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5 **DETENTION IN EUROPE**

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7 **JRS-EUROPE Observation and Position Paper 2004**

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57 **I. Introduction**

58

59 During the last two decades the number of refugees, who were seeking refuge in Europe, in
60 particular in EU Member States, increased considerably. However, only 20%¹ of the global refugee
61 population came to Europe.² The vast majority of people, who had to flee to save their life, were
62 received in the poor regions of this world.³

63

64 EU Member States as well as their neighbouring States, most of them among the new Member
65 States after 1 May 2004, tightened their refugee policies, which became ever more repressive and
66 restrictive. "Protection of refugees" turned into "Protection from refugees". This policy trend is even
67 stronger after the terrorist attacks of 1 September 2001. In the European Union domestic security
68 as well as refugee protection fall within the competence of Justice and Home Ministers, and now
69 they clearly give priority to domestic security over refugee protection.

70

71 This development is of growing concern. In November 2002 United Nations High Commissioner for
72 Refugees Ruud Lubbers declared at the United Nations that there is "a more general trend
73 towards increased use of detention, often on a discriminatory basis" and that this "is worrying".⁴ In
74 November 2003, the Vatican appealed to governments, legislative bodies and international
75 organizations "to respect and protect the human dignity and human rights (...) of migrants and
76 refugees, be they in a regular or an irregular situation, and not to make international terrorism a
77 pretext to reduce their rights" and "to admit that policies which are only repressive and restrictive
78 towards migrants and refugees are unable to control migratory flows."⁵ In January 2004, in a high-
79 profile speech to the members of the European Parliament, UN Secretary-General Kofi Annan
80 heavily criticized the EU policies towards refugees and migrants. He spoke of "offshore barriers"
81 and "refused entry because of restrictive interpretations" of the Geneva Convention relating to the
82 Status of Refugees, and castigated that refugees are "detained for excessive periods in
83 unsatisfactory conditions".⁶ Only two weeks before, the EU Parliament's Committee on Citizens'
84 Freedoms and Rights, Justice and Home Affairs, had expressed that it "is concerned at the plight
85 of persons being deprived of their freedom in holding centres despite the fact that they have been
86 charged with no crime or offence".⁷

87

88 The EU Council Directive⁸ laying down minimum standards for the reception of asylum seekers⁹
89 defines "detention" as the "confinement of an asylum seeker by a Member State within a particular
90 place, where the applicant is deprived of his or her freedom of movement"¹⁰, and in the Amended
91 Proposal of the EU Commission for an EU Council Directive on minimum standards on procedures
92 in Member States for granting and withdrawing refugee status "detention" means "the confinement
93 of an applicant for asylum by a Member State within a restricted area, where his freedom of
94 movement is substantially curtailed".¹¹

95

96 EU Member States detain asylum seekers and other refugees as well as migrants in order to make
97 forceful return, especially deportation, easier, but also to facilitate processing of asylum claims.
98 Reliable data about the total number of detainees in Europe are not available. Yet, on the grounds
99 of data, which are partially available, the number of detainees in Europe may be in the 100.000s
100 persons per year.

101

102 In Europe the refusal of the right to free movement has a particularly terrifying history. Jews,
103 Roma, homosexuals and resistance fighters were ghettoized, "removed" to concentration camps.

¹ Rounded number

² Cf. UNHCR Population Data Unit (Population and Geographic Data Section), 1 January 2003

³ 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), 1 January 2003

⁴ Statement to the Third Committee of the General Assembly, New York, 7 November 2002; www.unhcr.ch

⁵ Cf. Fifth World Congress on the Pastoral Care of Migrants and Refugees (Rome, 17 - 22 November 2003), Final document; www.vatican.va

⁶ www.un.org/apps/news

⁷ EU Parliament Draft Report on the situation as regards fundamental rights in the European Union (2003), 2003/2006 (INI), 15 January 2004

⁸ "EU Council Directives" are EU laws.

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

¹⁰ Article 2 (k), Council Directive 2003/9/EC of 27 January 2003

¹¹ Article 2 (j), COM (2002) 326 final/2, 3 July 2002

104 During the Cold War, countries, which were at that time Member States of the EU, politically
 105 attacked Eastern European Countries for refusing free movement to their people. Cynically, now
 106 those same Western European States refuse free movement to people in need of protection, and,
 107 furthermore, force new EU Member States to do so, too – those countries, which they attacked
 108 only 30 years ago for doing so.

109
 110 The Jesuit Refugee Service (JRS) in Europe as well as JRS in other regions of the world
 111 accompanies refugees, also in detention centers. Based on the experience from this work, on
 112 JRS-EUROPE's research on irregular migration, legal analysis of international and European
 113 standards and norms, in particular human rights legislation, JRS-EUROPE has developed this
 114 "Observation and Position Paper on Detention".

115
 116 It intends to alert and to guide political and administrative decision makers in Europe, journalists,
 117 NGOs and all those who are, in a different way, involved in attending to the needs of refugees who
 118 seek protection and dignified livelihoods in Europe.

119
 120 The Treaty of the EU as amended in Amsterdam (1999) wants the EU to be established as "an
 121 area of freedom, security and justice"¹². JRS-EUROPE regards this "Observation and Position
 122 Paper on Detention" as one of its major current contributions to achieve freedom, security and
 123 justice not only for citizens of Europe, but also for refugees and migrants in Europe.

124 125 **II. Detainees in Europe**

126
 127 The detainee population in Europe includes refugees, especially asylum seekers, as well as
 128 migrant residents. These are women, also pregnant women, men and children, including
 129 unaccompanied minors. Many arrived after having suffered trauma and persecution in their own
 130 countries

131
 132 In detention, detainees do not only suffer from the deprivation of fundamental liberties, often
 133 including the separation from their family and, at times, from their children; they also suffer from
 134 long periods without the opportunity to pursue meaningful activities. In particular, they suffer from
 135 "criminalization" as a result of being detained, and they face enormous insecurity as a result of fear
 136 as to what the future holds for them. Although, legally, detention is only an administrative measure
 137 and not a measure of the penal system, its application often takes on characteristics of criminal
 138 incarceration, resulting in significant emotional, physical and mental health problems for detainees.
 139 It is highly alarming that detainees increasingly commit suicide or attempt suicide.

140 141 **III. Detention practices in Europe**

142 143 **1. Detention conditions**

144
 145 JRS-EUROPE observes that the following main phenomena are either the rule or increasingly
 146 appear in detention practices of European States:

- 147
- 148 • Often detainees do not know why they are in detention.
- 149 • Generally detainees are kept in quasi-prisons or in prisons together with persons charged
 150 or convicted of crimes.
- 151 • It occurs that detainees cannot receive visits from the United Nation's High Commissioner
 152 for Refugees (UNHCR)¹³ and from priests.
- 153 • If detainees are allowed to have visits, these are often restricted to one hour per month.
- 154 • Increasingly detention separates parents and their young children.
- 155 • Detainees are separated from their family, unless they are detained, too.
- 156 • Most of the time detainees receive substandard health care.
- 157 • Normally detainees have no access to legal services.
- 158 • Detainees have no opportunity to pursue meaningful activities.

¹² Article 61

¹³ The United Nation's High Commissioner for Refugees (UNHCR) is being denied access to persons of direct concern; statement by Ms. Erika Feller, Director of Department of International Protection (UNHCR), at UNHCR Executive Committee meeting 2003

- 159
- Detention of minors is the rule rather than the exception.
 - Very often detention is ordered, although there is little chance of timely deportation or when there is little, even no risk of absconding.

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2. Detention duration

The maximum duration under national law for detention of migrants and refugees, including asylum seekers, varies significantly throughout Europe: for example, from six days in Spain¹⁴, 60 days in Italy¹⁵, three months in Greece, five months in Belgium¹⁶ and 18 months in Germany to an unlimited time period in Great Britain. Legal appeals against the duration of detention are often not thoroughly examined.

3. Detention costs

For the taxpayer, detention is very expensive. For instance, per day and per person, in Berlin/Germany it costs 60 euros, in Bologna/Italy 89. In Italy, during the period from July 2002 to July 2003, 17.000 people were detained¹⁷. So, if each one of them would have been detained in Bologna for only one day, the Italian taxpayer would have paid more than 1,5 million euros for this one day. Or: When a person is detained in Bologna for 60 days, the detention of this one person would cost 5.340 euros, 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 euros¹⁸.

IV. Detention in EU legislation

The EU Council, the EU Commission and the EU Parliament are increasingly addressing the issue of detention within the political and legislative framework that is gradually built up to harmonize, on one hand, the area of asylum and, on the other hand, the area of immigration legislation in the EU.

Detention is dealt with according to two different purposes.

1. Detention pending removal

In terms of a political chronology, in the beginning the EU raised the issue of detention only in the context of "immigration", more precisely "illegal immigration", although at that time already, the detainee population in Europe was including large numbers of asylum seekers.

Especially the EU Laeken Council (2001) and the EU Sevilla Council (2002) intensively discussed irregular immigration to Europe. As a result, in October 2002, the EU Commission presented a "Communication to the Council and the European Parliament on a community return policy on illegal residents"¹⁹. In this Communication, the EU Commission acknowledged "the need for Member States to provide for the possibility of detention pending removal". However, the EU Commission stated in this document, 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

¹⁴ Persons seeking admission into Spain to apply for asylum can be "retained" at the border for a maximum of six days during which the governmental Office of Asylum and Refuge must decide on whether to admit the application for processing. If a decision is not made within that time period, the person must be released. Once a person is in the territory of Spain, however, he or she can only be detained in a detention centre for a maximum period of 40 days. This longer period of detention can only be done with the authorization of a magistrate.

¹⁵ If the Italian authorities are not able to deport the person within 2 months, the person is released, without documents, but with an invitation to leave the country within 5 days. An irregular immigrant, who had been released, might be detained again, if police forces catch him.

¹⁶ However it happens that persons are for 9 months in detention due to a practice of the administration: When a person obstructs policy forces in the performance of deportation, the administration orders detention again. The courts approve this practice.

¹⁷ In Italy's 12 detention centers ("Centro di Permanenza Temporanea")

¹⁸ www.schober-international.com/italy

¹⁹ COM (2002) 564 final

204 for detention in the framework of a future Directive on Minimum Standards for Return
205 Procedures”.²⁰

206
207 The EU Council picked this reminder of human rights and the suggestion of common “minimum
208 standards” up, transformed it, however, in spirit and content – from safeguarding human rights to
209 facilitating operational co-operation. In November 2002, in a note from the Danish EU Presidency
210 to the EU Council concerning a Proposal for a return action programme²¹, the EU Presidency
211 stated, “there are already international instruments requiring that detention must be in accordance
212 with the basic human rights in place. Consideration should, however, be given to whether certain
213 minimum standards for detention pending removal or during transit are needed in order to facilitate
214 operational co-operation between Member States.”

215
216 This consideration has not yet been further pursued, unless the 2003 EU Commission’s
217 Communication to the European Parliament and the Council in view of the European Council of
218 Thessaloniki on the development of a common policy on illegal immigration, smuggling and
219 trafficking of human beings, external borders and the return of illegal residents²² is considered as a
220 follow-up. In this Communication the EU Commission announced that it is “preparing draft
221 guidelines on security provisions for removals by air, which are crucial in order to safeguard a
222 smooth and safe return of the persons concerned” and that it “intends to take the initiative to
223 prepare a Proposal for a Council Directive on minimum standards for return procedures and
224 mutual recognition of return decisions”. In January 2004, during the informal EU Justice and Home
225 Affairs Council in Dublin, EU Commissioner Antonio Vitorino announced that the EU Commission
226 will spend 30 million euros in 2005/6 on policies for the repatriation of illegal immigrants, and that
227 this money could be spent on “preparatory actions”, or pilot projects to organize “joint flights”²³.

228

229 **2. Detention pending a decision by the determining authority**

230

231 Against this background of detention pending removal, detention then began to make its political
232 and legislative way to the area of “asylum”. The 2003 EU Council Directive laying down standards
233 for the reception of asylum seekers²⁴ is dealing with detention. Also, the EU Commission’s
234 Amended proposal for a Council Directive on minimum standards on procedures in Member States
235 for granting and withdrawing refugee status of 3 July 2002²⁵ is addressing detention. Article 17 and
236 18 lengthily deal with “Detention pending a decision by the determining authority”:

237

238 **2.1. Article 17 of the Amended proposal for a Council Directive on minimum standards on** 239 **procedures in Member States for granting and withdrawing refugee status**

240

241 Article 17 says:

242

243 “Member States shall not hold an applicant for asylum in detention for the sole reason that his
244 application for asylum needs to be examined before a decision is taken by the determining
245 authority. However, Member States may only hold an applicant for asylum in detention during the
246 examination of the application where such detention is, in accordance with a procedure laid down

²⁰ The EU Commission recommended minimum standards which “could cover: Grounds for detention pending removal; (...) 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 issuing of a detention order. 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; (...) Time limits for the duration of detention pending which removal. Although the grounds for detention (e.g. identification or prevention from absconding) has 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.

²¹ 14673/02, LIMITE, MIGR 125, FRONT 135, VISA 172

²² COM (2003) 323 final, 3 June 2003

²³ agence europe, 23 January 2004

²⁴ Council Directive 2003/9/EC of 27 January 2003

²⁵ COM (2002) 326 final/2

247 by national law or regulation, objectively necessary for an efficient examination of the application
 248 or where, on the basis of the personal conduct of the applicant, there is a strong likelihood of his
 249 absconding (...) Member States may also hold an applicant for asylum in detention during the
 250 examination of his application if there are grounds for believing that the restriction on his freedom
 251 of movement is necessary for a quick decision to be made. Detention for this reason shall not
 252 exceed two weeks (...) Member States shall provide for the possibility of an initial judicial review
 253 and subsequent regular judicial reviews of the order for detention of applicants for asylum detained
 254 pursuant to (...) Member States shall ensure that the court called upon to review the order of
 255 detention is competent to review whether detention is in accordance with the provisions of this
 256 Article.”

257
 258 **2.2. Article 18 of the Amended proposal for a Council Directive on minimum standards on**
 259 **procedures in Member States for granting and withdrawing refugee status**

260
 261 Article 18 says:

262
 263 “Member States may hold the applicant in detention to prevent him from absconding or effecting
 264 an unauthorised stay, from the moment at which another Member State has agreed to take charge
 265 of him or to take him back in accordance with Council Regulation ...[establishing the criteria and
 266 mechanisms for determining the Member State responsible for examining an asylum application
 267 lodged in one of the Member States by a third country national] until the moment the applicant is
 268 transferred to the other Member
 269 State. Detention for this reason shall not exceed one month (...) Member States shall ensure that
 270 the authority called upon to review the order is competent to examine the legality of the detention
 271 in accordance with the provisions of this Article.”

272
 273 **2.3. EU Council for Justice and Home Affairs, June 2003**

274
 275 Yet, presently, the future of these provisions is uncertain. In June 2003, the EU Council for Justice
 276 and Home Affairs²⁶ cut Article 17 down to a brief version:

277
 278 “Member States shall not hold a person in detention for the sole reason that he/she is an applicant
 279 for asylum. (...) Where an applicant for asylum is held in detention, Member States shall ensure
 280 that there is the possibility of speedy judicial review.”

281
 282 Article 18 was completely deleted.

283
 284 **V. International norms and guidelines for detention and detention practises**

285
 286 International Public Law and international guidelines establish minimum standards for detention
 287 and detention practises.

288
 289 **1. International Public Law²⁷**

290
 291 The most important treaties under International Public Law²⁸, which should govern detention and
 292 detention practises, are:

- 293
 294 • The Universal Declaration of Human Rights of 1948
 295 • The European Convention on Human Rights of 1950
 296 • The Geneva Convention relating to the Status of Refugees of 1951
 297 • The International Covenant on Civil and Political Rights of 1966/1976
 298 • The International Covenant on Economical, Social and Cultural Rights 1966/1976
 299 • The Convention on the Rights of the Child of 1989/1990

²⁶ 10235/03, LIMITE, ASILE 35

²⁷ Codices of International law are not automatically binding for national and/or EU legislation. It needs to be transposed into national law by the competent national legislative bodies.

²⁸ A “treaty under International Public Law” is any agreement governed by International law and concluded in written form between on 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”.

- 300
- The Charter of Fundamental Rights of the European Union of 2000²⁹
 - The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990/2003
- 301
302
303

304 These international codices establish internationally recognized standards, namely the following
305 ones.

307 1.1. Principle of proportionality

308

309 Detention and detention practises must comply with the Principle of proportionality. Article 49 of
310 the Charter of Fundamental Rights of the European Union explicitly refers to this principle, which
311 demands that any measure of a public authority that affects a human right must be appropriate,
312 necessary and reasonable. It is a general common principle of law limiting legislative and
313 administrative power, if a basic right is subjected to limitations.

314

315 2.2. Right to freedom of movement

316

317 Detention is the contrary to the freedom of movement. According to Article 45 of the Charter of
318 Fundamental Rights of the European Union, freedom of movement is granted not only to citizens
319 of EU Member States, but freedom of movement may be granted to “nationals of third countries³⁰
320 legally resident in the territory of a Member State”, too. National legislation determines who is
321 considered to be “legally” residing, but national legislation in the EU Member States vary in this
322 respect. Generally, refugees are not considered “illegal”, when there are no legal grounds for
323 expulsion; thus, when there are no legal grounds for expulsion, refugees need to be considered as
324 “legally resident.”³¹

325

326 The European Convention on Human Rights³², the Universal Declaration of Human Rights³³, and
327 the International Covenant on Civil and Political Rights³⁴ also protect the right to freedom of
328 movement.

329

330 In particular, detention must be compatible with the ban of arbitrary detention. Article 9 of the
331 International Covenant on Civil and Political Rights states that “no one shall be subjected to
332 arbitrary arrest or detention.” The United Nations Commission on Human Rights clarifies: “The
333 notion of ‘arbitrariness’ must not be equated with ‘against the law’, but be interpreted more broadly
334 to include such elements as inappropriateness (...) The fact of illegal entry may indicate a need for
335 investigation, and there may be other factors particular to the individuals, such as the likelihood of
336 absconding and lack of cooperation, which may justify detention for a period. Without such factors
337 detention may be considered arbitrary, even if entry was illegal.”³⁵

338

339 Article 31 of the Convention relating to the Status of Refugees forbids, in general, limitations on
340 the freedom of movement and only allows necessary restrictions until the status of a refugee is
341 clarified. Thus, this Convention forbids in principal detention³⁶ of asylum seekers as the most
342 intensive form of restriction. Exceptions are possible when prompted, for example, by interests of
343 national security³⁷,

²⁹ The EU Member States approved the draft at the European 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. The key question for the future is whether the charter should be made legally binding when the next European Union treaty is signed in 2004

³⁰ States, which are not EU Member States

³¹ 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.”

³² Article 5, European Convention on Human Rights

³³ Article 3, Universal Declaration of Human Rights

³⁴ Article 9, International Covenant on Civil and Political Rights

³⁵ Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1997)

³⁶ Guideline 2, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

³⁷ Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

344 special circumstances of a mass influx, or if necessary after illegal entry.³⁸
 345 Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers
 346 and Members of Their Families provides that “migrant workers and members of their families shall
 347 not be subjected individually or collectively to arbitrary arrest or detention; they shall not be
 348 deprived of their liberty except on such grounds and in accordance with such procedures as are
 349 established by law”.

350

351 **1.3. Right to medical care**

352

353 Article 23 of the Geneva Convention relating to the Status of Refugees states “the Contracting
 354 States shall accord to refugees lawfully staying³⁹ in their territory the same treatment with respect
 355 to public relief and assistance as is accorded to their nationals, including medical attendance and
 356 hospital treatment.

357

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

364

365 **1.4. Right to be informed**

366

367 When detainees, refugees and migrants, are not told why they are detained, several provisions in
 368 international human rights conventions are elementary, namely Article 5 of the European
 369 Convention on Human Rights, which provides as follows: first, the right to be informed promptly of
 370 the reasons for detention; second, that everyone who is deprived of her/his liberty, shall be entitled
 371 to proceedings by which the lawfulness of his detention shall be decided speedily by a court; and,
 372 finally, the right to compensation for unlawful detention. The content of Article 5 of the European
 373 Convention on Human Rights has been defined and interpreted by the European Court of Human
 374 Rights⁴⁰: “Any person arrested must be told, in simple, non-technical language that he can
 375 understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to
 376 apply to a court to challenge its lawfulness.”

377

378 **1.4. Protection of minors**

379

380 Minors, i.e. children who are not yet of age, are additionally and especially protected. Concerning
 381 the detention of minors, the Convention on the Rights of the Child is the most important document.
 382 It is the most widely ratified human rights treaty in history; only two countries, the United States
 383 and Somalia, have failed to endorse it. Article 37 of this Convention forbids the detention of minors
 384 except as a last resort and then only for the shortest possible time.

385

386 **1.5. Protection of families**

387

388 Family life and family unity enjoy special protection, too. Regarding detained family members,
 389 especially the detention of mothers and single fathers of young children whom detention separates
 390 from their children, but also regarding administrative rules on family visits to detainees, Article 33
 391 of the Charter of Fundamental Rights of the European Union states, that “the family shall enjoy
 392 legal, economic and social protection.” Also, Article 23 of the International Covenant on Civil and
 393 Political Rights as well as Article 8 of the European Convention on Human Rights and Article 10 of
 394 the International Covenant on Economical, Social Cultural Rights oblige States to protect family
 395 life.

396

³⁸ 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.

³⁹ 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.”

⁴⁰ Cf. Fox, Campbell and Hartley vs GB, ECHR 182, § 40

397 **2. UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the**
 398 **Detention of Asylum Seekers**
 399

400 In 1999 UNHCR established Guidelines on Applicable Criteria and Standards Relating to the
 401 Detention of Asylum Seekers. The detention of asylum-seekers is, in the view of UNHCR,
 402 "inherently undesirable". (...) This is even more so in the case of vulnerable groups such as single
 403 women, children, unaccompanied minors and those with special medical or psychological needs.
 404 Freedom from arbitrary detention is a fundamental human right and the use of detention is, in
 405 many instances, contrary to the norms and principles of international law. (...) As a general
 406 principle asylum-seekers should not be detained. According to Article 14 of the Universal
 407 Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human
 408 right. In exercising this right asylum-seekers are often forced to arrive at or enter a territory
 409 illegally. However, the position of asylum-seekers differs fundamentally from that of ordinary
 410 immigrants in that they may not be in a position to comply with the legal formalities for entry. This
 411 element, as well as the fact that asylum-seekers have often had traumatic experiences, should be
 412 taken into account in determining any restrictions on freedom of movement based on illegal entry
 413 or presence."

414
 415 **2.1. Exceptional Grounds for Detention**
 416

417 Guideline 3 deals with "Exceptional Grounds for Detention": Detention of asylum-seekers may
 418 exceptionally only be resorted to, if necessary, for several reasons. These are:

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

425
 426 **2.2. Alternatives to detention**
 427

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

- 433 • Monitoring Requirements
- 434 • Provision of a Guarantor/ Surety
- 435 • Release on Bail
- 436 • Open Centres

437
 438 UNHCR has emphasized that while detention may be used in exceptional circumstances,
 439 consideration should always be given first to all possible alternatives⁴¹. Thereafter, detention
 440 should be used only if it is reasonable and proportional and, above all, necessary.⁴²
 441

442 **VI. JRS-EUROPE's positions**
 443

444 **1. Political and legal language**
 445

446 JRS-EUROPE denounces political and legal notions like "illegal immigrant" or "removal" of
 447 persons. A behaviour or a situation can be "illegal", i.e. not to comply with law, but not a person.
 448 "Removal" of persons brings back, in memory, terrifying situations and events in Europe, such as
 449 "concentration camps" and "ethnic cleansing".
 450

451 **2. Use of detention**

⁴¹ Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

⁴², 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.

452 JRS-EUROPE wants the use of detention to be avoided.

453

454 3. Principle of proportionality

455

456 JRS-EUROPE is of the opinion that any restriction to personal life, which is not justified by the
457 purpose of the detention, is in contradiction to the principle of proportionality and endangers
458 human rights.

- 459 • Detention for deportees is in most cases unnecessary and ineffective because:
 - 460 ○ Research has shown that only 2 % of people released on bail have absconded.⁴³
 - 461 ○ Serious factors motivating a person to leave his/her home country and to go to
462 another country, such as civil war, human rights violations, disastrous economical
463 or environmental situations, are more decisive than the deterrent effect of
464 detention.
- 465 • Detention criminalizes people who have not committed a crime.
- 466 • Detention causes unnecessary harm and injustice.
- 467 • Detention itself does not help to verify a person's identity.
- 468 • Detention has enormous financial costs.
- 469 • Detention has an adverse effect on the morals of society as it normalizes exclusion and
470 administrative imprisonment of a part of the society and provokes racism and xenophobia.

471

472 4. Grounds of detention

473

474 If detention cannot be avoided, a detention order must be based on grounds provided by a formal
475 law. A detention order itself must be issued in accordance with a procedure prescribed by law,
476 whether issued by a court or another public authority. A detention order should never be based
477 solely on the fact that a person has entered the territory of the state "illegally" or stays "illegally"
478 because this does not automatically imply an intention not to comply with the duty to leave the
479 country, for instance after a negative asylum procedure, and may be unnecessary. Any regulation
480 providing grounds for detention orders must clearly state that the order must be based on objective
481 evidence regarding the facts and the personal behaviour in the past and that due to this behaviour
482 no other less restrictive means exists to enforce return. The behaviour can only be considered
483 when the concerned person knew about his/her obligation to leave the country (was informed
484 about his/her obligation in a language he/she understands), and when he/she had informed
485 access to the appeal process.

486

487 JRS-EUROPE acknowledges the contribution made by UNHCR's Revised Guidelines on
488 Detention of Asylum Seekers, which point out that "the detention of asylum-seekers who come
489 'directly' in an irregular manner should (...) not be automatic, or unduly prolonged"⁴⁴, and that "the
490 use of detention is in many instances contrary to the norms and principles of international law"⁴⁵.
491 Nevertheless, JRS-EUROPE considers the exceptional grounds for detention in Guideline 3⁴⁶ to

⁴³ Cf. Irene Bruegel/Eva Natamba, Maintaining contact: What happens after detaining asylum seekers get bail? Social Science Research Papers No. 16, South Bank University 2002

⁴⁴ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999); Introduction 3.

⁴⁵ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999); Introduction 1.

⁴⁶ 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

492 be too far-reaching, especially regarding the verification of identity and determination of the
 493 elements on which the claim for protection is based. Given that many asylum seekers do not have
 494 or cannot present a passport or other documents proving their identity, the authorities can abuse
 495 the first exception to justify detention in many cases. Thus, most asylum seekers would be
 496 detained, as the strict conditions for getting a visa oblige them to enter the host state irregularly
 497 and, often, with the help of a non-profit private or commercial smuggler. In consequence, asylum
 498 seekers have no valid travel documents either at the beginning of their voyage, often because they
 499 have to hand them over to the commercial smuggler. It is not reasonable to think that the reasons
 500 for the claim can better be determined when the applicant is in detention rather than free and able
 501 to access legal and social services which would aid in establishing the bona fides of the asylum
 502 claim.

503 **5. Procedures while being in detention**

504 Procedures in detention must uphold international standards, including the following:

- 507 • The person who is detained shall be informed promptly, in a language, which she/he
 508 understands, of the reasons for his/her arrest.
- 509 • The detainee must have the right to be heard during the procedure, if necessary with the
 510 help of an interpreter.⁴⁷ If the information and hearing is not possible in the native
 511 language or any other language the person understands, he/she must be released as in
 512 this case; the lawfulness of the detention is not guaranteed.
- 513 • The person who is deprived of liberty by detention shall be entitled to take proceedings by
 514 which the lawfulness of his/her detention shall be decided speedily by a court and his/her
 515 release ordered if the detention is not lawful;⁴⁸ this court must be different from the issuing
 516 body; the possibility of appeal must not only be given at the beginning of the detention but
 517 at any appropriate time.⁴⁹
- 518 • The person must be informed about the above-mentioned right in a language he/she
 519 understands.
- 520 • Each person must be provided with legal assistance.
- 521 • The costs for the interpreter must be covered by the State responsible for detention.
- 522 • Any detention order should automatically and regularly be reviewed by the issuing body in
 523 order to ascertain that the detention remains appropriate.

524 **6. Domestic security**

525 JRS-EUROPE is concerned that domestic security is used more and more as a reason to detain
 526 refugees. If public order and/or national security are a consideration in such cases, any measures
 527 to detain must be based on criminal law. Administrative detention is neither an adequate nor a
 528 reasonable response.
 529
 530
 531

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 cooperate 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 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.

⁴⁷ Cf. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), Principles 11

⁴⁸ Cf. Article 5 of the European Convention on Human Rights; Article 9 of the International Covenant on Civil and Political Rights

⁴⁹ Cf. Principle 32 of the Body of Principles

532 Criminal and administrative law can and should address the problem of threats to national security
 533 and public order without criminalizing innocent refugees and migrants.

534

535 **7. Detention duration**

536

537 The duration of detention often exceeds reasonable time limits, and alternative methods of
 538 assuring a person's presence during proceedings and/or ultimate departure – reporting to local
 539 authorities, guarantors, custody agreements, bail, open detention centres – are often ignored or
 540 not considered. National law must specify a maximum duration for detention.

541

542 JRS-EUROPE is aware that it may be problematic to suggest a maximum duration by proposing a
 543 precise term. However, given the enormous differences in national provisions in Europe, JRS-
 544 EUROPE also recognizes danger in not doing so and leaving it to the discretion of the states to fix
 545 a term – or indeed not to fix any term.

546

547 **8. Compensation**

548

549 Compensation should be provided to any person who has been unlawfully detained or in case of a
 550 breach of Article 5 of the European Convention on Human Rights or Article 9 of the International
 551 Covenant on Civil and Political Rights.

552

553 **9. Detention conditions**

554

555 Since refugees and migrants do not belong to the category of people, who are charged or
 556 convicted of crimes, detention conditions must differ significantly in a positive way from the
 557 conditions established for convicted criminals. The status of detainees must be recognized as a
 558 non-criminal status.

- 559 • Detainees should be kept separate from persons charged with and/or convicted of criminal
 560 offenses.⁵⁰
- 561 • Men and women should be accommodated separately. If married couples or family
 562 members⁵¹ are detained, they should be permitted to live together.
- 563 • Detainees should be permitted to move freely on the compound of the detention centre.
- 564 • Detainees should have the opportunity to prepare their own food.
- 565 • Detainees should have the opportunity for paid work.
- 566 • Detainees should have free access to a telephone and the means to finance at least calls
 567 to UNHCR, church institutions, NGOs, lawyer and family.
- 568 • Detainees should have free access to legal counselling.
- 569 • Detainees should receive full medical care, including psychological help, complemented
 570 by a doctor of their own choice.
- 571 • Detainees should have access to adequate leisure facilities.
- 572 • Detainees should have the right to receive visitors during the day and to communicate
 573 freely and in privacy with family members, friends and persons providing legal advice.
- 574 • Detainees should be provided with adequate social care, preferably provided by NGOs or
 575 church institutions.
- 576 • Pastoral workers, medical doctors, UNHCR and NGOs should have access to the centre
 577 or camp in order to offer assistance care and advice to the detainees.
- 578 • The personnel working in detention centers must be trained for working with foreigners in
 579 a field related to human rights⁵²
- 580 • The personnel working in detention centers must wear badges, which clearly identify them
 581 as staff. The badges should contain the staff person's name and/or identification number.
- 582 • An independent body should be appointed for every centre – with free access to the
 583 building and to whom the detainees can submit complaints concerning the conditions and
 584 the treatment by both guards, administrative and social staff on the one hand, and other
 585 detainees on the other hand.

⁵⁰ Cf. Principle 8 of the Body of Principles

⁵¹ As protected by Article 8 of the European Charter of Human Rights

⁵² Sensitization to migration and refugee background and traumatized persons, language skills, human rights instruction etc.

- 586 • A system should be established that guarantees an immediate, impartial and thorough
587 investigation in cases of alleged violations of basic rights.
588

589 **10. Special protection for especially vulnerable persons**

590 JRS-EUROPE strongly believes that special groups of individuals should never be detained in
591 detention centres given the negative impact of detention on their psychological and physical health
592 and on the right to family life. These groups are:

- 593 • Minors
594 • Pregnant women
595 • Traumatized persons
596 • Persons with special physical or mental health needs
597 • Persons older than 65 years
598 • Mothers or fathers accompanying minors under 14 years
599 • Chronically or seriously ill persons
600

601 **11. Detention as a push factor for irregular immigration**

602
603 JRS-EUROPE stresses that the more asylum seekers are detained after lodging a claim either at
604 the frontier or in the country, the more those who have protection needs may be forced into
605 situations of illegality rather than pursuing legitimate asylum claims.
606

607 **VII. JRS-EUROPE's appeals**

608
609 **1. To governments and legislators in European States**
610

- 611 • JRS-EUROPE urges governments and legislators in European States to avoid the use of
612 detention because detention implies restrictions of fundamental human rights.
613 • JRS-EUROPE urges governments and legislators in European States not to use detention
614 as a deterrent or as a reception or return policies element that is applied in a systematic
615 and general way because in an “area of freedom, justice and security” there is no place for
616 systematic restrictions of human rights.
617 • JRS-EUROPE urges governments and legislators in European States not to detain asylum
618 seekers and other people applying for a status until a final decision is made, as this is the
619 only way to ensure the right of a fair asylum procedure by enabling applicants to easily
620 consult a lawyer, a refugee organization etc. of their choice and confidence in order to
621 obtain legal advice and avoid re-traumatization and intimidation. “Final decision” means
622 the exhaustion of all administrative and judicial appeals even if there is no suspensive
623 effect.
624 • JRS-EUROPE urges governments and legislators in European States, which detain
625 refugees and migrants, that such detention should be as short as possible, and should
626 never exceed a total time period of two months, be it in one or multiple periods of
627 detention even after release or transfer to another centre. This suggestion of a maximum
628 time period should not be used as a justification to detain or to increase any maximum
629 duration of less than two months under current legislation. In case a person cannot be
630 returned within this two-month period and therefore must be released, he/she must not be left
631 in an illegal status and/or destitute. These are requirements of the Principle of
632 proportionality.
633 • JRS-EUROPE urges governments and legislators in European States to transpose and
634 implement International Public Law concerning detention and detainees and to adhere to
635 the UN Body of Principle for the protection of all persons under any form of detention or
636 imprisonment⁵³, the UN Standard Minimum Rules for the Treatment of Prisoners⁵⁴ as well
637 as to the UN Rules for the Protection of Juveniles Deprived of their Liberty⁵⁵ and the
638 Standards of the European Committee for the Prevention of Torture (CPT) in order to
639 prevent human rights violations of refugees, asylum seekers and migrants in detention.

⁵³ A/RES/173, General Assembly, 9 December 1988

⁵⁴ 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

⁵⁵ Resolution 45/113, 14 December 1990

640 • Concerning Article 17 and Article 18 of the EU Commission's Amended Proposal for a
 641 Council Directive on minimum standards on procedures in Member States for granting and
 642 withdrawing refugee status of 3 July 2002⁵⁶ JRS-EUROPE urges the EU Member States
 643 to ensure that a future EU Council Directive on minimum standards on procedures in
 644 Member States for granting and withdrawing refugee status complies with International
 645 Public Law, especially with Article 31 of the Geneva Convention relating to the Status of
 646 Refugees⁵⁷; there is strong legal evidence that the way in which Article 17 (2) and (3)
 647 are/were formulated might be in breach of Article 31 of this Convention. JRS-EUROPE
 648 urges the EU Member States not use vague formulations only in order to fulfil political time
 649 requirements of Article 63 of the 1999 Amsterdam Treaty, which says that "the Council
 650 (...) shall, within a period of five years after the entry into force of the Treaty of
 651 Amsterdam, adopt (...) minimum standards on procedures in Member States for granting
 652 or withdrawing refugee status". JRS-EUROPE reminds that Article 63 of the 1999
 653 Amsterdam Treaty states, too, that these measures must be "in accordance with the
 654 Geneva Convention (...) and the Protocol of 31 January 1967 relating to the status of
 655 refugees and other relevant treaties." Vague formulations leave room for interpretation to
 656 the detriment of asylum seekers and thus could lead to the detention of asylum seekers in
 657 almost all cases and violate the Geneva Convention. JRS-EUROPE generally supports
 658 the changes made by the EU Council for Justice and Home Affairs in June 2003⁵⁸, which
 659 say, "Member States shall not hold a person in detention for the sole reason that he/she is
 660 an applicant for asylum. (...) Where an applicant for asylum is held in detention, Member
 661 States shall ensure that there is the possibility of speedy judicial review." However, JRS-
 662 EUROPE would prefer to see it stated that asylum seekers should generally not be
 663 detained, in particular especially vulnerable people, absent compelling reasons to the
 664 contrary.

665 2. To relevant EU institutions

666 • JRS-EUROPE addresses the appeal concerning Article 17 and Article 18 of the EU
 667 Commission's Amended proposal for a Council Directive on minimum standards on
 668 procedures in Member States for granting and withdrawing refugee status also to the EU
 669 Commission and the European Parliament.

- 670 • JRS-EUROPE urges relevant EU institutions not to promote the use of detention.
- 671 • JRS-EUROPE urges relevant EU institutions not to promote detention as a deterrent or as
 672 a reception or return policies element that is applied in a systematic and general way
 673 because in an "area of freedom, justice and security" there is no place for systematic
 674 restrictions of human rights.
- 675 • JRS-EUROPE urges relevant EU institutions not to promote the detention of asylum
 676 seekers and other people applying for a status until a final decision is made, as this is the
 677 only way to ensure the right of a fair asylum procedure by enabling applicants to easily
 678 consult a lawyer or a refugee organization of their choice and confidence in order to obtain
 679 legal advice and avoid re-traumatization and intimidation.
- 680 • JRS-EUROPE urges relevant EU institutions to influence the governments and legislators
 681 in European States, which detain refugees and migrants, to make sure that such detention
 682 is as short as possible, and should never exceed a total time period of two months, be it in
 683 one or multiple periods of detention even after release or transfer to another centre. This
 684 suggestion of a maximum time period should not be used as a justification to detain or to
 685 increase any maximum duration of less than two months under current legislation. In case
 686 a person cannot be returned within this two-month period and therefore must be released,
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⁵⁶ COM (2002) 326 final/2

⁵⁷ Article 31 (Refugees unlawfully in the country of refuge) "(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees' restrictions other than those, which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

⁵⁸ 10235/03, LIMITE, ASILE 35

689 he/she must not be left in an illegal status and/or destitute. These are requirements of the
690 Principle of proportionality.

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3. To journalists

- JRS-EUROPE asks journalists for their support in all the above-mentioned matters, asks them to investigate and report on detainees and detention in Europe.