ICJ OBSERVATIONS ON THE RECAST PROPOSAL OF THE RECEPTION CONDITIONS DIRECTIVE

I. Introduction

1. In this paper, the International Commission of Jurists sets out its observations on the 1 June 2011 recast of the *Directive laying down standards for the reception of asylum seekers* (Reception Directive - RD)[1] under consideration by the European Parliament and the Council of the European Union. The ICJ wishes to provide its views to the European Parliament and the Council on a number of outstanding issues regarding the compliance of the recast Directive with international refugee and human rights law.

2. Overall, the ICJ welcomes the proposal of the Commission, which considerably improves the previous RD text, in particular, by equating the legal protection regime of beneficiaries of subsidiary protection with that of refugees, thereby putting an end to an unjustified difference of treatment. The ICJ considers, however, that some of the suggested provisions need further revision to conform with international law obligations and with the *Charter of Fundamental Rights of the European Union* (EU Charter). In particular, the ICJ is concerned at:

- The definition of family members of an applicant for international protection;
- The limited geographical scope of the directive;
- Communication of information in languages which the applicant does not understand;
- Extensive grounds permitting detention of applicants for international protection;
- The lack of a maximum time limit for detention;
- Certain aspects of the judicial review of the detention;
- Exceptions to the principle of separation of asylum seekers in detention from other categories of detainees;
- Weak guarantees for vulnerable persons and unaccompanied children;
- The withdrawal of material reception conditions as a punitive measure.

3. The need for reform of the Reception Directive has been highlighted by the judgment of the Grand Chamber of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*. In that ruling, the Court held Belgium in breach of the prohibition of *non-refoulement* under Article 3 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) for having transferred an asylum seeker to Greece where the detention and reception conditions, including his living

[1] *Amended Proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum seekers*, Recast, European Commission, Brussels, 1 June 2011, EU Doc. COM(2011) 320 final, 2008/0244 (COD).

conditions, constitute inhuman or degrading treatment.[2] As for this last ground, the Court considered that "the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention."[3]

4. This case demonstrates that a Common European Asylum System centred on mutual recognition of national asylum systems must be based on an effective equivalency of detention and reception conditions. Without this, Member States will need to have recourse to internal procedures under the Dublin sovereignty clause to conduct a strict and thorough assessment of the principle of *non-refoulement* when they transfer an asylum seeker to another Member State.[4] The discretion left to the State on restriction of rights and guarantees in reception conditions must therefore be limited. Weakening guarantees provided for by the previous recast is likely to be counter-productive for the functioning of the European asylum system, as well as risking violations of international law obligations. The ICJ emphasises that the claimed need to respect national systems cannot justify dilution of protection of fundamental human rights, which are central to the EU legal system under Articles 2 and 6 of the *Treaty on the European Union* (TEU).

II. Analysis of recast provisions

Definitions and Scope

Family members (Article 2(c))

i) Limitation to country of origin

5. The ICJ is concerned by the definition of "family members" in Article 2(c) of the Directive, which limits its scope to members of the family of the applicant for international protection "in so far as the family already existed in the country of origin". International refugee law and international human rights law do not distinguish between families formed in the country of origin as opposed to any other place. Under international law, the obligation of States is to respect family life, and there are consequent obligations relating to family unity and reunification. Such a limitation on the definition of family contemplated under Article 2(c) would constitute an undue infringement of the refugee's and the family members' right to respect for family life. The ICJ would recall, in this regard, that the *Final Act of the Conference of Plenipotentiaries* which adopted the *Convention relating to the Status of Refugees* of 1951 (with the 1967 Addition Protocol, hereinafter referred to as the "*Geneva Refugee Convention"*) proclaimed that "the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee".[5] The *Universal Declaration on Human Rights* (UDHR) furthermore provides that the family, irrespective of country of formation, "is entitled to protection by society and the State".[6]

[2] *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application No. 30696/09, Judgment of 21 January 2011,, paras. 365-368.
[3] *Ibid.*, para. 263.
[4] See, *ibid.*, paras. 365-368.
[5] See, UNHCR ExCom *Conclusion No. 1 (XXVI) Establishment of the Subcommittee and General*, ExCom, UNHCR, 26th Session, 1975, para. (f); *Conclusion No. 7 (XXVIII) Expulsion*, ExCom, UNHCR, 28th Session, 1977, para. (a); *Conclusion No. 24 (XXXII) Family Reunification*, ExCom, UNHCR, 32nd Session, 1981, para. 1.
[6] Article 16.3 UDHR; Article 23.1 ICCPR; Article 10.1 ICESCR; Paragraph X, Preamble, CRPD; Article 16 ESC(r). See for further references, ICJ, *Migration and International Human Rights Law, Practitioners Guide No. 6*, Geneva, 2011, p. 73, fn 178 (ICJ Practitioners Guide no. 6).

Under Article 8 ECHR there is a positive obligation on the State of refuge to facilitate family reunification and ensure family unity on its territory where there is an **insurmountable objective obstacle** preventing the refugee already within its jurisdiction from realising his or her family life rights in any other place.[7] Fleeing war and/or seeking asylum are likely to present such obstacles to the development of family life outside of the country of destination.[8]

6. Finally, the proposed limitation might have the consequence that a child born in the country of refuge is left without a permit or protection, if that country does not recognise nationality on grounds of birth within the state (*ius soli)*, as is the case in many EU Member States. Such a child would risk being separated from his or her family, in breach of Article 9.1 of the *Convention on the Rights of the Child* (CRC). In most cases, this situation would run counter to the principle of the best interests of that child (Article 3 CRC) which under international human rights law is a paramount principle in decisions concerning children.

7. In sum, the requirement contemplated by the recast proposal is contrary to international human rights law and refugee law. This part of the Reception Directive would not respect Article 7 (respect for private and family life) and Article 24 (the rights of the child) of the EU Charter.

8. **The ICJ recommends excluding from Article 2(c) the wording "in so far as the family already existed in the country of origin".**

ii) Limitations to unmarried partner in stable relationship

9. The ICJ considers that the limitation in the directive on the inclusion of an unmarried partner in a stable relationship as a family member "where the legislation 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" should be deleted.

10. The European Court of Human Rights has established that, in the context of adult partnerships, family life will be held to exist in relation to both opposite-sex and same-sex[9] stable long-term relationships and stable and committed cohabiting non-marital relationships. [10] The UN Human Rights Committee has also held that it is discriminatory to distinguish in terms of rights and benefits between unmarried same-sex couples and opposite sex couples.[11]

11. According to international human rights law, therefore, States must not legislate to limit the possibility of family unity and reunification only to married couples. Furthermore, under the EU Charter, "which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and the scope of these rights shall be the same as those laid down by the said Convention" (Article 52(3) EU Charter). The interpretation of the Strasbourg Court of Article 8 ECHR is also binding for the content of Article 7 EU Charter. Inclusion of such a clause would therefore be incompatible with Articles 7 (right to family life), Article 21(1) (non-discrimination) and Article 51

[7] See, *Benamar and Others v. the Netherlands*, ECtHR, Application No. 43786/04, Admissibility decision, 5 April 2005, The Law. See also, *Gül v. Switzerland*, ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, paras. 38-42; *Sen v. the Netherlands*, ECtHR, Application No. 31465/96, Judgment of 21 December 2001, para. 31.
[8] See, *Tuquabo-Tekle and Others v. the Netherlands*, ECtHR, Application No. 60665/00, Judgment of 1 December 2005, para. 47.
[9] *Schalk and Kopf v. Austria*, ECtHR, Application No. 30141/04, Judgment of 24 June 2010, para. 94; *P.B. and J.S. v. Austria*, ECtHR, Application No. 18984/02, Judgment of 22 July 2010, para. 30.
[10] *Elsholz v. Germany*, ECtHR, GC, Application No. 25735/94, Judgment of 13 July 2000, para. 43; *Hoffmann v. Germany*, ECtHR, Application No. 34045/96, Judgment of 11 October 2001, para. 34. See also, *Marckx v. Belgium*, ECtHR, Plenary, Application No. 6833/74, Judgment of 13 June 1979, p. 14, para. 31; *Keegan v. Ireland*, ECtHR, Application No. 16969/90, Judgment of 26 May 1994, p. 17, para. 44; *Kroon and Others v. the Netherlands*, ECtHR, Application No. 18535/91, Judgment of 27 October 1994, pp. 55-56, para. 30. *P.B. and J.S. v. Austria*, ECtHR, Application No. 18984/02, Judgment of 22 July 2010, para. 27-30.
[11] *Young v. Australia*, CCPR, Communication no. CCPR/C/78/D/941/2000, 6 August 2003, paras. 10.1-10.4; *X v. Colombia*, CCPR, Communication no. CCPR/C/89/D/1361/2005, 14 May 2007, paras. 7.1-7.3.

(obligation to respect the EU Charter) of the EU Charter, Article 6 TEU. **Therefore, the ICJ recommends that this limitation be deleted.**

Scope of the Directive and Jurisdiction under international law (Article 3)

12. Recital 21 and paragraphs 2 and 3 of Article 3 (Scope) limit the scope of the Directive to territory, border, territorial waters and transit zones. This range does not cover all situations comprised in the definition of jurisdiction under international human rights law. Consequently, there are situations where the right of asylum (Article 18, EU Charter), the prohibition of *non-refoulement*, and other human rights cannot be guaranteed or risk being undermined, such as in the case of interception or rescue in international waters.

13. Under international human rights law, the term "jurisdiction" applies, *inter alia*, to all persons who fall under the authority or the effective control of the State's authorities or of other people acting on its behalf, and to all extraterritorial zones, whether of a foreign State or not, where the State exercises effective control.[12] The European Court of Human Rights has found that jurisdiction has extraterritorial reach in a number of distinct situations, including cases where the State exercises effective control of an area outside its borders (e.g. in the case of full or partial military occupation) or in the "zone d'attente" of an airport.[13] A State may have obligations to respect and protect the rights of persons who have not entered the territory, but who have otherwise entered areas under the authority and control of the State, or who have been subject to extra-territorial action (such as detention) by a State agent who has placed them under the control of that State. Of particular importance for migrants is the fact that the State's jurisdiction may extend in certain situations to international waters. The European Court of Human Rights has clearly stated that measures of interception of boats, including on the high seas, attract the jurisdiction of the State implementing the interception. From the moment of effective control of the boat, all the persons on it fall within the jurisdiction of the intercepting State, which must secure and protect their human rights.[14] The same principles apply in the context of operations of rescue at sea.

14. **The ICJ therefore recommends extending the scope of the Directive to all situations where the Member State has effective authority or control over the asylum seeker, including in international waters.**

General provisions on reception conditions

Information

15. Article 5 places an obligation on States to inform the asylum seeker, not later than fifteen days after the lodging of the application, of benefits and obligations under the Directive. Paragraph 2 provides that the information be in writing and in a "language that the applicants understand or are reasonably supposed to understand". It also says that, "where appropriate, this information may also be supplied orally". The ICJ is concerned that this formulation could allow national authorities to provide information on rights and obligations relating to the Directive in a language chosen on the basis of biased perceptions of the language the asylum-seeker understands. The current wording runs counter to the principle of international human rights law that rights must be protected in a way that is real and effective. In the recent European Court of Human Rights case of *Rahimi v. Greece*, where an unaccompanied child was given an information sheet in Arabic when all he spoke was Farsi, the Court found a violation of the child's right to *habeas corpus* and an effective remedy (Articles 5(4) and 13 ECHR) because of this lack of information. As the Strasbourg Court has highlighted in *M.S.S. v. Belgium and Greece* "the lack of

[12] See for extensive reference to this established jurisprudence: ICJ Practitioners Guide no. 6, pp. 43-45 and fn. 46.
[13] See, ICJ Practitioners Guide no. 6, pp. 43-45 and fn. 47-48.
[14] See, *Medvedyev and Others v. France*, ECtHR, GC, Application No. 3394/03, Judgment of 29 March 2010, paras. 62-67.

access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures".[15] **Hence, the ICJ recommends deleting the words "or are reasonably supposed to understand".** Furthermore, the ICJ understands the last sentence of the paragraph to mean that oral supply of information is an additional possibility and not a substitute means to its provision in writing. Otherwise, mere provision of information orally would not satisfy the right of information of the applicant. **The ICJ therefore recommends that the formulation be amended to read "where appropriate, this information may also be supplied orally in addition to being made available in written form."**

Documentation

16. Article 6.1 establishes a duty on the authorities to provide within three days of the lodging of an application for international protection a document "issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined". Article 6.2 provides for an exception in the application of the previous principle by giving States the possibility to exclude asylum seekers in detention, or during a border asylum procedure, or of a procedure to decide on the right to enter the territory. The ICJ is concerned at this blanket denial of the right to documentation in these circumstances, and sees no reason why an asylum seeker should not be provided with a document attesting to his or her status as asylum seeker, both as a proof of registration of the application and in order to accede to benefits which might be available in those situations. **The ICJ therefore recommends deletion of paragraph 2 of Article 6.**

Detention

Reasons for detention

Principles of international human rights law and refugee law

17. Under international refugee law, detention of asylum seekers is permitted in narrow circumstances, but is constrained by Article 31 of the *Geneva Refugee Convention* which prohibits States from imposing penalties on those entering the State without authorisation, where they come directly from a State fleeing persecution "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." More specifically, Article 31.2 prohibits restrictions on the movement of such persons other than those which are necessary, and requires that they be imposed only "until the individual's status is regularised or they obtain admission into another country". Based on these provisions, *UNHCR Guidelines on Applicable Criteria and Standards on the Detention of Asylum Seekers*, [16] and the Conclusions adopted by the Executive Committee on the International Protection of Refugees,[17] establish a presumption against detention, and the need to justify individual detentions as necessary for specified purposes.[18] Detention must therefore never be automatic, should be used only as a last resort where there is evidence that other lesser restrictions would be inadequate in the particular circumstances of the case, and should never be used as a punishment. Where detention is imposed, it should be seen as an exceptional measure, and must last for the shortest possible period.[19] The Executive Committee Conclusions (endorsed by the Guidelines, Guideline 3) stipulate that detention may only be resorted to where necessary on grounds prescribed by law:

a) to verify identity;

[15] *M.S.S. v. Belgium and Greece*, ECtHR, op. cit. fn. 2, para.304
[16] *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, UNHCR, 26 February 1999 ("UNHCR Revised Guidelines on Detention"), Guidelines 2, 3.
[17] *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37th Session, 1986.
[18] *Ibid*.
[19] *Ibid*., para. 3.

b) to determine the elements on which the claim to refugee status or asylum is based;
c) to deal with cases where refugees or asylum-seekers have destroyed their travel and / or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
d) to protect national security or public order".[20]

18. The Guidelines stipulate that detention of asylum-seekers for other purposes, such as to deter future asylum-seekers, or to dissuade asylum-seekers from pursuing their claims, or for punitive or disciplinary reasons, is contrary to the norms of refugee law. [21]

19. In *Saadi v. United Kingdom*, the European Court of Human Rights held that short-term detention, in appropriate conditions, for the purposes of efficient processing of cases under accelerated asylum procedures, was permissible in circumstances where the respondent State faced an escalating flow of asylum seekers.[22] The approach of the Court to Article 5.1(f) of the European Convention is distinct from the justification of detention on certain other grounds under Article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort.[23]

20. By contrast, under Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), as well as in international refugee law in regard to asylum seekers, the State must show the detention to be reasonable, necessary and proportionate in the circumstances of the individual case, in order to establish that detention is not arbitrary.[24] To establish the necessity and proportionality of detention, it must be shown that other less intrusive measures have been considered and found to be insufficient. In *C v. Australia,*[25] the Human Rights Committee found a violation of Article 9.1 because the State had not considered less intrusive means, such as "the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was […] arbitrary and constituted a violation of Article 9.1".

21. Both the ICCPR and the ECHR require that the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary. Excessive length of detention, or uncertainty as to its duration, may also amount to cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.[26] Prolonged detention of minors calls for particularly strict scrutiny and may violate obligations under the CRC (Articles 3 and 37) as well as Article 24 ICCPR.[27]

Detention principles: recitals

22. New recital 15, which lays down the basic principles to apply for detention, meets many of the standards of international refugee and human rights law. It mentions Article 31 of the *Geneva Refugee Convention*, and sets out principles of prescription by law, of necessity and proportionality of the

[20] *Conclusion No.44*, UNHCR, *op. cit.*, fn. 17. See also *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 16, Guideline 3.
[21] *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 16, Guideline 3.
[22] *Saadi v. United Kingdom*, ECtHR, GC, Application No. 13229/03, Judgment of 29 January 2008, paras. 75-80.
[23] *Ibid.*, para. 70.
[24] *A v. Australia,* CCPR, Communication No. 560/1993, Views of 30 April 1997, para. 9.3; *Saed Shams and others v. Australia*, Communication No.1255/2004, 11 September 2007; *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002.
[25] *C. v. Australia*, CCPR, Communication no. 900/1999, Views of 13 November 2002.
[26] *Concluding Observations on Sweden*, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12; *Concluding Observations on Costa Rica*, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10."
[27] *Concluding Observations on Czech Republic*, CCPR, UN Doc. CCPR/C/CZE/CO/2, 9 August 2007, para. 15.

detention and with an access to an effective remedy to challenge the detention. However, the ICJ recalls that, while the European Court does not make mention of the principle of detention as last resort, this is a cornerstone of all other international human rights treaties binding all EU Member States, including the ICCPR, the CRC and the *Geneva Refugee Convention* and accompanying jurisprudence. Furthermore, the principle of primacy of alternatives to detention is enshrined in the Directive and should be reflected in the Recital. **In light of this, the ICJ recommends inserting at the end of the recital the following sentence:** "**Detention of asylum seekers shall be considered a measure of last resort applicable only when no alternative means are available."**

23. The ICJ also regrets that the final reference in recast Recital 15 (16 in the 2008 recast) has substituted the sentence "Where an asylum seeker is held in detention he/she should have a right to a judicial remedy before a national court" with "Where an asylum seeker is held in detention he/she should be able to have effective access to the necessary procedural guarantees such as judicial remedy before a national court". While the ICJ welcomes the addition of the requirement of effectiveness, the new formulation seems to imply that access to a judicial remedy while in detention is only one possible procedural guarantee, and not a right. This would be clearly incompatible with the principle enshrined in Article 5.4 ECHR, Article 9 ICCPR, and Article 47 EU Charter. **The ICJ would therefore recommend reformulating the sentence as follows: "Where an asylum seeker is held in detention he/she has the right to an effective judicial remedy before a national court and to have effective access to the necessary procedural guarantees"**.

24. Recital 17 allows States to derogate from the reception guarantees only in exceptional circumstances and when set out in the Directive. Derogations should be duly justified in the circumstances of each case and in light of the level of severity of the derogation, its duration and impact on the individual. Since derogations on conditions of detention might sometimes touch upon non-derogable human rights, such as the prohibition of torture and cruel, inhuman or degrading treatment or punishment and the right to *habeas corpus*, **the ICJ recommends adding the following principle: "However, no derogation is permitted when it may lead to violation of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment or other rights that are non-derogable under international law".**

Grounds for detention

25. Article 8 establishes the grounds on which detention of an asylum seeker may be permitted. These are:

a) To verify identity and nationality;
b) To determine within a preliminary interview the elements on which the application for international protection is based which could not be obtained in the absence of detention;
c) In the context of a procedure to decide on the right to enter the territory;
d) When protection of national security or public order so requires.

26. While some of the grounds mirror those provided for by the UNCHR Guidelines on Detention and UNHCR ExCom recommendations, there are two grounds that are not in line with these standards, which constitute an authoritative interpretation of the obligations of States Parties to the *Geneva Refugee Convention*. First, according to these standards, it is not permitted to detain an asylum seeker for the purpose of verifying nationality. While identity may be verified via other means, the verification of nationality would almost certainly entail contacting the national authorities of the country of origin of the asylum seeker. This would be in violation of the principle of confidentiality in refugee law and of the

same Asylum Procedure Directive (APD).[28] **The ICJ therefore recommends amending it to state:** "**where necessary to verify identity where it is undetermined or in dispute**.

27. Furthermore, under these Guidelines, detention is not permitted in the context of a procedure to decide on the right to enter the territory.[29] As the Guidelines outline, the strict grounds for detention they establish reflect the obligation of States not to penalise an asylum seeker for his or her illegal entry onto the territory under Article 31 of the *Geneva Refugee Convention*. Article 8 of this Directive, read together with the recast APD provisions, apply to large arrivals, admissibility procedures and accelerated procedures, could together lead to such detention for a total of four weeks.[30] **The ICJ recommends deleting point (c) of Article 8.3.**

28. Point (d) incorporates into the Directive the fourth UNHCR ground for detention of asylum seekers, i.e. "when protection of national security or public order so requires". This general ground combined with Article 9.1, which provides that "[d]etention shall be for as short as possible and shall only be maintained as long as the grounds set out in Article 8(3) are applicable", might entail an excessive, if not indefinite, period of detention for reasons under point (d). According to Article 5.1(f) ECHR and the Court's jurisprudence under *A. and Others v. UK* and *Saadi v. UK*, detention is allowed only as far and as long as it is for the purpose of preventing unauthorised entry or deporting the person concerned. In *Saadi,* the Court held that detention in order to prevent unauthorized entry, including cases of national security and public order, must, in order not to be arbitrary, "be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country […]"[31] The ICJ believes that the ground of detention based on national security or public order is prone to too wide a scope of application beyond that of preventing unauthorised entry and effecting a deportation, which are the only admissible under Article 5.1(f) ECHR. Furthermore, Article 8.3(d), read together with Article 9.1, may allow for an interpretation which leads to excessive length of detention. **The ICJ recommends amending point (d) of Article 8.3 as follows: "when national security or public order so require and strictly for the purpose of preventing unauthorised entry or in order to execute a deportation"**.

Guarantees on detention

29. The new recast of Article 9 significantly reduces the human rights guarantees of the asylum seeker held in detention in comparison with the previous 2008 recast. Both of the recasts retain the principle in paragraph 1 that "detention shall be for the shortest time as possible". However, the 2008 recast specified that, at least in respect of the first three grounds (Article 8 (a-c)), detention must not "exceed the time reasonably needed" to conclude the relevant administrative procedures. The new recast provides that detention "shall be maintained for as long as the grounds set out in Article 8(3) are applicable" and that "administrative procedures relevant to the grounds set out in Article 8(3) shall be executed with due diligence". Both versions provide that "[d]elays in administrative procedures that cannot be attributed to the asylum seeker shall not justify a continuation of detention". The ICJ welcomes the fact that the principles of due diligence and proportionality of detention with the applicability of the grounds has been extended to encompass detention on grounds of national security or public order. However, the ICJ regrets that the new version, in adopting the standard of "due diligence", unnecessarily abandons that of "time reasonably needed". In light of the above, **the ICJ recommends adding after the first indent of paragraph 1: "and shall not exceed the time reasonably needed to fulfill the procedures contemplated in that provision"**.

[28] See also, Amnesty International submission on the 2008 European Commission proposal on the recast of the Reception Directive, Amnesty International, EU Office, April 2009, p. 5;
[29] The list of grounds in Guidelines no. 3 of the UNHCR Revised Guidelines on Detention is exhaustive and does not include this kind of detention.
[30] See, *Compromising Rights and Procedures: ICJ Observations on the 2011 Recast Proposal of the Asylum Procedure Directive*, ICJ, September 2011, paras. 60-69.
[31] *Saadi v. UK, ECtHR*, op.cit. fn. 22, para. 74.

30. The new recast Article 9 further abandons any prescription relating to maximum length of detention, merely expressing that it be "as short a period as possible". The 2008 recast, while not providing for a maximum length, required that the order itself specify the maximum period of detention (2008 recast Article 9.3) and that the asylum seeker be so informed (2008 recast Article 9.4). According to the jurisprudence of the European Court of Human Rights, laws imposing deprivation of liberty must be accessible and precise[32] and their consequences must be foreseeable to the individuals they affect. The law must provide for time limits that apply to detention, and for clear procedures for imposing, reviewing and extending detention.[33] **The ICJ therefore recommends that Article 9 of the Directive contain a provision establishing that Member States must set up a maximum time limit for detention of asylum seekers in any circumstances and the provision should reinstate the requirements to include these time limits in the detention order and in the communication to the asylum seeker.**

31. Article 9.2 provides that detention may be ordered by a judicial or an administrative authority. In the latter case, the detention order must be confirmed by a judicial authority within 72 hours. In the absence of such confirmation or when the detention is deemed unlawful by the judicial authority, the asylum seeker must be released immediately. The ICJ welcomes these provisions requiring an authorization by judicial authorities, in accordance with international human rights obligations including Article 9.3 ICCPR, Article 5.3 ECHR. The ICJ is concerned, however, that nowhere in Article 9 is there a requirement that the asylum seeker be present at the judicial hearing, nor there is reference to a judicial hearing. The same also applies to the requirements to have reviews of the detention by a judicial authority at reasonable intervals of time. In both cases, the requirements of having a judicial hearing and of the presence of the asylum seeker and his or her legal representative are fundamental not only to ensure their right to petition for *habeas corpus,* but also in relation to the obligations of Member States under the international law on the prevention of torture. As the European Court of Human Rights recognised in *Kurt v. Turkey*, "[w]hat is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection."[34] **The ICJ therefore recommends that Article 9.2 be revised to provide for the decision or confirmation of detention to be taken at a judicial hearing at which the asylum seeker must be present, or, at least, after having met with him or her, with the right to be accompanied by legal counsel respected.**

32. Paragraph 3 outlines the requirements of a detention order, in particular that it be in writing; state the reasons of fact and law; the procedures to challenge the order, and in a language the asylum seeker "understands or is reasonably supposed to understand". A person detained for any reason, including for purposes of immigration control, has the right to be informed promptly of the reasons for detention. This right is protected by Article 5.2 ECHR and Article 9.2 ICCPR. The right to be informed of reasons for detention is also affirmed by international standards and guidelines relating to the detention of migrants and asylum seekers.[35] The principle that the information must be provided in a form that is accessible, may require, in the case of migrants, that it be translated.[36] The language requirement in Article 9.3, which provides that information on reasons for detention be made available in a language "the asylum

[32] *Amuur v. France*, ECtHR, Case No. 17/1995/523/609, Judgment of 20 May 1996, para. 51.
[33] *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application No. 30471/08, Judgment of 22 September 2009.
[34] *Kurt v. Turkey*, ECtHR, Case No. 15/1997/799/1002, Judgment of 25 May 1998, para.123.
[35] The *Body of Principles for the Protection of all persons deprived of their liberty* provides in Principle 11.2 that: "a detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor." Principle 13 provides that at the commencement of detention, or promptly thereafter, a detained person should be provided with information on and an explanation of his or her rights and how to avail himself of such rights. See also, *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 16; *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 at the 925th meeting of the Ministers' Deputies, Guideline 6; and, *European Guidelines on accelerated asylum procedures*, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies, Principle XI.5.
[36] *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 14: a person who does not adequately speak the language used by the authorities, is entitled to receive this information in a language he understands.

seeker understands or is reasonably supposed to understand" is not sufficient to meet the standards of international law. For the reasons set out in paragraph 15, **the ICJ recommends deleting the expression "or is reasonably supposed to understand" and adding a sentence at the end of the article specifying that "the order shall state in detail the reasons why alternative measures have been considered to be insufficient to meet the purpose for which detention was ordered".**

33. Paragraph 4 provides that "detention shall be reviewed by a judicial authority at reasonable intervals of time, either ex officio or on request by the asylum seeker concerned, in particular whenever it is of a prolonged duration or relevant circumstances arise or new information becomes available which may affect the lawfulness of detention". This provision, as currently drafted, is not line with rights to judicial review under international human rights law, which requires both automatic review of detention, and the possibility for the detainee to apply for review on his or her own initiative. The right to challenge the lawfulness of detention judicially, on the initiative of the detainee, protected by Article 9.4 ICCPR and Article 5.4 ECHR,[37] is a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention. Particular public interest concerns, such as national security, are not permissible grounds upon which to restrict the right to judicial review of detention.[38] In fact, judicial review, in the form of *habeas corpus* or similar procedures, must remain available at all times, including times of emergency.[39] Furthermore, UNHCR guidelines require both automatic review of detention and regular automatic periodic reviews thereafter, and a right to challenge detention.[40] Judicial review should not be provided only when there is prolonged detention or relevant circumstances arise or new information becomes available which may affect the lawfulness of detention. The "prolonged detention" ground adds an unwarranted element to the regular nature of the judicial review. **The ICJ recommends that the sentence beginning from "in particular" should be deleted. Article 9 should make clear that judicial review of detention must be both ex officio and at the request of the asylum seeker, in order to ensure that a right of *habeas corpus* for the asylum seeker is maintained together with the automatic judicial review**.

34. Paragraph 5 provides for the right to access a lawyer, free of charge if needed, in cases of an appeal or review of the detention order. Detained asylum seekers have, under international human rights law, the right to prompt access to a lawyer, and must be promptly informed of this right.[41] International standards also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship.[42] Although Article 5 ECHR does not expressly provide for the right of detainees to have access to a lawyer, the European Court of Human Rights has held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate Article 5.4 ECHR where they prevent the detainee from effectively challenging the lawfulness of detention.[43] Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention

[37] See also Article 37(d) CRC, and Article 17.2(f) CPED. See, WGAD, *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, Guarantees 3 and 4; WGAD, *Annual Report 1999*, UN Doc. e/cn.4/2000/4, 28 December 1999, Principle 3; WGAD, *Annual Report 2003,* UN Doc. E/CN.4/2004/3, 15 December 2003, para. 86; WGAD, *Annual Report 2008*, UN doc. A/HRC/10/21, 16 February 2009, paras 67 and 82.
[38] *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 94.
[39] CCPR, *General Comment no. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.
[40] *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 16, Guideline 5.
[41] *Concluding Observations on Australia*, CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526. See also, Article 17.2(d), CPED; WGAD, *Annual Report 1998*, *op. cit.*, fn., para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999*, *op. cit.*, fn. 37, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, fn. 35, Guideline XI.5 and 6.
[42] *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 16, Guideline 5(ii); *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18.
[43] *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, Judgment of 12 March 2003, para. 72, endorsed by the judgment of the Grand Chamber, Application No. 46221/99, Judgment of 12 May 2005, para. 70.

under Article 5.4.[44] For access to a lawyer to be prompt, it cannot be limited to appeal or review of the detention, but must be provided at the time of the confirmation by a judicial authority of the detention order. Paragraph 5 further provides that "legal assistance and representation may be restricted to legal advisers or counselors specifically designated by national law to assist and represent asylum seekers". **The ICJ recommends that in order to ensure that legal advice from such designated lawyers is effective, it should be made explicit that "legal assistance and representation may be restricted to independent legal advisers or counselors…"**

Conditions of detention

35. Article 10.1 sets out the established principle of international human rights and refugee law that detention of asylum seekers should take place only on "specialized detention facilities".[45] The ICJ understands this term in line with international law to mean that such facilities may host only asylum seekers, and not any other type of detainees, from whom they should be kept separated unless exigencies of family unity or of the best interest of the child require otherwise. **The ICJ, however, considers that the deletion of the sentence "[M]ember States shall not detain asylum seekers in prison accommodation", which was included in the 2008 recast, may create confusion and could be taken as a signal that such arrangements would be permissible. The ICJ recommends that this provision be reinserted.**

36. International standards consistently reject detention of asylum seekers or other migrants in prisons, requiring that other facilities should be put in place and, that in event case asylum seekers and migrants should be kept separate from convicted persons or persons detained pending trial.[46]

37. Article 10.4 provides for the conditions for family members, legal advisors, counselors or NGO personnel to communicate and have access to the detained asylum seekers. Exceptions to access have been introduced from the previous recast and are provided in cases of national security, public order, or administrative management of the detention. A safety clause warns that access must not be "severely limited or rendered impossible". Some degree of restriction in respect of access to a detainee (and not in the communication, as the Directive correctly excludes) might be envisaged in cases where there are real concerns of national security and public order. However, it is highly problematic to include situations of "administrative management of the detention", which is a standard so broad as potentially to legitimise any type of restriction. It may in limited circumstances be that cases of legitimate temporary limitations might arise linked to administration of detention, for example in respect of a situation of transfer. However, the standard exceptionality is not properly reflected in the Article. **The ICJ recommends amending Article 10.4 to refer to** "**serious, brief and temporary and exceptional reasons related to the administration of the detention**."

38. Paragraph 5 of the same Article provides for the right to information of the detainee on the rules of the detention facility and their rights and obligations. The information will be given in a language the asylum seekers "understand or are reasonably supposed to understand". For the reasons outlined in paragraph 15, **the ICJ recommends deleting the expression "or are reasonably supposed to understand".**

[44] *Istratii v. Moldova*, ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, paras. 87-101.
[45] *CPT Standards*, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002)1 – Rev. 2010, Strasbourg, December 2010 ("CPT Standards"), page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn., Principle XI.7.
[46] *Concluding Observations on Ireland*, CCPR, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 21. See also, *Concluding Observations on Sweden*, CCPR, UN Doc. CCPR/C/SWE/CO/6, 2 April 2009, para. 17; *Concluding Observations on New Zealand*, CAT, UN Doc. CAT/C/NZL/CO/5, 14 May 2009, para. 6; *Conclusion No.44*, UNHCR, *op. cit.*, fn. 17, para. 10.

39. Paragraph 6 has been added since the 2008 recast and introduces exceptions to the principles of specialized detention centers in case of temporary unavailability, and to the right to information in cases of detention at the border or transit zones not linked with a border asylum procedure. The first exception allows detention of asylum seekers in prison accommodation, provided that they are kept separated from ordinary prisoners. In order to comply with international human rights and refugee law, this exception should be not only temporary (as the concept "temporarily not available" suggests), but for the shortest time possible, and the State must demonstrate that it is making all possible efforts to find place in a detention facility different than a prison, while this exception is applied. Otherwise, there may be a tendency towards passivity on the part of State authorities, leading to long-term detention in prison. Such long-term detention is particularly problematic, given that the Directive does not stipulate a maximum length for detention. **The ICJ would therefore recommend deleting this paragraph. However, if the rule is retained, the ICJ suggests adding at the fifth line of point (a) of Article 10.6, after "prisoners", the following: "and provided that the authorities demonstrate that they are undertaking all possible efforts to allow the asylum seeker detention in a specialised detention facility"**. As for the second exception, it is not clear what type of detention would necessitate a denial of the right to information. For the reason we have outlined above (see paragraph 15), the right to information, in particular on the detainee's right may not be overridden by the fact that he or she is detained at the border or in a transit zone. **The ICJ recommends deleting this exception contained in paragraph 6.**

40. Article 11 details specific provisions for vulnerable persons. The first paragraph provides that "vulnerable persons shall not be detained unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention". This formulation falls well short of the UNHCR Reviewed Guidelines on Detention (Guideline 7) stating that detention of these people should only be allowed "on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being". Similar standards are applied in international human rights law.[47] The requirement of **significant deterioration** is a far less demanding and lower standard of protection than that of **adversely affect**. **The ICJ therefore recommends changing "significantly deteriorate" with "adversely affect". The stipulation that certification of a qualified medical practitioner is needed for detention of such persons, which was included in the 2008 recast, should be re-inserted.**

41. Paragraph 2 provides for the very exceptional circumstances of detention for minors, including unaccompanied ones. The ICJ regrets that the new recast has eliminated the clear prohibition on detention of unaccompanied minors.

42. The Convention on the Rights of the Child (CRC) provides in Article 37(b) that the detention of a child should be only as a last resort and for the shortest appropriate period of time. Article 37 should be read in light of other provisions of the CRC, which affect decision-making regarding migrant children, including Articles 2.2, 3.1, 22.1 and 39 CRC. The Committee on the Rights of the Child, in General Comment No.6 (2005)[48] has provided guidance on the application of Article 37(b) CRC to migrant children. The Committee has stated that "unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall […] only be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes,

[47] See, ICJ Practitioners Guide no. 6, Chapter 4.III.3.
[48] CRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 61.

should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation."[49]

43. Detention of a minor does not necessarily violate Article 24 ICCPR, as such detention may be justified in exceptional circumstances.[50] However, where children are held in immigration detention contrary to their best interests, the Human Rights Committee has considered such detention to be arbitrary and in violation of Article 9.1 ICCPR. It may also violate Article 24 ICCPR, which guarantees the rights of the child to measures of protection required by his or her status as a minor, without discrimination.[51]

44. In regard to the detention of child asylum seekers or refugees, the *UNHCR revised guidelines on detention of asylum seekers*,[52] as well as the *UNHCR guidelines on refugee children*, state that child asylum seekers should not be detained. They reaffirm the principle in Article 37 CRC that detention of children should be a measure of last resort, and for the shortest possible period of time; and specify that where children accompany their parents, they should be detained only where detention is the only means of maintaining family unity.[53] Similarly, the *Council of Europe Guidelines on human rights protection in the context of accelerated asylum proceedings* state that "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".[54]

45. International standards require that, in those exceptional cases where children are detained, they should be held in facilities and conditions appropriate to their age. This general principle is established by Article 37.c CRC, which states that "[e]very 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 […]". Detailed rules for the exceptional situation of detention of children are provided by the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.[55] In exceptional cases where children are detained, whether they are unaccompanied or with their families, the conditions of detention must be appropriate and the best interests of the child must guide all decisions concerning the detention.[56]

46. In light of these standards, **the ICJ recommends that, given the highly exceptional nature of the circumstances in which such detention is permitted, the Directive could best protect the rights of minors by establishing a general prohibition of detention for unaccompanied minors.**

47. The last sub-paragraph provides that "where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults". This principle is in line with international human rights law and refugee law.[57] However, the same principle applies for all minors, whether or not they are accompanied, unless it is contrary to their best interests, but this standard is not reflected or contemplated by the provision. **The ICJ therefore recommends amending the provision to state that: "When minors are detained, Member States shall ensure that they are accommodated**

[49] *Ibid*., para. 61. See also, *Concluding Observations on Australia*, CRC, UN Doc. CRC/C/15/Add.268, 20 October 2005.
[50] *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002, para. 8.2.
[51] *Bakhtiyari v. Australia,* CCPR, Communication No. 1069/2002, Views of 6 November 2003, para. 9.3.
[52] *UNHCR Revised Guidelines on Detention*, *op. cit.*, fn. 16, Guideline 6.
[53] *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, UNHCR, February 1997, paras. 7.6-7.8.
[54] *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit*., fn. 35, principle XI.2.
[55] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted on December 14, 1990 by General Assembly resolution 45/113.
[56] Article 3(a) CRC. See also CRC, *General Comment No.6*, *op. cit.*, fn. 48, para. 63. *Concluding Observations on Cyprus*, CESCR, UN Doc. E/C.12/CYP/CO/5, 12 June 2009, para. 22; *Concluding Observations on Australia,* CRC, UN Doc. CRC/C/15/Add.268, 20 October 2005 paras. 62(b) and 64(c).
[57] Article 37.c CRC, and *UN rules for the protection of juveniles deprived of their liberty*.

separately from adults, unless it is not in their best interests. Unaccompanied minors shall always be accommodated separately from adults".

48. Paragraph 4 provides for separate accommodation of women asylum seekers from men, "unless these are family members and all concerned individuals consent thereto". The provision is in line with international human rights law and refugee law.[58] However, **the ICJ would recommend that the consent required be given through individual and private communication with an officer of the same sex.** This standard is in accordance with the principle of effectiveness of international law. Indeed, without such a requirement, women asylum seekers might find themselves in a situation which does not give them the possibility in practice to request such separate accommodation, for example, because of threats or fear of adverse consequences from family members.

49. Paragraph 5 introduces derogations from the right of minors to engage in leisure activities, including play and recreational activities appropriate to their age; the right of families to have separate accommodation guaranteeing adequate privacy; and the right of women asylum seekers to be accommodated separately. These may be imposed only in duly justified cases and for a reasonable period, when the asylum seeker is detained at border posts and not during a border asylum procedure. Regarding the right of women asylum seekers to separate accommodation, this is a right justified by the prevention of torture and ill-treatment, including sexual violence, towards women. It is a necessary protection pursuant to the states' obligation to implement the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment, which may not be subject to restrictions or derogations. **The ICJ recommends deletion of this exception.**

Material Reception Conditions

50. Article 17 provides for the modalities of guaranteeing material reception conditions, which must provide an adequate standard of living, guaranteeing the asylum seekers' subsistence and protecting their physical and mental health. Paragraph 5 specifies that, when material reception conditions are not provided in kind, i.e through financial allowances and vouchers, they shall be made commensurate with the levels of benefits that are accorded to nationals, such as for example to the minimum level of social assistance. However, paragraph 5 states that "Member States may grant less favourable treatment to asylum applicants compared to nationals in this respect, where it is duly justified". This provision runs contrary to the principle of non-discrimination of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), in particular, the right to an adequate standard of living under Article 11 ICESCR, read together with the obligation of non-discrimination under Article 2 ICESCR. [59]

51. The CRC also includes protection against discrimination in regard to the economic, social and cultural rights of children protected by the Convention, including on the basis of the child's or the child's parents' national origin.[60]

52. Differences of treatment as between asylum applicants and nationals are permissible only when they are not arbitrary and are justified where the two groups are not similarly situated in respect of circumstances relevant to the disparate treatment. It is difficult to see how the difference of circumstance of an asylum seeker, who might be barred from entering the work market for up to one year (see recast Article 15), might justify a less favourable treatment. The ICJ does not accept the argument put forward by some member states that the level of material support to be paid to asylum seekers could encourage

[58] See, ICJ Practitioners Guide no. 6, Chapter 4.III.3(e).
[59] Article 2 ICESCR protects against discrimination in relation to the Covenant rights. The CESCR has made clear that the prohibition of non-discrimination also includes discrimination against non-citizens on the grounds of nationality. See also, CRC, *General Comment No. 6*, *op. cit.*, fn. 48, para. 16.
[60] CRC, *General Comment No. 6*, *op. cit.*, fn. 48, paras. 12 and 18.

abusive asylum claims.[61] Member states are already bound by their obligations under the ICESCR, among them obligations of non-discrimination, which are immediately applicable, irrespective of the Directive. **The ICJ therefore recommends deleting paragraph 5.**

53. Finally, under paragraph 4 the asylum seeker may be asked to contribute to material reception condition costs if he or she has sufficient resources, for example if he or she is working. This is in line with international law. The ICJ understands that it is implicit in this provision that, if these independent resources are reduced, the asylum seeker's contribution would no longer be required or would be reduced, as appropriate. However, for the sake of avoiding violations of the asylum seeker's rights to an adequate standard of living and health, **the ICJ recommends inserting the following paragraph: "Contribution to or coverage of the costs of material reception conditions and health care as provided in paragraph 4 must be adapted to the developing capacity of the asylum seeker to have sufficient resources. If the asylum seeker no longer has sufficient resources or these are reduced, his or her contribution or coverage shall be accordingly reduced or suspended."**

54. Article 18 sets out modalities for material reception conditions and its paragraph 1 specifically deals with the right to housing. It lists as possible venues for housing: premises at border or transition zones; accommodation facilities "which guarantee an adequate standard of living"; and private houses, hotels or other premises adapted for housing applicants. It is unclear why the requirement of guaranteeing an "adequate standard of living" is related only to accommodation centres. Under Article 17.2, and international human rights law, all material reception conditions must guarantee an adequate standard of living. **The ICJ therefore recommends deleting this reference, and adding at the beginning of paragraph one the following: "Where housing is provided in kind, it should take one or a combination of the following forms, provided that they guarantee the applicant's right to an adequate standard of living".**

55. Article 20 provides for grounds and procedures for the reduction or withdrawal of material reception conditions. These may occur when an asylum seeker:

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 the APD; or
d) Has concealed financial resources and has therefore unduly benefited from material reception conditions

56. In cases (a) and (b), provision is made for the reinstatement of some or all the material reception conditions, when the applicant is traced or voluntarily reports to the authorities. This is ordered through a duly reasoned decision based on the reasons for the reduction or withdrawal.

57. These provisions present serious problems for compliance with international human rights law. As the right to adequate standard of living is a human right of the asylum seeker, it cannot be denied as a sanction for his or her behaviour. Grounds (a) and (b) coupled with the possibility of reinstating only partly the material reception conditions through a decision based on the reason for reduction or withdrawal suggest that the measure is intended as a sanction. This is in violation of Article 11 ICESCR. Reduction in this sense can only be justified if the conditions of reception resulting from it would still respect this right, but there is no safety provision in this sense. The ICJ regrets that this modification has

[61] *Joint Contribution of the German, French and United Kingdom delegations regarding the proposals for a directive laying down standards for the reception of asylum seekers and for asylum procedures*, EU Doc. 12168/11 ASILE 54, Brussels, 27 June 2011.

been made, while the 2008 recast provided only for the possibility of reduction for these grounds, limiting the withdrawal to the case of concealment of financial resources. The ICJ recommends reinstating the previous formulation. If the current version is retained, the ICJ recommends either adding a provision that any reduction or withdrawal must respect the right to an adequate standard of living, or modifying the last subparagraph of paragraph 1 to read: "**In relation to cases (a) and (b), when the applicant is traced or voluntarily reports to the competent authority, a decision shall be taken on the reinstatement of the provision of all of the material reception conditions withdrawn or reduced**."

58. As for point (c), this provision seems to have been contemplated to avoid possible abuses of material reception conditions when the applicant has already been determined not to have the right to asylum but tries nonetheless to take advantage of the material reception conditions. Under the definition of "subsequent application" in the APD, it would also include genuine applications, which contain new elements and are to be treated as effective asylum application. However, the current drafting would allow for more extensive application than is necessary to address this aim, thereby risking violation of the right to an adequate standard of living. **The ICJ recommends making reference to Article 31.6.f of the APD referring to situations where "the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal".**

Particular categories of asylum seekers

59. Article 25 concerns persons dealing with people "who have been subjected to torture, rape or other serious acts of violence" as particularly vulnerable people have the right to receive necessary treatment for injuries or trauma caused to them, and training must be available to those who assist them. The ICJ believes that, in light of the Member States' international obligations, this article should also make reference to persons who have been subject to cruel, inhuman or degrading treatment or punishment. Furthermore, the reference to "serious acts of violence" should include a reference to "sexual violence", to ensure that this is taken into consideration and in order to coordinate with other similar provisions included in the other directives of the CEAS. **The ICJ recommends inserting reference to "cruel, inhuman or degrading treatment or punishment" in Article 25 and including a reference to sexual violence.**

Appeals

60. Article 26 provides for a judicial remedy against decisions relating to benefits under the Directive and the asylum seeker's residence or freedom of movement.

61. Paragraph 2 establishes the right to access a lawyer and provides that "legal assistance and representation may be restricted to legal advisers or counsellors specifically designated by national law to assist and represent asylum seekers". This restriction is permissible under international human rights law provided that it safeguards the independence of the lawyer. The *UN Basic Principles on the Role of Lawyers* require that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent profession".[62] **The ICJ therefore recommends that the provision be amended to require that designated lawyers be independent.**

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[62] Principle 16.