylum-seekers and other persons seeking international protection. They equally apply to refugees and other persons found to be in need of international protection should they exceptionally be detained for immigration-related reasons. They also apply to stateless persons who are seeking asylum, although they do not specifically cover the situation of non-asylum-seeking stateless persons[5], persons found not to

[2] See, in particular, UN High Commissioner for Refugees (UNHCR), Executive Committee of the High Commissioner's Programme (ExCom), Conclusion on Reception of Asylum-seekers in the Context of Individual Asylum Systems, No. 93 (LIII) – 2002, available at: http://www.unhcr.org/refworld/docid/3dafdd344.Html. All ExCom Conclusions are also available by subject in UNHCR, A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011, www.unhcr.org/refworld/docid/3dafdd344.html.

[3] UNHCR, Refugee Protection and Mixed Migration: The 10-Point Plan in Action, February 2011, available at: http://www.unhcr.org/refworld/docid/4d9430ea2.html.

[4] A. Edwards, Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, page 1 ("There is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum.") (Edwards, Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention"), available at: http://www.unhcr.org/refworld/docid/4dc935fd2.html as restated in United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, para. 8, available at: http://www.unhcr.org/refworld/docid/502e0bb62.html

[5] A clear distinction is required between stateless persons who are seeking asylum in other countries and stateless persons who are residing in their "own" country in the sense envisaged by Article 12(4) of the *International Covenant on Civil and Political Rights*, 1966 (ICCPR). The latter include individuals who are longterm, habitual residents of a State which is often their country of birth. Being in their "own country" they have a right to enter and remain there with significant implications for their status under national law. Rules governing the acceptable grounds for detention will vary between these two groups (Guideline 4.1). In relation to the former, the grounds outlined in these Guidelines apply; however, such justifications for the detention of stateless persons residing in their "own" country will in many instances lead to arbitrary and unlawful (including indefinite) detention. For more on detention and stateless persons, see UNHCR, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, paras. 59-62, available at: http://www.unhcr.org/refworld/docid/4f7dafb52.html.

be in need of international protection[6] or other migrants, although many of the standards detailed herein may apply to them *mutatis mutandis.* This is particularly true with regard to non-refugee stateless persons in the migratory context who face a heightened risk of arbitrary detention. The Guidelines do not cover asylum-seekers or refugees imprisoned on the basis of criminal offences.

Terminology

Detention

5. For the purposes of these Guidelines, "detention" refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.

6. The place of detention may be administered either by public authorities or private contractors; the confinement may be authorised by an administrative or judicial procedure, or the person may have been confined with or without "lawful" authority. Detention or full confinement is at the extreme end of a spectrum of deprivations of liberty. Other restrictions on freedom of movement in the immigration context are likewise subject to international standards.[7]

7. Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of "degree or intensity and not one of nature or substance".[8] While these Guidelines focus more closely on detention (or total confinement), they also address in part measures short of full confinement. Detention can take place in a range of locations, including at land and sea borders, in the "international zones" at airports,[9] on islands,[10] on boats,[11] as well as in closed refugee camps, in one's own home (house arrest) and even extraterritorially.[12] Regardless of the name given to a particular place of detention, the

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[6] The term *"'persons found not to be in need of international protection' is understood to mean persons who have sought international protection and who after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations or national law"*, see UNHCR, ExCom, Conclusion on the Return of Persons Found Not to be in Need of International Protection, No. 96 (LIV) – 2003, preambular para. 6, available at: http://www.unhcr.org/3f93b1ca4.html.

[7] See, below note 22.

[8] *Guzzardi v. Italy*, (1980), ECtHR, App. No. 7367/76, para. 93, available at: http://www.unhcr.org/refworld/docid/502d42952.html

[9] *Amuur v. France*, (1996), ECtHR, App. No. 19776/92, available at: http://www.unhcr.org/refworld/docid/3ae6b76710.html.

[10] See, for example, *Guzzardi v. Italy*, above note 8.

[11] See, for example, *Medvedyev v. France*, (2010), ECtHR, App. No. 3394/03, available at: http://www.unhcr.org/refworld/docid/502d45dc2.html and *J.H.A. v. Spain*, UN Committee against Torture (CAT), CAT/C/41/D/323/2007, 21 November 2008, available at http://www.unhcr.org/refworld/docid/4a939d542.html.

[12] "Extraterritorial" detention refers to, inter alia, the transfer and detention of asylumseekers in another country's territory, including under agreement with that State. The responsibility of the sending State for the human rights standards in that place of detention will depend on a range of factors, see, for example, UNHCR,

important questions are whether an asylum-seeker is being deprived of his or her liberty de facto and whether this deprivation is lawful according to international law.

See also Figure 1 [13] *reproduced in the source document "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention".*

Alternatives to Detention

8. "Alternatives to detention" is not a legal term but is used in these Guidelines as short-hand to refer to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. As some alternatives to detention also involve various restrictions on movement or liberty (and some can be classified as forms of detention), they are also subject to human rights standards.

Asylum-Seeker

9. A "stateless person" is defined under international law as a person "who is not considered as a national by any State under the operation of its law."[14] An asylum-seeking stateless person refers to a stateless person who seeks to obtain refugee status under the 1951 Convention,[15] or another form of international protection.

Stateless Person

10. The term "asylum-seeker" in these Guidelines refers to persons applying for refugee status pursuant to the definition of a "refugee" in the 1951 Convention and 1967 Protocol relating to the Status of Refugees ("1951 Convention")[16] or any regional refugee

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Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at: http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf.

[13] Edwards, Back to Basics: The Right to Liberty and Security of Person and"Alternatives to Detention", above note 4, Figure 1.

[14] Article 1(A)(2), Convention relating to the Status of Refugees, 1951 (1951 Convention) as amended by the Protocol relating to the Status of Refugees, 1967.

[15] See, in particular, Article I(2), Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention); Conclusion No. 3, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984 (1984 Cartagena Declaration).

[16] See, in particular, European Union, Council 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 (recast), 20 December 2011, available at: http://www.unhcr.org/refworld/docid/4f197df02.html ; European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, available at: http://www.unhcr.org/refworld/docid/3ddcee2e4.html.

instrument,[17] as well as other persons seeking complementary, subsidiary or temporary forms of protection.[18]The Guidelines cover those whose claims are being considered within status determination procedures, as well as admissibility, pre-screening or other similar procedures. They also apply to those exercising their right to seek judicial review of their request for international protection.

Guideline 1- The right to seek asylum must be respected

11. Every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore, an unlawful act.[19] Furthermore, the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.[20] In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.

Guideline 2 - The rights to liberty and security of person and to freedom of movement apply to asylum-seekers

12. The fundamental rights to liberty and security of person[21] and freedom of movement[22] are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law. The Executive Committee of the High Commissioner's Programme (ExCom) has addressed on a number of occasions the

[17] Article 1 of the Convention relating to the Status of Stateless Persons, 1954 (1954 Statelessness Convention). See, further, UNHCR, Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01, available at: http://www.unhcr.org/refworld/docid/4f4371b82.html.
[18] Article 1(A)(2), second paragraph, 1951 Convention.
[19] Article 14, Universal Declaration of Human Rights, 1948 (UDHR); Article 22 (7) ACHR; Article 12(3), ACHPR; Article 27, American Declaration of the Rights and Duties of Man, 1948 (ADRDM); Article 18, Charter of Fundamental Rights of the European Union, 2000, (CFREU).
[20] Article 31, 1951 Convention.
[21] See, for example, Articles 3 and 9, UDHR; Article 9, ICCPR; Articles 1 and 25, ADRDM; Article 6, ACHPR; Article 7 ACHR; Article 5, ECHR; Article 6, CFREU.
[22] See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own. See, also, Article 12, African Charter on Human and Peoples' Rights, 1981 (ACHPR); Article 22, American Convention on Human Rights, 1969 (ACHR); Article 2, Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), 1950 (ECHR); Article 2, Protocol No. 4 to the ECHR, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto, 1963; Article 45, CFREU.

detention of asylum seekers. [23] These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.[24]

13. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.[25] Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory.[26] Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.[27]

14. These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.

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

15. Any detention or deprivation of liberty must be in accordance with and authorised by national law.[28] Any deprivation of liberty that is not in conformity with national law would be unlawful, both as a matter of national as well as international law. At the same time, although

[23] See, UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) –1986, para. (b), available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) –1998, paras. (cc), (dd) and (ee); and 89 (LI) –2000, third paragraph, all available at: http://www.unhcr.org/3d4ab3ff2.html

[24] UN Human Rights Committee (HRC), General Comment No. 18: Non-discrimination, 10 November 1989, para. 1, available at: http://www.unhcr.org/refworld/docid/453883fa8.html; HRC, General Comment No. 15: The Position of Aliens under the Covenant, above note 1.

[25] Article 31(2) of the 1951 Convention provides: *"The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country"*. See UNHCR, Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention – Revised, Geneva Expert Roundtable, 8-9 November 2001 (UNHCR Global Consultations Summary Conclusions: Article 31 of the 1951 Convention), para. 3, available at: http://www.unhcr.org/419c783f4.pdf. See, also, UNHCR, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17 (UNHCR Global Consultations: Reception of Asylum-Seekers), available at: http://www.unhcr.org/refworld/docid/3bfa81864.html.

[26] Article 26 of the 1951 Convention provides: "*Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.*" Article 26 of the 1954 Convention relating to the Status of Stateless Persons provides an identical provision.

[27] UNHCR, "Lawfully Staying" – A Note on Interpretation, 1988, http://www.unhcr.org/refworld/pdfid/42ad93304.pdf; UNHCR Global Consultations: Reception of Asylum-Seekers, above note 25, para. 3, available at: http://www.unhcr.org/refworld/docid/3bfa81864.html.

[28] For example, Article 9(1) of the ICCPR provides explicitly that: *"No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

national legislation is the primary consideration for determining the lawfulness of detention, it is "not always the decisive element in assessing the justification of deprivation of liberty."[29]

16. In particular, a specific factor that needs to be considered is the underlying purpose of preventing persons being deprived of their liberty arbitrarily.[30] Detention laws must conform to the principle of legal certainty. This requires, inter alia, that the law and its legal consequences be foreseeable and predictable.[31] The law permitting detention must not, for example, have retroactive effect.[32] Explicitly identifying the grounds for detention in national legislation would meet the requirement of legal certainty.[33]

17. Insufficient guarantees in law to protect against arbitrary detention, such as no limits on the maximum period of detention or no access to an effective remedy to contest it, could also call into question the legal validity of any detention.[34]

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

18. Detention in the migration context is neither prohibited under international law per se, nor is the right to liberty of person absolute.[35] However, international law provides substantive safeguards against unlawful (see Guideline 3) as well as arbitrary detention. "Arbitrariness" is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.[36] To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the

[29] Lokpo and Touré v. Hungary, (2011), ECtHR, App. No. 10816/10, para. 21 (final decision), available at: http://www.unhcr.org/refworld/docid/4e8ac6652.html.
[30] Ibid. The ECtHR stated: *"It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of the relevant provision, which is to prevent persons from being deprived of their liberty in an arbitrary fashion."*
[31] Bozano v. France, (1986), ECtHR, App. No. 9990/82, para. 54, available at: http://www.unhcr.org/refworld/docid/4029fa4f4.html; H.L. v. United Kingdom, (2004), ECtHR, App. No. 45508/99, para. 114, available at: http://www.unhcr.org/refworld/docid/502d48822.html. See, also, Dougoz v. Greece, (2001), ECtHR, App. No. 40907/98, para 55: the law must be "sufficiently accessible and precise, in order to avoid all risk of arbitrariness", available at: http://www.unhcr.org/refworld/docid/3deb8d884.html.
[32] The general principle that laws ought not to have retroactive effect is wellestablished in most legal jurisdictions, especially as regards criminal prosecution, arrest or detention: see, for example, Article 25 of the ADRDM, which provides in part that "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law." See, also, *Amuur v. France*, above note 9, para. 53.
[33] This is the recommendation of the UN Working Group on Arbitrary Detention (WGAD), Report to the Fifty–sixth session of the Commission on Human Rights, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5, available at: http://www.unhcr.org/refworld/pdfid/3b00f25a6.pdf.
[34] Louled Massoud v. Malta, (2010), ECtHR, App. No. 24340/08, available at: http://www.unhcr.org/refworld/docid/4c6ba1232.html.
[35] Article 9 of the ICCPR may be derogated from in a public emergency subject to being *"strictly required by the exigencies of the situation"* and *"provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination …"* (Article 4, ICCPR). Also, A v. Australia, HRC, Comm. No. 560/1993, 3 April 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b71a0.html, which found no basis to suggest that detention of asylum-seekers was prohibited as a matter of customary international law (para. 9.3).
[36] *Van Alphen v. The Netherlands*, HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8, available at: http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf

circumstances and proportionate to a legitimate purpose (see Guidelines 4.1 and 4.2).[37] Further, failure to consider less coercive or intrusive means could also render detention arbitrary (Guideline 4.3).

19. As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening or assessment tools can guide decision makers in this regard, and should take into account the special circumstances or needs of particular categories of asylum-seekers (see Guideline 9). Factors to guide such decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behaviour of compliance and character, and risk of absconding or articulation of a willingness and understanding of the need to comply.

20. In relation to alternatives to detention (Guideline 4.3 and Annex A), the level and appropriateness of placement in the community need to balance the circumstances of the individual with any risks to the community. Matching an individual and/or his/her family to the appropriate community should also be part of any assessment, including the level of support services needed and available. Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case.[38]

Guideline 4.1 - Detention is an exceptional measure and can only be justified for a legitimate purpose

21. Detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if entry was illegal.[39] The purposes of detention ought to be clearly defined in legislation and/or regulations (see Guideline 3).[40] In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security.

4.1.1 To protect public order

To prevent absconding and/or in cases of likelihood of non-cooperation

22. Where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention

[37] *Ibid.* and *A v. Australia,* above note 35, paras. 9.2-9.4 (on proportionality).
[38] See, for example, *A v. Australia,* above note 35; C v. Australia, HRC, Comm. No. 900/1999, 28 October 2002, available at: http://www.unhcr.org/refworld/docid/3f588ef00.html.
[39] *A v. Australia,* above note 35, para. 9.
[40] WGAD, Report to the Tenth Session of the Human Rights Council, 16 February 2009, A/HRC/10/21, para. 67, available at: http://www.unhcr.org/refworld/docid/502e0de72.html. Some regional instruments explicitly limit the grounds of immigration detention: for example, Article 5(f) of the ECHR: *"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."*

may be necessary in an individual case.[41] Factors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive.[42] Appropriate screening and assessment methods need to be in place in order to ensure that persons who are bona fide asylum-seekers are not wrongly detained in this way.[43]

In connection with accelerated procedures for manifestly unfounded or clearly abusive claims

23. Detention associated with accelerated procedures for manifestly unfounded or clearly abusive cases must be regulated by law and, as required by proportionality considerations, must weigh the various interests at play.[44] Any detention in connection with accelerated procedures should only be applied to cases that are determined to be "manifestly unfounded" or "clearly abusive";[45] and those detained are entitled to the protections outlined in these Guidelines.

For initial identity and/or security verification

24. Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks.[46] At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law (see below).

25. Mindful that asylum-seekers often have justifiable reasons for illegal entry or irregular movement,[47] including travelling without identity documentation, it is important to ensure that their immigration provisions do not impose unrealistic demands regarding the quantity and quality of identification documents asylum-seekers can reasonably be expected to produce. Also in the absence of documentation,

[41] *A v. Australia*, above note 35, para. 9.4.
[42] UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, above note 23, para. (b).
[43] International Detention Coalition (IDC), There are Alternatives, 2011, Introducing the Community Assessment and Placement Model, available at: http://idcoalition.org/cap/handbook.
[44] *R (on the application of Suckrajh) v. (1) Asylum and Immigration Tribunal* and (2) *The Secretary of State for the Home Department*, EWCA Civ 938, United Kingdom: Court of Appeal (England and Wales), 29 July 2011, available at: http://www.unhcr.org/refworld/docid/4e38024f2.html.
[45] UNHCR ExCom, Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 20 October 1983, No. 30 (XXXIV) -1983, para. (d), available at: http://www.unhcr.org/refworld/docid/3ae68c6118.html.
[46] UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, above note 23, para. (b).
[47] See, for example, UNHCR ExCom Conclusions No. 58 (XL) – 1989, Problem of Refugees and Asylum-Seekers who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, available at: http://www.unhcr.org/3ae68c4380.html. See, also, UNHCR Global Consultations Summary Conclusions: Article 31 of the 1951 Convention, above note 25.

identity can be established through other information as well. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate, or lead to an adverse security assessment. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. Rather, what needs to be assessed is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process.

26. Strict time limits need to be imposed on detention for the purposes of identity verification, as lack of documentation can lead to, and is one of the main causes of, indefinite or prolonged detention.

27. While nationality is usually part of someone's identity, it is a complicated assessment and as far as it relates to stateless asylum-seekers, it should be undertaken in a proper procedure.[48]

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.

28. It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection.[49] However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

4.1.2 To protect public health

29. Carrying out health checks on individual asylum-seekers may be a legitimate basis for a period of confinement, provided it is justified in the individual case or, alternatively, as a preventive measure in the event of specific communicable diseases or epidemics. In the immigration context, such health checks may be carried out upon

[48] UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, May 2011 (Global Roundtable Summary Conclusions), para 6, available at: http://www.unhcr.org/refworld/docid/4e315b882.html. See also, UNHCR, Guidelines on Statelessness No.2: Procedures for Determining Whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02, available at: http://www.unhcr.org/refworld/docid/4f7dafb52.html.

[49] UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, above note 23, para. (b)

entry to the country or as soon as possible thereafter. Any extension of their confinement or restriction on movement on this basis should only occur if it can be justified for the purposes of treatment, authorised by qualified medical personnel, and in such circumstances, only until the treatment has been completed. Such confinement needs to be carried out in suitable facilities, such as health clinics, hospitals, or in specially designated medical centres in airports/borders. Only qualified medical personnel, subject to judicial oversight, can order the further confinement on health grounds beyond an initial medical check.

4.1.3 To protect national security

30. Governments may need to detain a particular individual who presents a threat to national security.[50] Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in these Guidelines, in particular that the detention is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.[51]

4.1.4 Purposes not justifying detention

31. Detention that is not pursued for a legitimate purpose would be arbitrary.[52] Some examples are outlined below.

Detention as a penalty for illegal entry and/or as a deterrent to seeking asylum

32. As noted in Guidelines 1 and 2, detention for the sole reason that the person is seeking asylum is not lawful under international law.[53] Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country.[54] Apart from constituting a penalty under Article 31

[50] On the meaning of national security, see UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, paragraphs 29-32, available at: http://www.unhcr.org/refworld/docid/4672bc122.html.
[51] See, for example, *A. and others v. the United Kingdom*, (2009), ECtHR, App. No. 3455/05, available at: http://www.unhcr.org/refworld/docid/499d4a1b2.html.
[52] See, *Bozano v. France*, above note 31; *Shamsa v. Poland*, (2003), ECtHR, App. Nos. 45355/99 and 45357/99, available at: http://www.unhcr.org/refworld/docid/402b584e4.html; *Gonzalez v. Spain*, (2008), ECtHR, App. No. 30643/04, available at: http://www.unhcr.org/refworld/docid/502e31e42.html, and *Amuur v. France*, above note 9.
[53] Article 31, 1951 Convention; Article 18(1), European Union Council Directive2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, available at: http://www.unhcr.org/refworld/docid/4394203c4.html.
[54] WGAD Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, para. 53: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal

of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.[55]

Detention of asylum-seekers on grounds of expulsion

33. As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on grounds of expulsion as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected.[56] However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed.

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

34. The necessity, reasonableness and proportionality of detention are to be judged in each individual case, initially as well as over time (see Guideline 6). The need to detain the individual is to be assessed in light of the purpose of the detention (see Guideline 4.1), as well as the overall reasonableness of that detention in all the circumstances, the latter requiring an assessment of any special needs or considerations in the individual's case (see Guideline 9). The general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights.[57] The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case (see Guidelines 4.3 and Annex A).

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immigration and leads to unnecessary [and therefore arbitrary] detention." Available at http://www.unhcr.org/refworld/docid/502e0eb02.html

[55] Article 5 (3), ACHR; Article 7(2) ACHPR; Article 5(3) CFREU.

[56] See *Lokpo and Touré v. Hungary*, above note 29; R.U. v. Greece, (2011), ECtHR, App. No. 2237/08, para. 94, available at: http://www.unhcr.org/refworld/docid/4f2aafc42.html. See, also, *S.D. v. Greece*, (2009), ECtHR, App. No. 53541/07, para. 62, available at: http://www.unhcr.org/refworld/docid/4a37735f2.html. The ECtHR has held that detention for the purposes of expulsion can only occur after an asylum claim has been finally determined. See, also, UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Alaa Al-Tayyar Abdelhakim v. Hungary*, 30 March 2012, App. No. 13058/11, available at: http://www.unhcr.org/refworld/docid/4f75d5212.html; UN High Commissioner for Refugees, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Said v. Hungary*, 30 March 2012, App. No. 13457/11, available at: http://www.unhcr.org/refworld/docid/4f75d5e72.html

[57] *Vasileva v. Denmark*, (2003), ECtHR, App. No. 52792/99, para. 37, available at: http://www.unhcr.org/refworld/docid/502d4ae62.html and *Lokpo and Touré v. Hungary*, above note 29.

Guideline 4.3 - Alternatives to detention need to be considered

35. The consideration of alternatives to detention – from reporting requirements to structured community supervision and/or case management programmes (see Annex A) – is part of an overall assessment of the necessity, reasonableness and proportionality of detention (see Guideline 4.2). Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends.[58] Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken.[59]

36. Like detention, alternatives to detention equally need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement.[60] The principle of legal certainty calls for proper regulation of these alternatives (see Guideline 3). Legal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.[61]

37. Alternatives to detention that restrict the liberty of asylum-seekers may impact on their human rights and are subject to human rights standards, including periodic review in individual cases by an independent body.[62] Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.[63] Alternatives to detention need to be available not only on paper, but they need to be accessible in practice.

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[58] *C v. Australia*, above note 38, para. 8.2.

[59] See, for example, *Sahin v. Canada*, (Minister of Citizenship and Immigration) [1995] 1 FC 214 available at: http://www.unhcr.org/refworld/docid/3ae6b6e610.html. See, also, WGAD, Opinion No. 45/2006, UN Doc. A/HRC/7/4/Add.1, 16 January 2008, para. 25, available at: http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm and WGAD, Legal Opinion on the Situation regarding Immigrants and Asylum-seekers, UN Doc. E/CN.4/1999/63, para. 69: *"Possibility for the alien to benefit from alternatives to administrative custody."* available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=1520 and WGAD, Report to the Thirteenth Session of the Human Rights Council, A/HRC/13/30, 15 January 2010, para. 65, available at: http://www.unhcr.org/refworld/docid/502e0fa62.html

[60] Global Roundtable Summary Conclusions, above note 48, para 2.

[61] Global Roundtable Summary Conclusions, above note 48, para 20.

[62] These other rights could include: the right to privacy (Article 12, UDHR; Article 17(1), ICCPR; Article 16(1), CRC; Article 11 ACHR; Article 5 ADRDM; Article 8 ECHR; Article 7 CFREU), the right to family life (Articles 12 and 16(3), UDHR; Article 23(1), ICCPR; Article 10(1) ICESCR; Article 12(2), 1951 Convention and Recommendation B of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.unhcr.org/refworld/docid/40a8a7394.html; Article 18, ACHPR; Article 17(1), ACHR; Article 6, ADPDM; Article 2 and 8 ECHR; Article 9, CFREU), the prohibition on inhuman or degrading treatment (Article 7, ICCPR; Article 1, CAT; Article 3, ECHR;. Article 25 ADRDM; Article 4 CFREU; Article 5 ACHR; Article 5 ACHPR).

[63] Global Roundtable Summary Conclusions, above note 48, para 31.

38. Notably, alternatives to detention should not be used as alternative forms of detention; nor should alternatives to detention become alternatives to release. Furthermore, they should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers.[64]

39. In designing alternatives to detention, it is important that States observe the principle of minimum intervention and pay close attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma[65] (see Guideline 9).

See also Figure 2[66] *reproduced in the source document "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention".*

40. Alternatives to detention may take various forms, depending on the particular circumstances of the individual, including registration and/or deposit/ surrender of documents, bond/bail/sureties, reporting conditions, community release and supervision, designated residence, electronic monitoring, or home curfew (for explanations of some of these alternatives, see Annex A). They may involve more or less restrictions on freedom of movement or liberty, and are not equal in this regard. While phone reporting and the use of other modern technologies can be seen as good practice, especially for individuals with mobility difficulties,[67] other forms of electronic monitoring – such as wrist or ankle bracelets – are considered harsh, not least because of the criminal stigma attached to their use;[68] and should as far as possible be avoided.

41. Best practice indicates that alternatives are most effective when asylum-seekers are:

- treated with dignity, humanity and respect throughout the asylum procedure;
- informed clearly and concisely at an early stage about their rights and duties associated with the alternative to detention as well as the consequences of non-compliance;
- given access to legal advice throughout the asylum procedure;
- provided with adequate material support, accommodation and other reception conditions, or access to means of self-sufficiency (including the right to work); and

[64] Global Roundtable Summary Conclusions, above note 48, para. 19.
[65] Global Roundtable Summary Conclusions, above note 48, para. 21.
[66] Edwards, Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention", above note 4, page 1.
[67] Global Roundtable Summary Conclusions, above note 48, para. 21.
[68] Global Roundtable Summary Conclusions, above note 48, para. 21.

- able to benefit from individualised case management services in relation to their asylum claim (explained further in Annex A).[69]

42. Documentation is a necessary feature of alternative to detention programmes in order to ensure that asylum-seekers (and all members of their families) possess evidence of their right to reside in the community. Documents also serve as a safeguard against (re-)detention; and can facilitate their ability to rent accommodation, and to access employment, health care, education and/ or other services, as applicable.[70] Additional information about various types of alternative to detention and other complementary measures can be found at Annex A.

Guideline 5 - Detention must not be discriminatory

43. International law prohibits detention or restrictions on the movement of a person on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status.[71] This applies even when derogations in states of emergency are in place.[72] States may also be liable to charges of racial discrimination if they impose detention on persons of a "particular nationality".[73] At a minimum, an individual has the right to challenge his or her detention on such grounds; and the State will need to show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals, or between non-nationals, in this regard[74].

Guideline 6 - Indefinite detention is arbitrary and maximum limits on detention should be established in law

44. As indicated in Guideline 4.2, the test of proportionality applies in relation to both the initial order of detention as well as any extensions. The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite

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[69] Edwards, *Back to Basics: The Right to Liberty and Security of Person and'Alternatives to Detention'*, above note 4; International Detention Coalition, *There are Alternatives, A Handbook for Preventing Unnecessary Immigration Detention*, 2011, available at: http://idcoalition.org/cap/handbook/.

[70] Global Roundtable Summary Conclusions, above note 48, para. 24.

[71] Article 3, 1951 Refugee Convention; Article 2, UDHR; Article 2, ICCPR; Article 2(2), ICESCR; Article 2, CRC; Article 7, CMW and Article 5, CRPD as well as in regional instruments such as Article 2, ADRDM; Article 24, ACHR; Art. 14 ECHR; Article 21, CFREU and Articles 2 and 3, ACHPR.

[72] No derogations may be based on discriminatory grounds: Article 4, ICCPR. A like provision is found in Article 15, ECHR and in Article 27, ACHR. See, also, Article 8, 1951 Convention.

[73] CERD, General Recommendation No. 30: Discrimination against Non-Citizens, UN Doc. A/59/18, 10 January 2004, para. 19: The CERD Committee has called in particular for States to respect the security of non-citizens, in particular in the context of arbitrary detention, and to ensure that conditions in centres for refugees and asylum-seekers meet international standards, available at: http://www.unhchr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d.

[74] For example, in deportation proceedings there may be a justified distinction drawn between nationals and non-nationals, in the sense that the national has a right of abode in their own country and cannot be expelled from it: Moustaquim v Belgium (1991) 13 EHRR 802, available at: http://www.unhcr.org/refworld/docid/3ae6b7018.html See, also, Agee v. UK (1976) 7 DR 164 (European Commission on Human Rights decision), available at: http://www.unhcr.org/refworld/docid/4721af792.htm

detention for immigration purposes is arbitrary as a matter of international human rights law.[75]

45. Asylum-seekers should not be held in detention for any longer than necessary; and where the justification is no longer valid, the asylum-seeker should be released immediately (Guideline 4.1).[76]

46. To guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite, including particularly for stateless asylum-seekers.[77] Maximum periods in detention cannot be circumvented by ordering the release of an asylum-seeker only to re-detain them on the same grounds shortly afterwards.

Guideline 7 - Decisions to detain or to extend detention must be subject to minimum procedural safeguards

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,[78] and their rights in connection with the order, including review procedures, in a language and in terms which they understand.[79]

(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,[80] 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.

(iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and

[75] See, A v. Australia, above note 35, para. 9.2; Mukong v. Cameroon, HRC Comm. No. 458/1991, 21 July 1994, para. 9.8, available at: http://www.unhcr.org/refworld/docid/4ae9acc1d.html.
[76] *A v. Australia*, above note 35, para. 9.4; WGAD, Report to the Thirteenth Session of the Human Rights Council, above note 59, para. 61; WGAD, Report to Fifty-sixth Session of the Commission on Human Rights, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5, Principle 7, available at: http://www.unhcr.org/refworld/docid/502e10612.html. See, too, *Massoud v. Malta*, above note 34.
[77] WGAD Report to the Thirteenth Session of the Human Rights Council, above note 59, para. 62. See also, UNHCR, Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, 17 July 2012, HCR/GS/12/03, available at: http://www.unhcr.org/refworld/docid/5005520f2.html.
[78] Article 9 (2), ICCPR; Article 7 (4), ACHR; Article 5 (2) ECHR and Article 6, ACHPR.
[79] See, further WGAD, Report to the Fifty–sixth session of the Commission on Human Rights, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 available at: http://www.unhcr.org/refworld/pdfid/3b00f25a6.pdf.
[80] Article 16(2), 1951 Convention.

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.[81]

(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.

(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.[82] 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.

(vi) persons in detention must be given access to asylum procedures, and detention should not constitute an obstacle to an asylum-seeker's possibilities to pursue their asylum application.[83] Access to asylum procedures must be realistic and effective, including that timeframes for lodging supporting materials are appropriate for someone in detention, and access to legal and linguistic assistance should be made available.[84] It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.

(vii) to contact and be contacted by UNHCR.[85] Access to other bodies, such as an available national refugee body or other agencies, including ombudsman

[81] A. v. Australia, above note 35 and C. v. Australia, above note 38.
[82] Article 9(4), ICCPR; Article 7(6), ACHR; Article 5(4), ECHR; Article 25, paragraph 3, ADRDM; Article 7(6), ACHR; Article 6 read in conjunction with Article 7, ACHPR; Article 5, ECHR. See, for example, Article 2(3), ICCPR; Article 25, ACHR; Article 13, ECHR.
[83] UNHCR ExCom Standing Committee Conference Room Paper, Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice, June 1999, EC/49/SC/CRP.13, Figure 2, available at: http://www.unhcr.org/refworld/pdfid/47fdfaf33b5.pdf.
[84] UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, above note 23, para. (c). See, further, UNHCR Global Consultations: Summary Conclusions on Article 31 of the 1951 Convention, above note 25; and *I.M. v. France*, ECtHR, App. no. 9152/09, 2 February 2012, available at: http://www.unhcr.org/refworld/docid/4f2932442.html.
[85] UNHCR ExCom Conclusion, No. 85 (XLIX) – 1998, available at:

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.

(viii) general data protection and confidentiality principles must be respected in relation to information about the asylum-seeker, including health matters.

(ix) illiteracy should be identified as early as possible and a mechanism that allows illiterate asylum-seekers to make "submissions" should be in place, such as requests to meet with a lawyer, doctor, visitor, or to make complaints.[86]

Guideline 8 - Conditions of detention must be humane and dignified

48. If detained, asylum-seekers are entitled to the following minimum conditions of detention:

(i) Detention can only lawfully be in places officially recognised as places of detention. Detention in police cells is not appropriate.[87]

(ii) Asylum-seekers should be treated with dignity and in accordance with international standards.[88]

(iii) Detention of asylum-seekers for immigration-related reasons should not be punitive in nature.[89] The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population.[90]

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http://www.unhcr.org/refworld/docid/3ae68c6e30.html. See, also, WGAD, Report to the Fifty–sixth session to the Commission on Human Rights, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5; WGAD, Report to the Fifty-fifth Session of the Commission on Human Rights, E/CN.4/1999/63, 18 December 1998, paras. 69 and 70, referring to principles 3, 6, 7, 8, 9 and 10.

[86] For further information refer to UNHCR, Age, Gender and Diversity Mainstreaming, 31 May 2010, EC/61/SC/CRP.14, available at: http://www.unhcr.org/refworld/docid/4cc96e1d2.html.

[87] *Abdolkhani and Karimnia v. Turkey* (No.2), (2010), ECtHR App. No.50213/08, available at: http://www.unhcr.org/refworld/docid/4c5149cf2.html, which found a violation of Article 3 of the ECHR on account of the detention of refugees for three months in the basement of police headquarters.

[88] A number of human rights provisions are specifically relevant to conditions in detention, such as Articles 7 (prohibition against torture and cruel, inhuman or degrading treatment), 10 (right to humane conditions in detention) and 17 (right to family life and privacy) of the ICCPR. See, also, UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, General
Assembly resolute ion 43/173 of 9 December 1988, available at:
http://www.unhcr.org/refworld/docid/3b00f219c.html; UN Standard Minimum Rules for the Treatment of Prisoners, 1955, available at: http://www.unhcr.org/refworld/docid/3ae6b36e8.html; UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, A/RES/45/113, 14 December 1990, available at: http://www.unhcr.org/refworld/docid/3b00f18628.html.

[89] Inter-American Commission on Human Rights, Human Rights of Migrants, International Standards and the Return Directive of the EU, resolution 03/08, 25 July 2008, available at:
http://www.unhcr.org/refworld/docid/488ed6522.html; *Abdolkhani and Karimnia v. Turkey*, above note 87.

[90] WGAD, Report to the Seventh Session of the Human Rights Council, above note 54.

Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.

(iv) Detainees' names and the location of their detention, as well as the names of persons responsible for their detention, need to be kept in registers readily available and accessible to those concerned, including relatives and legal counsel. Access to this information, however, needs to be balanced with issues of confidentiality.

(v) In co-sex facilities, men and women should be segregated unless they are within the same family unit. Children should also be separated from adults unless these are relatives.[91] Where possible, accommodation for families ought to be provided. Family accommodation can also prevent some families (particularly fathers travelling alone with their children) from being put in solitary confinement in the absence of any alternative.

(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.

(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.

(viii) The opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities needs to be available; as well as access to suitable outside space, including fresh air and natural light. Activities

[91] *Muskhadzhiyeva and others v. Belgium*, (2010), ECtHR, App. No. 41442/07, available at: http://www.unhcr.org/refworld/docid/4bd55f202.html, in which it was held inter alia that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.

tailored to women and children, and which take account of cultural factors, are also needed.[92]

(ix) The right to practice one's religion needs to be observed.

(x) Basic necessities such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, are to be provided to asylum-seekers in detention. They should have the right to wear their own clothes, and to enjoy privacy in showers and toilets, consistent with safe management of the facility.

(xi) Food of nutritional value suitable to age, health, and cultural/ religious background, is to be provided. Special diets for pregnant or breastfeeding women should be available.[93] Facilities in which the food is prepared and eaten need to respect basic rules on sanitation and cleanliness.

(xii) Asylum-seekers should have access to reading materials and timely information where possible (for example through newspapers, the internet, and television).

(xiii) Asylum-seekers should have access to education and/or vocational training, as appropriate to the length of their stay. Children, regardless of their status or length of stay, have a right to access at least primary education.[94] Preferably children should be educated offsite in local schools.

(xiv) The frequent transfer of asylum-seekers from one detention facility to another should be avoided, not least because they can hinder access to and contact with legal representatives.

(xv) Non-discriminatory complaints mechanism (or grievance procedure) needs to be in place,[95] where complaints may be submitted either directly or confidentially to the detaining authority, as well as to an independent or oversight authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

[92] UN, Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010, Rule 42, available at: http://www.unhcr.org/refworld/docid/4dcbb0ae2.html.
[93] Rule 48, Bangkok Rules, ibid.
[94] Article 22, 1951 Convention; Art. 26, UDHR; Art. 13 and 14, ICESCR; Art. 28, CRC; Art.10, CEDAW.
[95] See, UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 29 November 1985, A/RES/40/43 available at: http://www.un.org/documents/ga/res/40/a40r034.htm.

(xvi) All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence,[96] the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention. Staff-detainee ratios need to meet international standards; [97] and codes of conduct should be signed and respected.

(xvii) With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international refugee or human rights law and remain accountable as a matter of international law. Accordingly, States need to ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms, including termination of contracts or other work agreements where duty of care is not fulfilled.[98]

(xviii) Children born in detention need to be registered immediately after birth in line with international standards and issued with birth certificates.[99]

Guideline 9
The special circumstances and needs of particular asylum-seekers must be taken into account

Guideline 9.1 - Victims of trauma or torture

49. Because of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain

[96] UNHCR ExCom, Conclusion on Refugee Women and International Protection, No. 39 (XXXVI) – 1985, available at: http://www.unhcr.org/3ae68c43a8.html and UNHCR ExCom, Conclusion on Women and Girls at Risk, No. 105 (LVII) –2005, available at: http://www.unhcr.org/refworld/docid/45339d922.html.

[97] Council of Europe Committee on Prevention of Torture Standards, December 2010, available at: http://www.cpt.coe.int/en/documents/eng-standards.pdf.

[98] UN, Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, para. 5; Global Roundtable Summary Conclusions, above note 48, para. 14.

[99] Article 7(1), CRC and Article 24(2), ICCPR. See, also, UNHCR ExCom, Conclusion on Refugee Children, No. 47 (XXXVIII) – 1987, para. (f) and (g), available at: http://www.unhcr.org/refworld/docid/3ae68c432c.html; UN Human Rights Council, Resolution on Rights of the Child, 20 March 2012, A/HRC/19/L.31, paras. 16(c) and 29-31, available at: http://www.unhcr.org/refworld/docid/502e10f42.html; UN Human Rights Council, Resolution on Action on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law, 15 March 2012, A/HRC/19/L.24, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/L.24.

(see Guideline 4). Victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.

50. Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.[100] This can be the case even if individuals present no symptoms at the time of detention.[101] Because of the serious consequences of detention, initial and periodic assessments of detainees' physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment needs to be provided to such persons, and medical reports presented at periodic reviews of their detention.

Guideline 9.2 - Children

51. General principles relating to detention outlined in these Guidelines apply *a fortiori* to children,[102] 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).[103]

[100] Global Roundtable Summary Conclusions, above note 48, para. 10.
[101] See, Jesuit Refugee Service - Europe (JRS-E), Becoming Vulnerable in Detention, June 2010, available at: http://www.unhcr.org/refworld/docid/4ec269f62.html.
[102] For the purposes of these Guidelines, a child is defined as "a human being below the age of 18 years", Article 1, United Nations Convention on the Rights of the Child (CRC), 1990. See also UN Rules for the Protection of Juveniles Deprived of their Liberty, above note 88.
[103] UNHCR, Best Interests Determination Children – Protection and Care Information Sheet, June 2008, available at: http://www.unhcr.org/refworld/docid/49103ece2.html. UNHCR, Guidelines on Determining the Best Interests of the Child, May 2008, para. 20, available at: http://www.unhcr.org/refworld/docid/48480c342.html. UNHCR, Field Handbook for the Implementation of UNHCR BID Guidelines, November 2011, available at: http://www.unhcr.org/refworld/docid/4e4a57d02.html. UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to

- 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".[104] 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."*[105]

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the Status of Refugees, 22 December 2009, HCR/GIP/09/08 (UNHCR Guidelines on International Protection on Child Asylum Claims) para. 5, available at: http://www.unhcr.org/refworld/docid/4b2f4f6d2.html. CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6 available at: http://www.unhcr.org/refworld/docid/42dd174b4.html.

[104] *Muskhadzhiyeva and others v. Belgium*, above note 91.

[105] UNHCR ExCom Conclusion No. 107 (LVIII) – 2007, on Children at Risk, para. G (i), available at: http://www.unhcr.org/refworld/docid/471897232.html. UNHCR Guidelines on International Protection on Child

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,[106] 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.[107] 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 child care 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.[108] 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.[109] Inadequate age assessments can lead to the arbitrary detention of children.[110] It can also lead to the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.

Asylum Claims, above note 103. See, also, International Detention Coalition, Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum-Seeking and Irregular Migrant Children Affected by Immigration Detention, 2012, http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf; IDC, Child Sensitive Community Assessment and Placement Model, available at: http://idcoalition.org/ccap-5step-model/.

[106] *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at: http://www.unhcr.org/refworld/docid/4f1990b22.html.

[107] Ibid.

[108] On reception conditions for children, see UNHCR, Refugee Children: Guidelines on Protection and Care, 1994, para. 92, available at: http://www.unhcr.org/refworld/docid/3ae6b3470.html. WGAD Report to the Thirteenth Session of the Human Rights Council, above note 59, para. 60: "Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort." *Mitunga v. Belgium*, (2006), ECtHR, App. No.13178/03, para. 103, available at: http://www.unhcr.org/refworld/docid/45d5cef72.html.

[109] Global Roundtable Summary Conclusions, above note 48, para. 7. UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b3360.html. UNHCR Guidelines on International Protection on Child Asylum Claims, above note 103.

[110] UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, ibid.

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.[111] 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.[112]

Guideline 9.3 - Women

58. As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained.[113] Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation.[114] Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.

59. Where detention is unavoidable for women asylum-seekers, facilities and materials are required to meet women's specific hygiene needs.[115] The use of female guards and warders should be promoted.[116] All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.[117]

60. 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.[118]

[111] An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.
[112] See CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, above note 103, para. 61.
[113] See, also, the Bangkok Rules, above note 92.
[114] Special measures, for example, would need to be in place to protect the right to live in dignity of women who have been trafficked into the country.
[115] Rule 5, Bangkok Rules, above note 92.
[116] Rule 19, Bangkok Rules, above note 92.
[117] Rule 33(1), Bangkok Rules, above note 92.
[118] Rule 25(1), Bangkok Rules, above note 92.

61. 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.[119]

Guideline 9.4 - Victims or potential victims of trafficking

62. The prevention of trafficking or re-trafficking cannot be used as a blanket ground for detention, unless it can be justified in the individual case (see Guideline 4.1). Alternatives to detention, including safe houses and other care arrangements, are sometimes necessary for such victims or potential victims, including in particular children.[120]

Guideline 9.5 - Asylum-seekers with disabilities

63. Asylum-seekers with disabilities must enjoy the rights included in these Guidelines without discrimination. This may require States to make "reasonable accommodations" or changes to detention policy and practices to match their specific requirements and needs.[121] A swift and systematic identification and registration of such persons is needed to avoid arbitrary detention;[122] and any alternative arrangements may need to be tailored to their specific needs, such as telephone reporting for persons with physical constraints. As a general rule, asylum-seekers with long-term physical, mental, intellectual and sensory impairments[123] should not be detained. In addition, immigration proceedings need to be accessible to persons with disabilities, including where this is needed to facilitate their rights to freedom of movement.[124]

Guideline 9.6 - Older asylum-seekers

64. Older asylum-seekers may require special care and assistance owing to their age, vulnerability, lessened mobility, psychological or physical health, or other conditions. Without such care and assistance, their detention may become unlawful. Alternative arrangements would need to take into account their particular circumstances, including physical and mental well-being.[125]

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[119] Rule 25(2), Bangkok Rules, above note 92.
[120] See OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add. 1, available at: http://www.ohchr.org/Documents/Publications/Traffickingen.pdf.
[121] Article 14, International Convention on the Rights of Persons with Disabilities, 2008 (ICRPD).
[122] UNHCR ExCom, Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR, No. 110 (LXI) –2010, paras. (c), (f), (h), (j), available at: http://www.unhcr.org/refworld/docid/4cbeaf8c2.html.
[123] Language taken from ExCom Conclusion, ibid., preambular para. 3.
[124] Article 18(1)(b), ICRPD.
[125] See, for example, Article 17(1), European Union: Council of the European Union, Council Directive 2003/9/EC of 27 January 2003, Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States, available at: http://www.unhcr.org/refworld/docid/3ddcfda14.html.

Guideline 9.7 – Lesbian, gay, bisexual, transgender or intersex asylum-seekers

65. Measures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation or gender identity.[126] Where their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals.

Guideline 10 - Detention should be subject to independent monitoring and inspection

66. To ensure systems of immigration detention comply with international legal principles, it is important that immigration detention centres are open to scrutiny and monitoring by independent national and international institutions and bodies.[127] This could include regular visits to detainees, respecting principles of confidentiality and privacy, or unannounced inspection visits. In line with treaty obligations, and relevant international protection standards, access by UNHCR[128] and other relevant international and regional bodies with mandates related to detention or humane treatment129[129] needs to be made possible. Access to civil society actors and NGOs for monitoring purposes should also be facilitated, as appropriate. Independent and transparent evaluation and monitoring are likewise important facets of any alternative programme.[130]

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[126] Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, Principle 9: The right to treatment with humanity while in detention, available at: http://www.yogyakartaprinciples.org/index.html.

[127] OHCHR, Chapter V, (pp. 87-93) of the Training Manual on Human Rights Monitoring, Professional Training Series n°7, 2001, available at: http://www.ohchr.org/Documents/Publications/training7Introen.pdf; OHCHR, Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training Series no. 8, 2001, available at: http://www.unhcr.org/refworld/docid/4638aca62.html; Association for the Prevention of Torture, Monitoring Places of Detention: A Practical Guide, 2004, available at: http://www.apt.ch.

[128] Relevant treaty provisions include paragraph 8 of the UNHCR Statute in conjunction with States' obligations to cooperate with UNHCR in the exercise of its international protection mandate, found in Articles 35 and 36 of the 1951 Convention and Article 2 of the 1967 Protocol; Article 45, ACHPR; European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Article 35, available at: http://www.unhcr.org/refworld/pdfid/4157e75e4.pdf.

[129] A range of international, regional and national bodies exist which have a monitoring or inspection function, such as the Sub-Committee on the Prevention of Torture and national preventive mechanisms set up pursuant to the Optional Protocol to the Convention Against Torture, 2002 (OPCAT). National mechanisms would include National Preventive Mechanisms, National Human Rights Institutions, Ombubdsmans, and/or NGOs.

[130] Global Roundtable Summary Conclusions, above note 48, para. 25.

67. In respect of monitoring the conditions of detention and treatment of women detainees, any monitoring body would need to include women members.[131]

Annex A
Alternatives to Detention

There are a range of alternatives to detention, which are outlined below. Some are used in combination, and as indicated in the main text, some impose greater restrictions on liberty or freedom of movement than others. The list is non-exhaustive.

(i) Deposit or surrender of documentation: Asylum-seekers may be required to deposit or surrender identity and/or travel documentation (such as passports). In such cases, individuals need to be issued with substitute documentation that authorises their stay in the territory and/ or release into the community.[132]

(ii) Reporting conditions: Periodic reporting to immigration or other authorities (for example, the police) may be a condition imposed on particular asylum-seekers during the status determination procedure. Such reporting could be periodic, or scheduled around asylum hearings and/or other official appointments. Reporting could also be to an NGO or private contractor within community supervision arrangements (see vii).

However, overly onerous reporting conditions can lead to non-cooperation, and can set up individuals willing to comply to instead fail. Reporting, for example, that requires an individual and/or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfil the conditions, and can unfairly discriminate on the basis of economic position.[133]

The frequency of reporting obligations would be reduced over time – either automatically or upon request – so as to ensure that any conditions imposed continue to meet the necessity, reasonableness and proportionality tests. Any increase in reporting conditions or other additional restrictions would need to be proportionate to the objective pursued, and be based on an objective and individual assessment of a heightened risk of absconding, for example.

(iii) Directed residence: Asylum-seekers may be released on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers may also be required to obtain prior approval if they wish to move out of the designated administrative

[131] Rule 25(3), Bangkok Rules, above note 92.
[132] Article 27, 1951 Convention. Global Roundtable Summary Conclusions, above note 48, para. 24.
[133] Global Roundtable Summary Conclusions, above note 48, para. 22.

region; or to inform the authorities if they change address within the same administrative region. Efforts should be made to approve residency that facilitates family reunification or closeness to relatives,[134] and/or other support networks. Residency conditions might also involve residence at a designated open reception or asylum facility, subject to the rules of those centres (see iv).

(iv) Residence at open or semi-open reception or asylum centres: Release to open or semi-open reception or asylum centres with the condition to reside at that address is another form of directed residence (see above iii). Semi-open centres may impose some rules and regulations for the good administration of the centre, such as curfews and/or signing in or out of the centre. General freedom of movement within and outside the centre should, however, be observed to ensure that it does not become a form of detention.

(v) Provision of a guarantor/surety: Another alternative arrangement is for asylum-seekers to provide a guarantor/surety who would be responsible for ensuring their attendance at official appointments and hearings, or to otherwise report as specified in any conditions of release. Failure to appear could lead to a penalty – most likely the forfeiture of a sum of money – being levied against the guarantor/surety. A guarantor, for example, could be a family member, NGO or community group.

(vi) Release on bail/bond: This alternative allows for asylum-seekers already in detention to apply for release on bail. Any of the abovementioned conditions (ii)-(v) may be imposed. For bail to be genuinely available to asylum-seekers, bail hearings would preferably be automatic. Alternatively, asylum-seekers must be informed of their availability and they need to be accessible and effective. Access to legal counsel is an important component in making bail accessible. The bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical. Bail/bond and guarantor/surety systems tend to discriminate against persons with limited funds, or those who do not have previous connections in the community. As a consequence, where bail/bond and guarantor/surety systems exist, governments are encouraged to explore options that do not require asylum-seekers to hand over any funds. They could, for example, be "bailed" to an NGO – either upon the NGO acting as guarantor (see v above) – or under agreement with the government.[135] Safeguards against abuse and/or exploitation, such as inspection and oversight, also need to be in place in these systems involving NGOs and others. In all cases, what needs to be assessed is whether payment of a bond or the designation of a guarantor/surety is necessary to ensure compliance in the

[134] On the right to family and personal life, see above note 62.
[135] Edwards, Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention", above note 4, page 1.

individual case. Systematically requiring asylum-seekers to pay a bond and/or to designate a guarantor/ surety, with any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary and not tailored to individual circumstances.

(vii) Community supervision arrangements: Community supervision arrangements refer to a wide range of practices in which individuals and families are released into the community, with a degree of support and guidance (that is, "supervision"). Support arrangements can include support in finding local accommodation, schools, or work; or, in other cases, the direct provision of goods, social security payments, or other services. The "supervision" aspect may take place within open or semi open reception or asylum facilities, or at the offices of the relevant service provider while the individual lives freely in the community. Supervision may be a condition of the asylum-seeker's release and may thus involve direct reporting to the service provider, or alternatively, to the immigration or other relevant authorities separately (see ii).

Supervision may also be optional, such that individuals are informed about the services available to them without any obligation to participate in them. Community supervision may also involve case management. *[…]*

[…]

Recommended Principles and Guidelines on Human Rights and Human Trafficking [1]

Adopted on 20 May 2002

[…]

Guideline 2: Identification of trafficked persons and traffickers

Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.

States are also obliged to exercise due diligence in identifying traffickers, including those who are involved in controlling and exploiting trafficked persons. States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.

2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.

3. Ensuring cooperation between relevant authorities, officials and nongovernmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.

4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.

[1] Text available at http://www.refworld.org/docid/3f1fc60f4.html

5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

[…]

Guideline 4: Ensuring an adequate legal framework

The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.
States should consider:

[…]

5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

6. Ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.

[…]

Guideline 5: Ensuring an adequate law enforcement response

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.

An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to

report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.

States and, where applicable, intergovernmental and non-governmental organizations should consider:

1. Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons.

2. Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking. This training should be sensitive to the needs of trafficked persons, particularly those of women and children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to report traffickers. The involvement of relevant non-governmental organizations in such training should be considered as a means of increasing its relevance and effectiveness.

3. Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony.

4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism.

[…]

7. Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combating trafficking and protecting the rights of victims.

8. Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent 1egal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

9. Encouraging law enforcement authorities to work in partnership with nongovernmental agencies in order to ensure that trafficked persons receive necessary support and assistance.

Guideline 6: Protection and support for trafficked persons

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination. States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.

3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.

4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.

5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.

6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.

7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where retrafficking is considered likely).

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

Guideline 8: Special measures for the protection and support of child victims of trafficking

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.
States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.

2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.
3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.

5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.

6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.

7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.

8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.

9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.

10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

Guidelines on international protection:
Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees[1]

HCR/GIP/02/01
7 May 2002

III. PROCEDURAL ISSUES

35. Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.

36. Against this background, in order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, the following measures should be borne in mind:

i. Women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.
ii. It is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands.
iii. Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves, and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.

[1] Text availalbe at : http://www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html

Guidelines on international protection No. 9:
Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees [1]

HCR/GIP/12/09
Adopted on 23 October 2012

V. PROCEDURAL ISSUES

General

58. LGBTI individuals require a supportive environment throughout the refugee status determination procedure, including pre-screening so that they can present their claims fully and without fear. A safe environment is equally important during consultations with legal representatives.

59. Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant's capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of "safe country or origin" concepts.

[1] Text available at http://www.unhcr.org/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html