

Access to Justice for Migrants in Detention

Training Materials on Access to Justice
for Migrants



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In Detention

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Access To Justice For Migrants In Detention

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This training module is the second of a five-part series of training materials¹ on protecting the rights of migrants in Europe. This part provides an overview of the guiding principles on access to justice for migrants in detention.

I. The right to liberty in international law

Key points

- Under the ECHR, a deprivation of liberty must be: justified for a specific purpose defined in Article 5.1.f; be ordered in accordance with a procedure prescribed by law; and not be arbitrary.
- Under the ICCPR, there are exceptional cases in which it can only be imposed as a measure of last resort following an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively.
- Under EU law, a deprivation of liberty must be in accordance with the law, necessary and proportionate.
- A deprivation of liberty must comply with the procedural safeguards in Article 5 (2) on the right to be informed of the reasons, and Article 5 (4) of the ECHR on the right to have the detention decision reviewed speedily.
- Under both EU and international law, deprivation of liberty or restriction on freedom of movement must comply with other human rights guarantees, such as: the conditions of detention respecting human dignity; never putting the health of individuals at risk.
- An individual who has been detained arbitrarily or unlawfully may have a claim for damages under both international (ICCPR or ECHR) and EU law.

Everyone has the right to liberty and security of person (article 5 ECHR, article 6 EU Charter and article 9 ICCPR). Detention² of migrants, either on entry to the country or pending deportation, must not be arbitrary and must be carried out in good faith pursuant to a legal basis.

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) CoE, ETS No. 5, adopted 4 November 1950

Article 3 - Prohibition of torture

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

Article 5 - Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...) f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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

0. Access to justice,
I. Fair asylum procedures and effective remedy,
II. Access to justice in detention,
III. Access to justice for economic, social and cultural rights,
IV. Access to justice in the protection of migrant's right to family life,
V. Access to justice for migrant children.

² The legal term for "detention" is "deprivation of liberty", the term "detention" is used in these training materials as shorthand. Detention is otherwise a narrower concept than deprivation of liberty - since deprivation of liberty can take place anywhere in situations not usually thought of as "detention".

International Covenant on Civil and Political Rights (ICCPR) adopted by UNGA Resolution 2200(XXI) of 16 December 1966

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

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.

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.

International law and standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort, to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible following a thorough assessment of all relevant facts and circumstances in the individual case.³ Detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.⁴ The decision to detain must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.⁵

The EU Charter of Fundamental Rights (2012/C 326/02, 6 October 2012) provides among other things that everyone has the right to liberty and security of person (article 6) and no one shall be subjected to torture or to inhuman or degrading treatment or punishment (article 4; see also right to physical integrity (article 3) and human dignity (article 1)).

Article 31 of the Geneva Refugee Convention and associated standards and guidance⁶ establishes a presumption against detention, and the principle that detention must be justified as necessary in a particular case.

Detention of asylum seekers and refugees:

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

Article 31 of the 1951 Convention Relating to the Status of Refugees

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.

³ *Hassen El Dridi case, CJEU, C-61/11*, 28 April 2011, para. 39; *Bashir Mohamed Ali Madi case, CJEU, C-146/14*, 5 June 2014, para 64; *Rahimi v. Greece, ECtHR, Application No. 8687/08*, 5 April 2011, para. 109.

⁴ Human Rights Committee, *General Comment No. 35 on Article 9*, 16 December 2014, para. 18; *A. v. Australia*, HRC, Communication No. 560/1993, 3 April 1997, UN Doc. CCPR/C/59/D/560/1993, paras. 9.3–9.4; *Samba Jalloh v. Netherlands*, HRC, Communication No. 794/1998, 26 March 2002, UN Doc. CCPR/C/74/D/794/1998, para. 8.2; *Nystrom v. Australia*, HRC, Communication 1557/2007, 18 July 2011, UN Doc. CCPR/C/102/D/1557/2007, paras. 7.2 and 7.3; *Saadi v. United Kingdom*, ECtHR, Application No. 13229/03, 29 January 2008, para. 74.

⁵ HRC, General Comment No. 35, para 18; *Baban v. Australia*, HRC, Communication 1014/2001, 18 September 2003, UN Doc. CCPR/C/78/D/1014/2001, para. 7.2; *Bakhtiyari v. Australia*, HRC, Communication 1069/2002, 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002, paras. 9.2–9.3; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), guideline 4.3 and annex A (hereafter UNHCR Guidelines on Detention).

⁶ Geneva Convention Relating to the Status of Refugees of 1951, and its Protocol Related to the Status of Refugees of 1967 (altogether, the *Geneva Refugee Convention*); and UNHCR Guidelines on Detention (cited above).

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.

1. Deprivation of liberty vs. restrictions on freedom of movement

Deprivation of liberty is distinct from restrictions on freedom of movement (article 2 Protocol 4 ECHR, article 12 ICCPR).

Article 2 protocol 4 ECHR

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 12 ICCPR

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. 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.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Deprivation of liberty involves more severe restriction of movement than mere interference with liberty of movement under article 12.⁷

The Working Group on Arbitrary Detention (WGAD) recommends that "(...) the guarantees available against arbitrary arrest and detention are extended to all forms of deprivation of liberty, including (...) detention of migrants and asylum seekers (...)."⁸

Under international human rights law, a deprivation of liberty is not defined solely with reference to the classification imposed by national law, but rather takes into account the reality of the restrictions imposed on the individual concerned. For example, persons accommodated at a facility classified as a "reception", "holding" or "accommodation" center and ostensibly not imposing "detention", may, depending on the nature of the restrictions on their freedom of movement, and their cumulative impact, be considered under international human rights law to be deprived of their liberty. In assessing whether restrictions on liberty amount to deprivation of liberty under international human rights law, relevant factors will include the type of restrictions imposed; their duration; their effects on the individual; and the manner of implementation of the measure (*Amuur v. France*, cited below, para. 42).

⁷ HRC, General Comment No. 35, para. 18; *González del Río v. Peru*, HRC, Communication No. 263/1987, 28 October 1992, UN Doc. CCPR/C/46/D/263/1987, para. 5.1; *Karker v. France*, HRC, Communication No. 833/1998, 26 October 2006, UN Doc. CCPR/C/70/D/833/1998, para. 8.5.

⁸ Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012, para 82(b) (hereafter Report of the WGAD).

The mere fact that a detained migrant is free to leave a place of detention by agreeing to depart from the country does not mean that the detention is not a deprivation of liberty. This was affirmed by the European Court of Human Rights in *Amuur v. France*, the Court noting that the possibility to leave the country would in many cases be theoretical if no other country could be relied on to receive the individual or to provide protection if the individual is under threat (para. 48). [The UNHCR Guidelines](#) on Detention take the same approach (p. 9, para. 7).

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

Facts: The applicants, four Somali nationals, arrived in France by airplane after fleeing Somalia. They were held in the international zone of the Paris-Orly airport for twenty days.

Analysis: The Court found that holding the applicants in the international zone of the airport resulted in a deprivation of liberty, and article 5.1 of the Convention was therefore applicable to the case. The Court further found that the deprivation of liberty had been unlawful, as the applicable provisions of French law in force at the time had not allowed the ordinary courts to review the conditions under which aliens were held or to impose a limit on the duration of their detention. Nor had these provisions provided for legal, humanitarian and social assistance.

Para. 43: "Holding aliens in the international zone does indeed involve a restriction upon liberty [...] Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions."

Para. 48: The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention."

Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.

Z.A. and others v. Russia, ECtHR, Application Nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019.

138. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants ...

156. The Court thus finds that, having regard in particular to the lack of any domestic legal provisions fixing the maximum duration of the applicants' stay, the largely irregular character of the applicants' stay in the Sheremetyevo airport transit zone, the excessive duration of such stay and considerable delays in domestic examination of the applicants' asylum claims, the characteristics of the area in which the applicants were held and the control to which they were subjected during the relevant period of time and the fact that the applicants had no practical possibility of leaving the zone, the applicants were deprived of their liberty within the meaning of Article 5.

Ilias and Ahmed v. Hungary, ECtHR, Application No. 47287/15, 21 November 2019.

Facts: The two applicants, Bangladeshi nationals reached the transit zone of Röszke in Hungary through Greece, the former Yugoslav Republic of Macedonia and Serbia. One of the applicants was provided with translation in a language he did not speak. Their asylum claim was rejected and they were escorted back to Serbia, considered a "safe country". The applicants complained that their stay in the transit zone was contrary to article 5(1) ECHR. They also feared that their

expulsion could start a 'chain-refoulement' to Greece. In 2017, the case was referred to the Grand Chamber.

Analysis: The court examined the distinction between restriction of movement and deprivation of liberty and considered that the assessment should be practical and realistic having regard to the present-day conditions and challenges. The applicants entered freely the transit zone and arrived in Hungary without fearing immediate danger in Serbia. The court considered that States have the right to take necessary measures while assessing asylum claims, which was done quite rapidly and only necessary measures were taken. Article 5 was found not to be engaged in terms of *ratione materiae*.

217. *In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants.*

EU law

In May 2020, the CJEU in *FMS and Others v. Főigazgatóság et al* (joint cases *C-924/19 and C-925/19*) established that the conditions prevailing in the Röszke transit zone in Hungary amounted to a deprivation of liberty within the meaning of the relevant EU Directives (§§ 226-231). The CJEU held that EU law does not allow for the detention of an applicant for international protection, nor the detention of a third-country national who is the subject of a return decision solely on the ground that they cannot meet his or her own needs.

Further, the CJEU held that Member States may require asylum-seekers who present themselves at their borders to stay there or in a transit zone for a maximum of four weeks in order to allow for examination as to whether their applications are admissible prior to granting a decision on the right to enter the territory. Thereafter, the person must be allowed to enter. The lawfulness of a detention measure, including in a transit zone, must be amenable to judicial review.

2. Alternatives to detention

International law

The decision [to detain] "...must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review."⁹ To establish the necessity and proportionality of detention in accordance with Article 9 ICCPR, it must be shown that other less intrusive measures have been considered and found to be insufficient. In *C v. Australia* (CCPR/C/76/D/900/1999, 13 November 2002), the Human Rights Committee found a violation of article 9.1 ICCPR on the basis that the State did not consider 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" (para. 8.2).

The ECtHR has held that in the application of Article 5.1(f) ECHR, particular consideration must be given to alternatives to detention for persons or groups in vulnerable situations, for the detention to be in good faith and free from arbitrariness. In case of unaccompanied migrant children, the Court in *Rahimi v. Greece* held that alternatives to detention must be considered.

The *UNHCR Guidelines on Detention* of asylum seekers state in Guideline 4.3 that "alternatives to detention need to be considered."¹⁰

⁹ HRC, General Comment No. 35, para. 18; *Baban v. Australia*, *op. cit.*, para. 7.2; *Bakhtiyari v. Australia*, *op. cit.*, paras. 9.2–9.3; see UNHCR Guidelines on Detention, guideline 4.3 and annex A.

¹⁰ In addition, the UNHCR has released two 'option papers' advising governments on alternatives to detention for children ([option paper 1](#)) and adults ([option paper 2](#)).

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention

Terminology

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. Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of "degree or intensity and not one of nature or substance". While these Guidelines focus more closely on detention (or total confinement), they also address in part measures short of full confinement.
7. Detention can take place in a range of locations, including at land and sea borders, in the "international zones" at airports, on islands, on boats, as well as in closed refugee camps, in one's own home (house arrest) and even extraterritorially. Regardless of the name given to a particular place of detention, the 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. (...)

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

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

-Guideline 4.1: Detention is an exceptional measure and can only be justified for a legitimate purpose

-Guideline 4.2: Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose

-Guideline 4.3: Alternatives to detention need to be considered

Guideline 5: Detention must not be discriminatory

Guideline 6: Conditions of detention must be humane and dignified

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

Guideline 8: Decisions to detain or to extend detention must be subject to minimum procedural safeguards.

EU law

Under EU law, detention must be a last resort and all alternatives must first be exhausted, unless such alternatives cannot be applied effectively in the individual case (article 8.2 of the recast [Reception Conditions Directive](#)¹¹, article 18.2 of the [Dublin Regulation](#)¹², and article 15.1 of the [Return Directive](#)¹³).

Reception Conditions Directive (recast) 2013/33/EU

Article 8

Detention

- (...) 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.

¹¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereafter Reception Conditions Directive)

¹² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereafter Dublin Regulation)

¹³ 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 (hereafter Return Directive)

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.

Return Directive (2008/115/EC)

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.

In Article 8.4, the recast Reception Conditions Directive obliges States to lay down rules for alternatives to detention in national law.

Alternatives to detention may include: reporting obligations, such as reporting to the police or immigration authorities at regular intervals; the obligation to surrender a passport or travel document; residence requirements, such as living and sleeping at a particular address; release on bail with or without sureties; guarantor requirements; release to care worker support or under a care plan with community care or mental health teams; or electronic monitoring, such as tagging.

3. Clear legal basis, arbitrariness, necessity and proportionality

All forms of detention must have a clear legal basis in national law and procedures and must not be arbitrary, unnecessary or disproportionate.

The right to liberty and security of the person under international human rights law requires that

deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary.

- The ICCPR prohibits any detention that is “arbitrary” (article 9)
- The ECHR provides for the lawfulness of detention for a series of specified legitimate purposes of detention. In relation to immigration detention, it permits detention:
 - to prevent unauthorised entry to the country (article 5.1.(f))
 - pending deportation or extradition (article 5.1.(f))

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

The **UN Human Rights Committee** has expanded at length on the meaning of “arbitrary” deprivation of liberty”, pursuant to article 9 of the ICCPR, in its **General Comment No. 35**: In respect of immigration detention:

18. Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.¹⁴ Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt (***Bakhtiyari v. Australia, paras. 9.2–9.3***). To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.¹⁶ The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹⁷ Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.¹⁸ Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.¹⁹ Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.²⁰

In its Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, the UN Working Group on Arbitrary Detention has set out the elements for arbitrariness (*Report of the WGAD*). In summary form, it has indicated that “[t]he prohibition of arbitrariness comprises through examination of lawfulness, reasonableness, proportionality and necessity of any measure depriving a human being of her or his liberty. The prohibition of arbitrariness can arise at any stage of legal proceedings” (Report of the WGAD, para. 80).

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

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

¹⁴ *A. v. Australia*, paras. 9.3–9.4; *Jalloh v. Netherlands*, op. cit., para. 8.2; *Nystrom v. Australia*, op. cit. paras. 7.2–7.3.

¹⁶ *Tarlue v. Canada*, HRC, Communication No. 1551/2007, 27 March 2009, UN Doc. CCPR/C/95/D/1551/2007, paras. 3.3 and 7.6; *Mansour Ahani v. Canada*, Communication No. 1051/2002, 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002, para. 10.2.

¹⁷ *Baban v. Australia*, op. cit., para. 7.2; *Bakhtiyari v. Australia*, op. cit., paras. 9.2–9.3; see also UNHCR Guidelines on Detention.

¹⁸ *Shafiq v. Australia*, Communication No. 1324/2004, 13 November 2006, UN Doc. CCPR/C/88/D/1324/2005, para. 7.3; *C. v. Australia*, op. cit, paras. 8.2 and 8.4.

¹⁹ *F.K.A.G. v. Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011, 20 August 2013, para. 9.3.

²⁰ *D. and E. and their two children v. Australia*, Communication No. 1050/2002, UN Doc. CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; *Jalloh v. Netherlands*, op. cit., paras. 8.2–8.3; see also CRC, articles 3.1 and 37(b).

- (e) in case detention is ordered with the view to expelling the person from the country, detention is permitted only for as long as deportation or extradition proceedings are in progress and only if they are executed with **due diligence**. There must also be a **realistic prospect** that the deportation or extradition will be carried out (see [Mikolenko v. Estonia](#), Application No. 10664/05, 8 October 2009. paras. 59, 67).

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

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

Analysis: The Court interpreted Article 5.1(f) ("detention of a person to prevent his effecting an unauthorized entry") as covering those who had surrendered themselves to the authorities and had applied for permission to enter, whether by way of asylum or otherwise. The Court found that seven-day detention of a "temporarily admitted" asylum seeker under the "fast-track" procedure was non-arbitrary and consistent with article 5.1. The 76-hour delay in providing the individual with the real reasons for his detention did not satisfy the promptness requirement of article 5.2. General statements – such as parliamentary announcements – could not replace the need for the individual being directly informed.

65. "On this point, the Grand Chamber agrees [...] that, until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to "prevent his effecting an unauthorised entry". It does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f)."
72. Similarly, where a person has been detained under Article 5 § 1 (f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained "with a view to deportation", that is, as long as "action [was] being taken with a view to deportation", there was **no requirement that the detention be reasonably considered necessary**, for example to prevent the person concerned from committing an offence or fleeing (see *Chahal*, cited above, § 112). The Grand Chamber further held in *Chahal* that the **principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time**; thus, it held that "any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible ..." (ibid., § 113; see also *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, ECHR 2007-II).
73. With regard to the foregoing, the Court considers that the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1 (f) **in the same manner** as it applies to detention under the second limb. Since States enjoy the right to control equally an alien's entry into and residence in their country (see the cases cited in paragraph 63 above), it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country.
74. "To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur*, cited above, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued."
84. "The Chamber found a violation of this provision, on the grounds that the reason for detention was not given sufficiently "promptly". It found that general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention."

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

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

Analysis: Examining the applicant's complaints of unlawful detention and lack of access to effective remedies, the Court found a violation of articles 5.1 and 5.4 of the Convention.

100. (...) In respect of the latter, the Court notes that Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, which was extensively cited by the Government, also considers that "[m]easures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case". In the light of these practices the Court has reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) with a maximum duration of eighteen months.
- 101 (...) the Court is concerned about the appropriateness of the place and the conditions of detention endured.
102. Lastly, the Court notes that in the present case it took the authorities one year to determine the applicant's asylum claim. This cannot be considered as a period of detention reasonably required for the purpose pursued, namely to determine an application to stay.
103. It follows that the applicant's detention up to the date of determination of his asylum application was not compatible with Article 5 § 1 (f) of the Convention, which has therefore been violated.
104. As to the second period of the applicant's detention, (...) The Court reiterates that detention under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (...). However, the Government admitted that the applicant's deportation had been stalled because of the criminal proceedings pending against him and that in view of those proceedings the authorities could not deport him (see paragraph 77 above). It is unclear when those proceedings were terminated; however, it was only in January 2013 that attempts to prepare the applicant for deportation were initiated. In consequence, it cannot be said that the period of detention of ten months between 2 April 2012 and January 2013 was for the purposes of deportation. As to the subsequent two months, the Government have not indicated any steps taken by the authorities, apart from an interview with the Consul of Sierra Leone, as a result of which they considered that the applicant could not be repatriated. The Court notes, however, that the applicant remained in detention until March 2013 despite the fact that the authorities had known since 11 February 2013 that there was no prospect of deporting him.
106. The foregoing considerations are sufficient to enable the Court to conclude that the national system failed as a whole to protect the applicant from arbitrary detention, and that his prolonged detention following the determination of his asylum claim cannot be considered to be compatible with the second limb of Article 5 § 1 (f) of the Convention.

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

50. ... In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 para. 1 (art. 5-1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; (...) they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies.

Al Husin v. Bosnia and Herzegovina (No. 2), ECtHR, Application No. 10112/16, Judgment 25 September 2019

97. Article 5 § 1 (f) does not demand that detention be reasonably considered necessary, for example to prevent the individual in question from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f). protection of fundamental rights with the requirements of States' immigration policies.

Chahal v. United Kingdom, ECtHR, Application No. 22414/93, Judgment 15 November 1996

112. The Court recalls that it is not in dispute that Mr Chahal has been detained "with a view to deportation" within the meaning of Article 5 para. 1 (f) (art. 5-1-f) (see paragraph 109 above). Article 5 para. 1 (f) (art. 5-1-f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 para. 1 (f) (art. 5-1-f) provides a different level of protection from Article 5 para. 1 (c) (art. 5-1-c). Indeed, all that is required under this provision (art. 5-1-f) is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5 para. 1 (f) (art. 5-1-f), whether the underlying decision to expel can be justified under national or Convention law.

113. The Court recalls, however, that any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f) (art. 5-1-f) (...). It is thus necessary to determine whether the duration of the deportation proceedings was excessive.

Mikolenko v. Estonia, ECtHR, Application No. 10664/05, Judgment 8 October 2009

63. The court reiterates that deprivation of liberty under Article 5 § 1 (f) is justified only for as long as deportation proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under this subparagraph (...).

64. The Court observes that the applicant's detention with a view to expulsion was extraordinarily long. He was detained for more than three years and eleven months.

65. What is more, the applicant's expulsion had become virtually impossible as for all practical purposes it required his co-operation, which he was not willing to give. While it is true that States enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory" (see, for example, Saadi, cited above, § 64, with further references), the aliens' detention in this context is nevertheless only permissible under Article 5 § 1 (f) if action is being taken with a view to their deportation. The Court considers that in the present case the applicant's further detention cannot be said to have been effected with a view to his deportation as this was no longer feasible.

68. The foregoing considerations are sufficient to enable the Court to conclude that the grounds for the applicant's detention – action taken with a view to his deportation – did not remain valid for the whole period of his detention due to the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence.

Where domestic law provides for requirements which go beyond the requirements set out by the ECtHR ("Saadi test"), for example because EU law so provides and is transposed into domestic law, these requirements have to be met (and this has to be reflected in the court decisions) in order for that deprivation of liberty to meet the lawfulness requirement (see e.g. *J.R. and Others v. Greece*, Application No. 22696/16, 25 January 2018, §§ 109-113).

UNHCR Guidelines on Detention

Guideline 4.1 further specifies the grounds allowing for detention of asylum-seekers:

- to protect public order:
 - to prevent absconding and/or in cases of likelihood of non-cooperation;
 - in connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
 - for initial identity and/or security verification;
 - in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention;
- to protect public health;
- to protect national security.

Guideline 4.2: Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose

Guideline 4.3: Alternatives to detention need to be considered

Guideline 5: Detention must not be discriminatory

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.

EU law

The [Reception Conditions Directive](#) states in its article 8.3 that:

An applicant (for international protection) 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 (9), 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;
- (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 (10).

The grounds for detention shall be laid down in national law.

According to article 8 of the Reception Conditions Directive and to article 26 of the [Asylum Procedures Directive](#)²¹, it is not lawful to detain a person solely for the reason that she or he has lodged an asylum application.

It is also not permissible to detain a person for the sole reason that he or she is subject to the Dublin Regulation (article 28.1 of the regulation). Exhaustive Regulation-compliant grounds for the detention of asylum seekers are listed in Article 8.3 of the Reception Conditions Directive. Asylum seekers may be detained in six different situations:

- to determine or verify the applicant's identity or nationality;
- to determine elements of the asylum application, which could not be obtained in the absence of detention, in particular where there is a risk of absconding;
- to decide on the applicant's right to enter the territory;
- if they are detained under the Return Directive and submit an asylum application to delay or frustrate the removal;
- when the protection of national security or public order so requires;
- and in accordance with Article 28 of the Dublin Regulation, which under certain conditions allows detention to secure transfer procedures under the Regulation.

The CJEU has clarified that the risk of absconding which is one of the grounds permitting detention under the Dublin Regulation must be clearly defined in national law. In the absence of such definition in national legislation, this ground cannot be used to justify detention under the Dublin Regulation²².

The Return Directive 2008/115/EC provides a legal basis for immigration detention for the purpose of removal where there is a risk of absconding or the third country national concerned avoids or hampers the preparation of return or the removal process, unless other less coercive measures can be applied (art.15).

In a case where an asylum seeker applied for international protection while in detention in the context of a return procedure, the CJEU ruled in *Mehmet Arslan v Policie ČR et al* (C- 534/11, 30 May 2013) that the detention remains lawful if "the application for asylum seems to have been made with the sole intention of delaying or even jeopardising enforcement of the return decision" (§57) or "the detention appears in such circumstances to be objectively necessary to prevent the person concerned from permanently evading his return" (§59). In addition, the CJEU ruled in *Hassen El Dridi* (C-61/11 PPU, 28 April 2011) that detention under the Return Directive is to be used only when there are no other less coercive measures available for the purpose of removal. The State has the obligation to use the least coercive measures possible (§39) and the use of coercive measures must be subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued (rec.13).

It should be underscored that grounds of detention which may superficially comply with EU Regulations and Directives still need to be consistent with other international legal obligations, including under the regional and universal human rights and refugee law.

II. Procedural safeguards in detention

1. Information on reasons for detention

Although article 5.2 ECHR refers expressly only to the provision of reasons for "arrest", the European Court of Human Rights has held that this obligation applies equally to all persons deprived of their liberty through detention, including immigration detention, as an integral part of protection of the right to liberty.²³

Article 5.2 ECHR

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.

Article 9.2 ICCPR

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.

The Human Rights Committee has stressed that "one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint", bearing consequences for the respect of the detainee's right to *habeas corpus*."

²¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereafter Asylum Procedures Directive)

²² *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, CJEU, C-528/15, 15 March 2017, para. 48. See the EDAL summary: <http://bit.ly/2icyi5y> and the Annex of this paper.

²³ *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application No. 30471/08, 22 September 2009, paras. 136 and 137; *Shamayev and Others v. Georgia and Russia*, ECtHR, Application No. 36378/02, 12 April 2005, paras. 413 and 414.

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

“(...) ‘arrest’ means the commencement of a deprivation of liberty, that requirement applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.²⁴ For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives.”²⁵

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. 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.

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

Facts: The applicants, Iranian nationals and former members of the People’s Mojahedin Organisation in Iran, were being held, at the time of their application, in Gaziosmanpaşa Foreigners’ Admission and Accommodation Centre in Kirklareli (Turkey).

Analysis: The applicants, who had been recognised as refugees by UNHCR, faced risk of ill-treatment contrary to article 3 upon Turkey’s proposed deportation of them to either Iran or Iraq. They had no effective opportunity to make an asylum claim or challenge their deportation, in contravention of article 13. Further their detention had no legal justification, the reasons for their detention were never communicated to them and they had been unable to challenge the detention’s lawfulness, in violation of Articles 5.1, 5.2 and 5.4.

Para. 135: “In sum, in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness [...]”

Para. 136: “In the absence of a reply from the Government and any document in the case file to show that the applicants were informed of the grounds for their continued detention, the Court is led to the conclusion that the reasons for the applicants’ detention from 23 June 2008 onwards were never communicated to them by the national authorities.”

Para. 142: “[...] the Court concludes that Turkish legal system did not provide the applicants with a remedy whereby they could obtain judicial review of the lawfulness of their detention [...]”

Reasons for detention must be provided promptly. Although whether information is conveyed sufficiently promptly will depend on the individual circumstances of each case, they should in general be provided within hours of detention. In *Saadi v. UK*, the Court held that waiting until seventy-six hours after arrest to provide the reasons for detention constituted a breach of article 5.2 ECHR (§§81-85).

The Human Rights Committee, General Comment No. 35, para. 27 affirmed that:

“That information [reasons for detention] must be provided immediately upon arrest. However, in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be required before an interpreter can be present, but any such delay must be kept to the absolute minimum necessary.”²⁶

Under Article 5 § 2 any person deprived of liberty must be told in simple, non-technical language that they can understand, the essential legal and factual grounds for the deprivation of liberty.²⁷

A “bare indication of the legal basis” for the detention is not sufficient; in addition, there must also be some indication of the factual basis for the detention.²⁸

²⁴ HRC, General Comment No 35, para. 24.

²⁵ HRC, *General comment No. 32*, para. 42; *Krasnov v. Kyrgyzstan*, HRC, Communication No. 1402/2005, 29 March 2011, UN Doc. CCPR/C/101/D/1402/2005, para. 8.5; Committee on the Rights of the Child, *General comment No. 10*, para. 48.

²⁶ *Hill and Hill v. Spain*, HRC, Communication No. 526/1993, 2 April 1997, UN Doc. CCPR/C/59/D/526/1993, para. 12.2.

²⁷ *Khlaifia and Others v. Italy*, ECtHR, Application no. 16483/12, 15 December 2016, § 115.

²⁸ *Fox, Campbell and Hartley v. United Kingdom*, ECtHR, Applications Nos. 12244/86, 12245/86 and 12383/86, 30 August 1990, para. 41.

Čonka v. Belgium, ECtHR, Application No. 51564/99, Judgment of 5 February 2002

50. As to the merits, the Court reiterates that paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, [of] the essential legal and factual grounds for his arrest so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4.

The responsibility of the State to inform the detainee of the grounds for detention is not discharged where the detainee has managed to infer from the circumstances or various sources, the basis for the detention. Even in such circumstances, there remains an obligation on the State to provide the information.²⁹

EU law

The recast Reception Conditions Directive (2013/33/EU, article 9) and article 26.2 of the Asylum Procedures Directive include safeguards for asylum seekers.

Article 9.2 of the revised Reception Conditions Directive requires authorities to order detention of asylum seekers in writing and provide reasons in fact and in law and Article 9.4 requires Member States to immediately inform applicants of the detention order “in a language which they understand or are reasonably supposed to understand. They should also be informed of 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.”

2. Other safeguards following detention

a) Right of access to and assistance of a lawyer

Migrants brought into detention have the right to prompt access to a lawyer and must be promptly informed of this right.³⁰

International standards and guidelines also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided.

Suso Musa v. Malta, Application No. 42337/12, Judgment of 23 July 2013

61. (...) The Court notes the apparent lack of a proper system enabling immigration detainees to have access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of a detainee under the Immigration Act making use of legal aid – despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade and who, as submitted by the Government, have no means of subsistence – appears merely to highlight this deficiency. The Court notes that, although the authorities are not obliged to provide free legal aid in the context of detention proceedings [...], the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy [...].

²⁹ *Shamayev and others v. Georgia and Russia*, *op. cit.*, para. 425.

³⁰ See: *Concluding Observations on Australia*, CCPR, Report of the UN Human Rights Committee to the General Assembly, 55th Session, Vol. I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern “at the State Party’s policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.” See also, Article 17.2(d), CPED; *UNHCR Guidelines on Detention*, Guideline 7(ii): “Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights”; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18. Principle 1 of the UN Basic Principles on the Role of Lawyers “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights...” See also: *WGAD, Annual Report 1998*, para. 69, *Guarantees 6 and 7*; *WGAD, Annual Report 1999*, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE, Guideline XI.5 and 6; Report of the WGAD, para 84.

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 (*Body of Principles for the Protection of all persons deprived of their liberty*, Principle 18.).

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.³¹

Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention under article 5.4.³²

In EU law, specific provisions on free legal assistance and representation for asylum seekers are included in Article 9 of the Reception Conditions Directive. Similarly, provisions on free legal assistance in return procedures are set out in Article 13 of the Return Directive.

For more information on the right to legal assistance, legal representation and legal aid for children cfr. Module V, section III.4 Legal assistance and representation.

b) Right to medical examination and medical treatment

On first entering into detention, there is also a right of prompt access to a doctor of one's choice, who can assess for physical health conditions as well as mental health issues which may affect justification of any detention, place of detention, or medical treatment or psychological support required during detention.³³

General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), CESCR, UN Doc. E/C.12/2000/4, 11 August 2000

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

c) Right to inform family members or others of detention

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

Article 18.1 of the *Convention on the Protection of all Persons from Enforced Disappearance* provides that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, have the right of access to at least information on the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to detention; the authority responsible for supervising the detention; the whereabouts of the person, including, in the event of a transfer, the destination and the authority responsible for the transfer; the date, time and place of release; information relating to the state of health of the person; and in the event of their death during detention, the circumstances and of death and the destination of the remains.

This right is of general application and applies, therefore, also to detention of migrants and asylum-seekers. The Council of Europe Guidelines on Human Rights Protection in the Context of Acceler-

³¹ *Öcalan v. Turkey*, ECtHR, Application No. 46221/99, 12 May 2005, para. 70; *Kaak and others v. Greece*, ECtHR, Application No. 34215/16, 3 October 2019, §§ 119-125.

³² *Istratii v. Moldova*, ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, 27 March 2007, paras. 87-101.

³³ *Algür v. Turkey*, ECtHR, Application No. 32574/96, Judgment of 22 October 2002, para. 44. *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36; *Body of Principles for the Protection of all persons deprived of their liberty*, Principle 24: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." See also, *European Guidelines on accelerated asylum procedures*, CMCE, *Guideline XI.5. In relation also cfr. Module III, section V. The right to the highest attainable standard of health.*"

ated Asylum Procedures also affirm the importance of this right in the immigration detention context (European Guidelines on Accelerated Asylum Procedures, CMCE, Principle XI.5.).

d) Right of access to UNHCR

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

They should be informed of this right promptly following detention, as it is established by the UN Body of Principles for the Protection of all Persons Deprived of their liberty. The Council of Europe Guidelines on Accelerated Asylum Procedures also affirm that this right must be applied in accelerated asylum procedures.

e) Right to consular access

Article 36 of the 1963 Vienna Convention on Consular Relations (UNTS vol. 596, p. 261) provides that, if so requested by the detained person, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State that its national has been deprived of their liberty. Any communication to the consular post by the person detained shall be forwarded by the competent authorities without delay.

Article 16 paragraph 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UNGA resolution 45/158 of 18 December 1990) provides that:

“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 interest of that State shall, if he or she so request, be informed without delay of his or her detention and of the reasons therefore; (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”.

3. Judicial review of the detention order

The right to challenge the lawfulness of detention judicially, protected by article 9.4 ICCPR and article 5.4 ECHR, is a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention.

This right is of vital importance to detained migrants, in particular where no clear individualized grounds for detention have been disclosed to the detainee or to his or her lawyer. Since the right to judicial review of detention must be real and effective rather than merely formal, its consequence is that systems of mandatory detention of migrants or classes of migrants are necessarily incompatible with international human rights standards.

a) Requirements of effective judicial review of detention

For a judicial review to meet international human rights law, it must fulfil a number of requirements.

- **The review must be clearly prescribed by law.** Both the law permitting detention, and the procedure for its review must be sufficiently certain, in theory and in practice, to allow a court to exercise effective judicial review of the permissibility of the detention under national law, and to ensure that the review process is accessible.
- **The review of detention must be accessible to all persons detained, including children.** *In Popov v. France*³⁴, the European Court of Human Rights found a violation of article 5.4 ECHR in respect of children detained in an immigration centre with their parents because “the law [did] not provide for the possibility of placing minors in administrative detention. As a result, children ‘accompanying’ their parents [found] themselves in a legal

vacuum, preventing them from using any remedies available to their parents.” In addition to establishing when detention is permissible, the law must prescribe a specific legal process for review of the legality of detention, separate from the legal process leading to a decision to deport. In the absence of such a separate procedure, there will be no means of redress for an initially legitimate detention that becomes illegitimate, for example where a deportation is initially being pursued but is later suspended.

- **The review must be done by an independent and impartial judicial body.** This reflects the general standard of the right to a fair hearing, which is given more specific expression in guarantees relating to judicial review of detention. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.³⁵
- The review must be of sufficient scope and have sufficient powers to be effective. The scope of the judicial review required will differ according to the circumstances of the case and to the kind of deprivation of liberty involved. The European Court of Human Rights has held that the review should, however, be wide enough to consider the conditions which are essential for lawful detention. The review must be by a body which is more than merely advisory, and which has power to issue legally binding judgments capable of leading to release. The Human Rights Committee has repeatedly emphasised that judicial review requires real and not merely formal review of the grounds and circumstances of detention, judicial discretion to order release. Article 9(4) requires that the reviewing court must have the power to order release from the unlawful detention. When a judicial order of release (...) becomes operative (...), it must be complied with immediately, and continued detention would be arbitrary in violation of article 9.1 ICCPR. (HRC, General Comment No. 35, para. 41)³⁶
- Persons deprived of liberty are entitled not merely to take proceedings, but to **receive a decision**, and without delay (HRC, General Comment No. 35, para. 47).
- **The review must meet standards of due process.** Although it is not always necessary that the review be attended by the same guarantees as those required for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (*Bouamar v. Belgium*, Application No. 9106/80, 27 June 1988, para. 60). Thus, proceedings must be adversarial and must always ensure guarantees as those required for fair trial. Legal assistance must be provided to the extent necessary for an effective application for release. Where detention may be for a long period, procedural guarantees should be close to those for criminal procedures.
- Unlawful detention includes detention that **was lawful at its inception** but has become unlawful because (...) the circumstances that justify the detention have changed (HRC, General Comment No. 35, para. 43).
- **The review must be prompt.** The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible. The Human Rights Committee found in *Mansour Ahani v. Canada* that a delay of nine and a half months to determine lawfulness of detention subject to a security certificate violated Article 9.4 ICCPR. However, in the same case a delay of 120 days before a later detention pending deportation could be challenged was permissible. In *ZNS v. Turkey* (Application no. 21896/08, 19 January 2010), the European Court of Human Rights held that, where it took two months and ten days for the courts to review detention, in a case that was not complex, the right to speedy review of detention was violated. In *Akhadov v. Slovakia, the Court considered that a 28-day judicial review was too long under article 5.4 (§§24-33).* (HRC, General Comment No. 35, para. 42)

In proceedings under Article 5 § 4, the court must not treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the “lawfulness”, within the meaning of the Convention, of the deprivation of liberty (*S.Z. v. Greece*, Application no. 66702/13, 21 June 2018, § 68).

³⁴ *Popov v. France*, ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 2012.

³⁵ HRC, General Comment No. 35, para 45; *Rameka v. New Zealand*, HRC, Communication No. 1090/2002, Views of 6 November 2003, UN Doc. CCPR/C/79/D/1090/2002, para. 7.4.

Al Husin v. Bosnia and Herzegovina (No.2), ECtHR, Application no. 10112/16, 25 September 2019

114. As the Court explained in *A. and Others v. the United Kingdom* (cited above, § 203), the requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances of the case in question. As a general rule, an Article 5 § 4 procedure must have a judicial character, but it is not always necessary that the procedure be attended by the same guarantees as those required under Article 6 in respect of criminal or civil litigation. The guarantees it provides must be appropriate to the type of deprivation of liberty in question (see *Sher and Others v. the United Kingdom*, no. 5201/11, § 147, ECHR 2015 (extracts)).
115. In particular, the authorities must disclose adequate information to enable an applicant to know the nature of the allegations against him and to have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able effectively to participate in court proceedings concerning continued detention (*ibid.*, § 149).

Mansour Ahani v. Canada, HRC, Communication No. 1051/2002, Views of 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002

Facts: After he was accepted by Canada as a refugee, the applicant was designated as a suspected terrorist and assassin by Canadian authorities, who detained him and initiated deportation proceedings. The applicant exhausted every available recourse under Canadian law to avoid being returned to Iran, where he alleged he would be tortured and executed. He then petitioned the Human Rights Committee but was deported by Canadian authorities despite the Committee's request for interim measure of protection and before the Committee could deliver its views on his communication.

Analysis: The Committee determined that Canada had violated its obligations under the ICCPR in failing to provide the applicant with timely judicial review of his detention and the appropriate procedural safeguards in the proceedings that led to his expulsion.

Para. 10.2: As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted four years and ten months. [...] Consequently, there has been a violation of the author's rights under article 9, paragraph 4, of the Covenant.

In *Shakurov v. Russia* (Application No. 55822/10, 5 June 2012), the ECtHR held that delays of thirteen and thirty-four days to examine appeals against detention orders in non-complex cases were in breach of article 5.4 ECHR. In *Embenyeli v. Russia*, where it took five months to process a review of detention, there had also been a violation of Article 5.4.

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

66. [...] The notion of "promptly" in the latter provision indicates greater urgency than that of "speedily" in Article 5 § 4 [...]. Even so, a period of approximately five months from the lodging of the application for release to the final judgment does appear, prima facie, difficult to reconcile with the notion of "speedily". However, in order to reach a firm conclusion, the special circumstances of the case have to be taken into account [...].
67. The Court observes that eleven weeks elapsed between the lodging of the application for judicial review on 1 October 2001 and the date of the first hearing on 20 December 2001. The Government explained that the delay was caused by the transfer of the case file to the prosecution authorities and back to the District Court. In this connection, the Court reiterates that Article 5 § 4 of the Convention imposes on Contracting States the duty to organise their judicial system in such a way that their courts can meet the obligation to examine detention matters speedily [...].

EU law

Article 47 of the EU Charter of Fundamental Rights demands that any individual in a situation governed by EU law has the right to an effective remedy and to a fair and public hearing within a reasonable time.

Article 9.3 of the recast Reception Conditions Directive requires a speedy judicial review when detention is ordered by administrative authorities.

In addition, Article 9.5 of the Reception Conditions Directive establishes that detention has to be reviewed at reasonable intervals of time either by application from the third-country national or ex officio. The review must be carried out by a judicial authority in case of asylum seekers, whereas for persons in return procedures, this is only required in cases of prolonged detention. Where the extension of detention has been decided in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension may order the detention to be lifted only when the person was actually deprived of the possibility to argue her/his defence better and influence the outcome of that administrative procedure. Provision of legal aid is regulated. Article 47 of the Charter also requires that all individuals have the possibility of being advised, represented and defended in legal matters, and that legal aid be made available to ensure access to justice.

b) Effective judicial review in national security cases

Special procedures for judicial review of detention in cases involving national security or counter-terrorism concerns, raise particular issues in regard to article 9.4 ICCPR and equivalent protections, where they rely on the use of "closed" evidence not available to the detainee or his or her representatives. Detention on the basis of national security certificates in Canada, as well as counter-terrorism administrative detentions in the UK, illustrate these difficulties. In *A and Others v. UK* (Application no. 3455/05, 19 February 2009), the European Court of Human Rights found that the system of review of administrative detention of persons subject to immigration control and suspected of terrorism, which relied on special advocates to scrutinise closed evidence and represent the interests of the detainee in regard to the allegations it raised, without the detainee being aware of them, did not provide sufficient fair procedures to satisfy article 5.4. The Court held that the detainee had to be provided with sufficient information to enable him to give instructions to the special advocate. Where the open material consisted only of general assertions, and the decision on detention was based mainly on the closed material, Article 5.4 would be violated. In *Mansour Ahani v. Canada*, the Human Rights Committee held that a hearing on a security certificate which formed the basis for the detention of a non-national pending deportation was sufficient to comply with due process under Article 14 ICCPR. The Committee based its decision on the fact that the non-national had been provided by the Court with a redacted summary of the allegations against him, and that the Court had sought to ensure that despite the national security constraints in the case, the detainee could respond to the case against him, make his own case and cross-examine witnesses.

4. Compensation for unlawful detention

The UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (hereafter The Principles) affirm that States have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.

In accordance with this general principle, persons who are found by domestic or international courts or other appropriate authorities to have been wrongly detained have a right to reparation, in particular compensation, for their wrongful detention (article 5.5 ECHR; article 9.5 ICCPR). Under the ICCPR this right arises whenever there is "unlawful" detention, i.e. detention which is either in violation of domestic law, or in violation of the Covenant. Under the ECHR, it arises only where there is detention in contravention of the Convention itself (although in practice this will include cases where the detention did not have an adequate basis in domestic law). Article 5.5 ECHR creates a direct and enforceable right to compensation before the national courts (*A and others v. the UK*, § 229). The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty (*Ciulla v. Italy*, Application No. 11152/84, 22 February 1989, § 44). The award of compensation must be legally binding and enforceable: ex gratia payments will not be sufficient (*Brogan and Others v. United Kingdom*, Application no. 11209/84; 11234/84; 11266/84; 11386/85, Judgment of 29 November 1988, para. 67).

Article 5.5 comprises a right to compensation not only in respect of pecuniary damage but also for any distress, anxiety and frustration that a person may suffer as a result of a violation of other provisions of Article 5 (*Sahakyan v. Armenia*, Application No. 66256/11, 10 November 2015, § 29).

Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 Dec 2014

The right to compensation for unlawful or arbitrary arrest or detention

49. Paragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Like paragraph 4, paragraph 5 articulates a specific example of an effective remedy for human rights violations, which States parties are required to afford. Those specific remedies do not replace, but are included alongside, the other remedies that may be required in a particular situation for a victim of unlawful or arbitrary arrest or detention by article 2, paragraph 3, of the Covenant.³⁷ Whereas paragraph 4 provides a swift remedy for release from ongoing unlawful detention, paragraph 5 clarifies that victims of unlawful arrest or detention are also entitled to financial compensation.
50. Paragraph 5 obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time. Paragraph 5 does not specify the precise form of procedure, which may include remedies against the State itself or against individual State officials responsible for the violation, so long as they are effective.³⁸ Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. Paragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim.³⁹
51. Unlawful arrest and detention within the meaning of paragraph 5 include such arrest and detention arising within either criminal or non-criminal proceedings, or in the absence of any proceedings at all.⁴⁰ The “unlawful” character of the arrest or detention may result from violation of domestic law or violation of the Covenant itself, such as substantively arbitrary detention and detention that violates procedural requirements of other paragraphs of article 9.⁴¹ However, the fact that a criminal defendant was ultimately acquitted, at first instance or on appeal, does not in and of itself render any preceding detention “unlawful”.⁴²
52. The financial compensation required by paragraph 5 relates specifically to the pecuniary and non-pecuniary harm resulting from the unlawful arrest or detention (*Coleman v. Australia*, Comm. No. 1157/2003, 10 August 2006, UN Doc., para. 6.3). When the unlawfulness of the arrest arises from the violation of other human rights, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by article 2, paragraph 3, of the Covenant.⁴³

EU law

The CJEU in the joined cases of *Francovich and Bonifaci v. Italian Republic* (C-6/90 and C-9/90, 19 November 1991) established that national courts must provide a remedy for damages caused by a breach of an EU provision by an EU Member State. The principle has not yet been applied to breaches caused by a Member State’s non-implementation of a directive in the context of immigration detention.

³⁷ HRC, *General comment No. 31*, paras. 16 and 18; *Bolaños v. Ecuador*, HRC, Communication No. 238/1987, Views of 26 July 1989, UN Doc. Supp. No. 40 (A/44/40) para. 10; *Mulezi v. Democratic Republic of the Congo*, Communication No. 962/2001, Views of 23 July 2004, UN Doc. CCPR/C/81/D/962/2001, para. 7.

³⁸ See concluding observations: Cameroon (CCPR/C/CMR/CO/4, 2010), para. 19; Guyana (CCPR/C/79/Add.121, 2000), para. 15; United States of America (A/50/40, 1995), para. 299; Argentina (A/50/40, 1995), para. 153; 1885/2009, *Horvath v. Australia*, para. 8.7 (discussing effectiveness of remedy); 1432/2005, *Gunaratna v. Sri Lanka*, para. 7.4; general comment No. 32, para. 52 (requirement of compensation for wrongful convictions).

³⁹ *Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, Views of 10 August 1994, UN Doc. CCPR/C/51/D/414/1990, para. 6.5; *Mulezi v. Democratic Republic of the Congo*, op. cit., para. 5.2.

⁴⁰ A. v. New Zealand, op. cit., paras. 6.7 and 7.4; *Martínez Portorreal v. Dominican Republic*, Communication No. 188/1984, Views of 5 November 1987, UN Doc. Supp. No. 40 (A/43/40), para. 11; *Mulezi v. Democratic Republic of the Congo*, op. cit., para. 5.2.

⁴¹ *Marques de Morais v. Angola*, HRC, Communication No. 1128/2002, para. 6.6; see also 328/1988, *Zelaya Blanco v. Nicaragua*, para. 10.3 (arbitrary detention); *Sahadeo v. Guyana*, HRC, Communication No. 728/1996, Views of 1 November 2001, UN Doc. CCPR/C/73/D/728/1996, para. 11 (violation of article 9.3); *Santullo Valcada v. Uruguay*, HRC, Communication No. 9/1977, Views of 26 October 1979, UN Doc. CCPR/C/8/D/9/1977, para. 12 (violation of art. 9. 4).

⁴² *W.B.E. v. Netherlands*, Communication 432/1990, Views of 1 December 1992, UN Doc. CCPR/C/46/D/432/1990, para. 6.5; *Übergang v. Australia*, Communication No. 963/2001, Views of 22 March 2001, UN Doc. CCPR/C/71/D/963/2001, para. 4.4.

⁴³ *Ibid.*, para. 9; *Marques de Morais v. Angola*, para. 8; HRC, General comment No. 31, para. 16.

III. Duration of detention

International law

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

Both the ICCPR and the ECHR require that where detention is permitted at all, the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary (WGAD, Annual Report 1998, para. 69, Guarantee 10).

"States parties ... need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases." (HRC, General Comment No. 35, para. 15)

"Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors." (HRC, General Comment No. 35, para. 18)

Excessive length of detention, or uncertainty as to its duration, may also constitute cruel, inhuman or degrading treatment, the Committee against Torture and the Committee for the Prevention of Torture (CoE) have repeatedly warned against the use of prolonged or indefinite detention in the immigration context.⁴⁴

See also:

- [Chahal v. United Kingdom](#), ECtHR, Application No. 22414/93, Judgment 15 November 1996.
- [Mikolenko v. Estonia](#), ECtHR, Application No. 10664/05, Judgment 8 October 2009.
- [Saadi v. United Kingdom](#), ECtHR, Application No. 13229/03, Judgment of 29 January 2008, para. 74.
- [Louled Massoud v. Malta](#), ECtHR, Application No. 24340/08, Judgment of 27 July 2010.
- [Mohamad v. Greece](#), ECtHR, Application No. 70586/11, Judgment of 11 December 2014.
- [J.R. and others v. Greece](#), ECtHR, Application No. 22696/16, Judgment of 25 January 2018.
- [Kaak and others v. Greece](#), ECtHR, Application No. 34215/16, Judgment of 3 October 2019.

EU law

For asylum seekers article 9.1 of the revised Reception Conditions Directive as well as Article 28.3 of the [Dublin III Regulation](#) stipulate that detention must be for the shortest period 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". Reduced time limits for submitting and responding to transfer requests apply when asylum seekers are detained under the Dublin Regulation. In addition, article 15.5 of the [Return Directive](#) mentions that detention can be maintained as long as it is necessary to ensure removal. Member States must set a period of detention and in any case, it must not exceed six months.

IV. Detention Conditions

Even where detention of migrants can be justified, international human rights law imposes further constraints on the place and regime of detention, the conditions of detention, and the social and medical services available to detainees. In addition, it imposes obligations to protect detainees from violence in detention. The most relevant standard for the treatment of detainees is the prohibition on cruel, inhuman and degrading treatment (article 16 Convention Against Torture (CAT)⁴⁵, articles 7 and 10 ICCPR, article 3 ECHR, Rule 1 Nelson Mandela Rules⁴⁶). States have obligations to take effective measures to prevent acts of torture and of cruel, inhuman or degrading treatment or punishment including to keep under systematic review arrangements for the custody and treatment of persons subjected to any form of detention with a view to preventing torture and ill-treatment (CAT).

Detained persons must be treated with humanity and respect for their dignity (article 10 ICCPR, ar-

⁴⁴ See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [Factsheet Immigration Detention](#), CPT/Inf(2017)3, March 2017.

⁴⁵ [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT), Resolution 39/46 of 10 December 1984.

ticle 1 ECHR and article 4 EU Charter).

The OPCAT also requires State Parties to establish one or more independent national mechanisms for the prevention of torture and cruel, inhuman or degrading treatment or punishment with powers of access to detention centres.

1. Appropriateness of place of detention

Except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs (*CPT Standards*). Detention of migrants in unsuitable locations, including police stations or prisons, may lead or contribute to violations of freedom from torture or cruel, inhuman or degrading treatment.

While detention of a migrant at an airport may be acceptable for a short period of a few hours on arrival, more prolonged detention without appropriate facilities for sleeping, eating or hygiene could amount to ill-treatment. Although immigration detainees may have to spend some time in ordinary police detention facilities, given that the conditions in such places may generally be inadequate for prolonged periods of detention, the time they spend there should be kept to the absolute minimum (*CPT Standards*).⁴⁸

Asylum seekers and migrants should be kept separate from convicted persons or persons detained pending trial.

2. Conditions of detention

The revised United Nations Standard Minimum Rules of the Treatment of Prisoners (the Nelson Mandela Rules) adopted by the UN General Assembly in 2015, constitute the universally acknowledged minimum standards for the conditions of detention facilities management and treatment of detainees.

Facilities where migrants are detained must provide conditions that are sufficiently clean, safe, and healthy to be compatible with freedom from torture or other cruel, inhuman or degrading treatment ("ill-treatment") and the right to be treated with humanity and with respect for the inherent dignity of the human person (Article 10 ICCPR).⁴⁹

In assessing the compliance of the physical conditions of detention with Article 3, the ECtHR takes into account factors such as the personal space available in the detention area, the availability of outdoor exercise, access to natural light or air, ventilation, and compliance with basic sanitary and hygiene requirements (*G.B. and others v. Turkey*, Application No. 4633/15, 17 October 2019, § 100).

Economic pressures or difficulties caused by increased arrivals of migrants cannot justify a failure to comply with the prohibition on torture or other ill-treatment, given its absolute nature (*M.S.S. v. Belgium and Greece*). Even treatment which is inflicted without the intention of humiliating or degrading the victim, and which stems, for example, from objective difficulties related to a migration crisis, may entail a violation of Article 3 of the Convention (*Khlaifa and others v Italy*, § 184).

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

Facts: The applicant, an Afghan national, entered the European Union via Greece. He subsequently arrived in Belgium, where he applied for asylum. By virtue of the Dublin II Regulation he was transferred back to Greece in June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building, where, according to his reports, he was locked up in a small space with 20 other detainees, access to the toilets was restricted, detainees were not allowed out into the open air, were given very little to eat and had to sleep on dirty mattresses or on the bare floor.

Analysis: The Court held that there had been a violation of article 3 of the Convention by Greece because of the applicant's detention conditions. Despite the fact that he had been kept in detention for a relatively short period of time (four days and a week), the Court found that, taken

⁴⁷ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Article 3.

⁴⁸ *Sh.D. and others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, ECtHR, Application No. 14165/16, Judgment of 13 September 2019, §§ 48-51; *Haghilo v. Cyprus*, ECtHR, Application No. 47920/12, Judgment of 26 March 2019, §§ 160-169.

⁴⁹ Also related cfr. Module III, section V. The right to the highest attainable standard of health.

together, the feeling of arbitrariness, inferiority and anxiety he must have experienced, as well as the profound effect such detention conditions indubitably had on a person's dignity, had constituted a degrading treatment. In addition, as an asylum seeker the applicant was particularly vulnerable, because of his migration and the traumatic experiences he was likely to have endured. The Court also held that there had been a violation of article 13 taken together with article 3 by Greece because of the deficiencies in the asylum procedure followed in the applicant's case, a violation of article 3 by Belgium both because of having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and because of having exposed him to detention and living conditions in Greece that were in breach of Article 3, and a violation of article 13 taken together with article 3 by Belgium because of the lack of an effective remedy against the applicant's expulsion order.

Para. 216: ...[T]he confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions.

Para. 217: Where the Court is called upon to examine the conformity of the manner and method of the execution of the measure with the provisions of the Convention [on Human Rights], it must look at the particular situations of the persons concerned [...].

Para. 218: The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct [...].

Para. 223: ...The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum-seekers on their arrival at major international airports and of the disproportionate number of asylum-seekers when compared to the capacities of some of those States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision.

S.D. v. Greece, ECtHR, Application No. 53541/07, 11 September 2009

Facts: The applicant, a Turkish national, was detained for two months in a holding facility at a border guard station in Greece after entering the country irregularly. During his detention, he was not allowed to go outside or make telephone calls, and had no access to blankets, clean sheets or hot water.

Analysis: The Court held that there had been a violation of article 3 with regards to the applicant's detention conditions in Soufli and Attiki, thereby taking into account the personal situation of torture of the applicant in Turkey, which left important clinical and psychological scars on him. It further found a violation of articles 5.1 and 5.4 due to the unlawful detention of the applicant and the lack of remedies to challenge it.

Para. 52: As regards the applicant's personal situation, the court observes that he had suffered severe torture in Turkey, which had left him with significant medical and psychological consequences. The fact that this condition was not officially certified by the Medical Center for the Recovery of Victims of Torture until after the end of his detention, does not in any way change this observation.

Para. 53: In the light of the foregoing, the Court considers that the conditions of detention of the applicant, as a refugee and asylum seeker, combined with the excessive length of his detention in such conditions, amounted to degrading treatment.

Popov v. France, ECtHR, Applications nos. 39472/07 and 39474/07, 19 January 2012

96. The Commissioner for Human Rights and the CPT also raised the question of administrative detention centres being unsuited to the accommodation of families and to the needs of children, taking the view that, in addition to the ill-adapted material conditions, the lack of privacy, stress, insecurity and hostile environment in such centres also had harmful consequences for minors, at odds with the international principles on the protection of children. In response to this criticism, the French authorities acknowledged, in 2006, that the furnishings in family rooms were not always adapted to infants (see paragraphs 38 to 40 above).

Z.A. and others v. Russia, ECtHR, Applications Nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019

191. On the basis of the available material, the Court can clearly see that the conditions of the applicants' stay in the transit zone of Sheremetyevo Airport were unsuitable for an enforced long-term stay. In its view, a situation where a person not only has to sleep for months at a stretch on the floor in a constantly lit, crowded and noisy airport transit zone without unimpeded access to shower or cooking facilities and without outdoor exercise, but also has no access to medical or social assistance ... falls short of the minimum standards of respect for human dignity.

(a) Personal space and overcrowding

Severe overcrowding has regularly been determined by international tribunals to amount to a violation of freedom from cruel, inhuman or degrading treatment. The European Court of Human Rights has ruled, in the case of *Aden Ahmed v. Malta*,⁵⁰ that, in "deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements:

- (a) each detainee must have an individual sleeping place in the cell;
- (b) each detainee must dispose of at least three square meters of floor space; and
- (c) the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items.
- (d) Other aspects (see *Ananyev and Others*).

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3. [...]

Ananyev and Others v. Russia, ECtHR, Applications Nos. 42525/07, 60800/08

149. In cases where the inmates appeared to have at their disposal sufficient personal space, the Court noted other aspects of physical conditions of detention as being relevant for the assessment of compliance with that provision. Such elements included, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements. Thus, even in cases where a larger prison cell was at issue – measuring in the range of three to four square metres per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting (...).

Where overcrowding is less severe, it may nevertheless lead to violations of freedom from cruel, inhuman or degrading treatment when considered in conjunction with other conditions of detention, including poor ventilation or access to natural light or air, poor heating, inadequate food, poor sanitation or lack of a minimum of privacy.

(b) Access to healthcare⁵¹

Although there is no general obligation to release detainees on health grounds, there is an obligation to protect their physical and mental wellbeing while in detention, by providing medical care and medicines appropriate to the health condition of a detainee (*Keenan v. United Kingdom*, 27229/95, 3 April 2001, para. 111). For example, failure to provide medical supervision and drugs necessary to

⁵⁰ *Aden Ahmed v. Malta*, ECtHR, Application no. 55352/12, Judgment of 23 July 2013, § 87.

⁵¹ See also cfr. *Module III, section V. The right to the highest attainable standard of health.*

detainees with HIV, or with severe epilepsy, leading to exacerbation of their conditions, can undermine the dignity of the detainee, and cause anguish and hardship beyond that normally inherent in detention, in violation of Article 3 ECHR. Such a violation may occur even in the absence of demonstrated deterioration of the health condition of a detainee.

The standards of the CPT, as well as the Nelson Mandela Rules specify that prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status (Nelson Mandela Rules, rule 24).

(c) Protection from ill-treatment, including violence in detention

Physical or sexual assaults, or excessive or inappropriate use of physical restraint techniques - may violate rights including the right to life and freedom from torture or cruel, inhuman or degrading treatment and rights to physical integrity. Where a person is unlawfully killed or subjected to cruel, inhuman or degrading treatment while in detention, there is a presumption that State agents are responsible, and the onus is on the State to provide a satisfactory and convincing explanation to the contrary.

In addition, where the State authorities know or ought to know that particular individuals held in detention face a real or immediate threat from private actors to their life, freedom from cruel, inhuman or degrading treatment, or physical integrity, there is an obligation to take all reasonable measures to prevent or end the situation (*Osman v. United Kingdom*).⁵² This arises as part of the general positive obligations on States to exercise due diligence and take reasonable measures to prevent, protect against and investigate acts of private persons in violation of these rights (CCPR, General Comment No. 31, para. 8).

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

In situations where there is clear potential for gender or ethnic violence in detention, for example, appropriate preventive and security measures must be put in place. In *Rodić and 3 others v. Bosnia-Herzegovina*,⁵³ the ECtHR held that two Serb prisoners held in open, crowded conditions in an ethnic Bosnian dominated prison, and subjected to violence by fellow prisoners, without any adequate security measures being taken by the authorities, suffered mental anxiety as a result of the threat and anticipation of violence that amounted to a violation of article 3 ECHR. In *O.M. v. Hungary* the Court held that authorities have a duty of care when asylum seekers indicate that they are members of a vulnerable group (LGBT *in casu*).

O.M. v. Hungary, ECtHR, Application No. 9912/15, Judgment 5 July 2016.

53. Lastly, the Court considers that, in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant's detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran (...).

In addition to protection from the acts of officials or fellow detainees, the State also has an obligation to take reasonable measures within its power to protect detained persons from acts of self-harm or suicide.

Women in detention may face particular risks of sexual or gender-based violence, either from officials or from private actors. States are required to take measures to prevent and protect detainees from all sexual violence in detention, including by making it a criminal offence, and enforcing the criminal law. Certain forms of sexual violence in detention, such as rape, amount to torture (*Aydin v. Turkey*).⁵⁴

⁵² *Osman v. United Kingdom*, ECtHR, Application No. 23452/94, Judgment of 28 October 1998.

⁵³ *Rodić and 3 others v. Bosnia-Herzegovina*, ECtHR, Application No. 22893/05 1 December 2008.

⁵⁴ *Aydin v. Turkey*, ECtHR, (57/1996/676/866), Judgment of 25 September 1997, paras. 83-86.

(d) Cumulative effect of poor conditions

The cumulative effect of a number of poor conditions may lead to violation of the prohibition on ill-treatment. Furthermore, the longer the period of detention, the more likely that poor conditions will cross the threshold of ill-treatment.⁵⁵ The test is an objective one, and can be met irrespective of whether there had been any intent on the part of the authorities to humiliate or degrade (*Riad and Idiab v. Belgium*, Applications Nos. 29787/03 and 29810/03, 24 January 2008, para. 107).

General living conditions of persons deprived of liberty, with regards to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space that apply to all prisoners without exception are addressed in international standards including the standards of the Council of Europe Committee for the Prevention of Torture (CPT)⁵⁶ and the Nelson Mandela Rules (Rule 42).

Whether conditions are cruel, inhuman or degrading must also be seen in the context of the individual – it may depend on the sex, age or health of the individual detainee. For those held in immigration detention, it is also relevant that they are not charged with or convicted of any crime, which should be reflected in the conditions of detention and facilities at the detention centre. (*M.S.S. v. Belgium and Greece*, paras. 231-233)

EU law

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

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

(e) Detention of persons with specific vulnerabilities

Additional safeguards against arbitrary detention apply to children and other individuals with specific vulnerabilities. To be able to benefit from such protection, asylum-seekers should have access to an assessment of their vulnerability in line with EU obligations in order to identify any such specific vulnerabilities, and be informed about respective asylum procedures that apply to them by virtue of their vulnerable state (*Thimothawes v. Belgium*, Application No. 39061/11, 18 September 2017). Lack of active steps and delays in conducting the vulnerability assessment may be a factor in raising serious doubts as to the authorities' good faith (see *Abdullahi Elmi and Aweys Abubakar v. Malta*, Applications Nos. 25794/13 and 28151/13, 22 November 2016).

Detention of persons rendered vulnerable by their age, state of health or past experiences may, depending on the individual circumstances of the case, amount to cruel, inhuman or degrading treatment (violation of Article 3 ECHR, Article 7 ICCPR, CAT). Persons in vulnerable situations can in particular include:

- Asylum seekers, who may have suffered torture or ill-treatment or other traumatic experiences, sometimes with physical or mental health implications (*C. v. Australia*)
- Persons with disabilities⁵⁷
- Victims of trafficking⁵⁸
- Children⁵⁹
- Elderly persons⁶⁰
- Torture victims⁶¹

The Convention on the rights of persons with disabilities states in its article 14(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 the present Convention, including by provision of reasonable accommodation."

⁵⁵ *Dougoz v. Greece*, ECtHR, Application No. 40907/98, Judgment of 6 March 2001; *Z.N.S. v. Turkey* (cited above); *M.S.S. v. Belgium and Greece*, (cited above), paras. 230-233.

⁵⁶ The 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")

⁵⁷ UN Convention on the rights of persons with disabilities (CRPD), adopted by UNGA Resolution A/61/611 of 24 January 2007.

⁵⁸ *UNHCR Guidelines on Detention*, op. cit, guideline 9.

⁵⁹ *Rahimi v. Greece*; *Popov v. France*.

⁶⁰ *Farbtuhs v. Latvia*, ECtHR, Application No. 4672/02, Judgment of 2 December 2004.

⁶¹ *Factsheet Immigration Detention*, p.8; CPT, *United Kingdom visit 2012*, CPT/Inf(2014)11, 28 March 2013, paras. 132-133; CPT, *Malta: Visit 2008*, CPT/Inf(2011)5, 22 December 2008, para. 68.

EU law

Article 21 of the recast Reception Conditions Directive (2013/33/EU) lists persons considered to be vulnerable⁶². It does not bar the detention of vulnerable persons, but when they are detained, article 11 of the Reception Conditions Directive requires that detailed attention be paid to their particular situation and that health, including mental health, of vulnerable persons shall be primary concern to the authorities. This article also contains specific provisions for minors, who are only to be detained as a measure of last resort for the shortest period of time. All efforts must be made to release and place them in accommodation that is suitable for children. Unaccompanied minors seeking asylum must only be detained in exceptional circumstances and never placed in prison accommodation and in any case separately from adults.

1. Children

Migrant children should be first and foremost **treated as children**. Indeed, their situation of vulnerability – whether or not they are accompanied by their parents – is a decisive factor that takes precedence over considerations relating to the child’s status as an illegal immigrant (*G.B. and Others v. Turkey*, § 101). Persons who claim to be children should be treated as such until proven otherwise.⁶³

Convention on the rights of the child, (CRC) adopted by UNGA Resolution 44/25 of 20 November 1989

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (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.

General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005

61. “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

⁶² “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”.

⁶³ [Joint general comment No. 4 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families \(CMW\) and No. 23 \(2017\) of the Committee on the Rights of the Child \(CRC\) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return](#), CMW/C/GC/4-CRC/C/GC/23, 16 November 2017 paras. 5-13; [CRC General Comment No. 6 \(2006\)](#), CRC/GC/2005/6, Para. 61-63; see also [UN Committee on the Rights of the Child, report of 2012 Day of General Discussion of 28 September 2012, “The Rights of All Children in the Context of International Migration”, para. 32](#) PACE resolution 2020(2014), para 9.4.

appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, 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.”

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

As affirmed in the [Joint General Comments](#) by the Committee on Migrant Workers and the Committee on the Rights of the Child No. 4 and No. 23, children must never be detained because of their or their parents' migration status (para. 5). The UN [Special Rapporteur on torture considered](#) that detention of children is never in the best interest of the child and that it may constitute cruel, inhuman or degrading treatment.⁶⁴

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, paras. 5-13

Right to liberty (articles 16 and 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 37 of the Convention on the Rights of the Child)

5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.
6. Immigration detention is understood by the Committees as any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents', migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty. “Reasons related to migration status” is understood by the Committees to be a person's migratory or residence status, or the lack thereof, whether relating to irregular entry or stay or not, consistent with the Committees' previous guidance.
7. In addition, both the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents' migration status. Irregular entry and stay do not constitute crimes per se against persons, property or national security. Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.

⁶⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, [A/HRC/28/68](#), 5 March 2015, para. 80.

8. The Committee on the Rights of the Child, in relation to unaccompanied and separated children, stated in 2005 that children should not be deprived of their liberty and that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.
9. The Committees emphasize the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, even when they are detained for a short period of time or with their families. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that "within the context of administrative immigration enforcement ... the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children".
10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.
11. Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family.
12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children's holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced.

HRC, Report of the Special Rapporteur on the human rights of migrants – regional study: management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/23/46, 24 April 2013.

48. It should of course be noted that, in fact, the Return Directive stipulates that detention should be a measure of last resort. Yet, in practice, few viable alternatives to detention appear to be explored by the European Union institutionally and by European Union member States individually. In the countries visited the Special Rapporteur witnessed an almost complete absence of readily implementable wide-scale alternatives to detention, including for children.
77. For example, the Special Rapporteur repeatedly witnessed inadequate procedures for detention, including the failure to respect legal, procedural and substantive guarantees, the detention of persons without prospect of removal, the detention of children, and an absence of alternatives to detention. Similarly, return procedures, particularly when facilitated through readmissions agreements, failed to provide the necessary safeguards.

The [UNHCR's position regarding detention of refugee and migrant children in migration context](#) (January 2017) stresses that the best interest of the child should always be the primary consideration and a child can never be detained because of their or their parents' migration status. Alternatives to detention/care arrangements should always be explored.

In all actions relating to children an assessment of the child's best interests must be undertaken separately and prior to a decision that will impact that child's life (article 3 CRC, article 24.2 EU Charter).⁶⁵

"States parties [to the CRC and CMW] should assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status. Best-interests determination procedures should be put in place in any decision that would separate children from their family, and the same standards applied in child custody, when the best interests of the child should be a primary consideration."⁶⁶

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

10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.
11. Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return. When children are unaccompanied, they are entitled to special protection and assistance by the State in the form of alternative care and accommodation in accordance with the Guidelines for the Alternative Care of Children. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. When the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family.
12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children's holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced.

The 2020 [Report of the UN Special Rapporteur on the human rights of migrants](#) calls on States to eliminate child migration detention by shifting the focus from enforcement and coercion towards a human rights-based approach, which promotes children's rights and well-being and provides alternative care and reception for all migrant children and their families.

HRC, Report of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and providing adequate care and reception for them, A/75/183, 20 July 2020.

82. Detention of any child for reasons related to their, their parents' or their legal guardians' migration status is always a child rights violation and may constitute cruel, inhuman or degrading treatment of migrant children. Immigration detention of children and their families has a pervasive impact on children's physical, social, emotional and cognitive skills development, depriving them of their fundamental rights, and their future.

⁶⁵ For more information on the principle of best interest of the child cfr. Module V, section II.2 The best interest of the child.

⁶⁶ [Joint general comment No. 3 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 \(2017\) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration](#), CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para 32(e).

86. (...) More specifically, States are urged to:

- (a) Establish in domestic law an explicit prohibition of immigration detention of all migrant children under the age of 18, including unaccompanied children and children with their families. Policy framework and quality assurance processes should be established to ensure that the prohibition is effectively implemented and that migrant children are provided with the strongest protection; (...)
- (c) Strengthen existing national child protection and welfare systems and integrate unaccompanied migrant children into these systems without any discrimination, irrespective of the child's migration status. Child protection and welfare authorities, rather than immigration authorities, should take primary responsibility for the care and safety of migrant children. Child protection authorities should be informed and involved from the outset upon the identification of an unaccompanied or separated migrant child; (...)
- (e) Promote family unity throughout asylum and other migration-related procedures, refrain from adopting any policy that would lead to systematic family separation and take appropriate measures to prevent and respond to family separation in the context of international migration;
- (f) Provide alternative care arrangements, preferably family-based alternatives, for migrant children without parental care, while facilitating family tracing and reunification according to the best interests of the child; (...)
- (h) Take affirmative action to overcome obstacles in order to ensure migrant children's access to health care, education, adequate housing and other rights and essential services. Such measures may include reviewing laws and regulations, overcoming administrative barriers, developing firewalls between public service providers and immigration enforcement authorities, providing interim documentation to facilitate access to services, making concrete efforts to overcome language and other access barriers, ensuring the affordability of services and increasing awareness of the human rights and entitlements of migrant children and their families; (...).

The UN Committee on the Rights of the Child, the UN Special Rapporteur on the human rights of migrants⁶⁷ and the Parliamentary Assembly of the Council of Europe⁶⁸ all make it clear that immigration detention of migrant children is **not in their best interest** and that detention of vulnerable individuals, including unaccompanied children is prohibited in international law.

States have a positive obligation to protect and take care of unaccompanied migrant children under Article 3 ECHR and Article 20 CRC.⁶⁹ The duty to act in the best interest of the child entails, in the situation of unaccompanied minors, a comprehensive assessment of the identity of the child in a child friendly manner (age, nationality, background, etc.).

States are required to appoint a competent guardian and a legal representative, if necessary, for asylum, administrative or judicial procedures.⁷⁰ The child should also be duly registered with appropriate school authorities as soon as possible⁷¹ and an appropriate care arrangement should be provided.⁷²

General Comment No. 13, The right to education, CESCR, UN Doc. E/C.12/1999/10, 8 December 1999

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

⁶⁷ *UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece*, Statement of 16 May 2016.

⁶⁸ PACE, *Resolution 1707 (2010) on Detention of asylum seekers and irregular migrants in Europe*, and *Resolution 1810 (2011) on Unaccompanied children in Europe: issues of arrival, stay and return*.

⁶⁹ *Sh.D. and others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, Application No. 14165/16, Judgment of 13 September 2019, §§ 52-62; *Khan v. France*, ECtHR, Application No. 12267/16, Judgment 28 February 2019; *Rahimi v. Greece*, cfr. *Module V, section II.4 The positive obligation to provide care and protection to migrant children*.

⁷⁰ *Cfr. Module V, section III.4 Legal assistance and representation*

⁷¹ *Cfr. Module III, section VI.1. Children's right to education*

⁷² CRC, *General Comment No. 6*, paras. 19-22; CMW & CRC, paras. 11 and 17; IOM, *Unaccompanied Children on the Move – The work of the International Organization for Migration (IOM)*, 2011, pp.16-20.

UNHCR, Options Paper 1 - *Options for governments on care arrangements and alternatives to detention for children and families*, 2014, p. 2.

- Asylum-seeking, refugee and migrant children should not in principle be detained, any detention should be a measure of last resort and for the shortest possible period of time (Art 37(b), CRC).
- The best interests of the child must be a primary consideration (Art. 3, CRC)
- Family-based care arrangements should be prioritised, with institutional care being used only in very limited circumstances.
- Every child has the right to the highest levels of physical and mental health (Art. 24, CRC).
- Every child has a fundamental right to survival and development to the maximum extent possible (Art. 6, CRC). Every child has the right to education (Art. 28, CRC; Art. 22, 1951 Refugee Convention).
- Every child has the right to rest, leisure and play (Art. 31, CRC) and to cultural life (Art. 30, CRC).

Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 2010 (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

Deprivation of liberty

19. Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time.
20. When deprivation of liberty is imposed, children should, as a rule, be held separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.
21. Given the vulnerability of children deprived of liberty, the importance of family ties and promoting the reintegration into society, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children in particular should have the right to:
 - a. maintain regular and meaningful contact with parents, family and friends through visits and correspondence, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment;
 - b. receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport;
 - c. access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status.
22. The deprivation of liberty of unaccompanied minors, including those seeking asylum, and separated children should never be motivated or based solely on the absence of residence status.

The European Court for Human Rights jurisprudence makes it clear that in cases of children, the authorities must make an assessment of **necessity and proportionality and last resort** (see *Popov v. France and Rahimi v. Greece op. cit.*). The immigration detention of children may also reach the threshold of inhuman and degrading treatment, prohibited by Article 3 ECHR and Article 7 ICCPR.

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

100. In the present case, the Court finds that the length of detention of the children, over a period of fifteen days, whilst not excessive per se, could be perceived by them as never-ending, bearing in mind that the facilities were ill-adapted to their accommodation and age.
101. In addition, the applicants maintained that detention in this ill-adapted centre had subjected the children, especially the eldest, to a situation of stress that had entailed mental distress.

The Court would observe, like the Government, that these allegations by the applicants have not been corroborated by any evidence. However, in view of its findings as to the unsuitability of the premises for the detention of children, the Court does not doubt that this situation created anxiety, psychological disturbance and degradation of the parental image in the eyes of the children.

102. It can be seen from the foregoing that the conditions in which the children were held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied, added to the parents' distress, were manifestly ill-adapted to their age. The two children, a small girl of three and a baby, found themselves in a situation of particular vulnerability, accentuated by the confinement. Those living conditions inevitably created for them a situation of stress and anxiety, with particularly traumatic consequences.
103. Accordingly, in view of the children's young age, the length of their detention and the conditions of their confinement in a detention centre, the Court is of the view that the authorities failed to take into account the inevitably harmful consequences for the children. It finds that the authorities' treatment of the children was not compatible with the provisions of the Convention and exceeded the threshold of seriousness for Article 3 of the Convention to be engaged. There has therefore been a violation of that Article in respect of the children.

A.B. and others v. France, ECtHR, Application No. 11593/12, 12 July 2016

114. The court considers that such conditions, although necessarily significant sources of stress and anxiety for a child of a young age, are not sufficient, in the case of a short period of detention and in the circumstances of the case, to attain the level of gravity required to fall within the scope of Article 3. It is convinced, however, that beyond a brief period, the repetition and accumulation of these psychological and emotional assaults necessarily has negative consequences for a child of a young age, which exceed the aforementioned level of gravity. Therefore, the passing of time is of paramount importance regarding the application of this provision. The Court considers that this brief period was exceeded in the present case, which concerns the confinement of a child of four years old, prolonged for eighteen days in the conditions set out above.
115. In addition, taking into account the age of the applicants' child, the duration and the conditions of his confinement in the Toulouse-Cornebarrieu detention centre, the Court considers that the authorities subjected this child to treatment which surpassed the threshold of severity required by article 3 of the Convention. There has therefore been a violation of this article in regard to the child of the applicants.

Rahimi v. Greece, ECtHR, Application No. 8687/08, Judgment of 5 July 2011

Facts: This case concerned in particular the conditions in which a minor, a migrant from Afghanistan, who had entered Greece illegally, was held in the Pagani detention centre on the island of Lesbos and subsequently released with a view to his expulsion.

Analysis: The Court held that there had been a violation of Article 3 of the Convention in respect of the applicant's conditions of detention in the Pagani detention centre. Different factors gave cause to doubt the authorities' good faith in executing the detention measure, in violation of Article 5.1(f). Moreover, even assuming that the remedies had been effective, the Court failed to see how the applicant could have exercised them, and found a violation of Article 5.4.

Para. 108: in this case, the decision to detain the applicant appears to be the result of the automatic application of article 76 of law no.3386/2005, without examination of the particular situation of the unaccompanied minor [...]

Para. 110: It is moreover the case that, as the court has already noted in the context of article 3 of the Convention, the conditions of detention at the Pagani centre, notably concerning accommodation, hygiene and infrastructure, were so serious that they undermined the essence of human dignity. In view of the above, the Court concludes that the detention of the applicant was not "regular" in the sense of article 5.1.f of the Convention and that there has been a violation of this provision.

Several cases have highlighted the unlawfulness of detention, even where the child in question was accompanied by a parent:

In **Muskhadzhiyeva and Others v. Belgium**, *Application No. 41442/07*, 19 January 2010, the ECtHR ruled that the month-long detention in a closed transit centre of a mother and her four children, aged between seven months and seven years, constituted a violation of article 3 of the ECHR. In reaching its conclusions, the Court drew attention to the fact that the centre was "ill-equipped to receive children", with serious consequences for their mental health.

Popov v. France concerns the administrative detention of a family for two weeks pending their deportation to Kazakhstan, confirms this ruling. The ECtHR found a violation of article 3 of the ECHR insofar as the French authorities had not measured the inevitably harmful effects on the two children (who were five months and three years old) of being held in a detention centre in conditions that were "ill-adapted to the presence of children". The Court also found a violation of article 5 and article 8 in respect of the whole family and referred to article 37 of the CRC, which provides 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".

Similarly, in **Kanagaratnam v. Belgium** (*Application No. 15297/09*, 13 March 2012) the detention of an asylum-seeking mother and her three children in a closed centre for aliens in an irregular situation for four months amounted to a breach of articles 3 and 5 of the ECHR. Despite the fact that the children had been accompanied by their mother, the Court considered that, by placing them in a closed centre, the Belgian authorities had exposed them to feelings of anxiety and inferiority and had, in full knowledge of the facts, risked compromising their development.

In **A.B. and others v. France**, the Court held that detaining a four-year-old for eighteen days (with his parents) was contrary to article 3, considering the age of the child, the anxiety-provoking environment and the prolonged period (paras 110-115). These factors were also taken into account in **S.F. and others v. Bulgaria** (*Application No. 8138/16*, 7 December 2017), where three children (aged 16, 11 and one) were detained in cells "extremely run-down, with paints peeling off the walls and ceiling, dirty worn out bunk beds, mattresses and bed linen, and litter and damp cardboard on the floor" and where the applicants were forced to urinate on the floor due to limited access to toilet (paras. 84-87). During the first 24 hours of detention no food nor water was provided. The Court held that the detention which lasted between 38 and 41 hours in those conditions amounted to a violation of article 3.

In **Bilalova and others v. Poland** (*Application No. 23685/14*, 26 March 2020) the court considered that Poland did not correctly examine alternatives to detention of the children:

78. *The Court observes that when the authorities decided to extend their detention for three consecutive months, the child applicants had already been detained in the same center for almost two months. If the material conditions of reception of the interested parties seem to have been correct (...), this structure constituted, without a doubt, a place of confinement similar, in many respects, to penal institutions (...). The Court recalls in this context that, in the context of cases similar to the present one which it has had to consider, it found violation of the Convention in cases of detention - in structures similar to that in which the child applicants were detained - of young minors accompanied by their parents for periods of much shorter duration than the one criticized in the present case (...).*

79. *The Court notes that it follows from its well-established case-law on the matter that, in principle, the detention of young children in such structures should be avoided and that only short-term detention in adequate conditions could be compatible with the Convention, provided, however, that the authorities establish that they have resorted to this measure only as a last resort after actual verification that no other measure involving a lesser restriction of liberty could be implemented (...).*

80. *In this instance, while having regard to the reasons relied on by the national authorities in support of the contested measure, the Court considers that it does not have sufficient information to be satisfied that they have in fact sought to ascertain whether, in the particular circumstances of the present case, the detention of the child applicants was a measure of last resort which could not be substituted by any alternative measure (...).*

Restrictions on residence may also raise issues in regard to the right to respect for family life, where they serve to separate members of a family.⁷³

See also:

- [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#), ECtHR, Application No. 13178/03, Judgment of 12 January 2007.
- [Bistieva and others v. Poland](#), ECtHR, Application No. 75157/14, Judgment of 10 April 2018.
- ECtHR, Factsheet – [Accompanied migrant minors in detention](#), October 2019.
- ECtHR Factsheet – [Unaccompanied migrant minors in detention](#), June 2019.

EU law

Article 24 [Charter of Fundamental Rights of the European Union](#) provides that children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely.⁷⁴ Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity (para. 1). In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration (para. 2).

See also article 11.2 Reception Conditions Directive stating that: "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 (...) 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."

The Directive equally states in paragraph 3 that "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."

2. Persons with psychosocial disabilities

Detainees with psychosocial disabilities, who are mentally ill or who suffer from traumatic experiences require particular consideration where they are to be placed in immigration detention. Their detention raises questions as to (a) whether the person should be detained at all or whether more suitable alternatives can be found; and, if detention is warranted, (b) the appropriate form of detention, conditions of detention, and provision of medical care (ICJ, *Migration and International Human Rights Law - A Practitioners' Guide*, Updated Edition, 2014, p. 152).

Dybeku v Albania, ECtHR, Application no. 41153/06, Judgment of 2 June 2008, paras. 47 and 51.

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

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

Where the mental health condition of a detainee is caused or exacerbated by his or her detention, and where the authorities are aware of such conditions, continued detention may amount to cruel, inhuman or degrading treatment. In *C v. Australia*, the Human Rights Committee found a violation of article 7 ICCPR as a result of the prolonged detention of a person with serious psychiatric illness

⁷³ [Agraw v. Switzerland](#), ECtHR, Application No. 3295/06, Judgment of 29 October 2010. Also, *cfr. Module IV. Access to justice in the protection of migrant's rights to family life.*

⁷⁴ *Cfr. Module V, section II.3. The right to participate and to be heard.*

which the authorities knew had come about as the result of his detention and which by the time of his eventual release, was so serious as to be irreversible.⁷⁵

3. Persons with serious illness

Cases of seriously physically ill persons have been considered by the ECtHR. In the case of *Yoh-Ekale Mwanje v. Belgium*, Application No. 10486/10, 20 March 2012, the ECtHR observed that the applicant had a serious and incurable disease, which the Belgian authorities were aware of, and which had worsened while she was detained. There was a delay in the applicant being examined by hospital specialists and in administering appropriate treatment. The Court considered that the authorities had not acted with due diligence in taking all measures reasonably expected of them to protect the applicant's health and prevent its deterioration whilst she was detained. This exposed her to suffering over and above that expected for someone detained, with HIV, facing deportation, which constituted inhuman and degrading treatment.⁷⁶

4. Persons with disabilities

Where persons with disabilities are detained, measures are taken to ensure that conditions of detention are appropriate to their level of disability.⁷⁷ Under Article 14 Convention on the Rights of Persons with Disabilities, States parties must "ensure that if persons with disabilities are deprived of their liberty they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation." Article 2 of that Convention defines reasonable accommodation as "all means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

5. Survivors of torture and other forms of ill-treatment

Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatized persons among them so that appropriate treatment and conditions can be provided for them.⁷⁸

Being a victim of torture/traumatized asylum seeker is a personal circumstance, which has to be taken into account when examining the necessity of detention. Detaining someone who is a victim of torture/traumatized asylum seeker might have severe consequences on his/her mental health,⁷⁹ which might be disproportionate to any legitimate objective pursued by the government when detaining such a person.

According to UNHCR's detention guidelines (guideline 9.1), victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.

6. Rights of detained women and girls

Women held in immigration detention often face particular difficulties. These may include instances of gender-based violence or harassment, including sexual violence and abuse, perpetrated by both State actors and detainees; absence of childcare; inadequate and inappropriate provision of health-care, goods and services needed by women; as well as other forms of gender discrimination. According to UNHCR Guidelines on detention (guideline 9.3) pregnant women and nursing mothers should not be detained.⁸⁰ Alternative arrangements should take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.

⁷⁵ See also cfr. Module III, section V. *The right to the highest attainable standard of health.*

⁷⁶ See also cfr. Module III, section V. *The right to the highest attainable standard of health.*

⁷⁷ *Asalya v. Turkey*, ECtHR, Application No. 43875/09, Judgment of 15 April 2014; *Price v. United Kingdom*, ECtHR, Application No. 33394/96, Judgment of 10 July 2001, paras. 25-30; *Farbtuhs v. Latvia*, op. cit., para. 56; *Hamilton v. Jamaica*, HRC, Communication No. 616/1995, Views of 23 July 1999, UN Doc. CCPR/C/50/D/333/1988.

⁷⁸ Council of Europe CoM recommendation R(1998) Guideline 10(i).

⁷⁹ Jesuit Refugee Service, *Becoming Vulnerable in Detention* - Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (*the DEVAS Project*), June 2010, FRA, *Alternatives to detention for asylum seekers and people in return procedures*, 9 October 2015; and Odysseus, *Alternatives to Immigration and Asylum Detention in Europe for Implementation*, January 2015

⁸⁰ *Mahmundi and others v. Greece*, Application No. 14902/10, Judgment of 31 July 2012.

7. Rights of LGBTI+ detainees

Within places of immigration detention, LGBTI persons often become marginalised; vulnerable to identity-based abuses in their home countries, and again forced to endure identity-based abuses in the detention environment. LGBTI persons in immigration detention are at a heightened risk of marginalisation, discrimination, and violence, both at the hands of fellow detainees and detention centre personnel.⁸¹

The European Court for Human Rights has stated that in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee.

O.M. v. Hungary, ECtHR, Application No. 9912/15, Judgment 5 July 2016”

53. Lastly, the Court considers that, in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran (see, *mutatis mutandis*, *Alajos Kiss v. Hungary*, no. [38832/06](#), § 42, 20 May 2010).

54. As a consequence, in the absence of a specific and concrete legal obligation, which the applicant failed to satisfy, Article 5 § 1 (b) of the Convention cannot convincingly serve as a legal basis for his asylum detention. The foregoing considerations, demonstrating that the applicant’s detention verged on arbitrariness, enable the Court to conclude that there was a violation of Article 5 § 1 of the Convention in the period from 7 p.m. on 25 June to 22 August 2014 (see, *mutatis mutandis*, *Blokhin v. Russia* [GC], no. 47152/06, § 172, ECHR 2016).

⁸¹ International Detention Coalition, [LGBTI Persons in Immigration Detention](#), Position Paper, June 2016, p. 9.

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