



DETENTION IN EUROPE

Administrative Detention of Asylum-seekers and Irregular Migrants

The European Parliament “is concerned at the plight of foreigners being deprived of their freedom in holding centres despite the fact that they have been charged with no crime or offence” and “calls for holding centres, in particular holding centres for asylum-seekers, to meet human rights standards.”

Report of the European Parliament’s Committee on Citizens' Freedoms and Rights, Justice and Home Affairs on the situation as regards fundamental rights in the European Union (2003), 22 March 2004, no. 27

Jesuit Refugee Service (JRS) – EUROPE

Observation and Position Document

18 October 2004

From time to time this Observation and Position Document will be complemented and updated. Each update will be available at:

www.detention-in-europe.org,

a website, which JRS-EUROPE created and maintains. It is dedicated to detainees in Europe and it provides, *inter alia*,

DOCUMENTATION
STORIES
PHOTOS
LINKS

The LINKS are primarily links to those institutions and organisations in Europe, whose personnel visits detainees.

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OVERVIEW AND SUMMARY

The Jesuit Refugee Service (JRS)¹ is a global Catholic organization, which was founded in 1980 and whose mission is to accompany, serve and defend the rights of refugees and forcibly displaced people regardless of their religious affiliations. JRS often works in or with interfaith teams. The regional office of JRS-EUROPE in Brussels networks with JRS staff in 22 European countries. JRS personnel in Europe accompany *inter alia* detainees and former detainees. Based on the experience from this work and on JRS-EUROPE's research, JRS-EUROPE has developed this "Observation and Position Document" on detention. The purpose of this document is to inform and to alert, but also to advocate the rights of detainees.

Both irregular immigrants and increasingly asylum applicants are detained, i.e. deprived of their right to freedom of movement. However, the general public in Europe, decision-makers and the media know hardly anything about these "new camps in Europe".

JRS-EUROPE points out that in Europe there is neither a common definition of "detention" nor of "detention centres". Therefore "detention centres" can also be called, for example, "reception centres" and thus mislead the public. JRS-EUROPE presents a preliminary inventory of more than 200 "detention centres" in 24 European countries². JRS-EUROPE examines the underlying EU policies of detention, EU legislation as well as national legislation of 14 European States³, the ECHR and Public International Law. JRS-EUROPE concludes that there is an alarming legislative deficit as well as worrisome discrepancies between, on one hand, law and, on the other hand, the application of law. JRS-EUROPE complements the legal and political research with ethical considerations and theological, pastoral and spiritual reflections. JRS-EUROPE stresses the need for more action in order to make the EU a genuine "area of freedom, security and justice" (EU Amsterdam Treaty) and to make also the "wider Europe" a world region firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law.

JRS-EUROPE has developed positions and recommendations, *including*:

- JRS-EUROPE urges European countries to avoid the use of detention, at least to
 - provide for a time limit of detention and
 - ensure a minimum of rights of people being detained, concerning, for example,
 - the right to be visited,
 - the right to health care and
 - the protection of minors and families.
- JRS-EUROPE asks the EU Commission to set up an EU body, which monitors and periodically reports on the development of national legislation on detention and detention practices in the EU Member States as well as in the EU Candidate Countries and their non-EU neighbour countries.

This "Observation and Position Document on Detention" will be updated from time to time. Updates as well as further information will be available at www.detention-in-europe.org, a website of JRS-EUROPE dedicated to detainees in Europe.

The following short table of contents indicates major focal points.

¹ www.jesref.org

² Austria, Belgium, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Luxemburg, Malta, Netherlands, Poland, Romania, Russian Federation, Spain, Slovakia, Slovenia, Sweden, Turkey, Ukraine, and United Kingdom

³ Belgium, Czech Republic, France, Germany, Ireland, Italy, Malta, Poland, Romania, Russian Federation, Slovakia, Slovenia, Ukraine, and United Kingdom

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FOREWORD

By Jan Stuyt SJ, Regional Director of JRS-EUROPE

Detention: A prominent political concern

The *United Nations High Commissioner for Refugees, Mr. Ruud Lubbers*, declared in November 2002 in a statement at the United Nations that there is “a more general trend towards increased use of detention, often on a discriminatory basis” and that this “is worrying”.⁵

In January 2004 the *UN Secretary General, Mr. Kofi Annan*, heavily criticized the policies of the European Union towards refugees and migrants. In a speech to the Members of the European Parliament he spoke of “offshore barriers” and of “refused entry because of restrictive interpretations” of the Geneva Convention relating to the Status of Refugees. He stated that refugees are “detained for excessive periods in unsatisfactory conditions”.⁶

Two months later, in March 2004, the *European Parliament’s Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs* wrote in its “Report on the Situation as regards Fundamental Rights in the European Union” that it “is concerned at the plight of foreigners being deprived of their freedom in holding centres despite the fact that they have been charged with no crime or offence; and calls for holding centres, in particular holding centres for asylum-seekers, to meet human rights standards.”⁷

Exclusion and closed borders in the history of Europe

During the 20th century in Europe, refusal of the right of free movement has had a frightening history. Jews, Roma, homosexuals and resistant fighters and civilians were ghettoised and deported to concentration camps. Neighbouring countries often denied refugees access at their borders. After the Second World War, the post of United Nations High Commissioner for Refugees was established, and the 1951 Refugee Convention was signed. The countries that formed the European Community at that time attacked, during the Cold War, the countries of Eastern Europe for refusing free movement to their people. It is ironic that these same Western States now refuse free movement to people in need of protection, and furthermore expect new EU Member States to do the same – those countries which they attacked only 30 years ago for refusing free movement. Detention of unwelcomed migrants is increasingly used as a means of deterrence and as preparation for removal.

Jesuit Refugee Service (JRS)

Jesuit Refugee Service (JRS) in Europe is concerned about the increased use of detention and the conditions in which detainees are held.

⁵ Statement, New York, 7 November 2002; www.unhcr.ch

⁶ www.un.org/apps/news

⁷ Report of the European Parliament’s Committee on Citizens' Freedoms and Rights, Justice and Home Affairs on the situation as regards fundamental rights in the European Union (2003), 22 March 2004, no. 27

JRS is an international Catholic organization, whose mission is to accompany, serve and defend the rights of refugees and forcibly displaced people. JRS undertakes services at national and regional levels with the support of an international office in Rome. JRS was founded in 1980 as a work of the Society of Jesus, an order of religious men in the Catholic Church, better known as “the Jesuits”. More than 600 women and men, among them 120 Jesuits, work for JRS in 47 countries all over the world. In total, more than 375.000 individuals are direct beneficiaries of JRS projects.

JRS-EUROPE in Brussels is registered as an AISBL, an international non-profit organisation according to Belgian law. JRS-EUROPE is operational in ten European countries and has contact persons in twelve other European countries, inside and outside the EU. The ten European countries in which JRS currently has projects are: Belgium, Germany, Ireland, Italy, Malta, Portugal, Romania, Slovenia, Ukraine and the United Kingdom. A separate office, JRS South East Europe, coordinates activities in Croatia, Bosnia, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia. Salaried staff and volunteers working for JRS in Europe accompany refugees, asylum-seekers and migrants, some of whom are or were in detention centres.

In several places in Europe, JRS encourages and takes part in academic research, such as the Universities of Oxford in the United Kingdom, and Deusto, in Bilbao, Spain. Among the publications produced or commissioned by JRS-EUROPE are:

- JRS Conference Report, JRS and detention of forcibly displaced persons, Conference on immigration detention, St. Georgen. Frankfurt/Germany, 1999⁸;
- Joerg Alt, *Illegal in Deutschland*, Karlsruhe 1999;
- Matthew Gibney, *Outside the Protection of the Law: The situation of Irregular Migrants in Europe*, Synthesis report commissioned by JRS-EUROPE, Oxford University 2000;
- Lena Barrett (Ed.), *Voices from the shadows*, Brussels 2001;
- Joerg Alt, *Leben in der Schattenwelt*, Berlin/Karlsruhe 2003;

About this JRS-EUROPE “Observation and Position Document” on detention

Based on its experience in the field, reflection, research and evaluation, JRS-EUROPE has developed this “Observation and Position Document” on detention.

The Treaty of the European Union as amended in Amsterdam in 1999 aims for the European Union to be established as “an area of freedom, security and justice” (Article 61). JRS-EUROPE regards this “Observation and Position Document” as a contribution to achieve these goals of freedom, security and justice not only for the citizens of the Member States of the European Union, but also for refugees and other victims of forced migration who have come and continue to come to Europe. Key conclusions include the following:

- *The increased use of detention, arbitrary or not arbitrary, should not be the answer of the European Union to the number of asylum-seekers and growing number of irregular migrants coming to the EU.*
- *Legislation on detention of asylum-seekers and irregular immigrants is very diverse in the EU Member States.*

⁸Published by JRS-USA

- *It is in many cases seriously flawed or offends against fundamental human rights principles. In so far as legislation exists, it is often not applied.*
- *Children should never be detained.*
- *Governments should respect that persons in detention have rights: to appeal against their detention, to be visited, to have health care and not to be separated from their family members who are also detained.*
- *The EU lacks, at present, a body that could effectively monitor legislation on detention and detention practices.*

In this document there are several reflections on ethics and pastoral theology. We decided to include these articles because they explain where we come from and what our inspiration is. In Europe it is no longer fashionable to talk about one's religious inspiration outside the private domain - and there are very good reasons to keep religion out of politics. But pastoral care is an integral part of our mission, and we receive questions about our gospel inspiration from both the detainees and from our sponsors and colleagues.

This document intends to alert and to guide political and administrative decision makers in Europe, journalists, services of the church and of other religious institutions, NGO's and all those who are involved in attending to the needs of people who seek protection and dignified livelihoods in Europe.

Acknowledgements

I wish to express deep gratitude towards those who contributed to this document, who are (or were) colleagues in JRS and who are mostly in the field with detainees: Milena Bajt, Mihai Benchea, Dusan Bezak SJ, Anne Christine Bloch, Cornelia Bührle RSCJ (editor), Katrine Camilleri, John Dardis SJ (my predecessor as Director of JRS-EUROPE), Norbert Frejek SJ, Anna Marie Gallagher, Rik de Gent SJ, Pierre Grec SJ, Bernd Günther SJ, Michel Guery SJ, Michael Hainz SJ, Eddy Jadot SJ (first Director of JRS-EUROPE), Carola Jiménez-Asenjo, Stefan Kessler, Michael Koop SJ, Stjepan Kusan SJ, Francesco de Luccia SJ, Pierre Meyers SJ, Shana Mongwanga, Barbara Müller RSCJ, Dieter Müller SJ, David Nazar SJ, Joseph Poncin, Christophe Renders SJ, Frank Sammon SJ, Corina Sandersfeld, Isabelle de Sazilly, Georg Schmidt SJ, Stefan Tauebner SJ, Flavia Vianello, Renaud Gaudin de Villaine and Louise Zanré.

JRS-EUROPE owes special gratitude to those who are not JRS staff, to: Markus Babo, Klaus J. Bade, Eleanor Edmond, Madeline Garlick, Caroline Intrand, Peter Knauer SJ, Alex Müller, our Anglican friend John Riches, Joan Roddy, and Bartek Tokarz. I wish to thank particularly Silvia Fowler who assured the necessary translation from German into English.

In so far as national legislation is concerned, I want to thank various representatives of EU Permanent Representations and EU Permanent Missions who helped to establish the section "National legislation". Their co-operation was very encouraging.

I also want to thank all those who want to or who have to remain "in the dark".

I apologize for any oversight in acknowledging other contributors by name. This is not intentional: we have been fortunate in the generosity of so many people that it is too easy

to miss one name out. It almost goes without saying that we are also extremely grateful for your help.

We hope that this document be well-received and welcomed by all those who care about the fate of detained asylum-seekers and irregular migrants in Europe and that it will be useful to you all in your work for detainees.

EXPLANATORY NOTES

Language

JRS-EUROPE regrets and apologizes that this Observation and Position Document is only available in English. JRS-EUROPE is an organisation, which is too small in order to take care of the translation of such a comprehensive document into another language, let alone into all European languages.

JRS-EUROPE also asks native English speakers for their understanding of the limitations of the language used. This Observation and Position Document is deliberately a document in simple English to make sure that everybody, who is not an English native speaker, can understand this document easily.

As far as we have been able, JRS-EUROPE has tried to be faithful to professional language, for example legal terminology.

Distinctions

JRS-EUROPE tries to make a clear distinction between facts and judgements.

Religious beliefs

In so far as this document is dealing with ethical and religious points, it intends to be respectful towards all religious beliefs. At the same time, it tries to describe and outline specific approaches of Christian belief, in particular within the frame of Roman-Catholic tradition.

Country reports

In this document, JRS-EUROPE abstains from country reports, whether these are reports from JRS offices or reports from other organisations and institutions. Governments often contest facts in such reports, and often the objective truth of reports is conditioned by small details. JRS-EUROPE wants this document to be honest and true and thus leaves country reports - i.e. an inventory of what, on hand, law provides or should provide for, and, on the other hand, how law is or should be being executed - to the future.

European Detention Conference

Against this background JRS-EUROPE will try to initiate, with others, a “European Detention Conference”, during which country reports by various non-governmental organisations and institutions, whose representatives have access to detention centers, can be compared with facts being presented by governments. A previous conference has already taken place at St. Georgen, Germany in 1999 upon invitation of JRS.

Global detention coalition

JRS-EUROPE regards this document as a possible contribution to a possible global coalition focussing on detention issues. JRS set up a meeting of NGOs involved with

detention of refugees, asylum-seekers and migrants, in Geneva in March 2004, to begin the process of developing a global coalition.

Choices of countries

This document deals with countries in Europe in two contexts: when trying to make a preliminary inventory of detention centers and when summarizing essential national legislation.

By making a preliminary inventory of detention centers in 24 countries in Europe, JRS-EUROPE wants to show that detention is not a marginal phenomenon in a handful of countries, but a phenomenon in all European countries, especially in EU Member States.

However, the personnel capacities of JRS-EUROPE are too limited in order to analyze and summarize national legislation of all those 24 countries. JRS-EUROPE had to focus, and thus selected 14 countries, which are either representative in Europe or where JRS staff in Europe is particularly involved in detention issues.

Advocacy tool

This document is, *inter alia*, an advocacy tool. This is one of the reasons why it is so long. It intends to be a service tool at several levels: Council of Europe, EU as well as at national and regional/local level.

It tries to provide basic information and reflections as a background for non-governmental organisations and institutions in particular at the national level.

EU legislation, which already exists or which might be coming up and which needs to be transposed into national law, as well as present and future national legislation can be compared with binding law of the European Convention on Human Rights and with Public International Law.

Each user can choose what might be helpful and/or further develop the section(s) of particular interest.

PART I:
INTRODUCTION

1. Visiting detainees

1.1. “It is harder for the detainees than it is for me”

By Shana Mongwanga, JRS-United Kingdom

I was anxious about the moment I would have to actually go and visit a refugee or asylum-seeker in a detention centre. Although I suspected it was going to be something really hard to do, the difficulty was not where I expected it to be. It is hard to go and meet people deprived of their liberty. And selfishly, I thought it would be hard for me to see the pain, frustration, and anger of detainees. Indeed, it not an easy thing.

But I forgot something very important: It is harder for the detainees than it is for me.

“It’s worse than being in prison”, said one detainee I visited. “At least when you are in prison you can reasonably know for how long you are there and why.”

“You haven’t committed any crime, except asking for a better life for you and your family”.

I also now realise that detention is another world. It is a world apart, where the detainee is treated as being guilty, until proven innocent, guilty of “wanting to profit from a system and absolutely not willing to contribute to it”.

As an individual I am learning a lot from people I visit. I realise how lucky I am to be literally “free”, to have a place to live, a place to work, to have family and friends, to have rights and be able to chose a competent person to represent me, if those rights are challenged. When you are detained, you lose access to most of these things we all take for granted.

Now when I visit someone in a detention centre, I keep all that in mind and try to the best of my ability to give support, hope, courage and love. As a friend, for the rest of his journey, wherever it may end.

1.2. Sergei

By Michael Koop SJ, JRS-Germany

Sergei looks like an adult, but in reality he is a youngster. About 1,85 m tall. Open face. Vivid eyes. I introduce myself and ask him how he is. He puts his head close to the bars, which separate us. He talks to me about private things, his home, his childhood.

Sergei is from Ukraine. He grew up with his mother, has never met his father. “Mother was great. She made us both survive. She worked hard, I helped her, and she taught me a lot of things. She was very knowledgeable, she had studied economics.”

I ask him about school. “I was an external student. That exists in my country. In 1999 I graduated from secondary school.”

“In my whole life there I had never anything to do with the police. Policemen are badly paid, you know. Also, there is the Mafia. They are everywhere. It is difficult to get a job without them.”

In 2000, Sergei’s mother died. “She had many problems with her heart. Now I did not know where to go. I did not even know if I had relatives or not. I had to leave the place where my mother and I lived. The landlord had given notice. For a little while I could stay with friends of my mother’s. But I did not find work.”

Sergei reflected upon his situation and future. Then he decided to leave his country and go to Germany. “Mother had always told me how important it is to take decisions. It could have been England, France or Italy, too. But I chose to go to Berlin with an acquaintance of mine.”

Sergei spent two months in Berlin. “Everything was different and unknown, all the traffic, and so many people in the streets. The language was only like a noise, which I did not understand.”

Sergei got caught in a police documentation control exercise. He did not have valid documents. “I spent my 17th birthday in detention. Detention is too long. People expect too much from the guards, then they are often in a bad mood and we get to feel it. Sheets are not regularly changed, and you get only one -hour fresh air outside, often at 8 o’clock in the morning. I get headaches. The first-aid attendant told me to drink two litres of water each day, and then it would get better. But it did not get better. I got a water belly and my eyes got very bad. Although I asked for help, nobody helped me. Some of my teeth got rotten.”

Sergei stayed in detention for 11 months, before he was transferred to a public home for minors.

He is not only physically, but also psychologically in bad shape. “I suffer from depression.”

1.3. Pastoral care – To care from the heart

By Barbara Müller RSCJ, JRS-Germany

For some time I have been working as a JRS volunteer in the Eisenhüttenstadt detention centre (East Germany). Usually, there are 40 - 60 people, around 75% men and 25% women detained there. They are NOT criminals, but are only staying in Germany “illegally”. Either their residence permit has run out or they travelled without valid visas in the first place. Maybe their application for asylum has been rejected because they could not prove political persecution at home, or they came to escape from economic poverty in their home countries.

I have come face to face with human beings from over 50 countries, including China, Vietnam, Mongolia, India, Iraq, the Baltic States, Ukraine, several Russian republics; I have met Kurds, Turks, Yugoslavs, Africans and women who had been tricked into prostitution from as far away as Latin America. Communication is a problem: they cannot speak much German, sometimes a little English or French; a knowledge of Russian is/would be very useful. With the women, body language is a great help: I hold their hands and offer them a shoulder to cry on.

And what can we do for them? A Jesuit and I visit them once a week. We help them to understand legal documents and detention decisions issued in German. Sometimes we write powers of attorney, petitions or letters for them and fill in forms because without adequate knowledge of German they cannot do this for themselves.

As for pastoral care, we are guided by what troubles them most. For example, JRS provides funds to buy them newspapers in their mother tongues; occasionally we make contact with lawyers, forge ties with other refugee organizations or with specialists from the Caritas service (for women in prostitution who are threatened by criminal proceedings). The frustrating thing is that you often get no feedback as to how successful such assistance has been, as it is impossible to follow each case individually. But I think what matters, is that people in detention meet at least some Germans who show them goodwill and kindness instead of exclusively pursuing their forcible return.

Of course we also hold religious services for those who express a desire to attend, but more important is caring action, visiting and talking with them, for we “pastoral carers” are the only visitors they have and the only people allowed to move more or less freely within the prison confines.

Now and then one or other of them is released, i.e. they are allowed (for the time being) to remain in Germany, for example a Chechen family or Afghans, Iraqis... But most of them are forcibly returned to their home countries. It has struck me that it is not unusual for them to find a certain comfort in returning to their parents, or sometimes children, though there are others who resist forcible return “tooth and nail”.

Anyone who had to flee or was expelled from their home in the aftermath of World War II cannot but feel deep sympathy and concern for these persons.

1.4. “It took three years”

By Mihai Benchea, JRS-Romania

It took three years for JRS-Romania to get permission to visit the detainees in the detention centre near Otopeni airport in Bucharest. Staff of JRS-Romania began in 2000 by presenting project proposals, plans for small activities, proposals for an agreement on visits to the competent public authorities. It was a struggle: No answers, no feedback, not any sign of opening the doors for somebody willing to visit irregular immigrants, undesirable refugees on Romanian territory. It was a challenge not to give up. Finally, in November 2003, we succeeded.

We began to listen and to accompany people forced to stay in a closed facility, without friends and family. Since then, in Otopeni, JRS-Romania has met people coming from diverse cultures with different traditions, religious beliefs and attitudes. We meet persons with psychological problems and particular social needs because they are detained. We meet persons who look and wait for somebody to talk to, somebody who listens to them. We meet persons asking for legal support, persons asking for a priest or any other pastoral worker. They are not murderers. They are not criminals. Their only offence is being in a country where they are not supposed to be.

“I have a boy and I am forced to stay in detention. My child can be free but me, no. What can my child do alone on the street?” said one person from Russia.

An Iranian refugee said: “I have humanitarian protection, but I don’t have the right to move freely. There is no country which would accept me and where I could lead a normal and peaceful life because they don’t accept the Romanian travelling document. I am undesirable for all countries”.

“My family is in the Arab Emirates”, said a Bangladeshi. “I want to be a medical doctor, and I started my studies in Romania. I want to have a family, I want to live in Romania. I like Romania and the people from here. Now I am Christian and I want to get married to a lovely Romanian woman. The policemen here tell me that I am intelligent and a good guy, but they don’t allow me to be free...”

They are waiting for us. They know that JRS staff visits each Wednesday. They ask us to be mediators between them and the public authorities, they ask us to help them to get better treatment in detention, better food and easier access to the asylum procedure. They ask us to help them to obtain legal status in Romania.

We do what we can. But we are not political decision-makers, and we are not legislators. We are only JRS in Romania.

1.5. “Quiet violence of the system”

By Eddy Jadot SJ, JRS-Belgium

At my weekly visits to the detention centre, I have regularly met Maham Nadiya, 10 years old, her 4 younger brothers and sisters, and her parents. They had first lived in an open centre, their children attending the village school. Their asylum claim was finally rejected, although the family belonged to a minority group harshly persecuted by the majority Muslim community in their country. They were sent to the closed “Repatriation centre”. Each time I would enter the family wing – 40 residents including 27 accompanied minors – Nadiya would run to me, smiling, and politely ask, in her already fluent Dutch: “When shall we go back to school with our Flemish friends?” I soon understood that those children were victims of a real psychological harassment, provoking their parents’ sadness, concern and stress: the kids were losing the best of their young life, “playing” in the corridor, filling their lungs with the smoke of adult cigarette smokers. In spite of the injustice of being detained and their suffering, Nadiya’s parents, as with most adult detainees, always retained their dignity. Their moral strength still arouses my high esteem for them.

More recently, for nine weeks in succession, I met 8 women from the Democratic Republic of Congo (DRC), with the same “itinerary”: after landing at Brussels airport on different days in October 2003, none of them was allowed to enter the territory; they were transferred from one closed centre to the other, ending in the “Repatriation centre”. Purposely circumventing the spirit of the law on foreigners, the Administration detained them for a total duration of 7 to 11 months. Six of them experienced between 5 and 13 expulsion attempts, some suffering severe cruelties from airport police – like being left totally undressed for several hours – a way of convincing them to embark on a flight to Kinshasa. Each week, I gave them the time they desired to share their stories, and support in their distress, as they remained scared at the prospect of being returned to their country.

In my 2 ½ years as a visitor, I noticed how much the inhumanity of detention centres has increased, together with the hypocrisy of the Belgian Federal Executive, repeatedly speaking of “humanizing” foreigners’ detention and expulsions. What we are witnessing is the well concealed and quiet violence of the system itself, leading to a continuous decline not only of the right to asylum but simply of individual basic human rights. I am therefore convinced that the individual pastoral care I can offer to my sisters and brothers in detention has to go hand in hand with a strong will to speak up for them and to fight for their rights.

1.6. "I lost 2 children, and I don't know where they are..."

Interview by Milena Bajt, JRS-Slovenia

This interview took place in a special room in a detention centre:

QUESTION: How was it where you come from?

ANSWER: Back at home... I am from Afghanistan, from the town of Kabloidi. The situation is very bad. War. They beat people, they beat young women. My husband was a member of the Party but they took him and they beat me. My husband escaped and then they came to our home and they beat us, me and my mother. We later escaped. We were caught by the police and then we were beaten again. I came here but I don't know where my 2 children are. They were left behind somewhere on the way. I don't know where they are at all. (She is crying all the time.)

QUESTION: What was your journey like? How long were you thinking of leaving?

ANSWER: I was thinking of leaving Afghanistan for a long time but I couldn't. I did not have money. I didn't have the possibility. Then my husband borrowed money for us so we could flee. Now my husband is in England, and I am here with 2 children (14 and 16 years old).

QUESTION: Your husband is in England...?

ANSWER: Yes, he is there illegally. We all wanted to go to England but it didn't work out. We didn't have money. Now I'm here without my family. They have killed them as they did many others. Children without fathers, without parents.

QUESTION: Where are you heading for?

ANSWER: To England, to my husband.

QUESTION: What do you expect from England?

ANSWER: Human rights.

QUESTION: Where did you get information about the journey?

ANSWER: My husband got the information. But I think that it's not so difficult to get it. You ask in an inn or on the street.

QUESTION: With whom did you travel? Who helped you?

ANSWER: A friend of my husband helped us. I wasn't fleeing alone. With me were my children and then a group of other people who also wanted to go to Europe. I didn't know them.

QUESTION: And the experience of your journey?

ANSWER: It was hard and I was in fear all the time we were hiding. I lost 2 children and I don't know where they are.

QUESTION: Where and how did your journey end?

ANSWER: We were caught by the police. I don't know where. I wanted to buy some food for me and the children. I didn't have any documents so the police took us to a police station and now I'm here.

QUESTION: How is it here in the Detention Centre? How long have you been here?

ANSWER: One week.

QUESTION: What is it like here?

ANSWER: Everybody is nice. But it's not nice here. We are in prison, we can't get out, we can't go further. Sadness and boredom. I'm bored.

QUESTION: What do you miss most?

ANSWER: My children, my husband and freedom.

QUESTION: How are your relations with the other detainees?

ANSWER: I don't understand anybody.

QUESTION: With employees?

ANSWER: They're nice, they do what they can.

QUESTION: What do you think is going to happen to you?

ANSWER: I don't know. I will go further, I have to find my family.

QUESTION: And if you get sent back? Would you try again?

ANSWER: They cannot send and they may not send us back. I cannot go back home.

QUESTION: Your plans for the future?

ANSWER: To find my children and to go to England.

QUESTION: Where do you see yourself in 5 years?

ANSWER: With my husband.

QUESTION: If you were the director of this centre, what would you change?

ANSWER: So it would not be a prison.

2. Preliminary remarks

2.1. **Retrospective: The context of asylum and immigration policies in Europe**

Until about 30 years ago, “asylum” and “immigration” were two distinct concepts in Europe. It did not constitute a problem to distinguish between an “asylum-seeker” and an “immigrant” because the terms of reference were basically clear.

An “asylum-seeker” was regarded as a political refugee having been forced to leave her/his country of origin to save her/his life. An “asylum-seeker” was regarded as a “forced migrant”. Everybody else was considered to be an “immigrant”, i.e. a “voluntary migrant”. This is very well reflected in the history of asylum and immigration law, but also on the history of asylum and immigration policies in Europe.

The old EU Member States used to offer a relatively generous reception to political refugees. It was the time of the Cold War, when refugees came primarily from countries of the Warsaw Pact⁹ or from countries in a state of (civil) war with those States, which were political adversaries of EU Member States¹⁰. Eastern European governments granted asylum to political leaders whose communist regimes were overthrown.

As far as immigration was concerned, many of the old EU Member States received large numbers of “labour immigrants” on a contractual basis because workers were desperately needed to assure economic growth. Countries of the Warsaw Pact invited “labour immigrants” too, small numbers from ideologically allied countries to express political friendship among the members of the communist world.

But then, communism in Europe collapsed, the Berlin wall and the Iron Curtain disappeared. What had been desired so much, in the East as well as in the West of Europe, became reality: the liberty of free movement. A new era began: the new mobility of humankind.

During the last two decades the number of refugees, who were seeking refuge in Europe, in particular in EU Member States, increased considerably. Yet, only 20%¹¹ of the global refugee population came to Europe.¹² The vast majority of people, who had to flee to save their lives, were and still are received in the poor regions of the world.¹³

Still, asylum policies in Europe changed radically. Commencing about 15 years ago¹⁴, political decisions in the old EU Member States began to aim at reducing the number of entries and discourage new requests for protection because the number of refugees applying for asylum had increased dramatically.¹⁵ The old EU Member States tightened their refugee policies. Wealthier “host” nations started to implement increasingly

⁹ For example from Czechoslovakia, Hungary, Poland

¹⁰ For example from Afghanistan during the Russia-Afghanistan war

¹¹ Rounded number

¹² Cf. UNHCR Population Data Unit (Population and Geographic Data Section), 1 January 2003

¹³ 1 January 2003 (number of people under protection of UNHCR): Asia (9,378,900), Africa (4,593,200), Europe (4,403,900), North America (1,061,200), Latin America & Caribbean (1,050,300), Oceania (69,200); UNHCR Population Data Unit (Population and Geographic Data Section); www.unhcr.pl/english/newsletter/21/liczby.php

¹⁴ In some EU Member States even earlier

¹⁵ Cf. Population Data Unit, UNHCR

restrictive border control systems.¹⁶ Only a comparatively low number of people were granted asylum or other forms of humanitarian protection.¹⁷

At the same time, EU immigration policy was no longer aiming at encouraging immigration of “labour immigrants”, but, little by little, focusing upon “integration policy”. The need for the integration of former “labour immigrants” and their family members had become evident.

Political leaders in the old EU Member States thought that the relevant laws could enforce asylum and immigration policies as well as integration policies. But the reality turned out to be different.

A new phenomenon came into being: “irregular migration”, i.e. migration movements, which were not provided by asylum and immigration policy and law. “Irregular immigrants” did not fit into existing patterns. It became ever more difficult to determine who was a “real” refugee, who was an “asylum-seeker” or a “voluntary migrant” because the degrees of what needs to be considered as “voluntary” and “involuntary” migration moved into a state of flux.¹⁸ Migration movements took on the characteristics of “mixed flows”; the “migration-asylum nexus¹⁹” was discovered.²⁰

The old EU Member States competed with each other towards a lowest common denominator in refugee protection in order to keep refugee numbers low. In fact, the number in official statistics went down, but not the number of people - irregular immigration increased.

Since the EU Amsterdam Treaty (1999), establishing “an area of freedom, security and justice”,²¹ and the EU Council meeting in Tampere/Finland (1999), the old EU Member States have been trying to cope with the migration – asylum nexus. The Tampere Presidency Conclusions state: “From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.”²² This points to what often, at the time, was referred to as the highly promising “spirit of Tampere”²³. An enlarged European Union would make no cuts in human rights, democratic institutions and the rule of law. After years of stingy discussions in EU Member States about their national asylum and immigration legislation and their reciprocal competition towards lowest common denominators, there would finally be concerted efforts. The EU would be “an open and secure European Union, fully committed to the obligations of the Geneva Refugee

¹⁶ Cf. Australian Bishops Conference, *The Call to Hospitality*, North Sydney, Australia, 2002; page 20

¹⁷ Cf. Population Data Unit, UNHCR

¹⁸ Cf. Georg Cardinal Sterzinsky, *In der Kirche ist niemand fremd*, speech at the Pontifical Gregorian University, 20 February 1995; cf. UNCHR Report 1996

¹⁹ “Nexus” (Latin) means “inter-linkage”, describes a situation when things are intertwined.

²⁰ Cf. Office of the United Nations High Commissioner for Refugees, 54th session of the Executive Committee, Geneva, 29 September – 3 October 2003; cf. Communication from the EU Commission, Study on the links between legal and illegal immigration, COM (2004) 412 final

²¹ Cf. Article 61

²² Tampere Presidency Conclusions, 1

²³ For example by EU Justice and Home Affairs Commissioner, Mr. António Vitorino: Outcome of the European Council of 15/16 October in Tampere, Debates of the European Parliament, 27 October 1999

Convention and other relevant human rights instruments”, and the Union wanted to be “able to respond to humanitarian needs on the basis of solidarity”²⁴.

Against this background, the EU agreed upon a number of asylum and immigration elements, and the EU Council passed relevant EU law. However, so far, neither policy nor law, succeeded to manage refugee and immigration flows. UN Secretary General, Mr. Kofi Annan, attributes this to the fact that the relevant States tend to see “immigration” as a problem, not as a solution.²⁵ There are only two considerable changes for the old EU Member States. Firstly, they no longer have asylum-seekers and irregular immigrants from the new EU Member States because those countries are considered to be safe. After 1 May 2004 the nationals of those countries enjoy the liberty of free movement. In this way, the number of asylum-seekers and irregular immigrants in the old EU Member States decreased. Secondly, there is a shift from old EU Member States to the new EU Member States in terms of external border control. With the accession of the 10 new EU Member States, now the newcomers bear the principal political responsibility for controlling the external EU borders in the East and Southeast of Europe. This responsibility is EU standardized. As one condition for their entry into the EU, the new Member States had to adopt standards in asylum and immigration policies, common to those of the old EU Member States, and they now have to implement EU legislation, too.

After 11 September 2001 and 11 March 2004, the significance of border control has even increased. In the EU, domestic security as well as refugee protection falls within the competence of Justice and Home Affairs Ministers, and presently Ministers clearly give priority to domestic security over refugee protection. In February 2004, EU Commissioner for Justice and Home Affairs, Mr. António Vitorino, when debating with the European Parliament, left little doubt that when it comes to weighing the rights associated with immigration and asylum against the security and support of a largely sceptical EU public opinion²⁶, the latter must win out.²⁷ It is bitter, but true: terrorism has achieved a considerable “success” - essential restrictions in the respect of human rights.

This development is of growing political concern²⁸ not only to NGOs, but also to the Catholic Church. In November 2003, the Vatican appealed to governments, legislative bodies and international organizations “to respect and protect the human dignity and human rights (...) of migrants and refugees, be they in a regular or an irregular situation, and not to make international terrorism a pretext to reduce their rights”, and called upon governments “to admit that policies which are only repressive and restrictive towards migrants and refugees are unable to control migratory flows.”²⁹

Among a multitude of repressive and restrictive policy elements in Europe³⁰ is the use of

²⁴ Tampere Presidency Conclusions, 4

²⁵ Cf. Kofi A. Annan, *Pourquoi l'Europe a besoin d'une réelle stratégie en matière d'immigration*, LA LIBRE BELGIQUE, 29 janvier 2004

²⁶ Cf. in particular EUROBAROMETER 2004.1, PUBLIC OPINION IN THE ACCEEDING AND CANDIDATE COUNTRIES, Publication May 2004

²⁷ Cf. Radio Free Europe/Radio Liberty Online; 11 February 2004

²⁸ Cf. Foreword of Jan Stuyt SJ

²⁹ Pontifical Council for the Pastoral Care of Migrants and Itinerant People (Ed.), *PEOPLE ON THE MOVE 93*, Final document of the Fifth World Congress on the Pastoral Care of Migrants and Refugees (Rome, 17- 22 November 2003), page 370

³⁰ Such as national legislation, EURODAC, DubliNET, EU visa measures, increased border controls at the

detention. Detention is not only a reality in Europe, but also a reality all over the world – in North America³¹ as well as in Latin America³², in China³³, in Australia³⁴, in the Asia-Pacific³⁵ and in Africa³⁶.

2.2. Concepts and definitions

2.2.1. Detention

Legally, detention is an administrative measure and not a measure of the penal system, although its use takes on characteristics of criminal incarceration. Thus it is neither pre-trial detention on remand nor imprisonment after a court trial. The notion “administrative detention” highlights this important difference.

2.2.1.1. United Nations

2.2.1.1.1. United Nations High Commissioner for Refugees (UNHCR)

The United Nations High Commissioner for Refugees (UNHCR) defines “detention” as “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory”.³⁷

2.2.1.1.2. United Nations General Assembly

In 1988 the UN General assembly defined “detention” as “the condition of detained persons as defined”, and states that “detained person” means “any person deprived of personal liberty except as a result of conviction for an offence”.³⁸

2.2.1.2. European Union (EU)

The EU Council defines “detention” as the “confinement (...) by a Member State within

external as well as the internal EU borders

³¹ Cf. Government of Canada, Department of Human Resources and Skills Development, Evaluation of Equivalent Detention rooms in Canada Customs and Revenue Agency border crossing buildings, 10 July 2002; cf. US Immigration and Customs Enforcement, Office of Detention and Removal

³² Cf. International Committee of the Red Cross, Annual Report 1999, Latin America and the Caribbean

³³ Cf. HUMAN RIGHTS IN CHINA, A report on administrative detention under "Custody and Repatriation", 1999

³⁴ ABC NEWS online, Children Commit Self-Harm in Detention Centres, 12 February 2004

³⁵ JRS-Asia Pacific: Special Report on Detention – Thailand “Out on a Limb: The Plight of Asylum-seekers and Refugees in Thailand”, 2004

³⁶ Cf. the reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa (www.penalreform.org/english/theme_rs.htm)

³⁷ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers; 3 February 1999; Guideline 1 (These Guidelines address exclusively the detention of asylum-seekers. The detention of refugees is generally covered by national law and subject to the principles, norms and standards contained in the Geneva Convention relating to the Status of Refugees of 1951, and the applicable human rights instruments.)

³⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988, 76th plenary meeting

a particular place, where (a person) is deprived of his or her freedom of movement”³⁹. The EU Commission defines it as “the confinement of (a person) by a Member State within a restricted area, where his freedom of movement is substantially curtailed”.⁴⁰

The question of how to define “detention” gets even more difficult, when it comes to the multitude of languages in Europe. For instance, the English notion of “detention” is “*rétenion*” in French⁴¹, meaning that somebody is “retenu”, i.e. “held back” from doing something⁴²; in German, “detention” is translated as “*Gewahrsam*”⁴³, which means in English “custody”⁴⁴.

The very definition of what constitutes “detention” is certainly rooted in the difference between legal cultures and traditions in Europe; however, it must also be attributed to the different interests of various groups.⁴⁵

2.2.2. Detention centre

The language used to describe the places where asylum-seekers and irregular labour immigrants are “detained”, vary to the same extent as the notion and definitions of detention.

2.2.2.1. European Council’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The European Council’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) speaks in the context of “deprivation of liberty”⁴⁶ under the headline of “detention facilities” of “custodial settings ranging from holding facilities at points of entry to police stations, prisons and specialised detention centres. As regards more particularly transit and ‘international’ zones at airports, the precise legal position of persons refused entry to a country and placed in such zones has been the subject of some controversy. On more than one occasion, the CPT has been confronted with the argument that such persons are not ‘deprived of their liberty’ as they are free to leave the zone at any moment by taking any international flight of their choice.”⁴⁷ However, in 1996, the European Court of Human Rights stated that 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 (“atteinte”) on liberty and held that holding the

³⁹ Article 2 (k), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers

⁴⁰ Article 2 (j), COM (2002) 326 final/2, 3 July 2002

⁴¹ Cf. Directive 2003/9/CE du Conseil du 27 janvier 2003 relative à des normes minimales pour l'accueil des demandeurs d'asile dans les États membres

⁴² Cf. LE ROBERT & COLLINS SENIOR Dictionnaire Français-Anglais, Anglais-Français, Dictionnaire Le Robert, Paris 1996

⁴³ Cf. Richtlinie 2003/9/EG des Rates vom 27. Januar 2003 zur Festlegung von Mindestnormen für die Aufnahme von Asylbewerbern in den Mitgliedstaaten; national German law (*Aufenthaltsgesetz*) translates “detention” as “*Abschiebungshaft*”)

⁴⁴ Cf. PONS Wörterbuch, Deutsch-Englisch, Ernst Klett Verlag, Stuttgart/Düsseldorf/Leipzig 2001

⁴⁵ Cf. Hughes, Jane/Liebaut, Fabrice, Detention of Asylum-seekers in Europe, Analysis and Perspectives, Kluwer Law International, The Hague 1998, page 14

⁴⁶ Cf. Art 5 European Convention on Human Rights (ECHR)

⁴⁷ The CPT Standards, Extract from the 7th General Report [CPT/Inf (97) 10], “Substantive” sections of the CPT’s General Reports, CPT/Inf/E (2002) 1 - Rev. 2003, English

applicants in the transit zone was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty.⁴⁸

At the level of the EU, there is no common understanding.

2.2.2.2. Commission of the European Union (EU)

The EU Commission distinguishes between “accommodation centres” and “detention centres”⁴⁹:

According to the EU Commission, “the characteristics that identify a place as an accommodation centre are the following: it has to be a place where only applicants for asylum and their accompanying family members may be housed and it has to be for collective accommodation (and therefore does not include single flats or hotel rooms). The longer the stay is envisaged the wider should be the number of services and facilities that are made available to the applicants and their accompanying family members”. Thus, for the EU Commission, “accommodation centres” means, “any place used only for collective housing of applicants for asylum and their accompanying family members”.

In comparison, the EU Commission holds that “for a place to be a detention centre it is sufficient that it be used for housing applicants and their accompanying family members in a situation where their freedom of movement is substantially curtailed. Therefore also premises set up for the specific purpose to house applicants and their accompanying family members during the examination of their application within the context of a procedure to decide on their right to legally enter the territory of a Member State as well as accommodation centres in situations where applicants for asylum and their accompanying family members are not allowed, in principle, to leave the centre, can be defined as detention centres under the meaning of the Directive.” Against this background, the EU Commission defines “detention centres” as “any place used for housing, in a detention situation, applicants for asylum and their accompanying family members; it includes accommodation centres where the applicants’ freedom of movement is restricted to the centres.”

2.2.2.3. Parliament of the European Union (EU)

The European Parliament, its Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, speaks of “holding centres” for asylum-seekers as well as for irregular immigrants.⁵⁰

2.2.2.4. Council of the European Union (EU)

In its legislation, the EU Council avoids the notion of “detention centre”; concerning asylum applicants, it refers to “premises used for the purpose of housing applicants

⁴⁸ *Mahad Lahima, Lahima, Abdelkader and Mohamed Amuur v. France*, Judgment of the European Court of Human Rights No 17/1995/523/609 of 25 June 1996

⁴⁹ Cf. EU Commission Proposal for a COUNCIL DIRECTIVE laying down minimum standards on the reception of applicants for asylum in Member States, COM (2001) 181 final

⁵⁰ Cf. Report on the situation as regards fundamental rights in the European Union (2003), (2003/2006(INI), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, March 2004

during the examination of an application for asylum lodged at the border” and to “accommodations centres”.⁵¹

2.2.2.5. National legislation

Notions in national legislation are very different, too. For example, in Germany, a “detention centre” is called “*Abschiebungshaftanstalt*”, i.e. an “institution of imprisonment pending deportation”; also, in Germany, sometimes people are detained in ordinary prisons for criminals. In Italy a “detention centre” is called “*Centro di Permanenza Temporanea e Assistenza*” and “*Centro di Identificazione*”, i.e. “Centre of Temporary Permanence and Assistance” and “Identification Centre”, in Slovakia a “detention centre” is a “*Útvar policajného zaistenia pre cudzincov*”, i.e. “Department for those foreigners who were arrested by the police” or “Unit of police arrest of foreigners”. “Detention centres” in the United Kingdom have been renamed “immigration removal centres”.

2.2.2.6. Concepts and definitions in political dialogue

In the practical political dialogue, appears another notion, the one of “reception centre”. In this sense, some distinguish between “reception centres”, which are open centres, i.e. centres without restrictions to the liberty of movement, and “detention centres”, i.e. centres, which the detainees cannot leave; others mean by “reception centre” a centre, which can either be open or closed.

In fact, “reception centre” sounds much nicer than “detention centre”; thus, occasionally, political EU representatives deny that a particular “detention centre” is a “detention centre”, and insist that it is a “reception centre”.

2.2.2.7. JRS-EUROPE

2.2.2.7.1. People-based approach

Trying to cope with those difficulties of definitions, JRS-EUROPE shares the basic approach of CPT to define “detention” with a view to the people being met in detention: “CPT visiting delegations frequently encounter foreign nationals deprived of their liberty under aliens legislation (hereafter “immigration detainees”): persons refused entry to the country concerned; persons who have entered the country illegally and have subsequently been identified by the authorities; persons whose authorisation to stay in the country has expired; asylum-seekers whose detention is considered necessary by the authorities; etc.”⁵²

JRS personnel in Europe meet asylum-seekers and irregular immigrants who are or who were kept in prison-like settings, deprived of their liberty of movement. For JRS in Europe it does not make any difference if those settings are called differently. For instance, if people are detained in “reception centres”, these “reception centres” are at the same time “detention centres”, and with view to the deprivation of liberty, these centres should be called so, too – “detention centres”.

⁵¹ Cf. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers

⁵² The CPT Standards, Extract from the 7th General Report [CPT/Inf (97) 10], “Substantive” sections of the CPT’s General Reports, CPT/Inf/E (2002) 1 - Rev. 2003, English

JRS-EUROPE calls these centres “detention centres” because they gather asylum-seekers and arrested irregular immigrants at particular places, which they cannot leave, unless they get a special permission, for example, to see a medical doctor.

2.2.2.7.2. Airport/transit zones

Although this document does not deal with international airport or transit zones because there are no JRS personnel in Europe working in such places, JRS-EUROPE regards those zones, of course, also as “detention centres”.

2.2.3. Detainee

The detainees with whom JRS staff in Europe is in touch⁵³, are not accused or convicted criminals.⁵⁴ They either are asylum applicants or irregular immigrants (sometimes also their family members), the latter ones having been arrested because they lack the necessary documents – men, women (among them pregnant women) and children (including unaccompanied minors). Among the asylum-seekers, many of them have arrived after having suffered trauma and persecution in their own countries. Being detained, asylum-seekers and irregular immigrants are not only suffering materially, but also from significant physical, emotional, and mental health problems as well as a sense of being criminalized in public opinion. They face enormous insecurity as a result of fear as to what the future holds for them.

2.2.3.1. Asylum-seeker

UNHCR and the EU define an “asylum-seeker” in a similar way.

2.2.3.1.1. UNHCR

For UNHCR, “asylum-seekers” are “persons who have applied for asylum or refugee status and who have not yet received a decision or who are otherwise registered as asylum-seekers”⁵⁵.

2.2.3.1.2. EU

In the terminology of the EU, an “asylum-seeker” or “asylum applicant” is a “third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken”⁵⁶.

2.2.3.1.3. JRS-EUROPE

JRS-EUROPE basically recognizes both definitions. However, from its practical experience, JRS-EUROPE regards both definitions as too narrow. JRS staff in Europe has met people who have just arrived in a country, where they intended to apply for

⁵³ JRS-EUROPE is not present in airport respectively transit zones.

⁵⁴ Exceptionally there may be convicted criminals among them awaiting to be returned to their country of origin or to be sent to another country.

⁵⁵ UNHCR Statistical Yearbook 2001, Chapter 6

⁵⁶ Article 2 (c), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers

asylum; but before they could do so, i.e. before they had a chance to get “registered” or to “make an application”, they were arrested and put in detention. JRS in Europe has been involved in cases, when, after many difficulties, those persons finally could officially apply for asylum – and were recognized as asylum-seekers.

2.2.3.2. Irregular immigrant

Irregular immigrants are men and women who are staying in a country (often with their children) without having a permit to stay in the country.⁵⁷ Either they are labour immigrants who look for work without a work permit; or they are rejected asylum-seekers who do not leave the country, although they are legally obliged to do so. Among the irregular immigrants there are also asylum applicants who absconded before a final decision about their asylum claim has been taken. Those asylum-seekers, who were rejected or absconded before a final decision was taken, look for work in order to try to make their living, too. The same is true for so-called “overstayers”, i.e. persons who had a permit to stay in the country, but the permit is no longer valid.

2.2.3.2.1. EU

The EU normally refers to all of them as “illegal immigrants”, to “people residing illegally in the EU” or to “illegal residents”.⁵⁸ They are not authorized to stay in the country and consequently legally obliged to leave the country.

2.2.3.2.2. JRS-EUROPE

JRS-EUROPE calls them “irregular” immigrants⁵⁹ because they are people whom JRS-EUROPE does not regard only under legal, i.e. residential law, aspects⁶⁰, but also from humanitarian points of view. They are “irregular” in the sense that they are residing in a country outside official asylum and immigration policies and their rules⁶¹.

⁵⁷ Irish legislation, for example, defines in its Illegal Immigrants (Trafficking) Act of 2000 an “illegal immigrant” as “a non-national who enters or seeks to enter or has entered the State unlawfully.”

⁵⁸ Cf. EU Commission Green Paper on a Community return policy on illegal residents, COM (2002) 175 final; Communication from the EU Commission on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM (2003) 323

⁵⁹ Cf. Gibney Matthew J., *Outside the Protection of the Law: The Situation of Irregular Migrants in Europe*, Synthesis report commissioned by JRS-EUROPE, Oxford University 2000. - Others prefer (in English) the term “undocumented immigrants”; but this notion often does not fit. For example, asylum-seekers who absconded, are publicly “documented”, i.e. registered, however, *in concreto*, public authorities cannot find them anymore.

⁶⁰ Cf. Die Deutschen Bischöfe, *Kommission für Migrationsfragen, Leben in der Illegalität – eine humanitäre und pastorale Herausforderung*, Bonn/Germany, 2001, page 14

⁶¹ In Latin, “regula” means, “rule”.

PART II:

FACTS

3. Starting point: Summary of JRS experience in Europe

For many years, JRS in Europe has been in touch with persons, who either are or were in detention centres. JRS-EUROPE has been and still is closely watching, evaluating and following up what happens to detainees in Europe.

It is against that background that JRS-EUROPE wants to summarize experience of JRS in Europe.

3.1. Critical points

JRS-EUROPE observes that the following main phenomena are either the rule or increasingly appear in detention practices of European States:

3.1.1. Legal grounds for detention

In all of the European countries, where JRS staff is in touch with present or former detainees, there exists national legislation providing legal grounds for detention. However, it occurs that the relevant laws are interpreted in a such way. That often does not justify the detention of a person. Very often detention is ordered, although there is little chance of timely forced repatriation or when there is little or even no risk of absconding.

3.1.2. Information for detainees about detention

- Often detainees do not know why they are in detention, or they do not understand a detention order because they do not speak the language of the country and there is no translation provided.
- Often they do not receive comprehensive information about their rights as detainees.
- In reality, detainees usually have no access to legal services.
- In many places detainees do not know the names of their guards because those guards do not wear a badge with their name on it.

3.1.3. Duration of detention

- The duration of detention varies significantly throughout Europe. It ranges from several days, several weeks to several months, or detention duration is not limited at all.
- There is neither a public nor a private institution in Europe, which keeps a record of the *de facto* duration of detention in Europe.⁶²
- Legal appeals against the duration of detention are often not thoroughly examined.

3.1.4. Detention conditions

- Generally detainees are kept in quasi-prisons or in prisons together with persons charged or convicted of crimes.

⁶² Local, regional or national records are the exception.

- Detainees have rarely the opportunity to pursue meaningful activities.
- The general climate in detention centres rarely promotes respectful human relations between detainees and their guards. Detainees suffer from the detention conditions; guards suffer when they are overwhelmed by their tasks.

3.1.5. Health care

- Most of the time detainees receive only substandard health care.

3.1.6. Visits

- Sometimes detainees are denied visits from people outside.
- If detainees are allowed to have visits, these can be restricted to one hour per month.
- If people from outside want to visit detainees, they often do not get the permission from the competent public authority, or a permission is withdrawn, and the person concerned cannot take any legal action against the withdrawal of the permission.
- Sometimes “good connections” determine, whether a person can visit detainees or not.

3.1.7. Protection of minors

- Detention of minors is the rule rather than the exception.
- Detention occasionally separates parents from their young children who live outside the detention centre.

3.1.8. Protection of families

- Detention as such separates detainees from their family members who live outside the detention centre.
- Spouses are often separately detained.
- Restrictive visiting rules often endanger instead protect family life, when family members of the detainee are living outside the detention centre.

3.1.9. Detention costs

For the taxpayers, detention is very expensive. For instance, per day and per person, in Berlin/Germany it costs 60 €⁶³, in Bologna/Italy 89 €. In Italy, during the period from July 2002 to July 2003, 17.000 people were detained. So, if each one of them would have been detained in Bologna for only one day, the Italian taxpayers would have paid more than 1,5 million € for this one day. When a person is detained in Bologna for 60 days, the detention of this one person would cost 5340 € i.e. 2.670 € per month. This is far more than the average income per household and month in Italy, which is less than 2.000 €⁶⁴.

3.1.10. Compensation

⁶³ At least, if a detainee has money in cash, the administration charges him that amount.

⁶⁴ Cf. www.schober-international.com/italy; per capita income (2002): \$ 21.500 p.a. (<http://www.state.gov/r/pa/ei/bgn/4033.htm>)

- Detainees normally do not receive compensation, when they are released after unlawful detention.
- If detainees are released, they often do not have any money and no place to stay.

3.2. Elements of good practice

Although not necessarily the rule, JRS in Europe also experiences to some extent elements of good practice, for example, when

- A detention centre has an independent local body monitoring detention conditions and reporting to the public authorities;
- Legal services are made accessible to detainees, although not provided by law;
- Translation is provided to detainees, often by volunteers;
- Guards treat detainees in a friendly manner;
- Guards wear badges with their names on it;
- Detainees have access to books or other leisure facilities;
- Journalists (print and TV media) may visit detention centres and report publicly about those visits;
- Detainees can receive pastoral care;
- Detention centres provide a special room for prayer.

At a recent seminar⁶⁵ on detention, which JRS-Slovenia and JRS-EUROPE held at the closed “foreigners’ centre” in Postojna/Slovenia, the participants (police, social workers and medical staff) set up a list of good practice in that centre:

- Police pay special attention to the first contact between (arriving) detainees and (receiving) staff of the centre. The staffs try to be respectful and friendly from the very beginning on.
- Volunteers working in the centre do not only talk with the detainees, they also try to create a personal atmosphere (cooking, baking etc. with detainees).
- Social workers run errands for detainees.
- During Ramadan, the food for Muslims is delivered the evening.
- The centre provides vegetarian food.
- Irregular immigrants, who need documents which the police have to get for them, are informed by the police how much time this will take.
- The police ask consulates/embassies for newspaper for detainees.
- Social workers provide Internet news for detainees.
- During the procedure, a detainee is always in touch with the same social worker or police officer.
- Excursions for detained minors are organised.

4. Political institutions publicly reporting on detention in Europe

Sometimes newspapers, TV or radio report about detainees and detention. There are also local, national, and global NGOs, which publish documents about detention. Still, public authorities often contest the truth of such reports.

⁶⁵ On 1 September 2004

Reports from political institutions are even more important. For political representatives it is more difficult to deny facts and analyses provided by political institutions, which even publicly report on detention in Europe and thus highlight how crucial detention issues are.

JRS-EUROPE does not give an overview hereon the critique being issued by those institutions or even summarize it. Reports of those institutions as well as reports of the media and of local, national, and global NGOs are publicly available.

JRS-EUROPE simply offers an overview on those political institutions, which publicly report on detention in Europe, in order to indicate that reports from these institutions exist.

4.1. United Nations (UN)⁶⁶

The United Nations has several institutions dealing (*inter alia*) with detention.

4.1.1. UN Working Group on Arbitrary Detention (WGAD)

The UN Working Group on Arbitrary Detention (WGAD) was established by the UN Commission on Human Rights in 1991. The Working Group has a mandate to investigate cases of detention, which are arbitrary or inconsistent with international standards, and carry out in-country visits. It can receive communications from individuals or their families as well as NGO representatives, and if the communication appears to indicate a case within the WGAD's mandate, it will write to the government seeking its views or further information on the case. Based on the information available, the WGAD will give its views as to whether an individual's detention is arbitrary or otherwise inconsistent with international standards. The WGAD has also established an urgent appeal procedure in cases where continued detention appears to pose a risk to the detainee's right to life and physical integrity.

Reports are available at

<http://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/Arbitrary+En?OpenDocument>

4.1.2. UN Committee against Torture (CAT)

The UN Committee against Torture (CAT) was established pursuant to Article 17 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in order to monitor its implementation. States parties to this Convention must report to this Committee, which examines the reports and issues concluding observations in which it includes its main findings and makes recommendations to the State party. The meetings where state parties present their reports are public, but only members of the CAT may put questions to the representatives of the State who presents the report. NGOs can provide information to the CAT in advance of its consideration of a state party's report, and the CAT can use this information when raising concerns at the public meeting where the report is considered. The Convention against Torture

⁶⁶ This section is drawn up with the help of the UN: The UN and refugees' human rights; A manual on how UN human rights mechanisms can protect the rights of refugees, published by Amnesty International and the International Service for Human Rights, London 1997/2001

specifically contains Article 3 which prohibits refoulement to a country where the risk of torture is the person is returned.

Furthermore, the CAT can receive and decides on individual communications from countries that have made a formal declaration under Article 22 of the Convention against Torture, that it recognizes the competence of the CAT to receive individual communications. In order to be admissible, communication must meet the following criteria:

- The communication must not be anonymous;
- The communication must be submitted by the victim, a close family member, or someone assigned by the victim to act on his/her behalf;
- All available domestic remedies must have been exhausted, unless the author of the communications can show such remedies are ineffective or procedures for securing such remedies would be unduly prolonged;
- The communication cannot be considered if the same matter is currently being examined under another procedure of international investigation.

Reports are available at

<http://www.unhchr.ch/html/menu2/6/cat/cats30.htm#32nd>

They cover, *inter alia*, Belgium, Bulgaria, Croatia, Czech Republic, Germany, Iceland, Latvia, Lithuania, Moldova, Monaco, Slovenia, and Turkey.

4.1.3. UN Special Rapporteur of the Commission on Human Rights on the question of torture

The Special Rapporteur on Torture was established by the Commission on Human Rights in 1985. The mandate of the Special Rapporteur is to seek and receive information on questions relevant to torture, to report annually to the Commission on the phenomenon of torture in the world and to contact governments on the measures taken to prevent torture, and on in-country visits. The Special Rapporteur has also established an urgent action procedure, which allows him to act immediately on credible information that a person is threatened with torture. Upon receipt of such information he can contact the government to ensure protection of the individual's right to physical and mental integrity. This urgent appeal can also be used to stop refoulement to a country where a person is at risk of being tortured.

Information is available at

<http://www.unhchr.ch/html/menu2/7/b/mtor.htm>

4.1.4. UN Human Rights Committee

The UN Human Rights Committee was established to monitor the implementation of the International Covenant on Civil and Political Rights and the Protocols to the Covenant in the territory of States parties (Article 28 of the Covenant). It is composed of 18 independent experts. The Committee convenes three times a year for sessions of three weeks' duration, normally in March at United Nations headquarters in New York and in July and November at the United Nations Office in Geneva. According to Article 40 of

the International Covenant on Civil and Political Rights, States are required to submit every five years to the UN Human Rights Committee a report on the progress in implementing the norms contained in the Covenant. Moreover, the UN Human Rights Committee has accepted to take into account written reports from non-governmental organisations of the country concerned.

The Optional Protocol to the Covenant, adopted on 16 December 1966, has established an additional monitoring mechanism. This mechanism allows individuals, “who claim to be victims of a violation by (a) State Party of any of the rights set forth in the Covenant (...)” (Article 1 of the Optional Protocol), to submit a complaint before the UN Human Rights Committee against the State Party, provided that the concerned State is both party to the Covenant and to the Optional Protocol. In order to be admissible, communications must meet the following criteria:

- The communication must not be anonymous;
- The communication must be submitted by the victim, a close family member, or someone assigned by the victim to act on his/her behalf;
- All available domestic remedies must have been exhausted, unless the author of the communications can show such remedies are ineffective or procedures for securing such remedies would be unduly prolonged;
- The communication cannot be considered if the same matter is currently being examined under another procedure of international investigation.

Information is available at

<http://www.unhchr.ch/html/menu2/6/hrc.htm>

4.1.5. UN High Commissioner for Refugees (UNHCR)

UNHCR offices report, too. In the case of Europe, UNHCR publishes, in particular, reports of other institutions on its website.⁶⁷ UNHCR does not have the resources to visit all asylum detainees.⁶⁸

Information is available at

<http://www.unhcr.ch/cgi-bin/texis/vtx/home>

4.2 Global Commission on International Migration (GCIM)

The Global Commission on International Migration (GCIM) is not an official body of the UN, but closely linked to the present UN Secretary-General. Upon the encouragement of the present UN Secretary General, Mr. Kofi Annan, wishing to provide the framework for the formulation of a coherent, comprehensive and global response to migration issues, Sweden and Switzerland, together with the governments of Brazil, Morocco and the Philippines, decided to establish a Global Commission on International Migration (GCIM)⁶⁹. It is comprised of 18 independent Commissioners,⁷⁰ who do not represent

⁶⁷ Cf. <http://www.unhcr.pl/english/newsletter/21/raport.php>

⁶⁸ Letter from UNHCR to JRS-EUROPE, 29 March 2004

⁶⁹ <http://www.gcim.org/>

their countries. Several countries subsequently joined the effort and there is an open-ended Core Group of Governments, co-chaired by Sweden and Switzerland. The GCIM began its work on 1 January 2004 and will make available its final report to the UN Secretary-General and to other stakeholders, in the summer of 2005.

The mandate of this Commission is to place international migration on the global agenda, analyse gaps in current policy approaches to migration and examine inter-linkages with other issue-areas. *Inter alia*, the GCIM research is addressing issues associated with the 'migration-asylum nexus'.

So it will be interesting to see, whether this Commission will give its attention also to detention issues, crucial in the context of the migration – asylum nexus and a consequence of considerable gaps in migration policy approaches:

<http://www.gcim.org>

4.3. Council of Europe

The Council of Europe is distinct from the 25-nation European Union. It is an intergovernmental organization, which was founded in 1949⁷¹, grouping together 45 countries, including 21 countries from Central and Eastern Europe. It was set up to

- Defend human rights, parliamentary democracy and the rule of law;
- Develop continent-wide agreements to standardise Member States' social and legal practices;
- Promote awareness of a European identity based on shared values and cutting across different cultures.

Since 1989, its main tasks have become :

- Acting as a political anchor and human rights watchdog for Europe's post-communist democracies;
- Assisting the countries of central and eastern Europe in carrying out and consolidating political, legal and constitutional reform in parallel with economic reform;
- Providing know-how in areas such as human rights, local democracy, education, culture and the environment.

4.3.1. Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

In 1989, the Council of Europe set up the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which operates within the framework of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The CPT visits places of detention – including police stations, prisons, juvenile establishments, psychiatric institutions and detention places for foreigners (for instance, those reserved for asylum-seekers in airport transit

⁷⁰ Jan O. Karlsson, Dr. Mamphela Ramphele, Dr. Francisco Alba, Aï cha Belarbi, Sharan Burrow, Joris Demmink, Rev. Nicholas Dimarzio, Dr. Mary Garcia Castro, Sergio Marchi, Manuel Marin, Mike Moore, Mary Robinson, Nafis Sadik, Reda Ahmed Shehata, Nand Kishore Singh, Prof. Dr. Rita Süßmuth, Patricia Sto Tomas Aragon, Dr. Valery Tishkov

⁷¹ Cf. Statute of the Council of Europe, London, 5 May 1949

zones). The CPT has the right of unrestricted access to places of detention, making it unique in the world. Its mandate is to evaluate conditions of detention and, if necessary, make recommendations. For each visit the CPT produces a report of up to 100 pages, which is sent to the government concerned. The government is requested to respond.

However, since the Convention for the Prevention of Torture is based on the two principles of co-operation and confidentiality, these reports are initially confidential. Governments can be sure that their dealings with the CPT remain confidential. Yet, if the government requests, both the reports and the responses may be published.

Reports and government responses are available at

<http://www.cpt.coe.int/en/>

They cover in 2003 and 2004, *inter alia*, Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Finland, France, Georgia, Iceland, Hungary, Latvia, Lithuania, Luxemburg, Former Yugoslav Republic of Macedonia, Malta, Moldova, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, Turkey and the United Kingdom

4.3.2. Commissioner for Human Rights

The Office of the Commissioner for Human Rights was established in 1999 as an independent institution within the Council of Europe. The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, which was adopted by the Committee of Ministers on 7 May 1999. The Resolution requires that the Commissioner:

- Promote education in and awareness of human rights in the member States;
- Identify possible shortcomings in the law and practice of member States with regard to compliance with human rights;
- Help promote the effective observance and full enjoyment of human rights, as embodied in the various Council of Europe instruments.

The Commissioner is a non-judicial institution, which does not take up individual complaints. He cannot, therefore, accept any requests to present individual complaints before national or international courts, nor before national administrations of member States of the Council of Europe. Nevertheless, he can draw conclusions and take initiatives of a general nature that are based on individual complaints. The Commissioner is to encourage action by, and work actively with, all national human rights structures and national ombudsmen or similar institutions. The Commissioner is to co-operate also with other international organisations for the promotion and protection of human rights. In performing his duties, the Commissioner may directly contact the governments of Council of Europe Member States, which must facilitate the independent and effective performance by the Commissioner of his functions

Pursuant to the mandate, the Commissioner for Human Rights effects visits to Member States with the purpose of either gaining an overall view of the human rights situation in that country or examining an issue or area of particular concern. Visits are effected either on the invitation of the member State in question or on the initiative of the Commissioner and usually involve meetings with senior government officials, representatives of civil

society and the inspection of sites tending to the undermining of human rights. The Commissioner makes recommendations on how the respect for human rights might be improved in certain areas. The Commissioner for Human Rights will discuss his conclusions and recommendations with the Ministers he meets with and again in the resulting visit report, which is submitted to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe and subsequently made available to the public.

The Parliamentary Assembly, by a majority of votes cast, elects the Commissioner for Human Rights from a list of three candidates drawn up by the Committee of Ministers; the Commissioner is elected for a non-renewable term of office of six years. Candidates must be nationals of a Member State of the Council of Europe and have recognised expertise in the field of human rights.

Country reports are available at

http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/By_country/index.asp#TopOfPage

They cover Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Former Yugoslav republic of Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia-Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom.

4.4. EU: Committee on Citizens' Freedom and Rights, Justice and Home Affairs (LIBE) of the European Parliament

The European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs reports on the situation as regards fundamental rights in the European Union, including detention.

Information is available at http://www.europarl.eu.int/committees/libe_home.htm.

5. Preliminary inventory of detention centres in Europe

Most of the detention centres in Europe are permanent centres. However, there is a certain degree of fluctuation. Sometimes existing detention facilities are closed down, other detention facilities are established at new places, occasionally only for a little while. Along with the difficulty of finding a commonly agreed definition of what is a "detention centre", this change in locations makes it especially difficult to follow and monitor detention realities.

Furthermore, there exists no reliable, indisputable list of detention centres in Europe. In particular, the European Council's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) does not have a comprehensive and

updated list⁷², and “there is no complete list of detention centres or camps in Europe compiled by UNHCR”⁷³.

With reservations to the question of what a “detention centre” is and what it might be called or not called, it is necessary to know that detention in Europe is not limited to a handful of places. JRS-EUROPE is proposing the following preliminary inventory⁷⁴, which includes places where JRS staff is present. On the whole, it may contain minor errors, for example, because a detention centre might have closed down or another one opened up after the publication of this inventory. If there are such errors and if those possible errors can be eliminated in the future, this already would be useful progress for all who live and work in the context of detention.⁷⁵ In this regard we would welcome feedback from readers.

5.1. Detention Centres in Belgium

In Belgium, there are 6 detention centres⁷⁶: Brussels (Centre 127, Centre 127bis, INAD), *Bruges*, *Merksplas (Anvers/Antwerpen)* and *Vottem (Liège/Luik)*.

5.2. Detention Centres in Croatia

In Croatia, there are two detention centres: *Jezevo* and *Sasna Grada*.

5.3. Detention Centres in the Czech Republic

The Czech Republic has 8 detention centres: *Balkova*, *Cerveny Ujezd*, *Frydek-Mistek*, *Poštorná/Břeclav*, *Praha-Ruzyně*, *Velké Pátlepy/Praha I and II* and *Vysni Lhoty*.

There are three types⁷⁷ of “asylum establishments”⁷⁸ for asylum-seekers in the Czech Republic. First, people who arrive at the Czech borders are detained in the “reception centre” of *Vysni Lhoty*. There they undergo a medical examination and have their first asylum interview for their asylum application. Then, after the quarantine period, most asylum-seekers are transferred to one of the “residence/accommodation centres” where they stay pending the examination of their asylum applications. If asylum is granted, they are transferred to an “integration centre”.

In “residence/accommodation centres”, asylum-seekers are freer than in the reception centre and may leave the centre temporarily after authorization. In addition, applicants may live outside the centre, if they can bring evidence that they have accommodation in the Czech territory. Asylum-seekers stay in “residence/accommodation centres” until the Czech authorities decide if they are eligible for the status of refugee.

5.4. Detention Centres in Denmark

⁷² Information from the CPT to JRS-EUROPE

⁷³ Letter from UNHCR to JRS-EUROPE, 29 March 2004

⁷⁴ Cf. also the map LES CAMPS D'ÉTRANGERS, © migreurop, at www.migreurop.org

⁷⁵ This is one of the reasons why this paper will be kept up-to-date.

⁷⁶ Cf. CIRE/OCIV, *L'arbitraire de l'enfermement en centre fermé*, 2003

⁷⁷ Cf. Amendment of the 1999 Asylum Act, Article 2/6

⁷⁸ This is how the Amendment of the 1999 Asylum Act describes centres in which asylum-seekers are lodged.

In Denmark, there are 2 detention centres: *Sandholm* and *Nyborg*.

5.5. Detention Centres in France

In France, there are 20 detention centres⁷⁹: *Bordeaux, Calais-Coquelles, Strasbourg-Geipolsheim, Hendaye, Lille, Lyon, Marseille, Nantes, Nice, Région parisienne (Bobigny, Le Mesnil-Amelot-Roissy, Nanterre, Paris, Versailles), Rivesaltes, Rouen, Saint Louis, Sète* and *Toulouse*.

5.6. Detention Centres in Germany

An estimated 45 detention centres⁸⁰ exist in Germany: *Adelsheim, Aichach, Bautzen, Berlin, Büren, Bremen, Bützow, Chemnitz, Dresden, Eisenhüttenstadt, Frankfurt (Main), Fulda, Görlitz, Goldlauter, Halberstadt, Hamburg, Ingelheim, Kassel, Landshut, Langenhagen, Leipzig, Lübeck, Mannheim, Moers, München-Stadelheim, Neuss, Nürnberg, Offenbach, Ottweiler, Plauen, Rassnitz, Rendsburg, Rockenberg, Rottenburg, Volkstedt, Stollberg, Wiesbaden, Zweibrücken* and *Zwickau*.

Persons are detained in special detention centers and in prisons.

5.7. Detention Centres in Greece

In Greece, there are 19 detention centres: *Athens (airport), Andros, Chios, region of Evros, Githio, Ierapetra, Igoumenitsa, Kalamata, Karistos, Kos, Lerros, Mykonos, Mytilene - Lesbos, Naxos, Rethymno, Rhodos, Samos* and *Patmos, Sitia, Syros* and *Zakinthos*.

5.8. Detention Centres in Hungary

In Hungary, there are 8 detention centres: *Balassagyarmat, Budapest (airport), Gyor, Kiskunhalas, Nagykanizsa, Nyirbàtor, Oroshàza* and *Szombathely*.

5.9. Detention Centres in Ireland

In Ireland, there are 6 detention centres⁸¹: *Mountjoy Prison*⁸², *Arbour Hill Prison (Dublin), Cork Prison, Limerick Prison, Clover Hill and Abbey Arch (Galway)*. The Refugee Act of 1996 [as amended by the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000] speaks about “place of detention” (Section 9(8)). In

⁷⁹ Cf. Official confidential report by l’Inspection générale de l’administration (IGA) and l’Inspection générale des affaires sociale (IGAS), Les condition de rétention administrative; état des lieux et normes souhaitables; cf. LA CROX, 5 August 2004

⁸⁰ And a transit zone at Frankfurt/Main Airport

⁸¹ In Ireland, the notion of a “detention centre” describes officially an institution where individuals between the ages of 16 and 21 years are held. Some places of detention may hold adult prisoners as well as prisoners aged 16-21 years. In this sense, there are 17 prisons and places of detention in Ireland; 7 in Dublin, 5 elsewhere in Leinster, 3 in Munster, 1 in Connacht and 1 in Ulster. Thirteen are “closed” institutions with both internal and perimeter security. Three are open centres with minimal internal and perimeter security. There is one semi-open prison with traditional perimeter security and minimal internal security.

⁸² “Mountjoy” includes Mountjoy main prison, the Training Unit and the Dochas Centre.

practice, asylum-seekers are first housed in reception centres for two weeks and then dispersed throughout the country to former hotels, hostels and custom-built accommodation centres.

5.10. Detention Centres in Italy

In Italy there are 16 detention centres⁸³, *Centri di Permanenza Temporanea e Assistenza (CPTA)* or *Centri di Identificazione (CDI)*: CPTA Torino “Brunelleschi”, CPTA Milano “Via Corelli”, CPTA “La Marmora”, Bologna “Enrico Mattei”, CPTA Roma “Ponte Galeria”, CPTA San Foca di Melendugno “Regina Pacis” (Lecce), CPTA Restinco (Brindisi), CPTA Lamezia Terme “Malgradotutoo”, CPTA Caltanissetta “Pian del Lago”, CPTA Agrigento “Contrada S. Benedetto”, CPTA Trapani “Serraino Vulpitta”, CPTA Lampedusa, CPTA/CDI Borgo Mezzanone (Foggia), CDI Bar-Palese (Bari), CDI “Don Tonino Bello”, Otranto (Lecce) and CDI “S. Anna”, Crotone.

A Directive of the Ministry of Home Affairs (*Direttiva generale in materia di Centri di Permanenza Temporanea e di Assistenza ai sensi dell’Article 22. comma i) del DPR 31 agosto 1999, n. 394* of 30 August 2000) regulates the administration of CPTA.

Detention centres in Italy are always run by not for profit organizations, such as the Italian Red Cross or *Misericordie* or *Fiamme D’Argento* (which draw together retired *Carabinieri*, Italian policemen).

5.11. Detention Centre in Luxemburg

In Luxemburg, there is only the detention centre of *Schrassig*.

5.12. Detention Centres in Malta

In Malta, there are 3 detention centres: *Ta’Kandja*, *Floriana*, and *Safi* Barracks. Article 34 of the Immigration Act describes a “place of detention” as follows:

“A person detained in custody under this Act, other than under Article 10 or 22, but not serving a sentence of imprisonment, may be detained either in prison or in any place appointed for the purpose by the Minister by notice in the *Gazette*, but if detained in prison he shall be treated as a person awaiting trial.”

5.13. Detention Centres in the Netherlands

In the Netherlands foreigners are detained in at least eight facilities: *inter alia* in Amsterdam, Tilburg and two international airports (Amsterdam and Rotterdam).

5.14. Detention Centres in Poland

In Poland there are 24 detention centres: *Bia³a Podlaska*, *Bielsko – Bia³a*, *Che³m*, *Elbl¹g*, *Gdańsk*, *Jelenia Góra*, *Jaworzno*, *Katowice*, *Konin*, *Krosno Odrzańskie*, *Lesznowola*

⁸³ *Medici Senza Frontiere, RAPPORTO SUI CENTRI DI PERMANENZA TEMPORANEA E ASSISTENZA*, January 2004

Wroc³aw, Lublin, Limanowa, Opole, Ostro³êka, Pi³a, Piotrków Trybunalski, Tychy, Suwa³ki, Szczecin, Toruñ, Wa³brzych and Warszawa – Raginis Street.

In Poland there are two types of detention centres for aliens: “guarded centres for aliens” and “deportation arrest” in border guard or police premises. The locations of deportation centres change very often.

Foreigners who apply for asylum at the Polish frontier are automatically detained in “closed centres”. Similarly, asylum applicants against whom a decision of deportation has been taken may be placed in a “guarded centre”. In-country asylum applicants, i.e. those who do not apply for asylum at the border, are in most cases accommodated in “refugee centres”.

5.15. Detention Centres in Romania

In Romania there are 2 detention centres: Bucharest and Arad.

5.16. Detention Centres in Russian Federation

According to Radio Free Europe, in October 2003, Anatolii Batrukin, head of the Moscow Interior Ministry's directorate for migrant issues, told city legislators that six “detention centres” are being set up in the city. According to Anatolii Batrukin, there are already three such centres.⁸⁴ In March 2004 the St. Petersburg Times reported that St. Petersburg, the second largest city in Russia, announced a “detention centre for migrants is being planned”. Alexander Babikov, head of the St. Petersburg city Migration Service, was quoted to have said that the first centre in St. Petersburg “will not be a jail, but people will be locked in and provided with food and places to sleep and wash”, and that the new centre would be capable of holding up to 270 people and would have food and security services.⁸⁵

5.17. Detention Centres in Spain

In Spain, there are numerous detention centres: *Algeciras, Barcelona, Fuerteventura*⁸⁶, *Lanzarote, Madrid, Málaga, Murcia, Tarifa* (“Isla de las Palomas” of the Civil Guard), *Tenerife, Valencia, Ceuta - Calamocarro, Melilla* and at the airport of Madrid.

5.18. Detention Centres in Slovakia

In Slovakia, there are two (police) detention centres for aliens, called “*Útvar policajného zaistenia pre cudzincov*”. They are under the responsibility of the Border and Alien Police and situated in *Seòovce* and *Medveïov*.⁸⁷ As a rule, families are placed in the police detention centre in *Seòovce*.

⁸⁴ Radio Free Europe/Radio Liberty Online, 14 October 2003

⁸⁵ The St. Petersburg Times Online, 12 March 2004

⁸⁶ On 8 July 2004, public authorities began transferring detainees from the former airport terminal of Fuerteventura to the new detention centers for foreigners (CIE); cf. Migration Policy Group (Ed.), Migration News Sheet, August 2004, page 9

⁸⁷ Reception and residential centres are under the responsibility of the Migration Office of the Ministry of Interior.

5.19. Detention Centres in Slovenia

In Slovenia, there are 2 detention centres.

5.20. Detention Centres in Sweden

In Sweden, there are 5 detention centres in three cities: Stockholm, *Göteborg*, and *Malmö*.

5.21. Detention Centres in Turkey

In Turkey, 2 detention centres are known of: Istanbul and Yozgat.

5.22. Detention Centres in Ukraine

In Ukraine, there is at least one detention centre, in *Pavshino (Mukachevo)*.

In March 2004, Mr. Nicholas Hellen from the Sunday Times wrote⁸⁸ about “Detention camps to halt asylum-seekers in east”, being funded by Brussels (...) The new network of centres, (...) is intended to catch migrants on routes westward from China, Afghanistan and the Indian sub-continent. (...) The first two centres, housing about 1,600 illegal migrants at a time, are to be set up in Ukraine, which is on a key transit route from Asia to Britain (...) Jeffrey Labovitz, head of the International Organisation for Migration (IOM) in Ukraine, said about 40,000 people annually made it into the EU from Ukraine (...) There were 4,280 detainees in the first nine months of 2003. At present, migrants caught trying to cross illegally from Ukraine into Poland, Hungary and Slovakia are housed at border posts in squalid conditions. The concrete buildings are unheated and officials have only 20p a day to feed each detainee. After six months they are released and little is done to prevent them from making fresh attempts to cross into the EU (...) The Ukrainian embassy in London confirmed that the preferred locations were on the sites of former barracks at Chernigov, north of Kiev, and Lutsk, on the Polish border. An embassy spokesman said: ‘We hope this will reduce the number of migrants heading for the EU’.⁸⁹

5.23. Detention Centres in the United Kingdom

In the United Kingdom there⁹⁰ are 12 detention centres⁹¹: Campsfield House (Oxfordshire), Colnbrook (West London, near Heathrow airport), Dover (Kent – near ferry port), Dover Harbour (short term holding facility), Dungavel (Renfrewshire, Scotland), Harmondsworth (West London, near Heathrow airport), Haslar (Portsmouth, near ferry port), Lindholme (near Doncaster), Manchester airport (short term holding facility), Oakington Reception Centre (Cambridgeshire), Tinsley House (South London, near Gatwick airport) and Yarl’s Wood (Bedfordshire, not too far from Luton airport).

⁸⁸ He confirmed the following information to JRS-EUROPE orally.

⁸⁹ THE SUNDAY TIMES (London), 7 March 2004

⁹⁰ In addition detainees are held in prison establishments; cf. Home Office Asylum Statistics, 4th Quarter 2003, Table 10

⁹¹ Home Office Asylum Statistics, 4th Quarter 2003, Table 10

There are different types of centres in which asylum-seekers and migrants are detained in the United Kingdom, namely: “removal centres” (called “detention centres”, before the 2002 Nationality, Immigration and Asylum Act), “immigration detention centres” managed on behalf of the Immigration Service, and “holding centres” for people who apply for asylum at borders. Some foreigners are also detained under Immigration Rules in prisons and in police cells.

PART III:

POLICY

6. Detention in EU policy

The concept of the European Union (EU) as an “area of freedom, security and justice”, as enshrined in the Treaty of Amsterdam (1999)⁹², implies a number of policy areas⁹³, among them “asylum” and “immigration”. Within these two areas, EU institutions increasingly address the use of detention.

6.1. EU asylum policy: Detention as an element of reception policy

In the area of asylum, the EU addresses “detention” within a policy frame dealing with the reception of asylum-seekers. This includes procedural questions as well as reception conditions.

6.1.1. Detention and asylum procedures

In 2002 the EU Commission presented an Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status of 3 July 2002⁹⁴. Article 17 and 18 of this Amended proposal refer to detention as follows:

Article 17:

“1) Without prejudice to Article 18, Member States shall not hold an applicant for asylum in detention for the sole reason that his application for asylum needs to be examined before a decision is taken by the determining authority. However, Member States may only hold an applicant for asylum in detention during the examination of the application where such detention is, in accordance with a procedure laid down by national law or regulation, objectively necessary for an efficient examination of the application or where, on the basis of the personal conduct of the applicant, there is a strong likelihood of his absconding.

2) Member States may also hold an applicant for asylum in detention during the examination of his application if there are grounds for believing that the restriction on his freedom of movement is necessary for a quick decision to be made. Detention for this reason shall not exceed two weeks.

3) Member States shall provide for the possibility of an initial judicial review and subsequent regular judicial reviews of the order for detention of applicants for asylum detained pursuant to paragraph 1. Member States shall ensure that the court called upon to review the order of detention is competent to review whether detention is in accordance with the provisions of this Article.”

Article 18:

“1) Member States may hold the applicant in detention to prevent him from absconding or effecting an unauthorised stay, from the moment at which another Member State has agreed to take charge of him or to take him back in accordance with Council Regulation

⁹² Article 61

⁹³ Free movement of persons, Visa policy, EU external borders policy, Schengen area, Immigration, Asylum, Judicial cooperation in civil and criminal matters, Drugs policy coordination, EU citizenship, Fundamental rights, Racism and xenophobia, Police and customs cooperation, Crime prevention, Fight against organized crime, External relations and Enlargement from a justice and home affairs perspective

⁹⁴ COM (2002) 326 final/2

.../...[establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national] until the moment the applicant is transferred to the other Member State. Detention for this reason shall not exceed one month.

2) Member States shall ensure that the authority called upon to review the order is competent to examine the legality of the detention in accordance with the provisions of this Article.”

In June 2003, the EU Council for Justice and Home Affairs⁹⁵ found political agreement on a short version of Article 17 of this Amended Proposal:

Article 17 (new)

“Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. (...) Where an applicant for asylum is held in detention, Member States shall ensure that there is the possibility of speedy judicial review.”

According to this political agreement, Article 18, referring to the establishment of the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, can be completely deleted.

Under the statutory period of the Amsterdam Treaty (1999)⁹⁶, the Irish EU Presidency (January until June 2004) looked for a solution, which would enable the EU Council to pass a Directive⁹⁷ on minimum standards on procedures in Member States for granting and withdrawing refugee status before 30 April 2004. However, until now, the EU Council has only reached political agreement about “common standards for a fair and efficient asylum procedure”, regarded as the “missing element in the finalisation of a Common EU Asylum System as provided for in the Amsterdam Treaty and in the 1999 Tampere European Council Conclusions”⁹⁸.

6.1.2. Detention and reception conditions for asylum-seekers

At the Tampere EU Council (October 1999), the EU Member States set as a priority for establishing a common European asylum system the development of minimum standards for the reception of asylum applicants during the asylum procedure. Among the issues involved are, for instance, documentation, accommodation and healthcare.

In 2001 the EU Commission made a Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States⁹⁹. This Proposal led to the EU Council Directive laying down standards for the reception of asylum-seekers¹⁰⁰.

6.2. EU immigration policy: Detention as an element of return policy

⁹⁵ 10235/03, LIMITE, ASILE 35

⁹⁶ Article 63 (1)

⁹⁷ A “Directive” is a decision by the EU Council, which must be transposed into the national law of the EU Member States.

⁹⁸ Press Release, 2579th Council meeting, JUSTICE AND HOME AFFAIRS, Luxembourg, 29 April 2004

⁹⁹ COM (2001) 181 final

¹⁰⁰ Council Directive 2003/9/EC of 27 January 2003

EU immigration policy does not only deal with rules concerning immigration, but also with its opposite, i.e. “return policy”. It is developed to return “illegal residents”. In particular the Laeken EU Council (December 2001) and the Sevilla EU Council (June 2002) intensively discussed irregular immigration to Europe.

6.2.1. EU Commission Green Paper on a community return policy on illegal residents

In April 2002, the EU Commission published a Green Paper on a Community return policy on illegal residents¹⁰¹, which deals extensively with detention. It was further developed and led to a “Communication to the Council and the European Parliament on a community return policy on illegal residents”¹⁰².

6.2.2. Communication of the EU Commission to the Council and the European Parliament on a community return policy on illegal residents

In this Communication, the EU Commission acknowledges “the need for Member States to provide for the possibility of detention pending removal”, defining “detention pending removal” as an “act of enforcement, deprivation of personal liberty for return enforcement purposes within a closed facility”¹⁰³. However, the EU Commission stated in this Communication, too, that “a fair balance should be struck between the Member States’ need for efficient procedures and safeguarding the basic human rights of the illegal residents”, and it recommended that “minimum standards on detention pending removal should be set at EU level, defining competencies of responsible authorities and the preconditions for detention in the framework of a future Directive on minimum standards for return procedures”. The EU Commission suggested, “minimum standards” could cover

- “Grounds for detention pending removal. This covers detention of the illegal resident concerned in order to obtain return travel documents or to prevent the illegal resident from absconding during the removal or during transit.
- Identification of the groups of persons who should generally not or only under specific conditions be detained:
 - Unaccompanied children and persons under the age of 18
 - The elderly, especially where supervision is required
 - Pregnant women, unless there is the clear threat of absconding and medical advice approves detention
 - Those suffering from serious medical conditions or the mentally ill
 - Those where there is independent evidence that they have been tortured or mistreated while being detained before they arrived in the EU
 - People with serious disabilities
- Rules concerning the issue of a detention order¹⁰⁴. This could include the proportionality of detention and the possibilities of suitable alternatives to detention such as reporting duties, obligatory residence, bail bonds or even electronic monitoring.

¹⁰¹ COM (2002) 175 final

¹⁰² COM (2002) 564 final

¹⁰³ ANNEX-definitions, COM (2002) 564 final

¹⁰⁴ “Administrative order or judicial decision which forms the legal basis for the detention pending removal” (cf. ANNEX-definitions, COM (2002) 564 final)

- Provisions on the judicial control. A judicial body should be competent to issue or to revise the detention order.
- Time limits for the duration of detention pending removal. Although the grounds for detention (e.g. identification or prevention from absconding) have an inherent limitation of the duration, the Commission considers it necessary to provide for an absolute time limit and time limits for judicial review on the continuation of detention.
- Rules on the conditions of detention, in particular on accommodation standards, but also on legal assistance, to ensure humane treatment in all detention facilities in the Member States. The Commission's considered opinion is that for accommodation purposes returnees should as far as possible be separated from convicts in order to avoid any criminalisation."

6.2.3. EU Presidency Proposal for a return action programme

However, under the Danish EU Presidency (July until December 2002), the EU Council did not pursue these human rights based suggestions for a future Directive on minimum standards for return procedures further. Instead, the Danish Presidency tabled a proposal for a return action programme and stated in a note to the EU Council¹⁰⁵ only, "there are already international instruments requiring that detention must be in accordance with the basic human rights in place. Consideration should, however, be given to whether certain minimum standards for detention pending removal or during transit are needed in order to facilitate operational co-operation between Member States."

6.2.4. EU Council adoption of a Return Action Programme

In November 2002, the EU adopted this Danish Proposal for a Return Action Programme at the 2469th Council meeting (Justice, Home Affairs and Civil Protection).¹⁰⁶

This Return Action Programme does not *a priori* reject the development of "minimum standards on detention", but it states "in establishing binding minimum standards on detention a certain degree of flexibility must, however, be ensured in order to leave Member States the ability of exercising their own discretion with the purpose of facilitating safe and dignified returns". As far as the future of "common minimum standards on detention pending removal" is concerned, the Return Action Programme provides as a medium term objective "considering minimum standards for return procedures (...) including certain minimum standards on detention pending removal".

So far, there have been no proposals for "minimum standards on detention pending removal"¹⁰⁷. The EU Commission was expected to present an EU Council Directive on

¹⁰⁵ 14673/02, LIMITE, MIGR 125, FRONT 135, VISA 172

¹⁰⁶ 14931/02, LIMITE, PV/CONS, 66 JAI 278; cf. COM (2002) 323 final

¹⁰⁷ There is only a EU Commission's Communication to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents (COM (2003) 323 final). In this Communication the EU Commission announces that it is "preparing draft guidelines on security provisions for removals by air, which are crucial in order to safeguard a smooth and safe return of the persons concerned" and that it "intends to take the initiative to prepare a Proposal for a Council Directive on minimum standards for return procedures and mutual recognition of return decisions". In January 2004, during the informal EU Justice and Home Affairs Council in Dublin, EU Commissioner António Vitorino announced that the EU Commission will spend 30 million € in 2005/2006

returns in September 2004, including provisions concerning detention. However, so far it was not published, and presently it is not certain that such a proposal will be published soon.

7. General political justifications of detention in Europe

JRS staff in Europe has talked to numerous political representatives, public servants in administration, policemen and border guards about the political justification of detention. According to their reflections, detention is justified for several reasons.

7.1. Identification of asylum-seekers and irregular immigrants

Asylum-seekers occasionally arrive with incomplete identification papers. Sometimes they have false or falsified papers because in many countries of origin it is often not possible to get valid documents, for example, when a person does not have money to pay the customary bribe. This is even truer in a situation of persecution, when the person does not even have time to get valid papers. Sometimes refugees arrive with no papers at all. Also, for various reasons, asylum-seekers sometimes apply several times for asylum; the recent first evaluation report of EURODAC¹⁰⁸ shows that in 7% of the total number of cases the same person had made an asylum application more than one country.¹⁰⁹

As far as irregular migrants are concerned, they, too, often lack valid identity documents. In all of these cases, officials say that detention is justified in order to identify the person correctly.

7.2. Medical screening

In practice, concerning the detention of asylum applicants, detention is often justified for reasons of medical screening. There is the fear that asylum-seekers might bring contagious diseases to the country. Thus detention is regarded as a preventative measure for the protection of public health. Political representatives also speak of individual care: in order to protect the health of the asylum-seekers, it is necessary to examine the person medically and, if necessary, to provide medical treatment.

7.3. Screening asylum-seekers and irregular immigrants against the background of international terrorism

After 11 September 2001, the EU Member States looked at reinforced security safeguards to prevent terrorists from gaining admission to their territory through different channels: "These could include asylum channels, though in practice terrorists are not likely to use the asylum channel much, as other channels are more discreet and more suitable for their criminal practices."¹¹⁰ Thus officials regard detention also as one means

on policies for the repatriation of "illegal immigrants", and that this money could be spent on "preparatory actions", or pilot projects to organize "joint flights" (agence europe, 23 January 2004).

¹⁰⁸ EURODAC is the EU-wide fingerprint database for the comparison of the fingerprints of asylum-seekers and irregular entrants to help establish which Member State is responsible for examining an asylum application. It is operational since 15 January 2003.

¹⁰⁹ IP/04/581, Brussels, 5 May 2004

¹¹⁰ EU Commission Working paper, Asylum: Commission paper seeks balance between improving security and protecting refugees' rights, IP/01/1754

to keep a person in custody while being screened to make sure that the person is not a (potential) terrorist.¹¹¹

This can have terrible results. In Macedonia, 7 irregular immigrants, six Pakistanis and one Indian were shot as “terrorists”. They had merely wanted to transit through Macedonia on their intended journey to Western Europe. When this was revealed, the Macedonian Minister of the Interior fled to Croatia.¹¹²

7.4. Facilitation of processing asylum claims

As regards detained asylum-seekers, officials stress that detention facilitates the processing of asylum claims: public authorities are able to get more easily in touch with the asylum applicants when they are kept at a place they cannot leave. So detention also is seen to be a contribution to speedy processing.

7.5. Facilitation of forced repatriation

Furthermore, detention is considered to make forcible group return easier. Removals are increasingly carried out with charter flights: “The development of this practice would not only have financial advantages, but the signal effect would be higher as well.”¹¹³ The Danish EU presidency stated in a note to the EU Council¹¹⁴ explicitly: “Consideration should, however, be given to whether certain minimum standards for detention pending removal or during transit are needed in order to facilitate operational co-operation between Member States.”

7.6. Deterrent to irregular immigration

Finally, detention is considered to be a deterrent to prevent people coming to European countries through irregular channels.

¹¹¹ Cf. EU Council framework decision of 13 June 2002 on the fight on terrorism, JO L 164 of 22 June; European Commission action paper in response to the terrorist attacks on Madrid, MEMO/04/66, Brussels, 18 March 2004

¹¹² Cf. Migration Policy Group (Ed.), Migration News Sheet, June 2004, page 8

¹¹³ Communication of the Commission to the Council and the European Parliament on a community return policy on illegal residents, COM (2002) 564, Brussels, 14.10.2002

¹¹⁴ 14673/02, LIMITE, MIGR 125, FRONT 135, VISA 172

PART IV:

LAW

8. Detention in EU legislation: EU Council Directive laying down minimum standards for the reception of asylum-seekers

Until now, there is only one act of EU legislation dealing with detention: In January 2003 the EU Council's Return action programme led to the EU Council Directive¹¹⁵ laying down standards for the reception of asylum-seekers¹¹⁶. It applies only to asylum-seekers, who applied for asylum, not to irregular immigrants.¹¹⁷

8.1. Scope

This Directive does not state explicitly whether its provisions apply only to asylum-seekers who may exercise the right to freedom of movement¹¹⁸ or also to asylum-seekers in detention. So this question needs further examination.

On one hand, there is evidence that this Directive includes detained asylum-seekers. It applies "to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as *asylum-seekers*^{119,120}, and it defines an "asylum-seeker" as "a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken"¹²¹. From that it can be concluded that, concerning the scope of this Directive, no distinction is made between asylum-seekers in detention and asylum-seekers who can move freely. Furthermore, this Directive defines "detention" as the "confinement (...) by a Member State within a particular place, where (a person) is deprived of his or her freedom of movement"¹²², and from a legally systematic point of view this definition would not make sense, if the Directive were not applicable to asylum-seekers in detention, too.

On the other hand, there is some evidence that this Directive does not apply to detained asylum-seekers in general, but only when this is explicitly stated, such as in the context of Article 6 (Documentation)¹²³ and again in the context of Article 13 (General rules on material reception conditions and health care)¹²⁴.

¹¹⁵ A "Directive" is a decision by the EU Council, which must be transposed into the national law of the EU Member States

¹¹⁶ Council Directive 2003/9/EC of 27 January 2003

¹¹⁷ This seems to be obvious because the Directive refers explicitly to (the reception of) asylum-seekers. Still, it needs to be stressed. In Germany, for example, the Law about Services for Asylum Applicants (*Asylbewerberleistungsgesetz*) applies also to irregular immigrants (cf. Article 1 *Asylbewerberleistungsgesetz*), although the title of this Law does not indicate it.

¹¹⁸ Article 7

¹¹⁹ *Italics* by JRS-EUROPE

¹²⁰ Article 3 (Scope): "1. This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum-seekers, as well as to family members, if they are covered by such application for asylum according to the national law."

¹²¹ Article 2 (Definitions): "(c) 'applicant' or 'asylum-seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken (...)"

¹²² Council Directive 2003/9/EC of 27 January 2003, Article 2 (k)

¹²³ Article 6 (Documentation): "2. Member States may exclude application of this Article when the asylum-seeker is in detention (...)"

¹²⁴ Article 13: "2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special

However, Article 6 states an exception to documentation rules resulting from the special situation created by detention. Thus Article 6 does not contradict a scope generally including detained asylum-seekers. Equally, this time in the context of the “standard of living”, Article 13 refers to a “specific situation”, which needs special attention, i.e. “to the situation of persons who are in detention”. So this provision, too, does not speak against the legal fact that this Directive applies to detainees, too.

Finally, within the whole system of the legal framework, of which this Directive is part, the notion of “asylum-seeker” is nowhere conditioned by the fact whether an asylum-seeker is detained or not. For example, Article 17/2 of the EU Council Regulation¹²⁵ (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national states that “The requesting Member State may ask for an urgent reply in cases where the application for asylum was lodged (...) and/or where the asylum-seeker is held in detention.”

Consequently it must be concluded that the provisions of this Directive apply to asylum-seekers in detention. This conclusion is in accordance with the EU Commission’s point of view. In its Proposal for this Directive, the EU Commission stated, that “premises set up for the specific purpose to house applicants and their accompanying family members during the examination of their application within the context of a procedure to decide on their right to legally enter the territory of a Member State as well as accommodation centres in situations where applicants for asylum and their accompanying family members are not allowed, in principle, to leave the centre, can be defined as detention centres under the meaning of the Directive.”¹²⁶

8.2. Contents

The standards laid down by this Council Directive refer to a number of rights, in particular to the rights to freedom of movement, to medical care and to information as well as to the special protection of minors and families. However, these standards are not binding with regard to more favourable conditions. Article 4 states, “Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum-seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive.”

8.2.1. Legal grounds for detention

Article 7 guarantees, principally, the right to freedom of movement: “Asylum-seekers may move freely within the territory of the host Member State (...).” However, “when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.”

needs, in accordance with Article 17” (General principle for the specific situation of vulnerable persons)”, as well as in relation to the situation of persons who are in detention.”

¹²⁵ A “Regulation” is a decision by the EU Council, which are directly and legally binding in the EU Member States. Unlike a “Directive”, a “Regulation” does not need to be transposed into national law.

¹²⁶ EU Commission Proposal for a COUNCIL DIRECTIVE laying down minimum standards on the reception of applicants for asylum in Member States, COM (2001) 181 final

8.2.2. Information for detainees about detention

According to Article 5(1), detainees have the right to be informed “within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any established benefits and of the obligations with which they must comply relating to reception conditions. Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care”, and “Member States shall ensure that the information referred to in paragraph 1 is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally” (Article 5(2))

8.2.3. Duration of detention

This Council Directive neither provides for a time limit of detention nor for legal remedies.

8.2.4. Detention conditions

Article 13(2) provides “General rules on material reception conditions and health care”, for example, “Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standards of living is met in the specific situation of persons who have special needs (...) in relation to the situation of persons who are in detention.”

8.2.5. Health care

Article 9 states that Member states may require medical screening for applicants on public health grounds.

Article 15(1) states that Member States “shall ensure that applicants receive the necessary health care, which shall include, at least, emergency care and essential treatment of illness”, and Article 13(2) provides that “Member States shall provide necessary medical or other assistance to applicants who have special needs.”

8.2.6. Visits

The Member States shall, according to Article 14(2)(b), ensure “the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) recognised by Member States.”

“Legal advisors or counsellors of asylum-seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the Member State concerned shall be granted access to accommodation centres and other housing facilities in order to assist the said asylum-seekers. Limits on such access may be imposed only on grounds relating to the security of the centres and facilities and of the asylum-seekers.” (Article 14(7))

In practice, those visiting rules can be facilitated by another provision: “Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality principle as defined in the national law in relation to any information they obtain in the course of their work.” (Article 14(5))

8.2.7. Protection of minors

The Directive recognizes in Chapter IV that there are “persons with special needs”, among them minors. Article 10 provides for “schooling and education of minors”, and Article 18 requests that the “best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.” As far as, especially, unaccompanied minors are concerned, Article 19 states, for example, that “Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.”

8.2.8. Protection of families

Article 8 provides that “Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the asylum-seeker’s agreement.” Article 19 states that as “far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.” And: “Member States, protecting the unaccompanied minor’s best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety.”

8.3. Transposition

According to Article 26, “Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 February 2005 (...)”. This means that they have less than one year to do so. “By 6 August 2006, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary” (Article 25).

9. Detention in national legislation in Europe

The more the “harmonisation” of asylum and immigration law is progressing, the more national legislation is important, before as well as after EU legislation comes into force. This is why JRS-EUROPE has tried to make an inventory of national legislation in selected European countries.

9.1. Belgium

According to Belgian law, asylum seekers are not detained for the sole reason that they are asylum applicants. However, detention of asylum seekers and irregular immigrants is possible under certain conditions.

The following laws are relevant for detainees:

- *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers;*
- *Arrêté Royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*
- *Arrêté royal du 2 août 2002 fixant le régime et les règles de fonctionnement applicables aux lieux situés sur le territoire belge, gérés par l'Office des Etrangers, où un étranger est détenu (...),* which lays down the operational rules of detention centres.

The *Loi du 15 décembre 1980* was modified and enhanced by further laws. Among those are:

- *Loi du 6 mai 1993*, which *inter alia* gives legal grounds for the creation of closed detention centres;
- *Loi du 15 juillet 1996* (also called: “*Loi Vande Lanotte*”), which extends the duration of detention;
- *Loi du 29 avril 1999*, which reduces the Duration of detention.

In Belgium, the *Office des Étrangers*, which works under the authority of the Ministry of Interior, is in charge of detention.

9.1.1. Legal grounds for detention

Belgian Law (*Loi du 15 décembre 1980*) allows the detention of foreigners in the following cases:

- In the case of irregular migrants:
 - When a foreigner has received an order to leave the territory (Article 7) or has not complied with such an order (Article 27)
 - When a foreigner has asked for the “revision” of a deportation order (Article 67)
 - Before the “refoulement” of a foreigner at the border, who tried to enter illegally into the territory (Article 74(5))
- In the case of asylum seekers (*Loi du 15 décembre 1980*):
 - When the person has applied for asylum at the Belgian border (Article 74(5));
 - When Belgian authorities consider that they are not responsible for examining the asylum application for the duration of the procedure that must determine which State is responsible ¹²⁷(Article 51(5), para.3, *alinéa* 4);

¹²⁷ Cf. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Official Journal L 50 of 25 February 2003), which replaces the Dublin Convention (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, Official Journal C 254, 19/08/1997 P. 0001 – 0012).

- When the asylum seeker has introduced an appeal (“*recours urgent*”) in case of exceptionally serious grounds (Article 63(5)).
- When the asylum application has been rejected (Article 74(6));
- When there are serious reasons for considering the asylum seeker to be a danger for public order and national security (Article 52 bis).

9.1.2. Information for detainees about detention

According to Article 17 of the 2002 *Arrêté royal*, asylum seekers are meant to receive two documents on arrival in the detention centre. The first one should list the rights and duties of detainees during their stay in a centre, and explain how to get medical and psychological, social and religious care. The second must describe the different appeals possible against detention. It should also inform detainees of their right to have access to legal advice and to NGOs.

Concerning legal advice, the director of the centre has to make sure that every detainee has access to legal aid (Article 62). Detainees have the right to phone their legal counsellor between 8.00 am and 10.00 pm without paying any charge. Legal counsellors can phone their clients at any time of the day (Article 63). Lawyers and interpreters have access to detention centres between 8.00 am and 10.00 pm (Article 64). The visit of lawyers cannot be forbidden. In certain cases, the access to detention centres can be refused to interpreters (Article 65).

9.1.3. Duration of detention

The first maximum duration of detention is two months (Article 7, 25, 29, 74(5), 74(6) of the *Loi du 15 décembre 1980*). The *Office des Etrangers* can prolong this duration for two further months. After this, only the Interior Minister can decide another prolongation for successive periods of one month. Normally, the duration of detention is limited to five months (Article 72(5), 29, 74(5), 74(6) of the Law). By exception, a period of eight months of detention is possible when the Interior Minister puts reasons of public order forward. If, after five or eight months, no decision has been taken, the person must be released.

An exception is made for detention pending the determination of the State responsible for examining the asylum application: the maximum duration in any such case is 2 months (Article 63(5) of the *Loi du 15 décembre 1980*).

Detainees can contest their detention before the *Chambre du Conseil auprès du Tribunal de Première Instance*, from the place where they have been arrested or where they are detained. An appeal can afterwards be lodged against the decision of the *Chambre du Conseil* before the *Chambre des Mises en Accusation*, by detainees or by the Prosecution (State). It must be noted that the tribunal may only check if detention complies with the laws but may not consider if it is appropriate (“*opportunité*”; Article 71 of the *Loi du 15 décembre 1980*).

9.1.4. Health care

According to Article 6 of the *Arrêté royal*, every detainee has the right to individual medical, psychological and social care. This right is detailed in Section 4 of the 2002 *Arrêté royal*.

In each detention centre, a health care service must be created and be accessible every day during the time provided for by the rules of the Centre (Article 52). In case of emergency, it must be accessible at any time. If a detainee is put in isolation (Article 98(4) of the *Arrêté royal*), a medical doctor shall visit the person every day (Article 59).

The medical doctor of the centre is supposed to be independent from the director of the Centre (Article 53). His services are free. It is possible for detainees to consult a doctor outside the centre. In this case, the detainee must pay for the consultation and for the medicines prescribed (Article 53). The doctor of the centre remains the only one to decide whether a detainee must be transferred to the health service of the centre. He is also the only one who decides the appropriate treatment for any illness, or in case of birth and when life is in danger, to transfer a detainee to a medical centre or hospital outside the detention centre (Article 55).

In addition, the doctor of the centre can object to the removal or the continuing detention of a detainee, when, on medical grounds, he considers that the psychological or physical health of the detainee would be seriously affected by his removal or detention (Article 61).

Concerning psychological care, a social department should exist in each centre in order to insure, in collaboration with the medical department, the psychological and social care of detainees, especially to prepare detainees for their possible removal (Article 68).

9.1.5. Visits

As for pastoral care, each detainee has the right to religious or social care, when she/he asks for it (Article 46). Ministers of religion, designated to visit detainees, have to remain neutral with regard to the rules of the centres and the legislation. When there is evidence that the minister of religion uses the right to visit detainees in an inappropriate or abusive way, the Secretary of Home Affairs or his delegate can refuse access to the centre (Article 51).

Detainees can receive the visit of diplomatic or consular representatives every day, between 8.00 am and 10.00 pm (Article 32). Members of the House of Representatives and of the Senate can also meet detainees, if they ask the director and, especially, if their visit is justified as regards their activities (Article 33).

Family members, namely husband and wife, parents, brothers and sisters, uncles and aunts, have the right to visit detainees for one hour every day, at the time fixed by the rules of the centre (Article 34). Other visitors can also have access to detainees if allowed to by the director (Article 37).

The Governor of the Province and the Mayor have the right to visit the centre every day from 8.00 am to 7.00 pm in the frame of their activities (Article 43). For the purpose of their mission, the following persons and institutions are allowed to visit detention centres, too (Article 44):

- The United Nations' Commissioner for Refugees;
- The United Nations' Committee against Torture;
- The European Commission on Human Rights;

- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- The *Centre pour l'égalité des chances et la lutte contre le racisme*;
- The *Commission permanente de recours des réfugiés*;
- The *Commissariat général aux réfugiés et aux apatrides* ;
- The *Kinderrechtencommissaris* and the *Délégué general aux droits de l'enfant*.

Other institutions, organisations or persons may be allowed to visit detention centres with the approval of the Secretary for Home Affairs or the Head of the *Office des Étrangers*.

9.1.6. Protection of minors

Belgian law does not forbid the detention of minors. The *Arrêté royal du 2 août 2002* explicitly states that minors may be detained. Article 83 states, that in centres where minors are detained, a special infrastructure for games must be allowed for.

Tribunals increasingly consider the detention of minors as contrary to the International Convention on the Rights of the Child (Article 3 and to Article 37).

9.1.7. Protection of families

Article 84 of the *Arrêté Royal du 2 août 2002* provides explicitly that families may be detained.

9.2. Czech Republic

In the Czech Republic, asylum-seekers are temporarily detained for the sole reason that they applied for asylum. Irregular immigrants can also be detained

Relevant laws are the Act No. 326 of November 30th, 1999, on Residence of Aliens in the Territory of the Czech Republic and Amendment to Some Acts (Aliens Act) and the Asylum Act in 1999, which was amended in 2001 in order to conform the Czech legislation to EU standards (Amended Act). The Ministry of Interior's Department for Refugees is the first-instance authority in the asylum procedure. Concerning minors, there is special legislation: the Act on the Police of the Czech Republic and the Act on Social and Legal Protection of Children.

9.2.1. Legal grounds for detention

Chapter XI, Section 124 of the Aliens Act, provides *inter alia* that the Police shall be entitled to detain an alien who was delivered a notice of commencement of proceedings concerning administrative removal if there is a risk that the alien could endanger the state's security, seriously interfere with public order or frustrate or exacerbate the execution of a decision on administrative removal. According to Section 129, the Police shall detain any alien who entered the Territory illegally so that he may be repatriated.

Applying for asylum also gives legal grounds for detaining the asylum applicant. Asylum-seekers must stay in "reception centres", until certain conditions are fulfilled (Article 46(1) Amended Act).

9.2.2. Information for detainees about detention

On their arrival in asylum establishments, asylum-seekers shall be informed by the centre manager of the house rules and their rights and obligations, in a language they understand (Article 83(2) Amended Act). Moreover, “the house rules shall also be published in a language which the majority of those staying in the establishment are able to understand, and they shall be displayed at an open public space” (Article 83(4) Amended Act).

According to Section 125 of the Aliens Act, the Police shall, without undue delay, report the detention of an alien to a family member to whom leave to remain in the Territory has been granted. Unless an international agreement stipulates otherwise, the Police shall also report the detention of an alien for the purposes of administrative removal to the relevant diplomatic authority or consulate of a foreign country, if the diplomatic authority or the consulate have an office in the territory and if the police is asked to do so by the alien.

9.2.3. Duration of detention

According to Section 125 of the Aliens Act, the period of detention shall not exceed 180 days and shall run from the moment of deprivation of personal liberty. According to Section 129 the Police shall detain any alien who entered the Territory illegally for the purposes of his repatriation under an international agreement for as long as necessary. According to Section 124 of the Aliens Act, an alien who has been detained shall be entitled to file a motion to commence proceedings pursuant to a special legal regulation in which a court shall take a decision on the legitimacy of detention and shall order the release of an alien in the case that the detention is unlawful.

The living conditions of asylum-seekers in asylum “establishments” are defined by house rules, which are issued by the Ministry of the Interior; they “regulate, in detail, the organisational and technical aspects of the stay of an alien in an asylum establishment” (Article 83(1) Amended Act).

9.2.4. Health care

Article 88(1) of the Amended Act provides that “an asylum-seeker and her/his child born on the territory shall be provided until the conclusion of the asylum procedure with health care in the territory (...)”. This provision sets out a right to medical care for every detained asylum-seeker. Medical care is taken in charge by medical centres with which the Ministry of the Interior has concluded special arrangements (Article 88(3) Amended Act). The cost of health care is borne by the Czech Government. According to Article 83(2) of the Amended Act, “the house rules shall set out, in particular: (...) c) the time schedule for the provision of health care (...)”. As a consequence, conditions in which health care is provided are described in house rules set out for each asylum establishment by the Ministry of the Interior.

9.2.5. Visits

Detained asylum-seekers have a right to be visited (Article 81 Amended Act). “Visiting

rules” are contained in the house rules set out by the Ministry of the Interior for every asylum establishment (Article 83(2)d Amended Act).

9.2.6. Protection of minors

According to Article 92 of the Amended Act, “a foreigner shall be considered capable of acts in law from the date when he attains 18 years”. As a consequence, someone capable of acts in law must represent asylum-seekers who are not yet 18 years old. In the case of accompanied minors, normally one of the parents or a member of the family shall be the legal representative of the child.

If the minor is not accompanied, “a guardian shall be appointed by the court to protect his rights and legally protected interests related to his stay in the Territory (...)” (Article 89(1) Amended Act). The guardian may be a relative who is staying in the Czech Republic, or in the absence of such a relative, “another suitable legal entity or private individual or the district council according to the registered address of the minor” (Article 89(2) Amended Act).

According to special legislation, the Act on the Police of the Czech Republic and the Act on Social and Legal Protection of Children, persons under 15 years of age may not be detained. These minors are passed over to District Authorities which take further necessary steps.

9.2.7. Protection of families

Article 44 of the Amended Act states: “If the resources of the asylum proceedings permit, an asylum-seeker shall be entitled to be provided with shared accommodation together with a spouse, a direct relative or a close person if they are also asylum-seekers”.

9.3. France

In France, asylum-seekers as well as other persons asking for entry can be detained in transit zones at ports and airport (*zones d'attente*). Furthermore, irregular immigrants can be detained in order to organise their forcible return.

Asylum is regulated in France by the *Loi du 25 juillet 1952 relative au droit d'asile*, which was recently amended by the law of the 10th December 2003.

9.3.1. Legal grounds for detention

Article 35 *bis* of the *Ordonnance du 2 novembre 1945* allows the detention of foreigners in so-called “*centres de rétention administrative*” for the following grounds:

- When a foreigner cannot leave immediately France for another EU Member State according to Article 33 of the 1945 *Ordonnance* (in application of the Dublin regulation or of a readmission agreement);
- When a foreigner, subject to a removal order, cannot leave French territory immediately;

- When a foreigner is subject to a removal order (Article 22 of the 1945 ordonnance: irregular situation in France), issued less than a year ago and cannot leave French territory immediately;
- When a foreigner is subject to a removal order according to Article 26 *bis* (recorded in the Schengen database, or subject to a removal/deportation order issued by another European country (in application of the 28 May 2001 EU Directive on mutual recognition of return decisions¹²⁸) and cannot leave French territory immediately;
- When a foreigner has not been removed by the end of the previous detention lasting 7 days.

According to Article 35 *quarter* of the *Ordonnance du 2 novembre 1945*:

- Foreigners, including asylum-seekers, denied entry into France at the border, may be kept in transit zones (*zones d'attente*) in a port or at an airport.

9.3.2. Information for detainees about detention

Article 35 *bis* of the *Ordonnance du 2 novembre 1945* provides that, once the case of a person is submitted to the “judge of freedoms and detention”, the detainee must be immediately informed of his rights, if necessary with the help of an interpreter. The same article states that a legal counsellor can assist a detainee, if the detainee asks for it. According to the *Loi Sarkozy*, the “Sarkozy Law,”¹²⁹ a detainee has the right to free legal advice (Art 35 *bis*, VI).¹³⁰

9.3.3. Duration of detention

Article 35 *bis* VI of the 1945 *Ordonnance* states: “A foreigner can be sent to or maintained in detention only for a period of time strictly required to organise his departure. The administration should be very careful about this.”

In cases, which relate to Article 35 *bis* of the *Ordonnance du 2 novembre 1945*¹³¹ the decision to detain is taken by the Prefect or, in Paris, by the Prefect of Police for a duration that should exceed 48 hours. The case must be submitted to the “judge of freedoms and detention” without delay. After 48 hours, the judge can decide to prolong the duration of detention. Since the *Loi Sarkozy*, detention can be prolonged for a period

¹²⁸ Council Directive 2001/40/EC

¹²⁹ Named after the former French Minister of Interior; it covers a series of legislative projects

¹³⁰ In waiting zones, asylum-seekers shall also be immediately informed of their rights and their duties, if necessary with the help of an interpreter (Article 35 *quarter* of the *Ordonnance du 2 novembre 1945*). Moreover, when the “judge of freedoms and detention” has to decide whether detention has to be extended, the detained asylum-seeker may ask for legal assistance (Article 35 *quarter* III).

¹³¹ In cases, which relate to Article 35 *quarter* of the *Ordonnance du 2 novembre 1945*, the Chief Immigration Officer (*chef du service de contrôle aux frontières*) may decide to hold foreigners in waiting zones for a maximum of 4 days (48 hours + 48 hours). After 4 days, the “judge of freedoms and detention” can decide to extend detention for a maximum of 8 days. In exceptional circumstances, the judge may decide to maintain foreigners in detention for another period of 8 days. Foreigners cannot be kept in waiting zones more than 20 days, unless they apply for asylum 4 days before the end of the 20 days. In this case, the *Ordonnance* as modified by the *Loi Sarkozy* provides that detention is automatically prolonged for a maximum period of 4 days. An appeal against the decision to prolong detention may be lodged before the Court of Appeal, which shall decide within 48 hours. Appeal is not suspensive, except when the asylum-seeker asks the Court to declare it suspensive.

of 15 days, whereas this period was five days renewable for a maximum of 12 days in the former version of the *Ordonnance*. Now, the judge of freedoms and detention may also extend detention for 15 more days in case of threat to public order or when it is impossible to execute the removal decision taken against the foreigner because of his actions (dissimulation or lost of his passport) or because no *Laisser-passer* has been delivered by the consulate or no flight is available. Detention can then be authorised for a maximum of 32 days.

The decision of the judge of freedoms and detention to prolong the duration of detention may be challenged before the first president of the Court of Appeal, who must decide within 48 hours. Appeal is in principle not suspensive.

9.3.4. Health care

The living conditions of detained foreigners and their access to information and assistance are governed by a *décret en Conseil d'Etat*, the *Décret No 2001-236 du 19 mars 2001 relatif aux centres et locaux de rétention administrative* (due to change shortly). In addition, each centre shall adopt its own operating regulations in order to establish rules and define detainees' rights (Article 5 of the *décret du 19 mars 2001*).

Article 35 *bis* of the *Ordonnance du 2 novembre 1945* states that, once the decision to detain a foreigner is submitted to the “judge of freedoms and detention”, the person can ask for medical care during the duration of detention. The *Loi Sarkozy* did not modify this provision. In addition, according to Article 14 of the *Décret du 19 mars 2001 relatif aux centres et locaux de rétention administrative*, each centre concludes an agreement with a near-by hospital to provide medical care to detainees.¹³²

9.3.5. Visits

CIMADE, a French NGO, is, under an agreement with the Ministry of Social Affairs, allowed to provide legal assistance in detention centres. In practice, CIMADE visits detention centres on a daily basis in order to provide legal advice to detainees. The NGO annually reports to the public about its activities and the *disfonctionnement* in the detention centres and of the removal system.

Article 35 *bis* VII of the *Ordonnance du 2 novembre 1945* provides that the *Procureur de la République* or the “judge of freedoms and detention” may visit detention centres in order to monitor living conditions in these centres. In addition, the *Loi Sarkozy* has created a new body (*la commission de contrôle des centres et locaux de rétention*) to monitor every detention centre, in order to ensure the respect of detainees' rights, through visits and recommendations to the Government (Article 35 *nonies* of the *Ordonnance*). The powers of this commission and its terms of reference are to be ordered by *décret*.¹³³

According to the Article 35 *bis* of the *Ordonnance du 2 novembre 1945*, detainees have the right to “communicate” with the Consulate of their country of origin, and with someone whom they have chosen, for example, among their family.

¹³² Concerning transit zones in ports or airports, there is no specific provision in the *Ordonnance du 2 novembre 1945* stating that asylum-seekers have the right to medical care.

¹³³ decree

9.3.6. Protection of minors

Generally, unaccompanied minors should be placed under the guardianship of the authorities. They cannot be detained in “centres de rétention” because they cannot be removed. In transit zones, they should be assisted by an “ad-hoc-administrator.”

9.3.7. Protection of families

The relevant legislation does not provide for special protection of families. Families are placed in “centre de rétention” but not all of them provide relevant facilities.

9.4. Germany

In Germany, asylum-seekers cannot be detained for the sole reason that they applied for asylum. However, irregular immigrants can be detained.

Recently, the federal legislative bodies of Germany passed a new Immigration Law (*Zuwanderungsgesetz*¹³⁴), which will come into force on 1 January 2005. Part of the Act is a new Residency Law (*Aufenthaltsgesetz*), which, *inter alia*, provides for the legal grounds of detention. It is complemented by a number of further laws, which are either Federal or Regional Law (*Landesrecht*).

9.4.1. Legal grounds for detention

There are two legal grounds for detention. They are provided for in Federal Law:

- According to Article 62(1) *Aufenthaltsgesetz*, upon the decision of a judge, a foreigner can be detained in order to prepare her/his removal, when a decision on the removal cannot be taken immediately and when the removal of the person would be essentially more difficult or made impossible without the detention of the person. This is called “preparatory detention” (*Vorbereitungshaft*).
- According to Article 62(2) *Aufenthaltsgesetz*, upon the decision of a judge, a foreigner can be detained:
 - When the person entered the territory illegally and therefore is obliged to leave the country;
 - When the person is obliged to leave the country, but the removal order cannot be executed;
 - When the person has overstayed a previously fixed date and has changed her/his residence without notifying the Office for Foreigners (*Ausländerbehörde*) about her/his new address;
 - When the person, for reasons she/he is responsible for, could not be met at the place where the person was supposed to be in order to execute her/his forcible repatriation;
 - When the person evaded her/his forced repatriation in any other manner;
 - When there is well-founded evidence that the person will evade her/his forced repatriation.

This is called “security detention” (*Sicherungshaft*).

¹³⁴ *Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*

9.4.2. Information for detainees about detention

According to Federal Law, a detainee must be informed about the reasons for detention and his rights to appeal against the detention order. As there are no further provisions regarding information on the Federal level it is up to the Regions (*Länder*) to regulate this situation, either by a law or by administrative orders. Only two *Länder*¹³⁶ have special laws providing for conditions in detention (*Abschiebungshaftvollzugsgesetz*).

9.4.3. Duration of detention

The duration of “preparatory detention” shall not exceed six weeks (Article 62(1) *Aufenthaltsgesetz*). The duration of “security detention” is limited to 18 months (Article 62(2) *Aufenthaltsgesetz*). An appeal is possible.

9.4.4. Health care

Article 1 of the Federal Law about Services for Asylum Applicants (*Asylbewerberleistungsgesetz*), which also applies to people who are not asylum-seekers¹³⁷, provides for health care for “acute” illness.

9.4.5. Visits

The right of detainees to have visits depends upon the public authorities of the Regions (*Länder*). Pastoral workers and social assistants may visit detainees, if they have permission from the competent authorities.

9.4.6. Protection of minors

There is no Federal law dealing with minors in detention. It is up to the Regions (*Länder*) to regulate this situation, either by a law or by administrative orders.

9.4.7. Protection of families

There are neither Federal nor Regional laws dealing with the special protection of the family.

9.5. Ireland

In Ireland, asylum-seekers cannot be detained for the sole reason that they applied for asylum. However, like irregular immigrants, they can be detained for other reasons.

The Refugee Act of 1996 [as amended by the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000] is the main text that regulates asylum in Ireland. According to Section 9(9), the Minister of Justice is responsible for setting regulations providing for the treatment of detained asylum-seekers. The dispersal and the accommodation of asylum-seekers are administered by the Reception and Integration Agency, which acts under the authority of the Irish Department of Justice.

¹³⁶ Berlin, Brandenburg

¹³⁷ Cf. Article 1 *Asylbewerberleistungsgesetz*

9.5.1. Legal grounds for detention

Under this Act, an immigration officer or a member of the *Garda Síochána* (the Irish Police Force), may detain an asylum-seeker when, “with reasonable cause”, he suspects that the asylum-seeker:

- Poses a threat to national security or public order in the State;
- Has committed a serious non-political crime outside the State;
- Has not made reasonable efforts to establish her/his true identity;
- Intends to avoid removal from the State in the event of his or her application for asylum being transferred to a convention country pursuant to section 22;
- Intends to leave the State and enter another state without lawful authority, or
- Without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents” (Section 9(8)).

In addition, Section 5 (1) of the Immigration Act 1999 states that

- Immigration officers or members of the *Garda Síochána* may arrest and detain an asylum-seeker whom they suspect to be in violation of any provision of a deportation order.

9.5.2. Information for detainees about detention

Section 10 of the Refugee Act 1996, as amended by the 1999 Immigration Act, regulates the right of detained asylum-seekers to be informed. It provides that “the immigration officer or, as the case may be, the member of the *Garda Síochána* concerned shall, without delay, inform a person detained pursuant to Subsection (8) or (13) (a) of Section 9 or cause him or her to be informed where possible in a language that the person understands:

- That he or she is being detained pursuant to Section 9;
- That he or she shall, as soon as practicable, be brought before a court which shall determine whether or not he or she should be committed to a place of detention or released pending consideration of that person's application for a declaration under Section 8;
- That he or she is entitled to consult a solicitor;
- That he or she is entitled to have notification of his or her detention, the place of detention concerned and every change of such place sent to the High Commissioner and to another person reasonably named by him or her;
- That he or she is entitled to leave the State in accordance with the provisions of this paragraph at any time during the period of his or her detention and if he or she indicates a desire to do so, he or she shall, as soon as practicable, be brought before a court and the court may make such orders as may be necessary for his or her removal from the State, and
- That he or she is entitled to the assistance of an interpreter for the purpose of consultation with a solicitor pursuant to Paragraph (c) and for the purpose of any appearance before a court pursuant to Section 9.”

According to these provisions, every detainee has the right to consult a legal counsellor. During the consultation, as with appearances before a court, the assistance of an interpreter may be provided, on the detainee's demand. The cost of the consultation is borne by the detainee. However, indigent asylum-seekers are provided with legal aid

throughout the asylum process from the Refugee Legal Service of the Legal Aid Board and the Department of Justice, Equality and Law Reform. Nevertheless, even in this case, there is a nominal fee of 20 Euros for the legal advice.

9.5.3. Duration of detention

Irish law does not explicitly state a time limit for detention. However, certain conclusions can be drawn from procedural rules according to the Refugee Act of 1996 [as amended by the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000].

An asylum-seeker, detained under the decision of an immigration officer or a member of the *Garda Síochána*, “shall, as soon as practicable, be brought before a judge of the District Court assigned to the District Court district in which the (asylum-seeker) is being detained” (Section 9(10)). The District judge may decide either “to commit the (asylum-seeker) concerned to a place of detention for a period not exceeding ten days” or to release him. The judge can impose conditions for release including “(I) that the person resides or remains in a particular district or place in the State, (II) that he or she reports to a specified *Garda Síochána* station or immigration officer at specified intervals, (III) that he or she surrenders any passport or travel document in his or her possession” (Section 9(10)(ii)). If a member of the *Garda Síochána* considers that a person has failed to comply with the conditions listed above, he may decide to detain the concerned person (Section 9(13)). In this case, the person must be brought, as soon as practicable, before a judge of the District Court from the district in which the person is being detained.

In any case, after ten days of detention, the judge of the District Court may commit the asylum-seeker for further periods of detention (each period not exceeding ten days) pending the determination of the asylum-seeker’s application (Section 9(14)). As a consequence, there is no time limit for detention of asylum-seekers awaiting a decision on admissibility and who fall under Section 9 (8) and (13). However, asylum-seekers cannot be detained indefinitely in prisons and designated places of detention or for more than 48 hours in a police station. In addition, foreigners who have been ordered to leave the country may be detained for a maximum of eight weeks.

The Refugee Act 1996, sections 15 and 16, as amended by the 1999 Immigration Act, has created a Refugee Appeals Tribunal to deal with the appeals that asylum-seekers lodge against the rejection of their applications. This independent tribunal consists of a chairperson and members with at least ten years experience as a solicitor or a barrister, appointed by the Minister. Decisions of the Tribunal may be judicially reviewed on point of law by the High Court.

9.5.4. Health care

Asylum-seekers receive a medical card, which entitles them, like Irish citizens, to free access to general practitioners and to free hospital and dental care on equal terms.

The Refugee Applications Centre offers a full medical screening service to asylum-seekers, which includes screening for certain infectious diseases and checking vaccination information. It also provides a community health nurse for pregnant minors

and small children. However, this Centre is based in Dublin so asylum-seekers outside Dublin cannot benefit from these services.

9.5.5. Visits

Irish law does not provide rules concerning the right of a detainee to have visits.

9.5.6. Protection of minors

Section 9 (12) of the Refugee Act 1996 forbids the detention of persons under the age of 18 years. However, when immigration officers or members of the *Garda Síochána* have “reasonable grounds for believing that the person is not under the age of 18 years”, they may decide to detain the concerned person (Section 9(12)(b)). Such a provision confers to immigration officers and member of the *Garda Síochána* large powers to detain minors.

The Childcare Act 1999 regulates the protection of separated children or unaccompanied minors. The Health Board is responsible for those minors.

9.5.7. Protection of families

Irish law does not specifically deal with the protection of families in detention.

9.6. Italy

In Italy, asylum-seekers as well as irregular immigrants can be detained.

Until the beginning of the 1990’s, no specific law had been enacted in Italy concerning immigration. The *Martelli* Law of 28 February 1990 was the first bill taken in that domain. The Foreigners Act of 6 March 1998 modified the *Martelli* Law. The 2002 Immigration and Asylum Bill (or *Bossi-Fini* Law) brought about further changes.

The Bill contains two Articles concerning asylum introducing *inter alia* “mandatory detention” of asylum-seekers.

9.6.1. Legal grounds for detention

In Italy, asylum-seekers can be detained in “identification centres” for the sole reason that they applied for asylum. Irregular immigrants can also be detained

The 1998 Foreigners Act provides the creation of temporary holding centres (*Centri di Permanenza Temporanea e Assistenza – CPTA*) to detain

- Any foreign national who entered Italy illegally and whose identity is not established.
- Rejected asylum-seekers subject to a removal order.

According to the 2002 Immigration and Asylum Bill,

- Asylum-seekers can also be detained in specific centres, named *Centri di Identificazione* (CDI), in which, after having been arrested at the borders when entering Italy, they are held during the examination of their asylum application.

9.6.2. Information for detainees about detention

The 2001 Immigration and Asylum Act provides a right to legal aid to asylum-seekers who do not have financial means to pay for legal advice and who make an appeal against the Central Commission's decisions. They have to request this aid from the Commission for Free Legal Aid. However, the asylum-seeker may be forced to leave Italy before the Supreme Court of Appeal takes a final decision.

Except for this, no legal aid is provided to asylum-seekers when the Central Commission for the Recognition of Refugee Status examines their asylum applications. Similarly, asylum applicants have no right to be represented by a legal counsellor at this stage.

Legal Aid is supposed to be given by NGOs, which may obtain a permission to visit detained asylum-seekers.

9.6.3. Duration of detention

Under the 1998 Foreigners Act, the duration of detention is 30 days: a maximum of twenty days for the detention of asylum-seekers, whose identity cannot be established, plus of 10 more days, which can be added in the case of asylum-seekers awaiting removal. The 2001 Immigration and Asylum Act prolonged the duration of detention to 60 days.

Most of all, the 2001 Immigration and Asylum Act established a pre-screening stage for asylum applications, during which manifestly unfounded claims are rejected by the Central Commission for the Recognition of Refugee Status without any possibility of review. Asylum-seekers whose claims are judged "manifestly unfounded" are not allowed to stay in Italy more than 2 days after the decision.

Otherwise, judicial review is led by the Central Commission for the Recognition of Refugee Status within 48 hours after the decision to detain. An appeal can be lodged against the Central Commission's decision before the Supreme Court of Appeal.

9.6.4. Health care

The 2001 Immigration and Asylum Act provides for benefits from the national health system, health care free of charge.

According to the 2000 Directive of the Ministry of Home Affairs (*Direttiva generale in materia di Centri di Permanenza Temporanea e di Assistenza ai sensi dell'Article 22, comma i) del DPR 31 agosto 1999, n. 394 of 30 August 2000*), every CPTA should provide detained asylum-seekers, when authorized by the medical staff, with medical care and any medication needed.

9.6.5. Visits

According to the 2000 Directive of the Ministry of Home Affairs, detained asylum-seekers in CPTA can be visited by Italian citizens or foreigners who legally stay in Italy, if such visits are first allowed by the *Prefettura*.

Detained asylum-seekers may also ask to talk to representatives of humanitarian organisations working in the centre where they are held.

9.6.6. Protection of minors

Unaccompanied minors under the age of 18 can neither be removed nor detained. In practice, they are often housed in reception centres and sometimes welcomed in a designated foster family. The Italian police must inform the Juvenile Court about any unaccompanied minor crossing the Italian border. Once informed, the Civil Court must appoint a guardian to assist every minor. A legal guardian may also be designated to assist unaccompanied minors when they apply for asylum before the Central Commission for the Recognition of Refugee Status.

9.6.7. Protection of families

Asylum-seekers held in detention have the right to the unity of their family, if members of the same family are subject to detention.

9.7. Malta

In Malta, asylum-seekers as well as irregular immigrants can be detained.

Relevant Maltese legislation is the Refugees Act of 25 July 2000, which reformed the Maltese asylum system, and the Maltese Immigration Act of 1970.

9.7.1. Legal grounds for detention

The 2000 Refugee Act gives legal grounds for the detention of asylum-seekers. According to Article 10 (2) (b) of the Act, “an asylum-seeker (...) shall, unless he is in custody, reside and remain in the places which may be indicated by the Minister (responsible for immigration)”. The particular circumstances, which would justify such detention, are not clearly stated. The references to persons “in custody in virtue only of a deportation or removal order” in Sections 7(3) and 11(1) of the Act, however, attest the fact that an asylum-seeker may be detained for breaching the provisions of the Immigration Act.

The Immigration Act refers numerous times to detention, in particular with regard to Malta’s geographic context of being an island. Concerning arrival by airplane, Article 10 states, for example: “(1) Where leave to land is refused to any person arriving in Malta on an aircraft, such person may be placed temporarily on land and detained in some place approved by the Minister and notified by notice in the Gazette until the departure of such aircraft is imminent. (2) Where leave to land is refused to any person arriving in Malta by any other means, such person at his own request may, with the leave of the Principal Immigration Officer, be placed temporarily on shore and detained in some place approved by the Minister and notified by notice in the Gazette: Provided that he shall be returned to the vessel by which he is to leave Malta immediately that he makes a request to that effect or that the Principal Immigration Officer so directs, whichever is the earlier. (3) Any person, while he is detained under sub-Article (1) or (2), shall be deemed to be in legal custody and not to have landed.”

According to Article 10 (1) of the Refugees Act, asylum-seekers cannot be removed before a decision on their application is taken.

9.7.2. Information for detainees about detention

An immigration officer shall as soon as practicable, interview a person seeking for asylum in Malta. According to Article 8(1) of the 2000 Refugees Act, “the immigration officer shall inform such a person of his right to apply for a declaration and to consult the High Commissioner and to have legal assistance during all the phases of the asylum procedure”. If necessary, interpreters are provided at all stages of the procedure.

Moreover, Article 14 of the Refugees Act provides that the Refugee Commissioner shall ensure as far as possible that the application of this Act is in conformity with accepted international practice (...). For this purpose, she/he may be assisted by the UN High Commissioner for Refugees or by “any national or international non-governmental body concerned with refugees matters”.

9.7.3. Duration of detention

There is no duration limitation set to detention.

9.7.4. Health care

According to Article 10(1) of the 2000 Refugees Act, every asylum-seeker “shall (...) receive state medical care and services”.

9.7.5. Visits

Family members, friends and NGO's may obtain permission to enter detention centres from the Police. JRS-Malta is one of four NGO's, which have regular access to detention centres.

9.7.6. Protection of minors

According to Article 12 of the Refugees Act, “any child or young person below the age of 18 years (...) shall be allowed to apply for asylum, and (...) shall be assisted in terms of the Children and Young Person (Care Orders) Act, as if he were a child or young person under such Act.”

No provision in the Maltese Law provides children with separate accommodation in detention centres.

9.7.7. Protection of families

There is no legal provision concerning the protection of families.

9.8. Poland

In Poland, asylum-seekers may be detained for the sole reason that they applied for asylum. Irregular immigrants can also be detained

There are two laws relevant for detention: the 1997 Act on Aliens, and the Act on Granting Protection to Aliens within the Territory of Poland, which is *lex specialis* to the Act on Aliens.

As far as the asylum procedure is concerned, at the first instance, the President of the Office for Repatriation and Aliens examines asylum cases; the second instance is the Refugee Board, an independent body of 12 experts in refugee law, which considers cases in 3-person panels. An asylum-seeker may file a complaint against the Refugee Board's decision to the Provincial Administrative Court, and she/he may appeal against its judgment to the Supreme Administrative Court.

9.8.1. Legal grounds for detention

Article 40 of the Act on Granting Protection to Aliens provides for detention of asylum-seekers who apply for asylum at the Polish borders as well as for irregular immigrants. In both cases, only a court can order detention.

Also, asylum seekers are detained, if they fulfil the criteria for removal, for instance, when they tried to cross the border illegally. They are then detained on the basis of the Act on Aliens.

As far as asylum applicants are concerned, they may be further detained after a negative decision on the asylum claim is taken (Act on Granting Protection to Aliens).

An asylum-seeker is accommodated in such a centre upon his/her request – it is a form of state's assistance to him/her for the period of the procedure. An asylum-seeker may also live outside of the centre during the procedure.

9.8.2. Information for detainees about detention

When asylum-seekers are detained in guarded centres or under removal orders, they must be informed of the rights they enjoy, in a language they understand (Article 43(1) of the Act on Granting Protection to Aliens).

9.8.3. Duration of detention

The initial period of detention is 30 days.

Concerning asylum-seekers, under Article 44 of the Act on Granting Protection to Aliens, the President of the Office for Repatriation and Aliens may release an alien from detention, if it is probable that she/he fulfils the criteria of 1951 Geneva Convention. If a negative decision on the asylum claim is taken while the asylum applicant is being detained, detention can be maintained for the time that is necessary for taking an appeal decision; if this decision is negative, an alien may be removed from Poland. If an asylum claim is considered to be manifestly unfounded, the claimant may be detained for a period of up to one year.

The same refers to an alien who is claiming asylum while being in detention. In this case she/he may be detained for up to one year, if a negative decision on the asylum claim is delivered to her/him within 90 days.

9.8.4. Health care

An asylum-seeker accommodated in the centre has the right to medical assistance on the same basis as a Polish citizen who is insured in the National Health Fund.

9.8.5. Visits

According to Article 43(1) of the Act on Granting Protection, asylum applicants have the right to contact organisations dealing with the issues related to refugees. The detainee is also entitled to contact the UNHCR (Article 43(2)).

9.8.6. Protection of minors

It is prohibited to detain an unaccompanied minor who applied for refugee status (Article 47(5) of the Act on Granting Protection).

According to Article 47(1) of the Act on Granting Protection to Aliens, a guardian should be appointed to represent unaccompanied minors in the asylum procedure.

9.8.7. Protection of families

There is no specific legislation dealing with the protection of families who are affected by detention.

9.9. Romania

PRESENTLY THIS SECTION IS UPDATED BECAUSE OF RECENT LAW CHANGES IN ROMANIA.

9.10. Russian Federation¹³⁸

In the Russian Federation, asylum-seekers are not detained for the sole reason that they are asylum-seekers. However, like irregular immigrants, they can be detained under certain conditions.

Russian law makes a distinction between “refugees” and “forced migrants”. This distinction is primarily based on citizenship: The Refugee Law applies to non-citizens of the Russian Federation, while the Forced Migrant Law applies to internally displaced persons who have the Russian citizenship and to people from the former Soviet Republics who are willing to become Russian citizens.

The Russian Federation acceded to the Geneva Refugee Convention and Protocol in 1992 and enacted national legislation to implement the Convention in 1993. Before replacing that legislation in 1997, the authorities applied the law on refugees almost exclusively to asylum-seekers from former Soviet countries. The 1997 Refugee Law restricts access to asylum for asylum-seekers.

¹³⁸ Cf. U.S. Committee for Refugees, http://www.refugees.org/who/contact_info.htm

Responsibility for refugees and forced migrants within the Russian government has shifted repeatedly in recent years, causing confusion and interruption in services and protection for asylum-seekers, refugees, and forced migrants.

Under the Refugee Law, the registration process may take up to five days, during which the asylum-seeker is not legally in the country and has virtually no rights.

The Ministry of the Interior conducts the asylum procedure.

9.10.1. Legal grounds for detention

According to the Refugee Law, asylum-seekers who enter the Russian territory must register with the Ministry of the Interior in order to obtain a “certificate of consideration of the claim and the merits”, which allows them to stay in Russia while their applications for asylum are processed. In practice, very few asylum-seekers obtain the certificate. Without the certificate, asylum-seekers are considered as illegal foreigners and can consequently be arrested by the police and detained at any time. Because most asylum-seekers, including those registered with UNHCR, never receive refugee status, Russian authorities consider them to be illegal migrants. They can be arrested at any time

Although the government generally does not detain registered asylum-seekers, the Russian penal code allows the government to apprehend “illegal migrants,” of whom unregistered asylum-seekers are an especially vulnerable group. Border guards may detain people at the border if “irregularities” appear in their documentation. Immigration authorities are also authorized to detain foreigners with removal orders “for the period necessary to carry out the removal”

Russia’s penal code stipulates that detention should not apply if a person enters the Russian Federation illegally to apply for asylum. However, the vast majority of foreign nationals whom border authorities apprehend are removed before they can gain access to the asylum procedure.

9.10.2. Information for detainees about detention

Article 6(1) of the Refugee Law entitles registered asylum applicants to be informed, if necessary by a translator, on the asylum procedures and on their rights and duties under Russian legislation. The Law doesn’t mention any legal aid for asylum-seekers.

9.10.3. Duration of detention

The Federal Border Service may detain asylum-seekers for up to three days if they cross the borders without any valid travel document. Registered asylum-seekers may also be detained if they don’t leave the Russian territory within the time required (normally 6 months), once their application has been rejected. In this case, rejected asylum-seekers are detained before being removed.

9.10.4. Health care

According to Article 6(1) of the Refugee Law, registered asylum applicants, have the right to medical care. Asylum-seekers without the certificate have no access to the

Russian national health system, except in case of an emergency. There are no particular provisions about health care for detainees.

9.10.5. Visits

There are no provisions about visits.

9.10.6. Protection of minors

There are no special provisions for vulnerable people.

9.10.7. Protection of families

There are no provisions about the protection of families.

9.11. Slovakia

In Slovakia asylum-seekers are not detained for the sole reason that they applied for asylum. However, like irregular immigrants, they can be detained under certain conditions.

In Slovakia, there is one law dealing with detention issues: the Act No. 48/2002 on the Stay of Foreigners and Modifications and Amendments of Some Acts.

In practice, policemen who are working at border control departments, which file their applications and send them to the Migration Office, interview people applying for asylum at the border. According to Article 3(6) of Act No. 480/2002 on the Stay of Foreigners and Modifications and Amendments of Some Acts, asylum applicants are obliged to report at reception centres within 24 hours of lodging their asylum application. The border police department, which has filed their application for asylum, provides them with a provisional identification document valid for 24 hours.

According to Article 43(1) of Act No. 480/2002 on the Stay of Foreigners and Modifications and Amendments of Some Acts, a foreigner, who has not been granted asylum, can ask for a tolerated stay on the territory of the Slovak Republic, if it is not possible to remove him according to Article 58, i.e. when a return to the country of origin is not possible.

9.11.1 Legal grounds for detention

According to Article 62 of Act No. 48/2002 on the Stay of Aliens and Modifications and Amendments of Some Acts, police may detain an alien who

- Has entered the territory of Slovakia illegally;
- Is staying on the territory illegally;
- Was returned by law enforcement services of a neighbouring State;
- Is subject to an administrative removal order, and detention is necessary for the execution of the administrative removal decision;
- Has tried to leave Slovak territory illegally.

9.11.2. Information for detainees about detention

Article 67 of Act No. 48 of the 13th December 2001 states, “the police department operating the facility shall, immediately after the placement of the foreigner in the facility, ensure instruction of the foreigner in a language he/she understands, on where he/she is placed and on the obligations and rights related to the detention as well as on the internal order of the facility”.

Similarly, the police shall instruct the foreigner, at his arrival in the detention centre, on the option of reviewing the lawfulness of the decision on detention, and in a language he/she understands (Article 63). The police department in charge of the centre cannot limit the right of the foreigner to access to persons providing legal protection to him (Article 72).

9.11.3. Duration of detention

According to Article 62(3) of Act No 48/2002 on the Stay of Aliens and Modifications and Amendments of Some Acts,

- A person can be detained for “the time inevitably needed”, not exceeding 180 days;
- Foreigners whose applications for asylum have been rejected cannot be held in detention for longer than 30 days.

The detainee may, according to Article 62(5) of the Act on the Stay of aliens, lodge an appeal before the Regional Court against the decision to detain her/him within fifteen days following the delivery of this decision. Lodging an appeal does not have a postponement effect. The detainee must be released, with no necessary delay, if the grounds for detention have expired, on the basis of a court decision or after expiry of 180 days (Article 63).

9.11.4. Health care

In each police detention centre for aliens, there is should be a health care authority.

According to Article 68(1) of the Act No 48 of the 13th December 2001, the detainee “is obliged to submit to a preventive entry, periodical, exit or extraordinary medical check to the extent determined by the physician, including necessary diagnostic and laboratory tests, vaccination and preventive measures determined by the health care authority.” If the detainee needs medical care that cannot be provided inside the centre, “the police department shall ensure this medical care in a medical centre outside the facility” (Article 68(2)).

9.11.5. Visits

According to Act No.48/2002 on the Stay of Aliens and Modifications and Amendments of Some Acts, the detainees have the right

- To visits, including of a person who is providing legal advice to the detainee;
- To send written notifications, requests and complaints;
- To daily newspapers and magazines;
- To receive letters and parcels containing things for personal use;

- To receive unlimited financial funds.

According to Article 72 (1) of Act No. 48 of the 13th December 2001, “the foreigner has the right to accept visits of maximum two persons once in three weeks, for a duration of 30 minutes. In well-grounded cases, the director of the facility may allow an exception”.

People who are giving legal protection to the detainees can visit them him without any restriction (Article 72(2)).

9.11.6. Protection of minors

Under the Foreigners Law, foreigners younger than 18 years must be separated from older foreigners, except when a family is detained (Article 67 (3) of Act No. 48 of the 13th December 2001). Concerning asylum-seekers, unaccompanied minors are to be housed in a residential centre, and the Migration Office must appoint them a guardian to act as their representative during the asylum procedure.

9.11.7. Protection of families

Article 67 (4) of the Act No. 48 of the 13th December 2001 states: “a family may be placed together in a facility. If the police department decides on the division of the family, they always must consider the consequences of such division to be appropriate to the reasons for the separation.”

9.12. Slovenia

In Slovenia, asylum-seekers are not detained for the sole reason that they applied for asylum. However, like irregular immigrants, under certain conditions they can be detained.

In the Republic of Slovenia, the 2001 Law on Asylum and the 2003 Law on changes and amendments to the Asylum Act regulate asylum; the Aliens Act of 2002 provides for aliens in general.

9.12.1 Legal grounds for detention

During the asylum procedure, the applicants’ freedom of movement can be temporarily limited in order to establish their identity, to prevent them from threatening life or property of other people, to prevent the spread of contagious diseases, or when there is suspicion that the procedure is being misled or abused (Article 27(1) Law on Asylum). In these cases, it may be decided to hold applicants in an “Asylum Home” or its branches. Article 45 of the 2001 Law on Asylum provides that an Asylum Home shall be organized for the accommodation of foreigners who are in the asylum process. This Asylum Home is established and managed by the Ministry of the Interior. Branches can be built “to place asylum-seekers more evenly in different places” (Article 45a Law on Asylum).

According to Article 56 of the Aliens Act, “Until the time they are deported but for no longer than six months, aliens who do not leave the country by the specified deadline and whom it is not possible to remove immediately for whatever reason, shall be ordered by the police to move to the Centre for Aliens (hereinafter referred to as the “Centre”) or

outside the Centre, until their removal from the country” (Article 56(1)); those provisions “shall also be applied in cases where the identity of the alien is not known.” However, an alien specified in the first paragraph of this Article whom it is not possible to accommodate at the Centre due to special reasons or needs may, in agreement with the social security office and with the costs borne by the Centre, be accommodated at a social security facility or provided with other appropriate institutional care” (Article 56(3)). An alien is obliged to leave the country immediately or within a stipulated period of time (Article 47 of the Aliens Act), if she/he resides in the Republic of Slovenia illegally. “It shall be deemed that an alien is residing in the Republic of Slovenia illegally if he/she entered without permission; his/her visa was annulled or if the period for which it was issued has expired; or if he/she resides in the Republic of Slovenia in contravention of the entry entitlement or if the time of the period he could reside in the Republic of Slovenia on the basis of the law or an international agreement has expired; he/she is not in possession of a residence permit, or if the permit has expired” (Article 47 of the Aliens Act).

According to Article 57 of the Aliens Act, “stricter police supervision in the Centre may be ordered “by a police decision if: it is suspected that the alien will attempt to avoid removal or if the alien has already avoided such a measure; it is necessary due to reasons of public order, national security or international relations. Residence under stricter police supervision shall be ordered for the period required for the removal of the alien, however, not exceeding six months. Stricter police supervision shall mean the restriction of the freedom of movement to the premises of the Centre and in accordance with the house regulations of the Centre.”

9.12.2. Information for detainees about detention

Asylum applicants shall be informed of the procedure for acquiring asylum status, as well as their rights and duties in such a procedure, in a language they understand (Article 9 of the Asylum Law). Moreover, asylum applicants “shall be enabled to follow and participate in the procedure in a language they understand” (Article 12 of the Asylum Law). If they don’t understand the official language of the procedure, they shall be provided with the services of “a court approved interpreter”.

Concerning legal assistance, asylum applicants have the right during the asylum process to select legal counsellors or “refugee counsellors” in order to assist them (Article 9(3) of the Asylum Law). The 2001 Law on Asylum created “Refugee counsellors”. They shall be appointed by the Minister of Justice, from lawyers who have passed the national legal exam and have experience in refugee issues, to provide “support and legal assistance to asylum applicants in asylum and procedural matters” (Article 16(1)). For this purpose, they shall “inform asylum applicants of all issues concerning laws and other regulations as well as general legal acts in the field of asylum and asylum application; provide assistance in lodging their asylum application; provide general legal assistance; represent them in the asylum procedure” (Article 16(2)). The Republic of Slovenia pays them.

Furthermore, asylum applicants shall have, as a general rule, access to free legal assistance for implementation of the rights guaranteed by the 2001 Law on Asylum (Article 43(1) of the Law on Asylum).

Concerning other foreigners, the Aliens Act provides in Article 58, “An alien’s accommodation at the Centre or outside the Centre and accommodation under stricter police supervision shall be ordered by the police with a decision, against which the alien may file an appeal with the minister responsible for internal affairs within a period of eight days of the receipt of a written issue of the decision. An appeal shall not withhold the execution of the decision. An appeal shall be decided upon by the minister within eight days. An administrative dispute may be initiated against the decision on the appeal. If for objective reasons it is not possible to remove an alien even after six months have passed, the police may: extend accommodation at the Centre or accommodation under stricter police supervision for a further six months if it is realistic to expect that it will be possible to remove the alien within this time and, in particular, if the procedure for determining identity or the acquisition of documents for the removal of the alien are still in progress, or if the extension is necessary for security reasons; determine another place of accommodation for the alien outside the Centre until his/her deportation, where he/she must observe the rules on accommodation outside the Centre; the alien may otherwise be re-accommodated at the Centre. The police may adopt measures in accordance with the (law) even before six months have passed if, for objective reasons, it is not realistic to expect that the alien will be removed from the country within that time.”

According to Article 4 of the Aliens Act, “Aliens against whom criminal proceedings or proceedings for any offence have been initiated and who are being kept under custody or detention shall, upon request, be allowed to contact the competent authorities of the country of which they are citizens by the authority who ordered the custody or detention.”

9.12.3. Duration of detention

Detention of aliens is limited to six months (Article 56 of the Aliens Act).

The decision to hold asylum applicants in the Asylum Home or one of its branches is issued by the Ministry of the Interior and is effective “for as long as the grounds for it subsist but in any event for no longer than 3 months” (Article 27(3)). An extension for a further period of one month is possible. However, if the limitation of movement is decided on the grounds of preventing the spread of contagious diseases, this limitation shall stay in effect as long as the grounds thereof subsist. Asylum applicants can lodge an appeal against a decision on the limitation of movement before the Administrative Court within 3 days after the decision has been served. The Administrative Court shall decide on the appeal within 3 days (Article 27(4)). It rules that, during the application procedure, “the competent authority shall enable asylum-seekers to protect and exercise as easily as possible their rights according to the Law” (Article 24(7)).

9.12.4. Health care

According to the Article 43 of the 2001 Law on Asylum, asylum applicants, whether they are accommodated or not accommodated in an Asylum Home, have the right to basic health care. The Aliens Law does not provide for health care in detention.

9.12.5. Visits

Legal counsellors and refugee counsellors mentioned above, as well as representatives of the Slovenian Office of the UNHCR, “shall have the right to contact the asylum

applicant at any time and at all stages of the procedure for asylum” (Article 9(4)). Similarly, the asylum applicant shall, at any time of the day, request contacts with the persons mentioned. In addition, asylum applicants have the right “to contact NGOs which are providing help to refugees” (Article 9(2)).

9.12.6. Protection of minors

The 2001 Law on Asylum provides protection to unaccompanied minors. In this respect, a legal guardian shall be appointed to foreigners under 18 years of age who arrive in Slovenia without any parent or other legally responsible person. Guardians shall be assigned before the start of the asylum procedure (Article 28).

When unaccompanied minors apply for asylum, their applications “shall have priority and shall be resolved in the shortest time possible” (Article 14(3)). During the asylum procedure, legal representatives, designated by the competent authority of the Republic of Slovenia, must assist unaccompanied minors (Article 14(2)).

“Unaccompanied minors shall not be removed to their country of origin or to a third country willing to accept them unless adequate reception and basic living conditions are provided for them in such a country” (Article 14(5)). In no case, unaccompanied minors shall be removed contrary to the adopted international instruments.

Concerning minors who are not applying for asylum, Article 60 of the Aliens Act provides that “An alien minor who has entered the Republic of Slovenia illegally and who was not accompanied by his/her parents or other legal representatives, or who remained without the persons who accompanied him/her after he/she arrived in Slovenia shall be temporarily accommodated by the police at the special department responsible for minors at the Centre, and the social work centre be notified thereof, which shall, in accordance with the law, immediately designate a temporary representative for the minor, if the authority which apprehended him/her cannot return him/her immediately to the country from which he/she came or deliver him/her to representatives of the country of which he/she is a citizen. A minor specified in the preceding paragraph of this Article must not return to his/her country of origin or to a third country which is willing to accept him/her until suitable reception is provided; in no case may unaccompanied minors be returned in violation of the European Convention for the protection of Human Rights and Fundamental Freedoms, adopted with Protocols 3, 5 and 8 and supplemented with Protocol 2 and its protocols 1, 4, 6, 7, 9, 10 and 11 (Official Gazette of the Republic of Slovenia RS-MP, no. 7/94), the European Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Official Gazette of the Republic of Slovenia RS-MP, no. 1/94), or the Convention on the Rights of the Child (Official Gazette of the Republic of Slovenia RS-MP, no. 9/92). An alien minor shall, as a rule, be provided with accommodation at the Centre together with his/her parents or legal representatives, unless it is assessed that other solutions may be better for him/her. In the case of minors under 16 years of age, stricter police supervision may be only ordered exceptionally, whereby they must be accompanied by both or at least one of their parents.”

9.12.7. Protection of families

Except within the context of the protection of minors, there is no legislation about special protection of families.

9.13. Ukraine

In Ukraine, asylum-seekers are not detained for the sole reason that they applied for asylum. But, like irregular immigrants, they can be detained for other reasons.

Ukraine ratified in January 2003 the Geneva Refugee Convention and its Protocol. In June 2001, a new refugee law was passed to replace the 1993 Law. The State Committee for Nationalities and Migration (SCNM) is the body in charge of asylum and protection of refugees in Ukraine. The migration services (territorial branches of the SCNM) are locally competent to examine asylum claims.

9.13.1. Legal grounds for detention

According to Article 2 of the Law on Refugees, foreigners who have entered the Ukrainian territory legally must submit their applications to one of the regional migration services within three days of entry. On the other hand, persons who have been forced to illegally cross the state border of Ukraine must “within one day approach a respective body of the migration service via its representative or an official of the border guard”.

The Border Guard can detain male asylum-seekers who enter Ukraine without any document or ones who have not applied for asylum within the required time limits. Those persons are detained with other undocumented migrants in Border Guard detention facilities.

When the asylum application is unsuccessful in the first instance before the regional migration services, asylum-seekers may appeal to the SCNM, which must give a decision within one month. Since a 1997 decision of the Ukrainian Supreme Court that recognized the right for everyone to challenge decisions of bodies of the state, it is possible for asylum applicants to appeal the decision of the SCNM to District Courts, then Appeal Courts and, at last resort, to Supreme Court.

Article 9 of the Law on Refugees provides for asylum applicants a “temporary accommodation” designated by the Ukrainian authorities, pending the examination of their applications.

9.13.2. Information for detainees about detention

There is no provision in the Ukrainian Law regarding information about the reason for being detained or regarding legal assistance for asylum-seekers. The state legal aid system, limited to criminal cases, is not available in asylum procedures. Consequently, UNHCR provides legal counselling to asylum-seekers housed in its reception centre in the region of Kiev. Various NGOs also provide legal aid in centres for asylum-seekers.

9.13.3. Duration of detention

Article 9 of the Law on Refugees provides that asylum applicants may move to “temporary accommodation” designated by the Ukrainian authorities, pending the examination of their applications, but for no longer than 3 months.

9.13.4. Health care

Article 9 of the Law on Refugees states: “an applicant for the refugee status shall have the right to (...) medical assistance and social services (...)”.

9.13.5. Visits

There are no specific provisions.

9.13.6. Protection of minors

The Law on Refugee does not include any provision concerning vulnerable groups. In practice, such groups live in difficult situations.

9.13.7. Protection of families

Despite UNHCR’s recommendations, the 2001 Law on Refugee does not include any provision concerning the protection of family life.

9.14. United Kingdom

Presently, the provisions concerning detention of migrants and asylum-seekers in United Kingdom are contained in the Immigration Act 1971, schedule 2 and 3, and the Immigration and Asylum Act 1999, section 10 (“Power to detain”). Under these Acts, Immigration Officers and, in certain cases, the Secretary of State of the Home Department shall decide to detain a foreigner arriving on the territory of United Kingdom.

9.14.1. Legal grounds for detention

Immigration Officers are authorised to detain

- Foreigners against whom an administrative removal order has been issued;
- “Illegal” or suspected “illegal” entrants;
- Members of the crew of a ship, aircraft or train who entered the UK without leave;
- People who claim asylum at a port of entry to UK (for instance, a seaport or airport) pending consideration of their claim.

The Secretary of State has the power to order the detention of any foreigner:

- When a criminal court has decided to deport him;
- When notice has been given to him of the decision to deport him;
- When a deportation order is in force against him;
- In application of the Anti-Terrorism, Crime and, Security Act 2001, when he is considered as a risk to national security and suspected of being connected to international terrorism.

The conditions of detention are regulated by the Detention Centres Rules adopted in 2001 and completed by the Operation Enforcement Manual (OEM) and Operating Standards. These documents are instructions given to Immigration Officers by the Home Office. They do not carry penalties for non-compliance but can be used to pull up instances of bad practice and make complaints. There is no harmonisation of detention conditions in the United Kingdom: each centre has its own regime.

9.14.2. Information for detainees about detention

Rule 9 of the Detention Centre Rules 2001 requires disclosure of reasons for detention to the detainee “at the time of his initial detention and thereafter with monthly written updates”.

Concerning legal assistance, there is no systematic mechanism to ensure that detainees receive access to free legal counsel and translation during judicial or administrative procedures.

9.14.3. Duration of detention

No maximum period of detention is provided by UK legislation. Paragraph 38(1) of the OEM states that “in all cases detention must be for the shortest possible time”; but as a non-binding provision, it creates no real obligation. There is also a policy statement backed up by case law that children may only be detained for 10 days.

Asylum-seekers whose applications are being processed under the fast-track procedures are detained for an initial period of ten days at Oakington Reception Centre while their applications are being processed. After ten days, they may either be granted temporary admission or, if needed, moved to another detention facility, while a decision is reached on their applications. Another fast-track procedure is operated at Harmondsworth Immigration Removal Centre.

There is no automatic form of appeal against the decision to detain foreigners or asylum-seekers. Common Law procedures may however apply. Thus, an application to the High Court for judicial review can be made to challenge the lawfulness of the detention on limited grounds, such as the length of detention. An application for *habeas corpus* can also be made before the High Court in the case where there is no power in law to detain. In practice, this last possibility is limited because of the wideness of the powers to detain in immigration matters. Moreover, *habeas corpus*, like judicial review, is an expensive, long and complicated way to free detained foreigners.

There is also the possibility to ask for bail before the High Court pending the judicial review. Other means of being released from detention are available, such as: temporary admission, bail from the Immigration Service or bail from an adjudicator or from the Immigration Appeals Tribunal. These kinds of bail do not challenge the legality of detention.

9.14.4. Health care

Health care standards are provided by the Detention Centres Rules 2001. These provisions define *inter alia* access to nurses and doctors, psychological assistance, consulting specialists or transferring detainees to hospital when necessary.

9.14.5. Visits

Every centre provides in its own regulations visiting hours for members of the detainee's family and friends. Visiting times differ from one centre to another. As a general rule, visiting hours last five or seven hours, except in Haslar Immigration Removal Centre (2 hours visiting a day in the afternoon, 6 days a week, not Sunday), Lindholme Immigration Removal Centre and Dover Immigration Removal Centre (short visiting hours in the afternoon and no evening visits).

Visits of legal advisers are allowed in every removal centre during the morning and the afternoon. In Oakington detainees are assigned a solicitor or a caseworker, from either Immigration Advisory Service or from the Refugee Legal Centre, both NGOs with offices on site. Outside solicitors do not have access.

Visits of NGOs can be made during social visiting hours, except in Oakington where a special arrangement is needed. Removal centres may however refuse admission to a person they consider to be a risk for security reasons or ban someone who caused a disturbance in the centre during a previous visit.

9.14.6. Protection of minors

The Home secretary has declared a 10 days maximum detention of children and this is supported by case law.

Concerning unaccompanied minors, Chapter 38.7.3.1 of the OEM allows their detention only in "exceptional circumstances and then only overnight, with appropriate care, whilst alternative arrangements for their safety are made". However, the fact that this provision is not binding can raise problems. Moreover, according to the OEM, when the age given by the supposed minor is contested by the Immigration service, "the applicant should be treated as an adult until such time as credible documentary or medical evidence is produced which demonstrates that they are the age claimed".

9.14.7. Protection of families

The only removal centres with family facilities at the moment are Tinsley House and Dungavel. Asylum-seeking families may be detained "for longer periods than immediately prior to removal" (2002 White Paper).¹³⁹

10. Detention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

¹³⁹ There are currently 150 family spaces in the detention estate, distributed between Harmondsworth, Dungavel and Tinsley House. The UK authorities estimate that thirty or forty families may be detained at any one time. However, they refuse to publish statistics on the number and the status of detainees.

10.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The 1950 ECHR¹⁴⁰ and its five Protocols in force¹⁴¹ is the treaty of reference of the Council of Europe. 45 countries have signed and ratified the ECHR: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.¹⁴²

Differently from many other international treaties, the ECHR is enforced by a special court, the European Court of Human Rights.

10.2. The European Court of Human Rights and the European Court of Justice

The European Court of Human Rights is based in Strasbourg¹⁴³. It monitors respect of the ECHR in the ECHR State Parties. It is made up of judges, one for every State Party to the ECHR.¹⁴⁴ They are elected by the Parliamentary Assembly of the Council of Europe and serve for six years. Once they are elected as judges, they rule as individuals and do not represent their country.

The European Court of Justice in Luxembourg has jurisdiction over questions of interpretation of the EU treaty, validity and interpretation of acts of the EU institutions and interpretation of statutes of bodies established by an act of the EU Council of Ministers, where provided for in those statutes. Article 234 of the Treaty of Rome, establishing the European Community, set up this Court.

10.3. Enforcement of the ECHR

The European Court of Human Rights examines the complaints lodged by people against States Parties to the Convention for alleged violations of those rights. Article 34 of the ECHR states that the Court may receive applications from “any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”.

Thus, any person claiming to be the victim of a violation by one of the 45 countries, which has signed and ratified the ECHR, may seek relief from the European Court of Human Rights. However, first the claimant must have exhausted all possibilities of

¹⁴⁰ Entered into force on 3 September 1953

¹⁴¹ Signed in PARIS 20 March 1952, *STRASBOURG* 6 May 1963, *STRASBOURG* 6 May 1963, *STRASBOURG* 16 September 1963, *STRASBOURG* 20 January 1966

¹⁴² <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html>

¹⁴³ Although founded in 1950, the court did not actually come into existence until 1959.

¹⁴⁴ The seats of judges in respect of Latvia and Lithuania are currently vacant (23 September 2004) ; cf. <http://www.echr.coe.int/BilingualDocuments/LISTEDEPRESEANCE.htm>

national legal remedies in that country and have filed an appeal with the court not later than six months of the final national court's decision.

Furthermore, the European Court of Human Rights is competent to examine measures taken by States in execution of EU Council Directives¹⁴⁵. Within the frame of the elaboration of EU Directives in asylum and immigration matters, that competence could play a great role. If an EU Directive does not respect the standards of the ECHR, the Court could indirectly sanction such a Directive by declaring measures of transposition, which have to be taken at a national level, as contrary to the ECHR.

In the *Loizidou v. Turkey* case¹⁴⁶, the European Court of Human Rights has stated, the Convention is “a constitutional instrument of the European public order”. Contrary to other international treaties, it “comprises more than mere reciprocal engagements between contracting states. It creates over and above a network of mutual, bilateral undertakings, objective obligations, which, in the words of the Preamble (of the ECHR) benefit from a collective enforcement”¹⁴⁷.

Thus, the ECHR and the European Court of Human Rights are key instruments for the protection of human rights in Europe and thus highly relevant in the case of administrative detention of asylum-seekers and irregular immigrants.

10.4. Article 5 ECHR

10.4.1. Scope of Article 5 ECHR

Article 5 ECHR deals with the right of liberty, in particular with detention.

10.4.2. Wording of Article 5 ECHR

The wording of Art 5 ECHR is as follows:

Article 5 – Right to liberty and security

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

¹⁴⁵ In the *Cantoni v. France* case (judgment, 15 November 1996), the European Court of Human Rights, has examined for the first time the conformity of a national measure taken in execution of a EU Directive.

¹⁴⁶ European Court H.R., *Loizidou v. Turkey*, judgment of 23 March 1995.

¹⁴⁷ European Court H.R., *Ireland v. the United Kingdom* judgment of 18 January 1978, para. 239.

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and the charge against him.
 - 3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 - 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 - 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation

10.4.3. Lawfulness of detention under Article 5 ECHR

According to the wording of Article 5 ECHR, detention is not unlawful *a priori*. Detention is permitted “in accordance with a procedure prescribed by law” and only in exceptional cases.

The European Court of Human Rights has ruled that “a procedure prescribed by law” implies the notion of fair and proper procedure which means a procedure conducted by an appropriate authority and free from arbitrariness.¹⁴⁸ Recently, in 2002, the Court has recalled these principles in the *Conka* judgment¹⁴⁹: “Where the lawfulness of the detention is in issue, including the question whether a procedure prescribed by law has been followed, the Convention¹⁵⁰ refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition, that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individuals from arbitrariness”.

If the country, which detains a person, meets these requirements, Article 5 ECHR exceptionally permits detention of asylum-seekers and irregular immigrants in the following cases:

- Detention of a person (for non-compliance with the lawful order of a court or) in order to secure the fulfilment of any obligation prescribed by law according to Article 5(1)(b) ECHR; the “obligation prescribed by law” is the obligation to leave the country;
The European Court of Human Rights ruled in the so-called *Amuur* case¹⁵¹:
“Holding aliens in the international zone¹⁵² does indeed involve a restriction upon

¹⁴⁸ Judgment of 24 October 1979, *Winterwerp* case

¹⁴⁹ Judgment of 5 February 2002, *Conka v. Belgium*

¹⁵⁰ ECHR

¹⁵¹ *Mahad Lahima, Lahima, Abdelkader and Mohamed Amuur v. France*, Judgment of the European Court of Human Rights No 17/1995/523/609 of 25 June 1996

¹⁵² 4 Somali asylum-seekers were detained in the international zone at the airport of Paris-Orly.

liberty, but one which is not in every respect comparable to (...) the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention (...) and the ECHR. States' legitimate concerns to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum-seekers of the protection afforded by those Conventions".

- Detention of a person for the prevention of the spreading of infectious diseases (and of persons of unsound mind, alcoholics or drug addicts, or vagrants) according to Article 5(1)(e) ECHR;
- Detention of a person to prevent his effecting an unauthorized entry into the country according to Article 5(1)(f) ECHR;
- Detention of a person against whom action is being taken with a view to deportation or extradition according to Article 5(1)(f) ECHR.

At the same time the wording of Article 5 ECHR makes clear that detention of an asylum-seeker at the moment of filing the claim is forbidden,¹⁵³ i.e. asylum-seekers are permitted to stay in the country during adjudication of the asylum application.

10.4.4. Rights under Article 5 ECHR

10.4.4.1. Information for detainees about detention

According to Article 5(2) ECHR “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him”.

10.4.4.2. Appeal and legal aid

Article 5(4) ECHR states, that “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

This provision is connected with Article 5(2) ECHR. If the detainee is not properly informed of her/his rights when she/he is deprived of her/his liberty, it will be difficult for her/him to appeal against the decision to hold her/him in a detention centre.

¹⁵³ Cf. also the case of *Mahad Lahima, Lahima, Abdelkader and Mohamed Amuur v. France*, Judgment of the European Court of Human Rights No 17/1995/523/609 of 25 June 1996: 4 Somali asylum-seekers were detained in the international zone at the airport of Paris-Orly. The question was whether an asylum-seeker who has reached the territory of a State Party to the ECHR, but there detained in an international or transit zone, is protected by the provisions by Article 5 ECHR: Is it a “deprivation of liberty”, when an asylum-seeker is detained in order to check if his claim is founded and when he could be sent to another country considered to be a “safe country”? The Court ruled that the existence of a so-called “safe third country” does not mean that detention in an international airport zone would not constitute a deprivation of liberty. According to the Court, the possibility for the asylum-seeker to go to another country “becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined to take them in”. So, in this case, the Court considered the fact that these asylum-seekers were detained in the international airport zone of Paris-Orly as a deprivation of liberty with view to Article 5 ECHR.

The appeal must be “effective”, too. This was confirmed by the *Amuur* judgment: The obligation of effectiveness implies that a number of procedural rights have to be granted to the foreigner. Among those rights are: the right to free linguistic assistance, the right of access to the case file and the right to legal aid.

The European Court of Human Rights also stated in the *Amuur* judgment: “Although by the force of circumstances the decision to order detention must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties”.

In the *Al Nashif* judgment of the 20 May 2002, the Court recalled this principle: “The Convention¹⁵⁴ requirement that an act of deprivation of liberty may be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying Article 5 of the Convention to provide safeguards against arbitrariness (...) The person concerned should have access to a court¹⁵⁵ and the opportunity to be heard either in person or by a representative.”

Concerning national security and terrorism, the Court stressed in the *Al Nashif* judgment: “National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.”

10.4.4.3. Compensation

According to Article 5(5) ECHR someone, who has been deprived of her/his liberty in contravention of the provisions contained in Article 5(1) - 5(4), “shall have an enforceable right to compensation”.

10.4.4.4. Duration of detention

Article 5 ECHR does not explicitly set a time limit for detention. However, concerning the prohibition of arbitrariness of the detention, the Court ruled in the *Bozano* case¹⁵⁶, referring to Article 5(1)(f) ECHR that the detention of an foreigner which is justified by the fact that proceedings concerning him are in progress can cease to be justified if the proceedings concerned are not conducted with due diligence.

10.4.5. Rights under further provisions of the ECHR

Other provisions under the ECHR are also relevant for asylum-seekers and irregular immigrants.

10.4.5.1 Humane treatment and health care

Article 3 ECHR prohibits “torture” and “inhuman or degrading treatment or punishment”.

¹⁵⁴ ECHR

¹⁵⁵ In so far, Article 5 ECHR goes further than certain international rules, according to which detention measures can be subject also to administrative review.

¹⁵⁶ Judgment of 18 December 1986

With regard to detention conditions, in particular health care while being in detention, detainees may invoke the prohibition of ill treatment.

In the so-called Greek Case¹⁵⁷, the European Commission for Human Rights¹⁵⁸ concluded that the detention conditions of political detainees constitute a violation of Article 3 ECHR, if there are conditions like overcrowding, inadequate heating, inadequate sleeping and toilet facilities, insufficient food, recreation and contacts with the outside world. In the Cyprus v Turkey case¹⁵⁹, the European Commission for Human Rights ruled that not providing enough food, water and medical assistance in detention centres constitute inhuman treatment contrary to Article 3 ECHR.

In the case of *Hurtado v Switzerland*¹⁶⁰, Swiss authorities were condemned for not having given appropriate medical assistance to a prisoner whose rib was fractured until six days after his arrest.

10.4.5.2. Protection of minors

According to Article 5(1) ECHR, minors shall be detained only “by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority”.

10.4.5.3. Protection of families

Article 8 of the ECHR states that the right to family life must be respected.

Thus, if an individual is detained, the competent public authorities must ensure that the right to respect for family life can be exercised by the detainee.

If two or more family members are detained, the public authorities must avoid separating these members of one family.

11. Treaties under Public International Law and international guidelines for detention and detention practises

A “treaty under Public International Law” is any agreement governed by Public International Law and concluded in written form between one or more states and/or one or more international organizations. The particular designation of the agreement is not relevant to a determination of its character as a treaty. In practice, states and organizations use different designations, for example “convention”, “pact”, “charter”, “protocol”.

Treaties under Public International Law and international guidelines are not automatically binding for national legislation, unless national legislation provides for this capacity.

International “guidelines” are not binding at all. They may be precursors for future law.

¹⁵⁷ The Greek Case, Yearbook 12, 1969

¹⁵⁸ The European Commission for Human Rights and the European Court of Human Rights became one single institution.

¹⁵⁹ The Cyprus v Turkey Case, Commission report of 10 July 1976

¹⁶⁰ *The Hurtado v. Switzerland Case*, Series A No. 280 A, Commission’s report.

Before a treaty under Public International Law becomes binding for national legislation, it has to undergo a two-fold process.¹⁶¹

Firstly it must be binding under Public International Law: i.e. it has entered into force. This occurs by the necessary quorum of ratifications being achieved. The necessary quorum is always stated at the end of the treaty. Until this time it is not binding under Public International Law.

When a treaty is binding under International Public Law, this does not mean that it is immediately binding under national law. A state must “transpose” or “incorporate” it into its national legal framework. If it does so, it is also binding under national law.

11.1. Non-binding treaties under International Public Law

Concerning the rights of detainees, the most important non-binding treaties under International Public Law are the Charter of Fundamental Rights of the European Union of 2000¹⁶² and the Universal Declaration of Human Rights of 1948.

11.1.1. Charter of Fundamental Rights of the European Union of 2000

According to Article 45 of the Charter of Fundamental Rights of the European Union, freedom of movement is granted not only to citizens of EU Member States, but freedom of movement may be granted to “nationals of third countries¹⁶³ legally resident in the territory of a Member State”. National legislation determines who is considered to be “legally” residing, but national legislation in the EU Member States vary in this respect. Generally, refugees are not considered “illegal”, when there are no legal grounds for removal.¹⁶⁴

Concerning the protection of families, Article 33 of the Charter of Fundamental Rights of the European Union states, that “the family shall enjoy legal, economic and social protection.”

11.1.2. Universal Declaration of Human Rights of 1948

Article 3 of the Universal Declaration of Human Rights states that everyone has the right to liberty. Detention is the contrary to the freedom of movement included in the notion of “liberty”.

11.2. Binding treaties under International Public Law

There are several binding treaties under International Public Law, which concern the rights of asylum-seekers and irregular immigrants.

¹⁶¹ Cf. Wolfgang Graf Vitzthum (ed.), *Völkerrecht*, Berlin/New York 2001, page 104

¹⁶² The EU Member States approved the draft at the EU Council in Biarritz in October 2000. The European Parliament gave its approval in November 2000 and the European Commission in December 2000. The Parliament, Council and Commission signed and proclaimed the charter on 7 December 2000 in Nice. It is intended to be incorporated in the future European Constitution.

¹⁶³ States which are not EU Member States

¹⁶⁴ Cf. Commentary on the Refugee Convention 1951, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997: “If a refugee is allowed to establish himself in a country and takes up residence there, he is lawfully staying in the country.”

11.2.1. Geneva Convention relating to the Status of Refugees of 1951

The 1951 Convention relating to the Status of Refugees is the key legal document in defining who is a refugee, their rights and the legal obligations of states.¹⁶⁵ The 1967 Protocol removed geographical and temporal restrictions from the Convention.

11.2.2. International Covenant on Civil and Political Rights of 1966/1976 (ICCPR)

The International Covenant on Civil and Political Rights details the basic civil and political rights of individuals and nations.

11.2.3. International Covenant on Economical, Social and Cultural Rights of 1966/1976 (ICESCR)

According to Article 3 of this Covenant, States Parties “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Present Covenant”. This principle of non-discrimination does not differentiate, among beneficiaries of the rights set forth in the Covenant, between nationals of the States Parties and foreigners in the territory of the concerned States. However, contrary to the ICCPR, the Covenant on Economical, Social and Cultural Rights does not provide any mechanism for individual complaints.

11.2.4. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984

This convention¹⁶⁶ bans torture under all circumstances and establishes the UN Committee against Torture. In particular, it defines torture, requires states to take effective legal and other measures to prevent torture, declares that no state of emergency, other external threats, nor orders from a superior officer or authority may be invoked to justify torture.

¹⁶⁵ Article 31 states: “Refugees unlawfully in the country of refuge. (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

¹⁶⁶ On 18 December 2002, after more than 10 years of negotiations within a UN Working Group, the Optional Protocol to the Convention against Torture was adopted at the 57th session of the UN General Assembly by a majority of 127 UN Member States (42 States abstained, and 4 voted against). The Optional Protocol comprises a unique ‘two pillar’ visiting mechanism to places of detention. It creates an expert international visiting body, a Sub-Committee to the UN Committee against Torture, which will conduct periodic visits to all States Parties, and maintain a dialogue with both the State Party and the national visiting body. States that ratify the Optional Protocol must establish or maintain a national visiting body to carry out visits to places of detention. The Optional Protocol is now open for signature, and requires 20 ratifications to enter into force. As of 1 April 2004, only Albania, Malta and United Kingdom have ratified the Optional Protocol, and 21 additional states have signed it.

11.2.5. UN Convention on the Rights of the Child of 1989/1990

This Convention bans discrimination against children and provides for special protection and rights appropriate to minors. It is the most widely ratified human rights treaty in history; only two countries, the United States and Somalia, have failed to endorse it.

11.2.6. UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990/2003

This Convention is a comprehensive international treaty about the rights of all migrant workers and members of their families. Article 5 protects also irregular immigrants:

Article 5

For the purposes of the present Convention, migrant workers and members of their families:

- (a) are considered as documented or in a regular situation if they are authorized to enter, to stay and
 - to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
- (b) are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

11.3. UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers

In 1999 UNHCR established Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers. The detention of asylum-seekers is, in the view of UNHCR, “inherently undesirable”.

11.3.1. Exceptional Grounds for Detention

Guideline 3 deals with “Exceptional Grounds for Detention”. Detention of asylum-seekers may exceptionally only be resorted to, if necessary, for the following reasons :

- To verify identity;
- To determine the elements on which the claim for refugee status or asylum is based;
- In cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum;
- To protect national security and public order.

11.3.2. Alternatives to detention

Guideline 4 recommends alternatives to detention: “Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.” UNHCR suggests alternatives to detention, which may be considered, as follows:

- Monitoring Requirements
- Provision of a Guarantor/ Surety
- Release on Bail

- Open Centres

UNHCR has emphasized that while detention may be used in exceptional circumstances, consideration should always be given first to all possible alternatives¹⁶⁷. Thereafter, detention should be used only if it is reasonable and proportional and, above all, necessary.¹⁶⁸

11.4. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

In 1988 the UN General Assembly approved a “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.”¹⁶⁹ It is not binding, but the General Assembly urged that every effort be made so that the “Body of Principles” becomes generally known and respected.

12. Rights under binding codices of Public International Law

These binding codices of Public International Law deal *inter alia* with the following rights.

12.1. The right to freedom of movement

12.1.1. International Covenant on Civil and Political Rights (ICCPR)

The ICCPR protects the right to freedom of movement. In particular, Article 9 states that “no one shall be subjected to arbitrary arrest or detention.” The UN Commission on Human Rights clarifies: “The notion of ‘arbitrariness’ must not be equated with ‘against the law’, but be interpreted more broadly to include such elements as inappropriateness (...) The fact of illegal entry may indicate a need for investigation, and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.”¹⁷⁰

12.1.2. Geneva Convention relating to the Status of Refugees

Article 31 of the Geneva Convention relating to the Status of Refugees forbids, in general, limitations on the freedom of movement and only allows necessary restrictions until the status of a refugee is clarified. Thus, this Convention forbids, in principle, detention¹⁷¹ of asylum-seekers as the most intensive form of restriction. Exceptions are possible when prompted, for example, by interests of national security¹⁷², special circumstances of a mass influx, or if necessary after illegal entry.¹⁷³

¹⁶⁷ Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers

¹⁶⁸ Cf. Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection (October 2001), no. 128

¹⁶⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988, 76th plenary meeting

¹⁷⁰ Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1997)

¹⁷¹ Cf. Guideline 2, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers

¹⁷² Cf. Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the

12.1.3. UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 16(1) of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that “migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law”.

12.2. The right to health care

12.2.1. Geneva Convention relating to the Status of Refugees

Article 23 of the Geneva Convention relating to the Status of Refugees states, that the contracting states shall accord to refugees lawfully staying¹⁷⁴ in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals, including medical attendance and hospital treatment.

12.2.2. UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 28 of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families states that “migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.”

12.3. The right to be informed: International Covenant on Civil and Political Rights (ICCPR)

Article 9(2) of the ICCPR states that 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. However, this provision does not detail the form of the information and the language in which the information must be provided. The Human Rights Committee¹⁷⁵ considers that the language used should contain sufficient details to enable the person concerned to understand whether, from the person’s point of view, the arrest was in accordance with the law. Article 9(4) specifies further: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

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¹⁷³ Cf. Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection (October 2001), no. 121.

¹⁷⁴ Cf. Commentary on the Refugee Convention 1951, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997: “If a refugee is allowed to establish himself in a country and takes up residence there, he is lawfully staying in the country.”

¹⁷⁵ Communication No 132/1988

12.4. Protection of minors: UN Convention on the Rights of the Child

Minors, i.e. children who are not yet of age, are additionally and particularly protected. Article 37 of the UN Convention on the Rights of the Child forbids the detention of minors except as a last resort and then only for the shortest possible time¹⁷⁶.

12.5. Protection of families: International Covenant on Civil and Political Rights and International Covenant on Economical, Social Cultural Rights

Family life and family unity enjoy special protection, too. Regarding detained family members, especially the detention of mothers and single fathers of young children whom detention separates from their children, but also regarding administrative rules on family visits to detainees, Article 23 of the ICCPR as well as Article 10 of the ICESCR oblige States to protect family life.

12.6. Compensation: International Covenant on Civil and Political Rights (ICCPR)

According to Article 9(5), “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

13. The principle of proportionality

The principle of proportionality is a general common principle of law according to which any measure of a public authority that affects a human right must be

- Appropriate in order to achieve the objective, which is intended;
- Necessary in order to achieve the objective, which is intended, i.e. there are no less severe means to achieve the objective, which is intended;
- Reasonable, i.e. the person concerned can reasonably be expected to accept the measure in question.

If a basic right is subject to legal limitations, this principle is a safeguard against unlimited use of legislative and administrative powers. It is considered to be something of a “rule of common sense”, according to which an administrative authority may only act to exactly the extent that is needed to achieve its objectives.¹⁷⁷

The principle is part of Public International Law as well as national law and EU legislation.

As a general and common principle of the rule of law, it is usually not written down; but a number of codices have incorporated it into their text.

¹⁷⁶ “States Parties shall ensure that: (...) (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time (...)”

¹⁷⁷ Cf. Braibant Guy, “Le principe de proportionnalité”, *Mélanges offerts à Marcel Waline: le juge et le droit public*, Librairie Générale de Droit et de Jurisprudence, Paris, 1974

As far as the EU is concerned, for instance, Protocol (30) on the application of the principles of subsidiarity and proportionality annexed to the Treaty on European Union and to the Treaty establishing the European Community states explicitly: “(Each institution) shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.”¹⁷⁸ Article 49 of the Charter of Fundamental Rights of the European Union refers to this principle explicitly, too.

Consequently, all detention legislation and detention practices must comply with the principle of proportionality.

¹⁷⁸ Protocol (30) on the application of the principles of subsidiarity and proportionality annexed to the Treaty on European Union and to the Treaty establishing the European Community, no. 1

PART V:
LAWFULNESS

14. JRS-EUROPE: legal summary

14.1. Legal conclusions under EU legislation and the European Convention on Human Rights

14.1.1. Lawfulness of detention

Existing EU legislation and the European Convention on Human Rights (ECHR) do not prohibit detention of asylum-seekers and immigrants. However, detention is unlawful, if it is detention of a person who applied for asylum, and if the asylum application is the sole reason for being detained (Article 5 ECHR).

The EU Council Directive laying down minimum standards for the reception of asylum-seekers allows the detention of asylum-seekers, “when it proves necessary, for example for legal reasons or reasons of public order”.

However, according to Article 5 ECHR, detention of asylum-seekers and irregular immigrants must be in accordance with a procedure prescribed by law. This is the case, if the relevant law implies the notion of fair and proper procedure: a procedure conducted by an appropriate authority and free from arbitrariness. Even if the law provides a procedure meeting these requirements, detention of asylum-seekers and irregular immigrants is only allowed in exceptional cases.

If the country, which detains a person, meets these requirements, Article 5 ECHR exceptionally permits detention of asylum-seekers and irregular immigrants in the following cases:

- Detention of a person (for non-compliance with the lawful order of a court or) in order to secure the fulfilment of any obligation prescribed by law according to Article 5(1)(b) ECHR; the “obligation prescribed by law” is the obligation to leave the country;
- Detention of a person for the prevention of the spreading of infectious diseases (and of persons of unsound mind, alcoholics or drug addicts, or vagrants) according to Article 5(1)(e) ECHR;
- Detention of a person to prevent his effecting an unauthorized entry into the country according to Article 5(1)(f) ECHR;
- Detention of a person against whom action is being taken with a view to deportation or extradition according to Article 5(1)(f) ECHR.

14.1.2. Information for detainees about detention

It is unlawful to arrest asylum-seekers or irregular immigrant without promptly informing the person, in a language which she/he understands, of the reasons for her/his arrest and the charge against her/him (Article 5(2) ECHR).

Concerning asylum applicants in the EU, according to Article 5 of the EU Council Directive laying down minimum standards for the reception of asylum-seekers, it is unlawful, when detainees:

- Are not informed “within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least

any established benefits and of the obligations with which they must comply relating to reception conditions”;

- Do not receive this information “in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally”;
- Are not “provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care”.

14.1.3. Duration of detention

Although the ECHR does not explicitly set a time limit for detention, under the ECHR the lawfulness of detention can cease, if the proceedings concerned are not conducted with due diligence.

14.1.4. Appeal

Under the ECHR, it is unlawful, when the person cannot take proceedings by which a court decides the lawfulness of his detention speedily and his release ordered if the detention is not lawful (Article 5(4) ECHR). When making an appeal, the detainee has the right to free linguistic assistance, the right of access to the case file, and the right to legal aid. National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.

14.1.5. Compensation

A detainee, whose detention was unlawful, has an enforceable right to compensation (Article 5(5) ECHR).

14.1.6. Human treatment and health care

Under the ECHR, it is unlawful to detain a person under conditions like overcrowding, inadequate heating, inadequate sleeping and toilet facilities, insufficient food, water, and medical assistance, insufficient recreation and contacts with the outside world.

According to the EU Council Directive laying down minimum standards for the reception of asylum-seekers, it is not lawful not to provide asylum applicants with “a standard of living adequate for the health of applicants and capable of ensuring their substance” (Article 13). It is unlawful, in particular, if asylum applicants do not “receive the necessary health care, which shall include, at least, emergency care and essential treatment of illness”.

14.1.7. Visits

According to EU Council Directive laying down minimum standards for the reception of asylum-seekers, it is not lawful for detainees not to be allowed to communicate with relatives and receive visits of legal advisors, unless security aspects impose limits (Article 14).

14.1.8. Protection of minors

Under the EU Council Directive laying down minimum standards for the reception of asylum-seekers the best interests of the child must be “a primary consideration” (Article 18), and “the necessary representation of unaccompanied minors” must be ensured “as soon as possible” (Article 19).

14.1.9. Protection of families

According to the ECHR, if an individual is detained, the competent public authorities must ensure that the right to respect for family life can be exercised by the detainee; if two or more family members are detained, the public authorities must avoid separating these members of the family.

According to the EU Council Directive laying down minimum standards for the reception of asylum-seekers, detention is unlawful if there are no appropriate measures taken “to maintain as far as possible family unity” as present in the respective EU Member State, “if applicants are provided with housing by the Member State concerned” (Article 8).

14.1.10. Law enforcement

The European Court of Justice can be appealed to in order to control the lawfulness of the EU Council Directive laying down standards for the reception of asylum-seekers.

The European Court of Human Rights can be appealed to by any person, non-governmental organisation or group of individuals, claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the ECHR. Concerning the EU Council Directive laying down standards for the reception of asylum-seekers, it can declare measures of transposition, which have to be taken at a national level, as being contrary to the ECHR.

National courts or tribunals are obliged, when determining a question relating to an ECHR right, to take into account the jurisprudence of the European Court of Human Rights.

14.2. Legal summary under binding codices of Public International Law

14.2.1. Lawfulness of detention

According to the ICCPR, detention is considered as unlawful, because arbitrary, if the person is detained only because her/his entry to the country was illegal; detention can only be justified by factors particular to the individual, such as the likelihood of absconding and lack of cooperation (Article 9).

According to the Geneva Convention relating to the Status of Refugees, detention is forbidden in principle; exceptions are possible when prompted, for example, by interests of national security, special circumstances of a mass influx, or if necessary after illegal entry.

According to the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, detention is unlawful, if the detention of individuals and members of their families are not in accordance with procedures established by law (Article 16).

14.2.2. Information for detainees about detention

According to the ICCPR, anyone who is arrested shall be informed, at the time of arrest, of the reasons for her/his arrest and shall be promptly informed of any charges against her/him. A detainee must be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (Article 9).

14.2.3. Duration of detention

Binding Public International Law does not provide for a maximum duration of detention.

According to the UN Convention on the Rights of the Child, detention of minors is only allowed for the shortest possible time (Article 37).

14.2.4. Compensation

A detainee, whose detention was unlawful, has an enforceable right to compensation (Article 9(5) of the ICCPR).

14.2.5. Health care

Detention does not comply with the Geneva Convention relating to the Status of Refugees, if a refugee who is allowed to establish himself in a country and taking up residence there, is not accorded the same treatment with respect to public relief and assistance as is accorded to their nationals, including medical attendance and hospital treatment (Article 23).

According to the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, irregular migrant workers and their families must have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned (Article 28).

14.2.6. Protection of minors

According to the UN Convention on the Rights of the Child, detention of minors is only justified as a last resort and then only for the shortest possible time (Article 37).

14.2.7. Protection of families

The ICCPR (Article 23) and the ICESCR oblige States to protect family life (Article 10).

14.3. The principle of proportionality

The general principle of proportionality requires that any measure of a public authority, that affects a human right, for example a detention order, a decision concerning health care or house rules in detention centres, must be

- Appropriate in order to achieve the intended objective;
- Necessary in order to achieve the intended objective i.e. there are no less severe means to achieve the intended objective;
- Reasonable, i.e. the person concerned can reasonably be expected to accept the measure in question.

PART VI:

BENEATH AND BEYOND POLICY AND LAW

15. **Ethics: Administrative Detention of Asylum-seekers and Irregular Immigrants – Between Individual Freedom and Interest of States**

By Dr. Markus Babo, University of Lucerne/Switzerland

15.1. **Introduction**

Ethical argumentation must be completely rational and take into account the many different philosophical approaches found in Europe. However, it is not intended here to remove the theological background, but rather to show that Bible stories and Church traditions provide models for the treatment of strangers, which can still guide us today.

As Christians we are all, so-to-speak, strangers on this earth, and mindful of this, we should be much more open-minded in meeting foreigners. Foreigners are also created by God in his own image and are therefore our equals. Jesus Christ demonstrated solidarity with all human beings throughout his life on earth and to a Christian, meeting a stranger in need offers an opportunity to experience Christ Himself. In his speech about the final judgment day Jesus said: “I was hungry, and you gave me food; I was thirsty, and you gave me drink; I was a stranger, and you invited me in; I was naked, and you clothed me; I was sick, and you visited me; I was in prison, and you came to me... What you have done to one of my brothers and sisters, even the least of them, you have done to me.” (Matthew 25, 35-40). Any committed Christian following the path of Jesus can thus be motivated by Bible stories and the teachings of Jesus to fight for the just treatment of foreigners. However, a discussion of these issues with those of other convictions requires clear, rational argumentation to improve understanding.

In this light, even a specifically theological approach could not produce a different result from a purely rational one. Jürgen Habermas recognizes this in his speech accepting the 2001 Peace Prize of the German Booksellers Association: “There is a fluid boundary between secular and religious reasoning, and any attempt at definition must be approached as a co-operative task which calls on *both* sides to look at things from the other’s point of view”¹⁷⁹. This paper is an attempt to do so.

15.2. **Detention: Deprivation of the right to freedom of movement**

Administrative detention of asylum-seekers (pre-admission detention) and of irregular immigrants (pre-removal detention) has become an increasingly widely used instrument in European asylum and immigration policy in order to enforce existing policies and legislation; not only the number of detainees has increased, but also the length of time people spend in detention¹⁸⁰. Detention of asylum-seekers (pre-admission detention) has become an element of the EU’s reception policy; detention of irregular immigrants has become an element of the EU’s return policy.

Detention is a deprivation of the right to freedom of movement. Since every type of deprivation of the right to freedom of movement is a serious infringement of a fundamental human right, the ethical question arises

¹⁷⁹ Habermas, J.: *Glauben und Wissen*, Frankfurt 2001, 20-25.

¹⁸⁰ Cf. Hughes, J., Field, O.: *Recent Trends in the Detention of Asylum-seekers in Western Europe*, in: Hughes, J., Liebaut, F. (Ed.): *Detention of Asylum-seekers in Europe: Analysis and Perspectives*, The Hague 1998, 5-48

- whether,
- and if so,
 - for which purpose
 - and with which consequences

the imposition of detention can be justified.

15.3. Ethical criteria

With regard to detention, we will initially consider its purpose and then assess the means necessary to achieve this purpose. We will look especially at the question of appropriateness of the means applied while considering the consequences for all concerned. In judging the consequences of an action we need to weigh up what good has been achieved or what evil has been prevented. Fundamentally, the aim is always to achieve good and to avoid evil. If, however, a good can only be achieved by accepting an evil, this can only be ethically justified if it is the lesser evil relative to the one that would have resulted from inaction. If, on the other hand, one has to choose between two evils, then the lesser evil or the one of shorter duration is to be preferred, or the one that is probable rather than the certain one¹⁸¹.

15.4. Fundamental reflections

Pre-admission detention as well as pre-removal detention must be considered in the context of

- management of migration flows, which include asylum as well as immigration,
- and the individual right to the freedom of movement.

15.4.1. Management of migration flows

Both from an ethical and from a legal point of view the fundamental right of a state or community of states to manage migration flows is largely undisputed.

In legal terms this goes back to the principle of national sovereignty, which confers on every state the right to independently manage the destiny of its nation¹⁸². The nation is the entirety of all citizens, i.e. all those individuals who are formal holders of the relevant nationality.

In ethical terms it is necessary to further investigate the concept of national sovereignty and seek a more profound justification. Leaving aside extremely universalistic approaches (which hold that no special ethical duties exist towards the members of a nation) then there seems to be a case for the argument that a state has specific responsibilities towards its own nationals. This is based on ethical duties between human beings which, due to their cultural and historical connection, exceed ordinary interpersonal relations. Such special duties exist on all social levels in the context of

¹⁸¹ Cf. Korff, W.: Kernenergie und Moraletheologie. Der Beitrag der theologischen Ethik zur Frage allgemeiner Kriterien ethischer Entscheidungsprozesse (suhkamp taschenbuch; 597), Frankfurt 1979; Schüller, B.: Die Begründung sittlicher Urteile. Typen ethischer Argumentation in der Moralthologie, Düsseldorf 3rd ed. 1987; Wolbert, W.: Vom Nutzen der Gerechtigkeit. Zur Diskussion um Utilitarismus und teleologische Theorie (Studien zur Theologischen Ethik; 44), Fribourg–Freiburg 1992

¹⁸² Cf. Hailbronner, K.: Der Staat und der Einzelne als Völkerrechtssubjekte, in: Vitzthum, W. Graf (ed.): Völkerrecht, Berlin–New York 2nd ed. 2001, 161–265, p. 191.

personal and family relationships, society and the state. Moreover, national and international commitments are best taken care of by political states, while democratic principles as well as basic social rights, national welfare and the protection of a cultural identity are best secured by the maintenance of national borders and a degree of control over immigration¹⁸³.

It therefore follows that political states have different and more important obligations towards their own nationals than towards members of other nations or, indeed, stateless individuals. Hence members of a state have more extensive rights within their own nation than any foreign nationals¹⁸⁴.

It has to be said, however, that this differentiation between own and foreign nationals is usually removed in times of greater need, when basic human solidarity becomes an overriding priority. Such situations arise when fundamental human rights are threatened (e.g. by political persecution, death penalty or other infringement of human rights in a refugee's home country)¹⁸⁵. In such cases the fundamental right of a state to manage migration flows must give way to the right of the individual to protection.

Granted that the state has a fundamental right to protect its people and to manage migration flows, then it must be allowed to prevent undesirable immigration. This would include those who try to immigrate illegally as well as those who might pose a threat to the health or security of the nation. This right must be enforceable, so that anyone refused entry, who does not leave the country voluntarily, may be forcibly removed. Without such sanction, legal immigration would be impossible to control and maintain and therefore the state would be forced into a passive role. Detention of foreigners can help to provide such sanction.

Thus, in considering the question of purpose, detention does not appear unethical at this stage. This does not, however, say anything about the moral appropriateness of detention in individual cases. The latter can only be determined by weighing up what good has been achieved or what evil has been avoided with regard to all concerned.

15.4.2. Individual right to the freedom of movement

It cannot be denied that detention violates a person's liberty. The right to liberty is a fundamental human right, which is preserved in all European constitutions and protected by Article 6 of the Charter of Fundamental Rights of the European Union: "Everyone has the right to liberty and security of person."¹⁸⁶ (cf. also Article 5 European Convention on Human Rights). This "habeas corpus" right protects every individual, not only members

¹⁸³ Cf. Bader, V.: *Praktische Philosophie und Zulassung von Flüchtlingen und Migranten*, in: Märker, A., Schlothfeld, S.: *Was schulden wir Flüchtlingen und Migranten? Grundlagen einer gerechten Zusanwerungspolitik*, Wiesbaden 2002, 143-167.

¹⁸⁴ Cf. also Rethmann, A.-P.: *Asyl und Migration. Ethik für eine neue Politik in Deutschland* (ICS-Schriften; 33), Münster 1996, 191-196; Rethmann, A.-P.: *Selbstbestimmung – Fremdbestimmung – Menschenwürde. Auskünfte christlicher Ethik*, Regensburg 2001, 153f; Aleinikoff, T. A.: *International Legal Norms and Migration: An Analysis*, Geneva 2002, 15; Roellecke, I. S.: „Du bist nur Gast, also verschwinde!“ Überlegungen zur moralischen Rechtfertigung von Abschiebung und Ausweisung, in: Märker/Schlothfeld (n. 6) 68-89, 76; 81.

¹⁸⁵ Cf. Aleinikoff (n. 7) 15ff. Cf. also Roellecke (n. 7) 69; 73-86.

¹⁸⁶ *Abl-EG C 364/1 vom 18.12.2000*. Cf. also Bernsdorf, N.: *Article 6*, in: Meyer, J. (Hrsg.): *Kommentar zur Charta der Grundrechte der Europäischen Union*, Baden-Baden 2003, 137-145.

of a particular state, against inadmissible infringement by the state. However, it is not an absolute right, which cannot be limited under any circumstances. Should a state find it necessary to limit this right to liberty, it is obliged to give reasons. For the removal of liberty represents a grave moral evil to the affected individual. This can only be ethically justified, if an even greater evil (generally for the relevant state or society) is to be avoided by such means. Deprivation of the right to liberty of movement can therefore be allowed only in absolutely exceptional circumstances. It must remain *ultima ratio* when all other means have failed.

15.5. Pre-Admission Detention

Pre-admission detention happens immediately after arrival. It is legitimized by the argument that a great number of refugees cross European borders and that it has to be assumed that only very few of them are in need of protection. Detention of asylum applicants is deemed necessary to establish their identity and need for protection more quickly and easily and to facilitate removal where necessary.

This could only be justified on ethical grounds if detention of asylum applicants were the lesser evil for the state and its people in comparison to the application for asylum without removal of liberty, and if a serious national emergency were threatened. This might be true if there were such a high number of asylum applicants that processing their applications without detention would be impossible.

This, however, is not the case. Only a fraction of worldwide refugee migrations reaches Europe. There were 10.5 million refugees throughout the world in 2002, of which only 2.3 million came to Europe and only 615,000 to North America, while 7.5 million went to Africa and Asia¹⁸⁷. Only as a result of the Balkan conflict was a steep increase felt in the number of refugees within Europe, for e.g. in 1980, out of a total 8.3 million refugees world-wide, Europe had only 0.6 million, North America 1.2 million and Africa and Asia 6 million¹⁸⁸. These figures put the talk of the “full boat”, which is so often used in populist electioneering, into perspective.

Indeed, the boat is getting emptier when one takes into account that, without mass immigration, the proportion of 15-64 year-olds in Western Europe will shrink by 8.5% from 259.4 million in 2000 to 237.3 million in 2025, and by 37.2% to 162.8 million in the year 2050¹⁸⁹. By contrast, countries in the southern hemisphere, where the boat is already more than full, continue to accept considerably more refugees in spite of their lower standard of living. Numbers alone, therefore, cannot serve to justify the indiscriminate detention of all refugees.

The fact that less than half the migrants are officially recognized as being in need of protection under the Geneva Convention relating to the Status of Refugees¹⁹⁰, is insufficient reason in itself for the routine detention of all asylum applicants. Since the attainment of refugee status remains practically the only entry route into Europe (apart

¹⁸⁷ Cf. UNHCR: 2003 Global Refugee Trends, Geneva 2004, 89.

¹⁸⁸ Opitz, P. J.: Migration – eine globale Herausforderung, in: Opitz, P. J.: Weltprobleme im 21. Jahrhundert, München 2001, 261-285, 262-263.

¹⁸⁹ Cf. International Organization for Migration: World Migration 2003. Managing Migration Challenges and Responses for People on the Move, Geneva 2003, 144.

¹⁹⁰ Cf. UNHCR: 2003 Global Refugee Trends (n. 11) 34-35.

from family reunification and immigration for highly qualified labour) all those willing to migrate are forced down this route, which is getting narrower and narrower.

The EU member states have reinforced their borders and surrounded themselves with a belt of third countries. Either law determines that those countries are safe, or politics declare them to be safe. Alongside this, special asylum procedures have been implemented at airports, which make it almost impossible to enter the EU legally. Refugees are therefore increasingly driven into the arms of professional human smugglers and traffickers and are virtually forced to disguise their identity and route of movement. Otherwise they risk ending up back in their country of origin. You cannot expect people who try to escape from inhumane conditions in their home country to apply for visas and enter a foreign country legally carrying a valid passport. Often they have neither the time nor the money to acquire the necessary travel documents. While these facts highlight the need for structural change in Europe, they must not lead to global suspiciousness of all those who try to acquire refugee status.

In addition, the routine detention of asylum-seekers is especially hard on those who have already suffered much persecution and have been traumatized by the experience. Having to undergo a further situation of custody not only reinforces existing psychological damage, but the increasing length of detention can also endanger their very existence. Moreover, these asylum-seekers cannot find the climate of trust, which would enable them to talk openly about their experiences. This, however, would be necessary to convince the authorities that their claim to asylum is legitimate. Anyone who takes the international commitments towards refugee protection seriously, therefore, cannot justify the routine detention of asylum-seekers just for the sake of simplifying administrative procedures. In years gone by, there was a much greater number of asylum applicants than now, and authorities coped without pre-admission detention. Where necessary, the administrative burden could be eased by less stringent methods, e.g. by the implementation of registration procedures and restrictions on mobility. It is a fallacy to suggest that the asylum process can be speeded up by detaining asylum-seekers. Better results could be expected from increasing the number of investigating personnel in the relevant authorities and improving their training.

Occasionally, detention is accounted for by the need for medical screening. This could, however, only be true if there were a valid reason for suspecting that communicable diseases might be brought in by individuals or groups. In such circumstances a period of quarantine would be necessary and legitimate in the interests of all concerned. Such quarantine would not normally take more than one to two weeks. Any further detention could not be justified. One would also have to reject medical screening if it served to identify and deselect individuals suffering from long-term medical conditions in an effort to prevent them burdening the social system of the host country.

Since 11 September 2001 and, again, 11 March 2004, the issue of national security has become a key argument in favour of detention of Islamic migrants travelling without valid documents¹⁹¹. This certainly has to be taken seriously. Where there is an acute threat, even stricter controls and more serious restrictions of individual rights can be justified. However, one must bear in mind that the terrorists did not enter the relevant countries as refugees. Any routine detention of (particular groups of) asylum-seekers

¹⁹¹ Cf. Welch, M.: *Detained: Immigration laws and the expanding I.N.S. jail complex*, Philadelphia 2002.

based on the argument of national security also serves to criminalize without differentiation and to strengthen xenophobic tendencies. By reducing migration issues to a national security problem one loses sight of the fact that it isn't the refugees that must be fought. What must be fought are the things, which cause migration, such as unjust economic and social orders, ecological destruction, inhumane political systems and the erosion of traditional cultural foundations in the refugees' home countries¹⁹². Thus the argument of national security must be employed with great care and only in exceptional circumstances. Security measures should never be implemented solely at the expense of refugee protection, as explicitly confirmed by the EU Commission.¹⁹³

15.6. Pre-removal detention

Detention of irregular immigrants, either as preparatory detention or as security detention, is becoming more significant both in terms of its duration as well as the legal grounds cited to support it. The purpose is either to prepare or to ensure forcible return. Some countries detain on a preventative basis, simply on suspicion that the refugee might try to evade removal. Others detain only when certain mobility restrictions in connection with a removal order have been disregarded¹⁹⁴.

Essentially, pre-removal detention cannot be classed as unlawful in itself. Where there is a sufficiently large number of returnees unwilling to leave the country, detention can be a legitimate means of enforcing repatriation. This does, however, presuppose that each case has been thoroughly tested under appropriate legal procedures to prove that forcible return is justified, and that the individual concerned does not have to fear for his life when re-entering his home country. Unfortunately, the system does not always perform adequately, even in the European democracies, as evidenced by the many cases where refugees have only succeeded in asserting their rights with the aid of public pressure from private individuals or the churches¹⁹⁵.

A second precondition in any specific case is that voluntary departure has been refused, and that all other less severe sanctions, such as registration orders, surety, bail etc.¹⁹⁶ have been exhausted. In this context it is important to consider that the option of voluntary return needs more support, and probably promises more success, than the straightforward exertion of authority. Only as a last resort should detention, which is after all a profound infringement of the individual's right to liberty, be employed.

We also have to presuppose that forced return is an option capable of execution. If it were highly likely that forced return could not be executed because, e.g. the target country would not issue the required travel documents, then detention would be pointless and irresponsible. That is why the relevant authorities must include past experience with

¹⁹² Cf. Nuscheler, F.: Migration und Sicherheit, in: Kreller, J., Wagner, J. H. (Hrsg.): Europa vor globalen Herausforderungen. Beiträge des Trierer Kolloquium Zukunft, Trier 2000, 127-141.

¹⁹³ Cf. Angenendt, S.: Entwicklung und Perspektiven der europäischen Migrations- und Asylpolitik, in: Die Friedens-Warte 77 (2002) 143-172, 165f

¹⁹⁴ Cf. Hughes/Field (n. 2) 24.

¹⁹⁵ Cf. Babo, M.: Kirchenasyl – Kirchenhikesie. Zur Relevanz eines historischen Modells im Hinblick auf das Asylrecht der Bundesrepublik Deutschland (Studien der Moraltheologie; 20), Münster–Hamburg–London 2003.

¹⁹⁶ Cf. Field, O.: Research Paper on Alternatives to Detention. Practical alternatives to the detention of asylum-seekers and rejected asylum-seekers, <http://www.ecre.org/research/alterns.doc> (last accessed Aug. 06/2004).

target countries as a criterion in the decision-making process. Once a detention order has been passed, they must continue to check whether the criteria still apply, i.e. whether the irregular immigrant continues to resist voluntary repatriation and whether the target country will co-operate by issuing travel documents. If these preconditions don't exist, the detainee must be released immediately.

Additionally, it is necessary to check whether the individual concerned is fit to be detained. This requires an initial medical examination prior to detention in order to prevent any psychologically frail or traumatized individuals from entering detention centres, where their lives might be at risk. A number of suicides and self-mutilations¹⁹⁷ in detention centres signal that such precautions are not always adequately implemented.

Detention of minors, sick people, those with special physical needs and pregnant women has been repeatedly in the news. In such cases governments should show a certain generosity of spirit and not insist on detention. The danger to the lives of such individuals cannot be offset by the need to uphold the public interest. A suspension of detention in such instances would also demonstrate the basic humanitarian orientation which historically underlies any asylum and immigration policy, but which seems to have been lost in the legal implementation of refugee protection within Europe¹⁹⁸.

It must be stressed that the executive must not be the sole decision maker in such instances. A foundation in law is required upon which an independent legal body can decide on the appropriateness of detention in individual cases after hearing the detainee's arguments. This again should be capable of investigation by a higher, independent legal authority. Only under these conditions is it possible to prevent arbitrary and excessive detention, which would treat the individual concerned as an object and thus violate his human dignity. There have been complaints that detention has been implemented too quickly or for excessively long periods, which remind us that the judges in charge ought to take their supervisory function very seriously.

But even when the stated preconditions have been fulfilled, it doesn't mean that every type and duration of detention is legitimate. The evil done to the individual in question must also be reduced to the absolutely necessary minimum. This means that the duration of detention must be as short as possible, as with increasing length the danger to the person's health increases, especially when this happens to be a traumatized or (psychologically) ill person¹⁹⁹. Therefore it has to be assumed "that, with increasing duration, the entitlement to liberty will be accorded more weight than the public interest in the proper execution of immigration law"²⁰⁰. It is first and foremost a duty of the competent authorities to vigorously pursue the earliest possible return immediately following the start of detention. In order to provide an incentive to speed up proceedings, it might be appropriate to legally limit an initial period of detention to just a few weeks, during which the detainee's identity and conditions of forced repatriation can be

¹⁹⁷ Hughes/Field (n. 2) 33-34; 45; Pourgourides, C.: The Mental Health Implications of the Detention of Asylum-seekers, in: Hughes/Liebaut (n. 2) 199-209; Heinhold, H.: Detention in Deutschland. Die rechtlichen Voraussetzungen und der Vollzug (Asyl-Praxis-Bibliothek), Karlsruhe 2004, 50-57; 136-138.

¹⁹⁸ Cf. Babo, M.: Das europäische Flüchtlingsrecht. Aktuelle Tendenzen im Vergleich zu frühneuzeitlichen Naturrechtspositionen, in: AWR-Bulletin 42 (2004) (in print).

¹⁹⁹ Cf. Sandersfeld, C.: Detention – Ein rechtsstaatliches Problem?, in: Stimmen der Zeit 128 (2003) 397-406, 404.

²⁰⁰ BVerfG 15.12.2000 – 2 BvR 347/00 (published in JURIS database).

ascertained. An extension of a few more weeks should only be considered when the authority can prove that further detention is necessary, forced return will be possible in the near future and that sufficient effort has been made to secure the return of the foreigner. The fixing of a maximum duration of detention appears particularly important, and a review should take place after the first half of this period has elapsed.

Differentiation is conceivable based on the legal grounds for detention, as detention for medical screening purposes is likely to be completed much more quickly than detention to obtain a passport substitute. In any case, the implementation of an appropriate maximum duration of detention would exert a certain institutionalized pressure on both the executive and the judiciary to speed up and control the process adequately. It would also help to prevent any serious impairment of the detainee's health.

As well as the duration, the conditions of detention must also be appropriate to its purpose. Thus, in extreme cases, a restriction of the freedom of movement may be required to ensure that the detainee does not go underground. However, it is by no means necessary to integrate or accommodate detainees within the ordinary prison system. After all, they are not meant to be punished; this administrative measure is merely intended to ensure the termination of their stay in the country in question. This important distinction between imprisonment and detention should be made clear both in institutional and in practical terms. To minimize the evil done to the detainees, minimum standards must be met. At the very least, the standards established for the local prison service have to be observed. This is even more important as detainees are not deprived of their liberty because of a high level of criminal activity, but merely to enable the implementation of an administrative measure. Hence they must be informed immediately in a language they can understand as to the reasons for their detention. To enable them to assert their rights as detainees they must be given access to free legal advice. The dialogue about their return must commence immediately after the start of detention. Since detainees have a greater need of assistance than imprisoned criminals, they must be adequately cared for by staff trained in multicultural relations. This should include the provision of socio-pedagogical, psychological, pastoral and medical care²⁰¹. Moreover, a reasonable degree of freedom to move around and communicate must be facilitated to ensure the detainee is not further isolated and humiliated, i.e. deprived of basic human rights. After all, communication with relatives in his home country, with acquaintances, officials or representatives of humanitarian organizations are all likely to aid better and faster repatriation. If occupational and training opportunities are offered in addition, then this may even persuade the detainee to co-operate in respect of his return, not least because he will not be regarded as a failure in his home country, having acquired new skills which he can bring to bear when he returns²⁰². As the provision of work and education are widely recognized measures to aid rehabilitation within the normal prison service, where deprivation of work is deemed a deliberate punishment, they have to be considered suitable measures in the implementation of detention to aid repatriation.

15.7. Conclusions

²⁰¹ It is stated over and over again that such fundamental care is often lacking; cf. Graunke, M.: Detention. Eine rechtssoziologische Untersuchung zur Umsetzung des Rechts der Detention, Aachen 2001, 104-106; Heinhold (n. 21) 27f; 35-43; 85f; 89; 92; 127; 313.

²⁰² Cf. also Horstkotte, H.: Realität und notwendige Grenzen der Detention, in: Neue Kriminalpolitik 11 (1999) 31-36, 35f; van Kalmthout, A.: Abgewiesen und abgeschoben, in: Neue Kriminalpolitik 11 (1999) 25-30, 28f.

For asylum-seekers and irregular immigrants the imposition of detention represents such a significant evil that it can only be justified if it serves to prevent an even greater evil.

15.7.1. Pre-admission detention

Pre-admission detention could be deemed legitimate in individual cases if,

- it helped to prevent the spread of serious communicable diseases, or
- the proliferation of terrorist activities could be prevented.

In each case concrete evidence would be required. Routine detention of asylum applicants for this purpose, to streamline administrative procedures or to enable identification, however, simply adds further evil. It causes migrants to become stigmatized and criminalized and reinforces xenophobic tendencies. It cannot, therefore, be justified.

15.7.2. Pre-removal detention

Pre-removal detention of healthy adults, on the other hand, can be an ethically legitimate last resort provided that

- an independent legal process has satisfactorily established that a number of foreigners have no right to remain and can be repatriated without risk to life and limb;
- they persistently refuse to return voluntarily;
- less drastic measures have proved unsuccessful;
- removal is practicable;
- the individuals concerned are fit to be detained;
- the necessity and appropriateness of detention of any particular individual has been tested by an independent court of law following an approved legal process in which the individual has been allowed to state his case;
- the duration of detention is limited to the absolute minimum as necessitated by its purpose; and,
- the conditions of custody are appropriate, i.e.
 - detention is clearly distinguished from imprisonment, both in terms of content and execution;
 - detainees are informed without delay, in a language they can understand, as to the legal grounds for detention;
 - they are given the opportunity to take free legal advice;
 - preparations for return, involving the detainee, are commenced as soon as they enter detention;
 - psychological care, health care, pastoral and socio-pedagogical care is provided for them by staff trained in multicultural relations;
 - they are allowed to enjoy reasonable freedom of movement, occupation and communication.

15.7.3. Political conclusions

The current practice of detention of asylum-seekers and irregular immigrants in Europe highlights numerous deficiencies in the application of human rights. It manifests a deviation from the underlying humanitarian intent of the asylum and immigration policy.

One could even get the impression that detention is used as a means to deter migrants altogether. At the same time detention has led migration policy down a dead-end road in relying solely on closing off the territory and using force and coercion to achieve repatriation. In doing so, it has largely lost sight of the need to fight the causes of involuntary migration as well as the need to foster voluntary return. Given that a day in custody costs between €60 and €100, much could be done if a proportion of the money currently spent on detention were used to promote more humane conditions in migrants' home countries, or to facilitate more humane repatriation. Although this would not solve every problem and cannot avoid the need for detention in extreme circumstances, it could be an important step towards establishing a greater emphasis on humanitarian values in asylum and immigration policy.

16. “Even the dogs eat the crumbs that fall from their masters' table!”

By Professor John Riches, University of Glasgow

The following Matthaean text is based on an earlier version of the story, which Matthew knew from Mark's gospel²⁰³. Matthew has substantially rewritten the Markan version in vv. 22-25 and 28.

Matthew 17

15:21 Jesus left that place and went away to the district of Tyre and Sidon. 15:22 Just then a Canaanite woman from that region came out and started shouting, "Have mercy on me, Lord, Son of David; my daughter is tormented by a demon." 15:23 But he did not answer her at all. And his disciples came and urged him, saying, "Send her away, for she keeps shouting after us." 15:24 He answered, "I was sent only to the lost sheep of the house of Israel." 15:25 But she came and knelt before him, saying, "Lord, help me." 15:26 He answered, "It is not fair to take the children's food and throw it to the dogs." 15:27 She said, "Yes, Lord, yet even the dogs eat the crumbs that fall from their masters' table." 15:28 Then Jesus answered her, "Woman, great is your faith! Let it be done for you as you wish." And her daughter was healed instantly.

The story recounts how Jesus withdraws into the region of Tyre and Sidon from the Galilee, which is to say from the area where he principally carried out his ministry, which was at the same time his own Jewish homeland. Tyre and Sidon were pagan, that is to say, non-Jewish towns. Matthews gives no reasons for Jesus' withdrawal, and further omits Mark's comment that Jesus entered a house and attempted to hide. In place of this, Matthew's version begins with the encounter between Jesus and the Canaanite woman. The woman's designation as a Canaanite (and not, as in Mark, a Syro-Phoenician) is perhaps a local designation (Luz) but has clear associations with the biblical story of the conquest of the land of Canaan.

One is particularly struck on the one hand by the derogatory nature of Jesus' remark, in which he refers to the woman and her child as dogs, and on the other, by the woman's persistence and her clever, witty parrying of Jesus' almost racist saying.

The encounter between the woman and Jesus takes place in three stages: in the first, she appears as a suppliant and pleads for him to have pity on her, addressing him with a Jewish honorific: "son of David". In this way she abandons her own culture and acknowledges his Judaism. However this concession is met only with silence. At this we learn from the words of the disciples, she keeps up a persistent verbal assault on the group of Jesus and his disciples. Jesus' reply, which is directed to the disciples and not to the woman, recalls 10:5, where a similar restriction is put on the disciples' mission. Now the woman comes (closer?) to him, falls down in front of him and simply asks for help. This simply expression of her human need initiates the discussion proper between Jesus and the woman. Now Jesus speaks to her for the first time - albeit in a deeply dismissive and humiliating manner - not indeed addressing her directly but in the form of a proverb, of a conventional wisdom saying, redolent of Jewish prejudice. "It is not right to take the children's bread and throw it to the dogs!" But it is just this remark, so full of nationalistic prejudice, which provides her with the opportunity, which she seizes with wit and intelligence - for she turns the metaphor to her advantage. What was intended as

²⁰³ Mk 7,24-30

a crude description of two absolutely irreconcilable groups is turned into the picture of a family household. The parents and the children are gathered round the table, while round them lie (just like the woman who is addressing Jesus) the household animals and wait for the leftovers. It is admitted an extremely lowly position; nevertheless the animals – dogs – have their place *within* the household, admittedly as the lowest members of the household hierarchy, and not *outside*, as in Jesus' saying, as something wholly alien and threatening. The brilliant twist which she gives to Jesus' saying transforms the situation: now Jesus speaks to her directly: "Woman, great is your faith! Let it be done for you as you wish!" And her daughter is healed.

In the story the Canaanite woman first speaks the language of her traditional rulers, the Jews, and is met with only silence, is ignored. Her incessant cries, as she gives expression to her need, alienates the disciples. Only when she adopts the simple language of human helplessness does a dialogue begin, which then at last allows Jesus insight into the situation of the woman and her child. But even this exchange between the woman and Jesus only becomes true dialogue as a result of the woman's subversive wit: Jesus' eyes are opened by her inversion of Jesus' conventional, inhuman saying. In this exchange between Jesus and the woman ("arguing with Jesus") light is shed precisely as a result of the woman's subtle resistance. Such are the subalterns' "arts of resistance"²⁰⁴, which attempt to undermine the official language of the dominant classes with wit and humour.

This old story, despite its age, speaks provocatively and not altogether without hope to the situation of those who work with detained refugees and migrants in present-day Europe. The story gives clear expression to the extreme need and helplessness of those who are excluded and ostracized. But it also sheds light on the role of those who work as advocates on behalf of migrants, who have to counter the official language of civil servants and judges, who need the wit and imagination to be able to confront those in positions of power effectively with the simple humanity and need of the homeless and powerless in our society.

Last year in a contribution to a volume of essay, Cardinal Sterzinsky, Archbishop of Berlin, demonstrated how Jesus changed his attitude to "strangers", how he underwent a development in his attitudes to "strangers"²⁰⁵. Matthew's Gospel in particular bears witness to this process. While in chapter 15 Jesus still calls "strangers" 'dogs', he later, in his account of the last judgement in chapter 25, identifies with "strangers".

Matthew 25

25:35 for I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, 25:36 I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me.' 25:37 Then the righteous will answer him, 'Lord, when was it that we saw you hungry and gave you food, or thirsty and gave you something to drink? 25:38 And when was it that we saw you a stranger and welcomed you, or naked and gave you clothing? 25:39 And when was it that we saw you sick or in prison and visited you?' 25:40 And the king will answer them, 'Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me.' 25:41 Then he will say to

²⁰⁴ James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts*, New Haven: Yale University Press, 1990.

²⁰⁵ Cornelia Müller-Magdeburg (ed.), *Unsere Aufgaben im 21. Jahrhundert. Festschrift für Lore Maria Peschel-Gutzeit*; Baden-Baden 2002.

those at his left hand, 'You that are accursed, depart from me into the eternal fire prepared for the devil and his angels; 25:42 for I was hungry and you gave me no food, I was thirsty and you gave me nothing to drink, 25:43 I was a stranger and you did not welcome me, naked and you did not give me clothing, sick and in prison and you did not visit me.' 25:44 Then they also will answer, 'Lord, when was it that we saw you hungry or thirsty or a stranger or naked or sick or in prison, and did not take care of you?' 25:45 Then he will answer them, 'Truly I tell you, just as you did not do it to one of the least of these, you did not do it to me.' 25:46 And these will go away into eternal punishment, but the righteous into eternal life."

But before he made this identification, there was the encounter with the heathen woman, the "stranger".

²⁰⁶ Matthew 15, 21-28

17. Pastoral care

By Georg Schmidt SJ, St. Georgen/Germany

“Pastor” in Latin means “shepherd” in English. “Pastoral care” means caring for and caring about people like a shepherd cares for her/his sheep.

17.1. The Gospel

The image of the “shepherd” is referred to in the Gospel of John and of Luke:

The Shepherd and His Flock

"I tell you the truth, the man who does not enter the sheep pen by the gate, but climbs in by some other way, is a thief and a robber. The man who enters by the gate is the shepherd of his sheep. The watchman opens the gate for him, and the sheep listen to his voice. He calls his own sheep by name and leads them out. When he has brought out all his own, he goes on ahead of them, and his sheep follow him because they know his voice. But they will never follow a stranger; in fact, they will run away from him because they do not recognize a stranger's voice." (...) "I am the good shepherd. The good shepherd lays down his life for the sheep. The hired hand is not the shepherd who owns the sheep. So when he sees the wolf coming, he abandons the sheep and runs away. Then the wolf attacks the flock and scatters it. The man runs away because he is a hired hand and cares nothing for the sheep. I am the good shepherd; I know my sheep and my sheep know me."²¹⁰

The Parable of the Lost Sheep

Now the tax collectors and "sinners" were all gathering around to hear him. But the Pharisees and the teachers of the law muttered, "This man welcomes sinners and eats with them." Then Jesus told them this parable: "Suppose one of you has a hundred sheep and loses one of them. Does he not leave the ninety-nine in the open country and go after the lost sheep until he finds it? And when he finds it, he joyfully puts it on his shoulders and goes home. Then he calls his friends and neighbours together and says, 'Rejoice with me; I have found my lost sheep.' I tell you that in the same way there will be more rejoicing in heaven over one sinner who repents than over ninety-nine righteous persons who do not need to repent."²¹¹

17.2. The flock

In general, detainees have to cope with a two-fold situation:

- No perspective in the country, where they are detained, and
- Uncertainty as regards their future.

During detention existential questions come up, for the first time in a person's life, and those detainees hope that pastoral workers can help to find answers to their existential

²⁰⁷ James C. Scott, *Domination And The Arts Of Resistance: Hidden Transcripts*, New Haven: Yale University Press, 1990

²⁰⁸ Cornelia Müller-Magdeburg (Ed.); *Festschrift für Lore Maria Peschel-Gutzeit, Unsere Aufgabe im 21. Jahrhundert*, Baden-Baden 2002

²⁰⁹ Matthew 25, 35-46

²¹⁰ John 10, 1-5; 11-14

²¹¹ Luke 15, 1-7

questions: “What have I done with my life so far? Why am I in this terrible situation? I have not committed a crime, I am not culpable!”

Emotionally there are differences between irregular immigrants and asylum-seekers. To a certain extent, irregular labour immigrants are psychologically conditioned for forced repatriation; they rather fear the financial consequences, i.e. no work, no income. For asylum applicants as well as rejected asylum-seekers who fled from their country for fear of life, detention has an existential dimension.

This is why a large number of the detainee population is looking for contacts especially with the Church with respect to pastoral workers.

17.3. Pastoral care

This is why the presence of pastoral workers among detainees is important.

Pastoral care has two dimensions, an individual dimension and a societal dimension.

17.3.1. Individual dimension

For a pastoral worker it is never important, whether a person has a right to stay or not. The Gospel of the loving and merciful God is addressed to each person without regard to his legal status.

Individual pastoral care varies according to the needs of detainees. Those among detainees, who are Christians and practising their belief, need not only human and religious accompaniment in general, but also shared and common prayer because for them this is an important support in their situation: They experience freedom and solidarity when sharing prayer and reflections with each other and/or the pastoral worker. It is a time and a place, when they can forget their daily negative experience because prayer and sharing means for them a positive experience. Therefore, the following are necessary:

- Human accompaniment,
- Religious accompaniment,
- Prayer, and
- Other religious service.

But non-Christian detainees often call Christian pastoral workers. This is mostly the case, when existential questions come up. The pastoral worker can help in those situations by

- Human accompaniment,
- Listening,
- Accompanying and
- Guiding this very personal search for answers to personal existential questions.

Religious service is a space for faith witness, also a space of encouragement, a space for lamentation, but also a space for the growth of a detainee’s personal religious and cultural tradition. Pastoral care does not only try to support this personal growth, but also offers help to a detainee to develop further her/his personal spirituality. This is why individual meetings are important. But also other means of help are important, for

example trying to provide for a Bible in the native language of a detainee or methodical support of personal mediation.

Pastoral workers are also challenged as social workers and legal counsellors. In such a situation it is important that the pastoral workers can make clear that pastoral care goes beyond the social and the legal dimensions. Pastoral care is still relevant, even after social and legal action have not brought about the desired success. This is often the only relevant pastoral care, which can be offered: the common experience of the detainee and the pastoral worker of being powerless, for instance when waiting for the police car, which will take the detainee to the airport.

Often it is very important that the pastoral workers stay in close touch with the local Church's missions for foreigners. They can help to ensure that the detainee finds forms of religious life, which correspond to his/her own cultural background which is often different from the local Church's cultural background.

Pastoral care is not only accompaniment, companionship or counselling in very real set of circumstances. Christian pastoral care represents the Church as well as basic human values and an example of ethical behaviour. The pastoral worker is under a duty to, therefore, offer guidance as to the detainee's behaviour as well as to offer a critique of policies and political measures.

17.3.2. Societal dimension

"Pastoral care" implies also a societal dimension, which is normally described as "advocacy", i.e. to plead the cause of detainees. This is a practical consequence of the pastoral teachings of the Second Vatican Council.²¹² It means to put into practice and to defend the ethical competence of the Church, but also to defend the Church against misunderstandings, to defend the Church against tendencies, which try to impose a "political" mandate upon the Church. The Church respects the autonomy of a State, without any reserve, and a State's competence to pass legislation and to execute it. At the same time, the Church clarifies that the ecclesial mission of pastoral care comprises the whole person, and that the Church's right to self-determination in pastoral affairs may not be touched. Pastoral care comprises engagement and involvement, when questions of justice closely linked with human rights are at stake:

"The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same people (...) It is only right, however, that at all times and in all places, the Church should have true freedom to preach the faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when the fundamental rights of a person or the salvation of souls require it. In this, she should make use of all the means-but only those-which accord with the Gospel and which correspond to the general good according to the diversity of times and circumstances."²¹³

Advocacy by the Church is the exercise of ethical competence in the public forum. Such advocacy is not governed by self-interest. It is not designed to enhance the Church's own power, but, rather, to give a voice to people who have no voice, such as detainees.

²¹² Cf. *Gaudium et spes* 76

²¹³ Cf. *Gaudium et spes* 76

17.4. Pastoral workers today

“Pastoral workers” are not only salaried priests and pastors, but also volunteers. Except for the Vatican’s seminars for the catholic airport chaplains, which are usually organised every second year, there is hardly any particular training for pastoral workers who work in detention centres or with released detainees.

By inviting especially Christians for prayer and religious service, the pastoral worker welcomes in a particular way these detainees among the detainee population. Pastoral workers thus communicate that life goes on in a universal Church. The continuity of Christian community remains even in a socially exceptional situation like detention. In so far pastoral workers have a bridging function: they are ambassadors of the local Church and represent symbolically the international and global dimension of the local Church.

As a Christian, the pastoral worker reserves her/his own personal ethical judgement in human matters for her/himself, especially when human existence and fundamental human rights are concerned. This can mean that the pastoral worker regards and judges about detention, deportation and/or the rejection of an asylum claim also from a point of view of

- Justice,
- The Christian option for the poor and
- The excluded in our global society,
 - Their human rights and
 - Their participatory rights

The pastoral worker is a critical example for detainees, too. Pastoral workers stand with their whole person for honesty and fairness, for the respect of fundamental values also in a situation like detention. They cannot accept dishonest behaviour aiming at achieving legal advantages by being dishonest. In case of necessity, a pastoral worker explains this to a detainee.

17.5. The mission of pastoral workers

In comparison with social workers or legal counsellors, the mission of the pastoral worker comprises the whole person – the whole human being is at the heart of pastoral care. The pastoral mission goes beyond a merely humanitarian mission. By her/his accompaniment and acting, the pastoral worker wants

- To help detainees to deepen their access to the Gospel or
- To help with the access to it;
- To help detainees to discover the Gospel as a liberating message.
- To encourage detainees in such a process by her/his mere existence and presence.
- To help detainees to discover God.

Against this background, pastoral workers must be very careful and wise. They should avoid any instrumentalisation of the work for political purposes by others. Otherwise the personal credibility of the pastoral worker as well as the credibility of pastoral care and of the Church is in danger. When looking for a humanitarian solution in an individual case, discretion is often *condition sine qua non* for obtaining the objective.

18. Theology and spirituality: The word „God“

By Professor Dr. Peter Knauer SJ, Foyer Catholique Européen, Brussels/
Belgium

The Jesuit Refugee Service is a Christian initiative. In this chapter, we want to consider in depth what the word “Christian” stands for. We will use a theological approach based on Ignatian spirituality. The name Jesuit (Society of Jesus) implies a commitment to an understanding of Christianity in the sense of standing before God together with Jesus, participating in his relationship with the Father.

What could the Christian faith mean to those confined in detention camps, or to those who try to stand by them? Is it only about Jesus’ dictum that by visiting prisoners you visit him? (Matthew 25,37) Is such faith only a kind of additional motivation towards a task that is worthwhile in itself? And to those in detention, is it only a comfort while hoping for a better life after death?

The present situation of Christianity

Christianity continues to lose influence in Europe. The Christian message appears meaningless or unintelligible. One rarely succeeds in conveying the Christian faith to young people. Yet especially today’s younger generation is deeply interested in religious matters. This is demonstrated, for example, by the increasing number of conversions to Islam within Europe.

The Christian message of the New Testament, however, makes a tremendous claim: “There is salvation in none other, for neither is there any other name under heaven, that is given among men, by which we must be saved!” (Acts of the Apostles 4,12) Faith is something, so it is held, on which one can depend in life as well as in death. Paul writes in his letter to the Romans: “Who then shall separate us from the love of Christ? Shall tribulation? or distress? or famine? or nakedness? or danger? or persecution? or the sword? ... But in all these things we overcome, because of him that hath loved us. For I am sure that neither death, nor life, nor angels, nor principalities, nor powers, nor things present, nor things to come, nor might, nor height, nor depth, nor any other creature, shall be able to separate us from the love of God, which is in Christ Jesus our Lord.” (Romans 8, 35-39) Faith is described as the “victory that has overcome the world” (1 John 5,4). Death is believed to have been overcome: “O death, where is thy victory? O death, where is thy sting?” (1 Corinthians 15,55) In the Hebrew Epistle it is said that the son of God became man so that he “might deliver them, who through the fear of death were all their lifetime subject to servitude.” (Hebrews 2,15). The root of all evil is seen here in mankind’s fear for itself due to its vulnerability and impermanence, which is made powerless only through faith.

It would appear, however, that most of today’s Christians are far removed from adopting any such statements for themselves. Instead, after two thousand years of Christianity, still no way has been found of reconciling all the suffering in the world with the doctrine of a benign as well as almighty God. There is a sense of shame especially regarding the Christian claim to absolutism. Are not all religions equally imperfect and therefore also equally valid? Just for the sake of preserving peaceful co-existence, nobody can be allowed to lay claim to the ultimate truth. This seems to be the only sensible approach.

Is not such resignation validated by major world events? Anyone expecting God to intervene is bound to experience fundamental disappointment. "Where is God?" was the newspaper headline reporting on the events of September 11, 2001. Some Christian theologians felt particularly honest, progressive and contemporary in openly admitting their sense of helplessness in an effort to at least show some solidarity with the doubters.

How can we explain why today's Christians seem so far removed from the certainty of the New Testament? Are the assertions found in the New Testament actually exaggerations?

The misuse of the word "God" to denote any manner of things

There is a simple reason for the misery of Christianity today. In order to understand and be convinced by the message of the New Testament, one needs to know who God is in the first place. If instead one starts with the question, for example, whether God exists, or where He is, or how He can allow such suffering, one makes a significant mistake in the sequencing of thought. The first question should have been: What is the meaning of the word "God". For this is by no means self-explanatory.

It would appear that over time Christianity has got used to an approach in which the meaning of the word "God" is no longer questioned or defined. The word "God" is used to denote any manner of things. It is quite common to have all sorts of different images of God. Nobody wants to be told what "God" should mean to them, and if in doubt, a multitude of images may be placed alongside each other. Even in monasteries and convents hours can be spent discussing these images of God, which may well be considered a satisfying and enriching experience. But because God is incomprehensible, none of these images can be remotely accurate. Each person holds at best a tiny piece of a huge mosaic. But it does not matter anyway; we all live far too much "in the head". Religion is a matter of one's innermost feelings.

In Argentina I witnessed a catechism of children. The catechist told the children to close their eyes and be completely calm and quiet. "Can you feel God?" That is how the children learnt that any talk of "God" refers to a vague feeling inside. I also know some adults who are utterly indignant if anyone dares to question any such "experience of God" of their own. I do not wish to call into question that they have such vague experiences, but rather whether they are experiences of God in the sense of the Christian message.

The assertions of the New Testament cannot be reconciled with any of these variable images of God and therefore may appear nonsensical. How can you ascribe to a God, who has been experienced as a vague feeling inside, the existence of Father, Son and Holy Spirit? But even if one thinks of that which is beyond the limit of all concrete human experience as God, (a limit which is in itself part of creation), one could ask what the New Testament's assertion that Jesus' death on the cross delivered us from our sins (Gal 1,4) has to do with this.

One should not pour new wine into old bottles (Matthew 9,17). One can only truly adopt the Christian faith if one allows this to happen at the most fundamental level instead of trying at all cost to force the Christian message into one's pre-existing ideas. The "Word of God" can only be understood as an all-encompassing last word.

The mistake in such false imagery is that one creates a god that suits oneself. Human beings have a tendency to do this. In his Large Catechism Luther posed a question regarding the interpretation of the First Commandment: “What does it mean to have a god, or what is God?” And his answer was initially an empty phrase which could serve to explain God as well as any idol: “To have a god means to have something on which we depend, from which we expect all good, and to which we take refuge in all distress”. And he pointed out that it is virtually inevitable that in this way everybody has a god, no matter what he calls him. Everybody has something which guides his life and on which he depends. This could be, for example, money, career or reputation. “He who has money and possessions feels secure, and is joyful and undismayed as though he were sitting in the midst of Paradise, ” wrote Luther.

However, the question arises whether this is the right god after all. Luther offers at least one criterion for determining which is *not* the right god. If you need to have a god first in order to subsequently be able to trust in him, it could be that if what you have is taken away, the trust collapses with it. That is how one can identify the wrong god. You may have a lot of money in the bank and feel totally secure; if your account is frozen for some reason, trust quickly turns into despair.

The Christian understanding of God

Faith in the true God represents an alternative to this, i.e. to every kind of idolizing as well as despair of the world. Having faith and trusting in it cannot be two different acts. Faith in the true God affords liberation and deliverance from the otherwise inevitable idolization, or despair, of the world.

For an answer to the question who is the Christian God, we have to look within the Christian message itself. The bible condemns all images of God outright (Deuteronomy 5,8). The Christian message has also always maintained that God cannot be put into words. But how, then, can one speak of Him at all?

The Christian message declares that the whole world, everything in our experience, has been “created from nothing”. We can grasp of God only that which is different from Him, that which points to Him. God Himself then really is outside our terminology; however, we can still talk about Him. God is “that without whom nothing exists”. This is intended to be a perfectly accurate statement. Even if God is outside the range of our expressions, this does not mean that we can only speak of Him in vague and imprecise terms, or that we should haphazardly abandon reason.

What underlies our reference to God is therefore everything that exists in our experience of the world. The Christian message only speaks of God when simply everything is involved with Him. Otherwise we do not truly speak of God. According to the Christian message, all talk of God that is not based on the premise that we are His creation, is pointless from the st Article

The word “creation” normally suggests the Big Bang or some other beginning of the world. However, something else is meant by the term “created out of nothing”, something that affects everything in existence at any moment in time: *If we were able to undo our createdness, nothing would remain of us.* That is what “being created out of nothing” means. It is not about production, but about the necessary precondition for

existence. Even of a world, which had existed forever, without any kind of identifiable beginning, it would be true to say that vis-à-vis God it would be that which would not exist without Him. Equally, a world which had come about solely as a result of an infinite series of coincidences, would still be, in the face of God, only that which could not be without Him. What the state of having-been-created means is that the world vis-à-vis God is totally defined by its inability to exist without Him. It has a “relationship totally focused on.../in complete dissimilarity to...”. The dots are meant to indicate a reality that cannot be expressed, but which we can refer to by saying that the world is wholly of such a kind that without this other reality it would not exist.

So we do not know at the outset who God is in order to then say He created the world. Rather: the only way to know who God is, is in describing the world as in every way related to Him and that its purpose is fulfilled in this very relationship. The world’s essence in relation to God is a total inability to exist without Him. It becomes impossible to speak of God in normal language, but only by analogy, i.e. in such a way that our expressions point towards Him.

This analogous reference to God was already explained by St. Augustine (354-430), who also showed how he arrived at his insight:

*“Thou, therefore, Lord,
didst make these things;
Thou who art beautiful, for they are beautiful;
Thou who art good, for they are good;
Thou who art, for they are.
(= affirmative reasoning)*

*Nor even so are they beautiful,
nor good,
nor are they,
as Thou their Creator art;
(= negative reasoning)*

*compared with whom
they are neither beautiful,
nor good, nor are at all.
(= transcending reasoning)*

St. Augustine, Confessions, Book 11, chapter 6

Because man’s self-awareness has made him the highest creature on earth and the mouthpiece of all creation, he does not think of God as an intangible reality. Man is inclined to think of God from the limitation of his own perception and ascribes to God a personal existence, albeit one that can only be inferred and cannot be captured by ordinary language concepts.

Because the Christian message claims that we have been created exactly to the extent that we are, and because our own self is a subject of reason, it follows that our own createdness should be recognizable by reason. Therefore it should be possible to carry out a proof of createdness. If the world had been created, it would exist in a “relationship

totally focused on.../in complete dissimilarity to...". If, therefore, the world had such a "relationship totally focused on.../in complete dissimilarity to...", then (and only then) its "relationship totally focused on..." should correspond to its positive aspects, and the fact that its positivity is pervaded by negativity should correspond to its "complete dissimilarity to...".

Actually, everything in this world is such a union of contrasts. The world is a place of constant interaction and change. Constant change means that all identity in the world already contains non-identity within it. And all finite existence is already pervaded by non-existence. It is in this union of opposites of everything in our world that our createdness becomes apparent. We will be content here to point out that nobody has yet succeeded in disproving this understanding of the world's createdness.

A proof of createdness is not a proof of God's existence. A proof of God is not possible. For if God does not fall within the realms of human terminology and one does not want to contradict oneself, then there can be no thought processes that reach beyond the world to God. God cannot be a conclusion or the result of a mathematical equation. That is why the world's existence is not explained with reference to God but to its createdness. But if we can say of the world that it is defined by its "relationship totally focused on.../in complete dissimilarity to...", we do speak of God correctly in the sense of the Christian message: Nothing can be without Him. The world is oriented towards such other reality, that the latter can only be defined by saying that the world is totally encompassed by it, that it (the world) could not be without it (the other reality). At the same time God remains incomprehensible.

We tend to speak of God as the "Almighty". Normally we imagine that He should be capable of everything possible. You could let your imagination run wild. Unfortunately, you never know whether He actually wants to do what you imagine. This is a disastrous image of God's omnipotence, which begs for deliverance if one wants to live sensibly in this world. Time and time again even Christians have confused God with such a "deus ex machina", employed to fix the woes of the world.

The Christian message does not assign such purely potential omnipotence to God; He is deemed "mighty in all" in an actual, not just potential sense. Everything that happens is already of such a kind that it could not be happening without Him. God does not need to intervene in world events, but rather, everything that happens is totally defined by its inability to exist without Him.

The statement that God is almighty ("No hair shall be lost from your head without the Father", Matthew 10,30) is no comfort in itself. How much misery is there in our world! For it is also true of suffering and death, even sin, that God is mighty in them all.

Such a statement may seem hard to accept. The createdness of the world is but a one-sided connection of the world with God, and as such it implies anything but community with God. It is indeed considered that God "inhabits an inaccessible light" (1 Timothy 6,16). God is not an integral part of the system we know as the world. We can only point to His existence and acknowledge that He is *per se* absolute. That is why, initially, the meaning of the word "God" in the Christian message represents the greatest possible argument against any reference to the "word of God" or "communion with God".

The possibility of a communion with God is not self-explanatory

The Christian message is about communion with God; it is about being secure at all times, in life and in death, in the love of the Almighty. No power in the world could undermine such security. One could simply always rely on it. But how can such communion with God, which nourishes the faith, be possible at all?

Luther has been accredited with the question “How can I find a merciful god?” This question is the key to understanding his entire theology. It is based on the realization that nothing that has been created can be an adequate basis for any communion with God. Even a perfectly created something could not transcend the unilateral connection between its createdness and God. Luther experienced at an existential level that no effort by the creation can achieve communion with God. But Paul knew this much earlier: “And if I should distribute all my goods to feed the poor, and if I should deliver my body to be burned ...” (1 Corinthians 13,3), none of these would be sufficient to reach the grace of God.

Luther’s question only makes sense if createdness is a unilateral connection with God. When we call God the creator of the world, then we make a connection between the world and our concept pointing to God; it is a connection that exists *solely in our heads*, but which is founded entirely *in the reality* of the unilateral connection between God and the world.

How then can communion with God be possible at all? Should we not expect Him to show His loving care towards the world? Should there not be a mutual relationship? But it is not possible to consider any kind of dependence of God on the world without negating the concept that the world has been created out of nothing.

We find an answer in the Christian message itself. You cannot understand it by attempting to integrate it into a comprehensive framework of ideas to make it plausible. However, its apparently impossible claim to be the word of God becomes intelligible by referring to its content. The Christian message is not self-explanatory in the sense that it needs no explanation, but rather in the very different sense that it explains itself through its content.

It announces that the world is enclosed by a love of God for God, i.e. the love of the Father for the Son which in itself is the Holy Spirit. It claims the world has been created into this love from the very beginning. God’s love for the world then does not, indeed, depend on created achievements, nor is it sometimes more and sometimes less. God knows no other love than that from God to God, and we are included within it. If we are thus in communion with the One who is almighty, then no power in the world can harm us.

That is why the Christian message refers to the Trinity of God. There are three ways in which God’s presence expresses itself, which we call Father, Son and Holy Spirit. The Father is as much an expression of the One God as is the Son and the Holy Spirit. But among each other, the three forms of God’s presence remain different. God’s love for the world cannot be measured in relation to the world and can, therefore, not become apparent in the world. It remains hidden to the world, unless it finds expression through human words.

We say God became man in order to make any talk of the word of God intelligible. The human being Jesus is created in his human form into that presence of God which we call the Son. That is how he can reveal to us through human language what God wants us to understand, i.e. that we are included within the love of the Father for him. Why did the Son of God become man? To make the “Word of God” possible in its strictest sense. Jesus’ death on the cross can also only be understood as a martyrdom for his message. Jesus was nailed to the cross because his message promised liberation from the power of fear, and because he found followers who adopted his message. God’s will was that he should remain true to his mission. Jesus’ resurrection is an expression of his Son of God presence.

Believing in the created human being Jesus as the Son of God from all eternity, means a certainty based on His Word, that oneself, and all the world, has been created into the eternal love of God for God, of the Father for the Son. This is what sums up the Christian message on which all the individual statements of Christian faith are based. In the sense of the Christian message, nothing can be believed that does not fit this basic formula.

Everything that is different from God is simply world and not a subject of faith. In the sense of the Christian message, only our communion with God can be an issue of faith. Faith is always and solely concerned with the manifestation of God.

Assertions of faith can only be true and understood if they are meant as the last and final word over and above all other reality. They must be unconditionally dependable. Assertions of faith have no comparative or superlative. Any assertions about God that can be graded in any way are pointless and cannot be true statements about the God of the Christian message.

The Consequences of Faith

In his poem entitled “The Doubter” Bert Brecht defines a criterion for his own work, which can also be applied to the Christian message:

*But above all
Again and again above all: How should one act
If one believes what you say? Above all: How
should one act?*

Bertolt Brecht, *Gesammelte Werke in acht Bänden. IV*,
Frankfurt am Main 1967, 587f.

The criterion for truth in the Christian message is not the behaviour of its proclaimers, but much more significantly, how those would act who adopt this message for themselves.

There are no new, additional ethical obligations in the Christian message, rather it refers to requirements that are already a part of human existence. It is only about avoiding inhumane and promoting humane actions.

The belief in the security in the love of God is intended to liberate man from the power of that fear which stems from his vulnerability and impermanence. This fear continues to

find expression in the fact that, when the worst comes to the worst, human beings may be prepared to walk over dead bodies in order to protect their own safety.

Christian faith liberates and delivers mankind from the power of this fear, which prevents humane in favour of inhumane behaviour. We deliberately do not claim that faith removes this fear, for Jesus himself knew fear. Faith, however, prepares us for fear; it gives us courage to face up even to situations of persecution by those in power in this world. Working in refugee areas, or even fighting for the rights of so-called “economic migrants” (and therefore illegal immigrants) in this country, can certainly bring many disadvantages to those who do get involved.

So long as man remains imprisoned by the fear for himself, the whole world becomes a place of desolation. Impermanence and death will always have the last word and no transient experience, however positive, can put this into perspective. It is the opposite when one has faith: Every positive experience, however insignificant or transitory, becomes a parable for heaven as the eternal communion with God, and mortality and death lose their power to part one from this. They only hinder in so far as the parable of heaven may be taken for heaven itself and therefore may be mistakenly idolized.

This also provides a Christian answer to the theodicy question: How does one reconcile God’s omnipotence and grace with all the suffering in the world? God’s grace cannot be determined by anything on earth and therefore cannot be measured by the well-being of humanity. His grace consists of giving man a sense of belonging with God which even death cannot take away. God’s omnipotence does not consist of His ability to do everything possible, but of His power in everything that actually happens. It is not about the question how God can allow suffering. For this question presumes, wrongly, that we might adopt a position, so-to-speak, behind God and measure His actions by some kind of standard. Instead of asking how God can allow suffering, Christians ask how their faith should affect how they deal with suffering. We trust in God not only when we “lie down in green pastures near still waters”, but also when we “walk through the valley of the shadow of death” (Psalm 23). Can such a psalm, which acknowledges the darkness too, apply to human beings subjected to the suffering brought by detention: “For thou art with me”?

Faith and Justice

As stated earlier, the import of faith on our actions in the world does not consist of additional ethical standards nor of any additional motivation. It consists of the removal of the hindrance represented by the fear of man for himself. God’s mercy then finds expression in making man merciful himself. God’s justice results in making man just, and God’s wisdom endows man with wisdom too.

The actions required in individual cases will have to be determined by reason and experience. By reason we mean every aware and responsible manner in which we deal with the world as well as the ability to demonstrably account for our actions.

The Society of Jesus sees its calling in spreading the faith and promoting justice in the world. Proclaiming the faith consists mainly of disempowering the fear that acts against justice, the fear thus which prevents mankind from exercising justice.

Ideally, it would not be sufficient to only achieve the physical liberation of political or otherwise unjustly detained persons without also conveying the inner freedom which makes people immune to attempts of repression by those who have power over them. This does not mean that prisoners or detained asylum-seekers and detained irregular immigrants should not be liberated because it would not be enough, as the higher goal was not attainable. Over and above this, one would even have to persuade the mighty to stop wielding power by conveying to them the security that is stronger than their own fear for themselves. But attaining the release of prisoners is worth a lot.

PART VII:
POSITIONS AND RECOMMENDATIONS

19. JRS-EUROPE's positions

JRS-EUROPE has a mission to speak out on behalf of asylum-seekers and refugees, both arising from our practical work with asylum-seekers and refugees and also from our faith principles.

As far as the secular mission is concerned, the Tampere Presidency Conclusions state: "We must develop an open dialogue with civil society."²¹⁴ JRS-EUROPE, as with other organisations, faith-based and otherwise, may be considered to be a part of civil society²¹⁵ "The European Parliament was particularly keen not to grant civil society organizations a role which, either wholly or in part, was that of those holding political responsibility and who were elected by universal suffrage."²¹⁶ Rather the role of civil society is different. "Civil society organisations play an important role as facilitators of a broad policy dialogue (...). Belonging to an association provides an opportunity for citizens to participate actively in addition to involvement in political parties or through elections."²¹⁷ Furthermore, "the organisations, which make up civil society mobilise people and support, for instance, those suffering from exclusion or discrimination (...). They often act as an early warning system for the direction of political debate."²¹⁸ They fulfil this role in particular by providing new information or by highlighting existing information. Civil society represents also "a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest."²¹⁹ Finally, as the EU Commission states, "Churches and religious communities have a particular contribution to make."²²⁰

This particular mission is the spiritual mission rooted in the Judeo-Christian Gospel.²²¹ In this respect, the mission of JRS-EUROPE as a Christian organisation goes beyond the mission of non-governmental organisations, which are not necessarily rooted in Christian values. However, the Christian Gospel is neither a yardstick for measuring the lawfulness or unlawfulness of legislation or for measuring policies, nor does it replace legal and political arguments; otherwise it would be a political and fundamentalist programme. However, it is a source for criteria, which help to look at realities from a Judeo-Christian point of view, which focuses on the person, i.e. the human being created

²¹⁴ Tampere Presidency Conclusions, 7

²¹⁵ "Civil society organisations can be defined in abstract terms as the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens. Their effectiveness is crucially dependent on the extent to which their players are prepared to help achieve consensus through public and democratic debate and to accept the outcome of a democratic policy-making process. (...) Civil society organisations include: NGOs, (...) charitable organisations, (...) religious communities." [Opinion of the Economic and Social Committee on 'The role and contribution of civil society organisations in the building of Europe' (1999/C 329/10)]

²¹⁶ REPORT FROM THE COMMISSION OF THE EUROPEAN COMMUNITIES ON EUROPEAN GOVERNANCE, 2003

²¹⁷ COMMUNICATION FROM THE COMMISSION, Consultation document: Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards for consultation of interested parties by the Commission, Brussels, 5.6.2002, COM (2002) 277 final

²¹⁸ COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE, A WHITE PAPER, Brussels, 25.7.2001, COM (2001) 428

²¹⁹ Ibid

²²⁰ Ibid

²²¹ "As the Father has sent me, I am sending you." (John 20, 21); "I am sending you out like sheep among wolves." (Matthew 10, 16)

at the image of God²²².

19.1. Political and legal language

(1) JRS-EUROPE is concerned about notions like “illegal immigrant” or “removal” of persons.

(2) A behaviour or a situation can be “illegal”, but not a person: i.e. the behaviour does not comply with the law. The forced “removal” of persons brings back, in memory, terrifying situations and events during World War II and more recently during the conflict in the Balkans.

19.2. Concepts and definitions

(3) JRS-EUROPE is deeply concerned that the EU Council and the EU Commission do not have a common definition of what constitutes “pre-accession detention” of asylum-seekers and “pre-removal detention” of irregular immigrants. This makes political dialogue about detention difficult.

(4) JRS-EUROPE is very concerned, too, that the EU Council, the EU Commission, the EU Parliament, the individual EU Member States at the level of their national legislation, and the European Council’s CPT neither have a common notion nor a common definition of what constitutes a “detention centre”. This not only contributes to confusion in political dialogue, but it leaves also legal space to deny that a centre is not a “detention centre”, although persons are *de facto* detained at such a place.

(5) JRS-EUROPE believes that “detention” of asylum-seekers and irregular immigrants should be defined with a view to the people deprived of their liberty under legislation concerning foreigners, including asylum-seekers.

(6) Against this background, JRS-EUROPE is deeply concerned that there is no official list of those centres, which are *de facto* detention centres.

19.3. Monitoring

(7) JRS-EUROPE is deeply concerned that detention in Europe cannot be sufficiently supervised because there is neither a common definition of “detention” nor a common definition of what constitutes a “detention centre” or an official list of *de facto* detention centres.

19.4. Detention and EU asylum and immigration policy

(8) JRS-EUROPE is principally in favour of the aims set out by the Amsterdam Treaty, i.e. the objective to make of the EU “an area of freedom, security and justice”, and supports the EU “spirit of Tampere”, i.e. “shared commitment to freedom based on human rights, democratic institutions and the rule of law”.

(9) However, JRS-EUROPE underlines that those “political guidelines”²²³ should not

²²² Genesis 1, 26

apply to policies concerning EU nationals only, but also third-country nationals living in the EU, including asylum-seekers and irregular immigrants.

(10) In the EU, an “area of freedom, justice and security”, there is no place for systematic restrictions of human rights.

(11) JRS-EUROPE shares the Vatican’s assessment that policies, which are only repressive and restrictive towards migrants and refugees, including measures such as administrative detention of asylum-seekers and irregular immigrants, are unable to control migratory flows.

(12) JRS-EUROPE recognizes State concerns regarding security safeguards especially after 11 September 2001 and 11 March 2004. However, any necessary safeguards should not be used as a pretext to detain asylum-seekers and immigrants. JRS-EUROPE is concerned that asylum-seekers and irregular immigrants may be further victimized as a result of public prejudice and restrictive judicial and administrative measures²²⁴. Criminal and administrative law can and should address the problem of threats to national security and public order. It is unnecessary to criminalize innocent refugees and migrants through restrictive administrative practices such as detention.

(13) JRS-EUROPE is also gravely concerned that refugee protection standards may be diminished in the face of policies and positions against terrorism.

(14) JRS-EUROPE acknowledges the EU’s attempt to distinguish between “asylum-seekers”, on the one hand, and “irregular immigrants”, on the other hand. Nevertheless, JRS-EUROPE must point out that the “asylum and migration nexus makes such a distinction ever more difficult.

19.4.1. EU asylum and immigration policy: Detention of asylum-seekers

(15) JRS-EUROPE is deeply concerned that pre-accession detention has become an element of reception policy, not only in the old, but also in the new EU Member States. Thus detention has become a deterrent element against people seeking asylum in the EU.

(16) JRS-EUROPE welcomes the recent political agreement of the EU Council for Justice and Home Affairs according to which EU Member States “shall not hold a person in detention for the sole reason that he/she is an applicant for asylum”.

(17) However, JRS-EUROPE regrets that the EU Council, so far, has not agreed on more precise terms in directives and other measures, at least highlighting the binding rights of detained asylum-seekers guaranteed by the ECHR and by other instruments of Public International Law. Such a step would be a substantial contribution to more legal security and legal clarity.

(18) In particular, JRS-EUROPE is deeply concerned that EU Member States have circumvented the agreed legislation (national and international), according to which a

²²³ Tampere Presidency Conclusions, 9

²²⁴ JRS-EUROPE is referring to measures and decisions taken by judicial and administrative authorities to detain asylum-seekers without consideration of due process, for example in cases of automatic detention, detention without hearing, or denial of right to appeal detention.

person shall not be held in detention for the sole reason that she/he is an applicant for asylum, by creating exaggerated *securitas contra humanitatem* legal reasons for the detention of asylum-seekers, such as medical or security screening.

(19) JRS-EUROPE challenges the detention of asylum-seekers:

- The more asylum-seekers are detained after lodging a claim either at the border or in a country, the more those who have protection needs may be forced into situations of “illegality” rather than pursuing legitimate asylum claims. In this way detention forces asylum-seekers to use channels of irregular immigration.
- It is not reasonable to think that an asylum claim can be better determined when the applicant is in detention rather than free and able to access legal and social services, which would aid in establishing the *bona fides* of the asylum claim.
- Detention itself does not help to verify a person’s identity.
- Detention criminalizes asylum-seekers.
- Detention has an adverse effect on the values of society as it normalizes exclusion and administrative imprisonment of a part of society and provokes racism and xenophobia.
- Detention has enormous financial costs.

(20) Consequently, detention of asylum-seekers should be avoided until a final decision is made. “Final decision” means the exhaustion of all administrative and judicial appeals even if there is no suspensive effect.

(21) Detention of asylum-seekers should be the exception, not the rule. Where detention is used, it only acceptable when circumstances in individual cases justify such under criminal law and any decision to detain must comply with due process guarantees.

19.4.2. EU asylum and immigration policy: Detention of irregular immigrants

(22) Detention of irregular immigrants should be avoided, too. Pre-removal detention is in most cases unnecessary and ineffective because

- Research in the UK, for instance, has shown that only 2 % of people released on bail have absconded ²²⁵;
- Serious factors motivating a person to leave his/her home country and to go to another country exist (e.g. civil war, human rights violations, disastrous economical or environmental situations) and these factors are more decisive than the deterrent effect of detention;
- Detention itself does not help to verify a person’s identity;
- Detention criminalizes irregular immigrants;
- Detention has an adverse effect on the values of society as it normalizes exclusion and administrative imprisonment of a part of society and provokes racism and xenophobia.
- Detention has enormous financial costs.

²²⁵ Irene Bruegel, Eva Natamba: “Maintaining contact: What happens after detaining asylum-seekers get bail?” – Social Science Research Papers No. 16, South Bank University (2002).

(23) JRS-EUROPE regrets that, so far, there are no human rights based EU minimum standards on detention pending removal in a framework of a EU Council Directive on minimum standards for return procedures, as the EU Commission had suggested.

19.5. European Convention on Human Rights (ECHR) and the European Council's Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT)

(24) JRS-EUROPE acknowledges the binding rights of detainees, asylum-seekers as well as irregular immigrants, as provided by the European Convention on Human Rights (ECHR).

(25) JRS-EUROPE acknowledges the outstanding merits of the Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT). JRS-EUROPE wishes to express gratitude towards the CPT for its on-going work.

(26) The rights provided by the ECHR and the relevant jurisdiction by the European Court of Human Rights are not sufficiently known.

19.6. EU legislation: EU Council Directive laying down minimum standards for the reception of asylum-seekers

(27) Still, JRS-EUROPE regrets that this Directive does not make sufficiently clear that asylum-seekers who are "received" may be detained at the same time.

(28) JRS-EUROPE believes that detention of asylum-seekers is not a real "reception" of asylum-seekers, but in fact the contrary.

19.7. Binding Public International Law

(29) JRS-EUROPE appreciates those norms referring to the detention of asylum-seekers and irregular immigrants, which are part of the body of binding Public International Law, such as the right to compensation, the right to health care and the protection of minors.

19.8. UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers

(30) JRS-EUROPE acknowledges the contribution made by UNHCR's Revised Guidelines on Detention of Asylum-seekers, which point out that "the detention of asylum-seekers who come 'directly' in an irregular manner should (...) not be automatic, or unduly prolonged"²²⁷, and that "the use of detention is in many instances contrary to the norms and principles of international law"²²⁸.

(31) Nevertheless, JRS-EUROPE considers the exceptional grounds for detention in

²²⁷ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers (February 1999); Introduction 3.

²²⁸ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers (February 1999); Introduction 1.

Guideline 3²²⁹ to be too far-reaching, especially regarding the verification of identity and determination of the elements on which the claim for protection is based. Given that many asylum-seekers do not have or cannot present a passport or other documents proving their identity, the authorities can abuse the first exception to justify detention in many cases. Thus, most asylum-seekers would be detained, as the strict conditions for getting a visa oblige them to enter the host state irregularly and, often, with the help of non-profit assistance²³⁰ or a commercial smuggler. In consequence, asylum-seekers have no valid travel documents either at the beginning of their voyage, often because they have to hand them over to the commercial smuggler. It is not reasonable to think that the reasons for the claim can better be determined when the applicant is in detention rather than free and able to access legal and social services which would aid in establishing the *bona fides* of the asylum claim.

19.9. National legislation

(32) As far as binding rights are concerned, at the level of EU legislation as well as at the

²²⁹ Guideline 3 (Exceptional Grounds for Detention): Detention of asylum-seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments. There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not having achieved the lawful and legitimate purpose. In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period. The permissible exceptions to the general rule according to which detention should be avoided, have to be prescribed by law. In conformity with EXCOM Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if necessary: (i) to verify identity. This relates to those cases where identity may be undetermined or in dispute. (ii) to determine the elements on which the claim for refugee status or asylum is based. This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time. (iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum. What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. (iv) to protect national security and public order. This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should she/he be allowed entry. Detention of asylum-seekers, which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centres, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.

²³⁰ Private/non-profit assistance seems to dominate increasingly; cf. Joerg Alt, *Leben in der Schattenwelt*, Berlin/Karlsruhe 2003, page 331

level of the European Convention on Human Rights and Public International Law, JRS-EUROPE wants to underline that States are not precluded from establishing even more humane rules relating to the detention of asylum-seekers and irregular migrants than those included in these instruments.

19.9.1. National legislation of EU Member States

(33) JRS-EUROPE is deeply concerned that national legislation of the EU Member States does not always take into account the legal obligations under Public International Law or is trying to circumvent binding Public International Law.

(34) Concerning the new EU Member States, JRS-EUROPE is fully aware that the old EU Member States were and still are dictating legal rules at the level of national legislation in the new EU Member States.

(35) JRS-EUROPE is therefore of the opinion that the new EU Member States are paying, in that respect, a very high price for the entry into the EU.

19.9.2. National legislation of States Parties to the European Convention on Human Rights and States Parties to codices of binding Public International Law

(36) JRS-EUROPE is also deeply concerned that the national legislation of EU Member States International and States aspiring to EU membership, has not yet fully complied with the legally binding norms of the ECHR and of binding Public International Law.

19.10. Especially vulnerable persons

(37) JRS-EUROPE strongly believes that special groups of individuals should never be detained in detention centres, given the negative impact of detention on their psychological and physical health and on the right to family life. These groups are:

- Minors;
- Pregnant women;
- Traumatized persons;
- Persons with special physical or mental health needs;
- Persons older than 65 years;
- Mothers or fathers accompanying minors under 14 years of age;
- Chronically or seriously ill persons.

19.11. Legal grounds for the detention of asylum-seekers and irregular immigrants

(38) If detention of asylum-seekers and of irregular immigrants cannot be avoided, national legislation and EU legislation as well as administrative bodies and courts should at a minimum strictly respect the binding rights of the ECHR and Public International Law. However, JRS-EUROPE would like to point out that those rights are sometimes not sufficient at all and therefore we encourage states to complement them

(39) The detention order must be based on grounds provided by a formal law.

(40) The detention order should never be based solely on the fact that a person has entered the territory of the State illegally or stays illegally because this does not automatically imply an intention not to comply with the duty to leave the country (for instance after a negative asylum procedure) and may be unnecessary. Thus, such a regulation would be in contradiction to *inter alia* the principle of proportionality.

(41) Any regulation providing grounds for detention orders must clearly state that the order must be based on objective evidence regarding facts and personal behaviour in the past and that due to this behaviour no other less restrictive means exists to enforce removal. The behaviour can only be considered when the concerned person knew about his/her obligation to leave the country, i.e. was informed about his/her obligation in a language he/she understands, and when he/she had informed access to the appeal process.

19.12. Procedure

(42) The detention order must be issued in accordance with a procedure prescribed by law, whether issued by administrative authority or a court. The procedure must uphold minimum standards, including the following:

- The person who is detained shall be informed promptly, in a language, which she/he understands, of the reasons for his/her arrest.
- The detainee must have the right to be heard during the procedure, if necessary with the help of an interpreter. If the information and hearing is not possible in the mother language or any other language the person understands, she/he must be released as in this case the lawfulness of the detention is not guaranteed.
- The person who is deprived of liberty by detention shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and her/his release ordered if the detention is not lawful;
- This court must be different from the issuing body; the possibility of appeal must not only be given at the beginning of the detention but at any appropriate time.

(43) The person must be informed about the above-mentioned right in a language he/she understands.

(44) Each person must be provided with legal assistance.

(45) The costs for the interpreter must be covered by the state.

19.13. Duration of detention

(46) The duration of detention often exceeds reasonable time limits, and alternative methods of assuring a person's presence during proceedings and/or ultimate departure – reporting to local authorities, guarantors, custody agreements, bail, open centres – are often ignored or not considered.

(47) JRS-EUROPE is aware that it may be problematic to suggest a maximum duration by proposing a precise term. However, given the enormous differences in national provisions and practise in Europe, JRS-EUROPE also recognizes danger in not doing so and leaving it to the discretion of the states to fix a term – or indeed not to fix any term.

19.14. Detention conditions

(48) Detention conditions in administrative detention must differ significantly in a positive way from the conditions established for convicted criminals. The status of detainees must be recognized as a non-criminal status because persons in administrative detention are neither charged nor convicted of crimes.

20. JRS-EUROPE's recommendations

(1) JRS-EUROPE urges governments and legislators in European States not to use detention as a deterrent or as an element of reception or return policies that is applied in a systematic and general way.

(2) JRS-EUROPE urges governments and legislators in European States to transpose and implement Public International Law concerning detention and detainees and to adhere to the UN Body of Principles for the protection of all persons under any form of detention or imprisonment²³¹, the UN Standard Minimum Rules for the Treatment of Prisoners²³² as well as to the UN Rules for the Protection of Juveniles Deprived of their Liberty²³³ and the Standards of the European Committee for the Prevention of Torture (CPT) in order to prevent human rights violations of refugees, asylum-seekers and migrants in detention.

20.1. Monitoring

(3) JRS-EUROPE asks the EU Parliament and the Council of Europe (CPT) to draft a common definition of what are “detention” and “detention centers”.

(4) JRS-EUROPE asks the EU Parliament and the Council of Europe (CPT) to establish a list of detention centers in the EU Member States as well as in the EU Candidate Countries and their non-EU neighbour countries. This list should be regularly updated and publicly accessible.

(5) JRS-EUROPE asks the EU Commission to set up a EU system and body, which monitors and periodically reports on the development of national legislation on detention and detention practises in the EU Member States as well as in the EU Candidate Countries and their non-EU neighbour countries. The report should include best practises, but also the cost of detention and information about the institutions paying for the detention centres, their administration and their maintenance. Any investigating and reporting body should have offices outside the centre.

20.2. Legal grounds for detention

(6) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to avoid the use of detention of asylum-seekers and irregular immigrants.

²³¹ A/RES/173, General Assembly, 9 December 1988

²³² Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

²³³ Resolution 45/113, 14 December 1990

(7) JRS-EUROPE urges EU Member States not to hold a person in detention for the sole reason that he/she is an applicant for asylum.

(8) JRS-EUROPE urges the EU Member States and the EU Candidate Countries not detain asylum-seekers under pretexts such as medical or security screening.

20.3. Information for detainees about detention

(9) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to ensure in legislation and in practise that

- The detainee is informed promptly, in a language, which she/he understands, of the reasons for her/his arrest.
- The detainee has the right to be heard during the procedure, if necessary with the help of an interpreter. If the information and hearing is not possible in the native language or any other language the person understands, he/she must be released as in this case the lawfulness of the detention cannot be guaranteed.
- The detainee can take proceedings by which a court shall decide the lawfulness of her/his detention speedily and her/his release ordered if the detention is not lawful. This court must be different from the issuing body; the possibility of appeal must not only be given at the beginning of the detention, but at any appropriate time.
- The detainee is informed about the above-mentioned rights in a language he/she understands.
- Each detainee is provided with legal assistance.
- The cost for the interpreter is covered by the State responsible for detention.
- The issuing body automatically and regularly reviews any detention order in order to ascertain that the detention remains appropriate.

20.4. Duration of detention

(10) JRS-EUROPE urges those EU Member States as well as those EU Candidate Countries and those of their non-EU neighbour countries, whose national legislation does not provide for a time limit of detention, to specify a maximum duration for detention.

20.5. Detention conditions

(11) JRS-EUROPE appeals to the EU Member States as well as to the EU Candidate Countries and to their non-EU neighbour countries to ensure in legislation and in practise that

- Detainees are kept separate from persons charged with and/or convicted of criminal offences;
- Men and women should be accommodated separately;
- Detainees should be permitted to move freely within the detention centre;
- Detainees should have the opportunity to prepare their own food;
- Detainees should have the opportunity for paid work;
- Detainees should have free access to legal advice;
- Detainees should have access to adequate leisure facilities;
- The personnel working in detention centres must be trained for working with foreigners in a field related to human rights; such training should include

sensitization to migration and refugee issues and the needs of traumatized persons, language skills, human rights knowledge;

- The personnel working in detention centres must wear badges, which clearly identify them as staff. The badges should contain at least the staff person's name and/or identification number;
- An independent body should be appointed for every centre with free access to the building and to whom the detainees can submit complaints concerning the conditions and the treatment by both guards, administrative and social staff on the one hand, and other detainees on the other hand;
- A local or regional system should be established that guarantees an immediate, impartial and thorough investigation in cases of alleged violations of basic rights;

20.6. Health care

(12) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to ensure in legislation and in practice that detainees receive full health care, including psychological help, complemented by a doctor of their own choice.

20.7. Visits

(13) JRS-EUROPE appeals to the EU Member States as well as to the EU Candidate Countries and to their non-EU neighbour countries to ensure legally and in practice that

- Detainees have free access to a telephone and the means to finance at least calls to UNHCR, church institutions, NGOs, lawyers and, of course, at least one member of her/his family;
- Detainees can receive visitors during the day and to communicate freely and in privacy with family members, friends and persons providing legal advice;
- Detainees are provided with adequate social care, preferably provided by NGOs or church institutions;
- Pastoral workers, medical doctors, UNHCR and NGOs have access to the centre or camp in order to offer assistance, care and advice to the detainees.

(14) JRS-EUROPE appeals to the EU Member States as well as to the EU Candidate Countries and to their non-EU neighbour countries to provide legal grounds for the refusal or withdrawal of permission of visits, and provide that the person concerned is entitled to take proceedings by which the lawfulness of the decision shall be decided by a court.

20.8. Protection of minors

(15) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries not detain minors.

20.9. Protection of families

(16) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to ensure legally and in practice that married couples or family members are permitted to live together while being detained.

20.10. Protection of further especially vulnerable persons

(17) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to ensure legally and in practice that

- Pregnant women;
- Traumatized persons;
- Persons with special physical or mental health needs;
- Persons older than 65 years;
- Mothers or fathers accompanying minors under 14 years of age;
- Chronically or seriously ill persons

are not detained.

20.11. Compensation

(18) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to provide compensation to any person who has been unlawfully detained or in case of a breach of Article 5 ECHR and Article 9 ICCPR.

20.12. The principle of proportionality

(19) JRS-EUROPE urges the EU Member States as well as the EU Candidate Countries and their non-EU neighbour countries to respect in legislation and administration the principle of proportionality.

PART VIII:

ANNEX

21. Documentation

21.1. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment



United Nations General Assembly
A/RES/43/173
76th plenary meeting
9 December 1988

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

The General Assembly,

Recalling its resolution 35/177 of 15 December 1980, in which it referred the task of elaborating the draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment to the Sixth Committee and decided to establish an open-ended working group for that purpose,

Taking note of the report of the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which met during the forty-third session of the General Assembly and completed the elaboration of the draft Body of Principles,

Considering that the Working Group decided to submit the text of the draft Body of Principles to the Sixth Committee for its consideration and adoption,

Convinced that the adoption of the draft Body of Principles would make an important contribution to the protection of human rights,

Considering the need to ensure the wide dissemination of the text of the Body of Principles,

1. Approves the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the text of which is annexed to the present resolution;
2. Expresses its appreciation to the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment for its important contribution to the elaboration of the Body of Principles;
3. Requests the Secretary-General to inform the States Members of the United Nations or members of specialized agencies of the adoption of the Body of Principles;
4. Urges that every effort be made so that the Body of Principles becomes generally known and respected.

ANNEX

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.
Use of terms

For the purposes of the Body of Principles:

- (a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

- (b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;
- (c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;
- (d) "Detention" means the condition of detained persons as defined above;
- (e) "Imprisonment" means the condition of imprisoned persons as defined above;
- (f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.
2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.
3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or

is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities, which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:
 - (a) The reasons for the arrest;
 - (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
 - (c) The identity of the law enforcement officials concerned;
 - (d) Precise information concerning the place of custody.
2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

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

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he

is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

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

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation, which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation, which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.
2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and,

when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.
3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.
2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

21.2. UN Commission on Human Rights: Report of the Working Group on Arbitrary Detention (WGAD) of detention of asylum-seekers and irregular immigrants



28 December 1999

E/CN.4/2000/4

COMMISSION ON HUMAN RIGHTS

Fifty-sixth session

Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Annex II

Deliberation No.5

Situation regarding immigrants and asylum-seekers

By resolution 1997/50, the Working Group was requested by the Commission to devote all necessary attention to reports concerning the situation of immigrants and asylum-seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.

In the light of the experience gained from its missions carried out in this framework, the Working Group took the initiative to develop criteria for determining whether or not the deprivation of liberty of asylum seekers and immigrants maybe arbitrary.

After consultation, in particular with the Office of the United Nations High Commissioner for Refugees, the Working Group, in order to determine whether the above situations of administrative detentions were of an arbitrary nature, adopted the following deliberation:

Deliberation No.5

For the purposes of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

The term "a judicial or other authority" means a judicial or other authority which is duly empowered by law and has a status and length of mandate affording sufficient guarantees of competence, impartiality and independence.

House arrest under the conditions set forth in deliberation No. 1 of the Working Group (E/CN.4/1993/24, para. 20) and confinement on board a ship, aircraft, road vehicle or train are assimilated with custody of immigrants and asylum-seekers.

The places of deprivation of liberty concerned by the present principles may be places of custody situated in border areas, on police premises, premises under the authority of a prison administration, ad hoc centres (centres de rétention), so called international or transit zones in ports or international airports, gathering centres or certain hospital premises (see E/CN.4/1998/44, paras. 28-41).

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

I. GUARANTEES CONCERNING PERSONS HELD IN CUSTODY

Principle 1: Any asylum-seeker or immigrant, when held for questioning at the border, or inside national territory in the case of illegal entry, must be informed at least orally, and in a language which he or she understands, of the nature of and grounds for the decision refusing entry at the border, or permission for temporary residence in the territory, that is being contemplated with respect to the person concerned.

Principle 2: Any asylum-seeker or immigrant must have the possibility, while in custody, of communicating with the outside world, including by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives.

Principle 3: Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.

Principle 4: Any asylum-seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person's identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.

Principle 5: Any asylum-seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held *incommunicado*, as well as of the guarantees accompanying such a measure.

II. GUARANTEES CONCERNING DETENTION

Principle 6: The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law.

Principle 7: A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

Principle 8: Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

Principle 9: Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.

Principle 10: The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.

21.3. UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers



OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES
GENEVA

UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS ¹

(February 1999)

Introduction

1. The detention of asylum-seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

2. Of key significance to the issue of detention is Article 31 of the 1951 Convention². Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are **necessary**, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country.

3. Consistent with this Article, detention should only be resorted to in cases of **necessity**. The detention of asylum-seekers who come "directly" in an irregular manner should, therefore, not be automatic, or unduly prolonged. This provision applies not only to recognised refugees but also to asylum-seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one. Conclusion No. 44(XXXVII) of the Executive Committee on the Detention of Refugees and Asylum-Seekers examines more concretely what is meant by the term "**necessary**". This Conclusion also provides guidelines to States on the use of detention and recommendations as to certain procedural guarantees to which detainees should be entitled.

4. The expression "**coming directly**" in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept "**coming directly**" and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression "**without delay**". The expression "**good cause**", requires a consideration of the circumstances under which the asylum-seeker fled. The term "asylum-seeker" in these guidelines applies to those whose claims are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.

5. Asylum-seekers are entitled to benefit from the protection afforded by various International and

Regional Human Rights instruments which set out the basic standards and norms of treatment. Whereas each State has a right to control those entering into their territory, these rights must be exercised in accordance with a prescribed law which is accessible and formulated with sufficient precision for the regulation of individual conduct. For detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.³

6. Although these guidelines deal specifically with the detention of asylum-seekers the issue of the detention of stateless persons needs to be highlighted.⁴ While the majority of stateless persons are not asylum-seekers, a paragraph on the detention of stateless persons is included in these guidelines in recognition of UNHCR's formal responsibilities for this group and also because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum-seekers and stateless persons. The inability of stateless persons who have left their countries of habitual residence to return to them, has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

Guideline 1: Scope of the Guidelines.

These guidelines apply to all asylum-seekers who are being considered for, or who are in, detention or detention-like situations. For the purpose of these guidelines, UNHCR considers detention as: **confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.** There is a qualitative difference between detention and other restrictions on freedom of movement.

Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.

When considering whether an asylum-seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

Guideline 2: General Principle

As a general principle asylum-seekers should not be detained.

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

Guideline 3: Exceptional Grounds for Detention.

Detention of asylum-seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.⁵

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration

of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.⁶

The permissible exceptions to the general rule that detention should normally be avoided, must be prescribed by law. In conformity with EXCOM Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if **necessary**:

(I) to verify identity.

This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based.

This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim.⁷ This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there **is an intention** to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order.

This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related to residency at reception centres, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.⁸

Guideline 4: Alternatives to Detention.

Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.

Alternatives to detention which may be considered are as follows:

(i) Monitoring Requirements.

Reporting Requirements: Whether an asylum-seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum-seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum-seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments.

Residency Requirements: Asylum-seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.⁹

(ii) Provision of a Guarantor/ Surety. Asylum seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.

(iii) Release on Bail. This alternative allows for asylum-seekers already in detention to apply for release on bail, subject to the provision of recognizance and surety. For this to be genuinely available to asylum-seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.

(iv) Open Centres. Asylum-seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.

These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum-seekers while allowing asylum-seekers basic freedom of movement.

Guideline 5: Procedural Safeguards.¹⁰

If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
- (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
- (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;
- (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;
- (v) 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.

Detention should not constitute an obstacle to an asylum-seekers' possibilities to pursue their asylum application.

Guideline 6: Detention of Persons under the Age of 18 years.¹¹

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, **minors who are asylum-seekers should not be detained.**

In this respect particular reference is made to the Convention on the Rights of the Child in particular:

- Article 2 which requires that States take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members;
- Article 3 which provides that in any action taken by States Parties concerning children, the best interests of the child shall be a primary consideration;
- Article 9 which grants children the right not to be separated from their parents against their will;
- Article 22 which requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognized refugees, whether accompanied or not, receive appropriate protection and assistance;
- Article 37 by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time.

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

If children who are asylum-seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma.

Children who are detained, benefit from the same minimum procedural guarantees (listed at Guideline 5) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.¹²

Guideline 7: Detention of Vulnerable Persons.

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within the following vulnerable categories:¹³

Unaccompanied elderly persons.

Torture or trauma victims.

Persons with a mental or physical disability.

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary.

Guideline 8: Detention of Women.

Women asylum-seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

Where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum-seekers should be granted access to legal and other services without discrimination as to their gender,¹⁴ and specific services in response to their special needs¹⁵. In particular they should have access to gynaecological and obstetrical services.

Guideline 9: Detention of Stateless Persons.

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.¹⁶

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally.¹⁷ Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

Guideline 10: Conditions of Detention¹⁸

Conditions of detention for asylum-seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points in particular should be emphasised:

- (i) the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- (ii) the segregation within facilities of men and women; children from adults (unless these are relatives);
- (iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;

(iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;

(v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;

(vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;

(vii) the opportunity to continue further education or vocational training;

(viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;

(ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries etc.;

(x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

Conclusion.

The increasing use of detention as a restriction on the freedom of movement of asylum seekers on the grounds of their illegal entry is a matter of major concern to UNHCR, NGOs, other agencies as well as Governments. The issue is not a straight-forward one and these guidelines have addressed the legal standards and norms applicable to the use of detention. Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based.

Footnotes

1. These Guidelines address exclusively the detention of asylum seekers. The detention of refugees is generally covered by national law and subject to the principles, norms and standards contained in the 1951 Convention, and the applicable human rights instruments.
2. The Geneva Convention of 28 July 1951 Relating to the Status of Refugees.
3. Views of the Human Rights Committee on Communication No. 560/1993, 59th Session, CCPR/C/D/560/1993.
4. UNHCR has been requested to provide technical and advisory services to states on nationality legislation or practice resulting in statelessness. EXCOM Conclusion No. 78(XLVI) (1995), General Assembly Resolution 50/152, 1996. See also Guidelines: Field Office Activities Concerning Statelessness. (IOM/66/98-FOM70/98).
5. Article 9(1) International Covenant on Civil and Political Rights. (ICCPR)
Article 37(b) UN Convention on the Rights of the Child. (CRC)
Article 5(1) European Convention for the Protection of Human Rights and Fundamental Freedoms. (ECHR)
Article 7(2) American Convention on Human Rights 1969. (American Convention)
Article 5 African Charter on Human and People's Rights. (African Charter)
6. Article 9(1), Article 12 ICCPR
Article 37(b) CRC
Article 5(1)(f) ECHR
Article 7(3) American Convention
Article 6 African Charter.
EXCOM Conclusion No. 44 (XXXVII)
7. EXCOM Conclusion No. 44 (XXXVII)
8. Sub Committee of the Whole of International Protection Note EC/SCP/44 Paragraph 51(c).
9. Art 16, Art 12 UDHR
10. Article 9(2) and (4) ICCPR
Article 37(d) CRC
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EXCOM Conclusion no. 44 (XXXVII)
UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. 1988
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11. See also UN Rules for the Protection of Juveniles Deprived of their Liberty 1990
12. An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.
13. Although it must be recognised that most individuals will be able to articulate their claims, this may not be the case in those who are victims of trauma. Care must be taken when dealing with these individuals as their particular problems may not be apparent, and it will require care and skill to assess the situation of a person with mental disability or a disoriented older refugee who is alone.
14. See UNHCR Guidelines on The Protection of Refugee Women.
15. Women particularly those who have travelled alone may have been exposed to violence and exploitation prior to and during their flight and will require counselling.
16. Art 15 UDHR. See EXCOM No. 78(XLVI)
17. Article 10(1) ICCPR
1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment.
UN Standard Minimum Rules for the Treatment of Prisoners 1955
1990 UN Rules for the Protection of Juveniles Deprived of their Liberty
18. Article 10(1) ICCPR
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