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5 **DETENTION IN EUROPE**

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

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56 **I. Introduction**

57
 58 During the last two decades the number of refugees, who were seeking refuge in Europe,
 59 in particular in EU Member States, increased considerably. However, only 20%¹ of the
 60 global refugee population came to Europe.² The vast majority of people, who had to flee
 61 to save their life, were received in the poor regions of this world.³

62
 63 EU Member States as well as their neighbouring States, most of them among the new
 64 Member States after 1 May 2004, tightened their refugee policies, which became ever
 65 more repressive and restrictive. "Protection of refugees" turned into "Protection from
 66 refugees". This policy trend is even stronger after the terrorist attacks of 1 September
 67 2001. In the European Union domestic security as well as refugee protection fall within
 68 the competence of Justice and Home Ministers, and now they clearly give priority to
 69 domestic security over refugee protection.

70
 71 This development is of growing concern. In November 2002 United Nations High
 72 Commissioner for Refugees Ruud Lubbers declared at the United Nations that there is "a
 73 more general trend towards increased use of detention, often on a discriminatory basis"
 74 and that this "is worrying".⁴ In November 2003, the Vatican appealed to governments,
 75 legislative bodies and international organizations "to respect and protect the human
 76 dignity and human rights (...) of migrants and refugees, be they in a regular or an
 77 irregular situation, and not to make international terrorism a pretext to reduce their rights"
 78 and "to admit that policies which are only repressive and restrictive towards migrants and
 79 refugees are unable to control migratory flows."⁵ In January 2004, in a high-profile speech
 80 to the members of the European Parliament, UN Secretary-General Kofi Annan heavily
 81 criticized the EU policies towards refugees and migrants. He spoke of "offshore barriers"
 82 and "refused entry because of restrictive interpretations" of the Geneva Convention
 83 relating to the Status of Refugees, and castigated that refugees are "detained for
 84 excessive periods in unsatisfactory conditions".⁶ Only two weeks before, the EU
 85 Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs,
 86 had expressed that it "is concerned at the plight of persons being deprived of their
 87 freedom in holding centres despite the fact that they have been charged with no crime or
 88 offence".⁷

89
 90 The EU Council Directive⁸ laying down minimum standards for the reception of asylum
 91 seekers⁹ defines "detention" as the "confinement of an asylum seeker by a Member State
 92 within a particular place, where the applicant is deprived of his or her freedom of
 93 movement"¹⁰, and in the Amended Proposal of the EU Commission for an EU Council

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

94 Directive on minimum standards on procedures in Member States for granting and
 95 withdrawing refugee status “detention” means “the confinement of an applicant for asylum
 96 by a Member State within a restricted area, where his freedom of movement is
 97 substantially curtailed”.¹¹

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

104
 105 In Europe the refusal of the right to free movement has a particularly terrifying history.
 106 Jews, Roma, homosexuals and resistance fighters were ghettoized, “removed” to
 107 concentration camps. During the Cold War, countries, which were at that time Member
 108 States of the EU, politically attacked Eastern European Countries for refusing free
 109 movement to their people. Cynically, now those same Western European States refuse
 110 free movement to people in need of protection, and, furthermore, force new EU Member
 111 States to do so, too – those countries, which they attacked only 30 years ago for doing
 112 so.

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

119
 120 It intends to alert and to guide political and administrative decision makers in Europe,
 121 journalists, NGOs and all those who are, in a different way, involved in attending to the
 122 needs of refugees who seek protection and dignified livelihoods in Europe.

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

129 130 **II. Detainees in Europe**

131
 132 The detainee population in Europe includes refugees, especially asylum seekers, as well
 133 as migrant residents. These are women, also pregnant women, men and children,
 134 including unaccompanied minors. Many arrived after having suffered trauma and
 135 persecution in their own countries

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

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

¹² Article 61

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III. Detention practices in Europe

1. Detention conditions

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

- Often detainees do not know why they are in detention.
- Generally detainees are kept in quasi-prisons or in prisons together with persons charged or convicted of crimes.
- It occurs that detainees may not receive visits, f. ex. from priests, or visitors have to comply with formal, bureaucratic or security requirements which make visits extremely difficult.
- If detainees are allowed to have visits, these are often restricted to one hour per month.
- Increasingly detention separates parents and their young children.
- Detainees are separated from their family, unless they are detained, too.
- Most of the time detainees receive substandard health care.
- Normally detainees have no access to legal services.
- Detainees have no opportunity to pursue meaningful activities.
- 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.

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 Spain¹³, 60 days in Italy¹⁴, three months in Greece, five months in Belgium¹⁵ 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 €, in Bologna/Italy 89 €. In Italy, during the period from July 2002 to July 2003, 17.000 people were detained¹⁶. 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 €, i.e. 2.670 € per month. This is far more than the average income per household and month in Italy, which is less than

¹³ 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ In Italy's 12 detention centers ("Centro di Permanenza Temporanea")

187 2.000 €¹⁷.

188

189 **IV. Detention in EU legislation**

190

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

195

196 Detention is dealt with according to two different purposes.

197

198 **1. Detention pending removal**

199

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

204

205 Especially the EU Laeken Council (2001) and the EU Sevilla Council (2002) intensively
206 discussed irregular immigration to Europe. As a result, in October 2002, the EU
207 Commission presented a “Communication to the Council and the European Parliament on
208 a community return policy on illegal residents”¹⁸. In this Communication, the EU
209 Commission acknowledged “the need for Member States to provide for the possibility of
210 detention pending removal”. However, the EU Commission stated in this document, too,
211 that “a fair balance should be struck between the Member States’ need for efficient
212 procedures and safeguarding the basic human rights of the illegal residents”, and it
213 recommended that “minimum standards on detention pending removal should be set at
214 EU level, defining competencies of responsible authorities and the preconditions for
215 detention in the framework of a future Directive on Minimum Standards for Return
216 Procedures”¹⁹.

217

218 The EU Council picked this reminder of human rights and the suggestion of common
219 “minimum standards” up, transformed it, however, in spirit and content – from
220 safeguarding human rights to facilitating operational co-operation. In November 2002, in a
221 note from the Danish EU Presidency to the EU Council concerning a Proposal for a return
222 action programme²⁰, the EU Presidency stated, “there are already international
223 instruments requiring that detention must be in accordance with the basic human rights in
224 place. Consideration should, however, be given to whether certain minimum standards for

¹⁷ www.schober-international.com/italy

¹⁸ COM (2002) 564 final

¹⁹ 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.

²⁰ 14673/02, LIMITE, MIGR 125, FRONT 135, VISA 172

225 detention pending removal or during transit are needed in order to facilitate operational
226 co-operation between Member States.”

227

228 This consideration has not yet been further pursued, unless the 2003 EU Commission’s
229 Communication to the European Parliament and the Council in view of the European
230 Council of Thessaloniki on the development of a common policy on illegal immigration,
231 smuggling and trafficking of human beings, external borders and the return of illegal
232 residents²¹ is considered as a follow-up. In this Communication the EU Commission
233 announced that it is “preparing draft guidelines on security provisions for removals by air,
234 which are crucial in order to safeguard a smooth and safe return of the persons
235 concerned” and that it “intends to take the initiative to prepare a Proposal for a Council
236 Directive on minimum standards for return procedures and mutual recognition of return
237 decisions”. In January 2004, during the informal EU Justice and Home Affairs Council in
238 Dublin, EU Commissioner Antonio Vitorino announced that the EU Commission will
239 spend 30 million € in 2005/2006 on policies for the repatriation of illegal immigrants, and
240 that this money could be spent on "preparatory actions", or pilot projects to organize "joint
241 flights"²².

242

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

244

245 Against this background of detention pending removal, detention then began to make its
246 political and legislative way to the area of “asylum”. The 2003 EU Council Directive laying
247 down standards for the reception of asylum seekers²³ is dealing with detention. Also, the
248 EU Commission’s Amended proposal for a Council Directive on minimum standards on
249 procedures in Member States for granting and withdrawing refugee status of 3 July
250 2002²⁴ is addressing detention. Article 17 and 18 lengthily deal with “Detention pending a
251 decision by the determining authority”:

252

253 **2.1. Article 17 of the Amended proposal for a Council Directive on minimum** 254 **standards on procedures in Member States for granting and withdrawing** 255 **refugee status**

256

257 Article 17 says:

258

259 “Member States shall not hold an applicant for asylum in detention for the sole reason
260 that his application for asylum needs to be examined before a decision is taken by the
261 determining authority. However, Member States may only hold an applicant for asylum in
262 detention during the examination of the application where such detention is, in
263 accordance with a procedure laid down by national law or regulation, objectively
264 necessary for an efficient examination of the application or where, on the basis of the
265 personal conduct of the applicant, there is a strong likelihood of his absconding (...)
266 Member States may also hold an applicant for asylum in detention during the examination
267 of his application if there are grounds for believing that the restriction on his freedom of
268 movement is necessary for a quick decision to be made. Detention for this reason shall
269 not exceed two weeks (...) Member States shall provide for the possibility of an initial
270 judicial review and subsequent regular judicial reviews of the order for detention of
271 applicants for asylum detained pursuant to (...) Member States shall ensure that the court
272 called upon to review the order of detention is competent to review whether detention is in
273 accordance with the provisions of this Article.”

274

²¹ COM (2003) 323 final, 3 June 2003

²² agence europe, 23 January 2004

²³ Council Directive 2003/9/EC of 27 January 2003

²⁴ COM (2002) 326 final/2

275 **2.2. Article 18 of the Amended proposal for a Council Directive on minimum**
 276 **standards on procedures in Member States for granting and withdrawing**
 277 **refugee status**
 278

279 Article 18 says:

280
 281 “Member States may hold the applicant in detention to prevent him from absconding or
 282 effecting an unauthorised stay, from the moment at which another Member State has
 283 agreed to take charge of him or to take him back in accordance with Council Regulation
 284 .../...[*establishing the criteria and mechanisms for determining the Member State*
 285 *responsible for examining an asylum application lodged in one of the Member States by a*
 286 *third country national*] until the moment the applicant is transferred to the other Member
 287 State. Detention for this reason shall not exceed one month (...) Member States shall
 288 ensure that the authority called upon to review the order is competent to examine the
 289 legality of the detention in accordance with the provisions of this Article.”
 290

291 **2.3. EU Council for Justice and Home Affairs, June 2003**
 292

293 Yet, presently, the future of these provisions is uncertain. In June 2003, the EU Council
 294 for Justice and Home Affairs²⁵ cut Article 17 down to a brief version:

295
 296 “Member States shall not hold a person in detention for the sole reason that he/she is an
 297 applicant for asylum. (...) Where an applicant for asylum is held in detention, Member
 298 States shall ensure that there is the possibility of speedy judicial review.”
 299

300 Article 18 was completely deleted.

301

302 **V. International norms and guidelines for detention and detention practises**
 303

304 International Public Law and international guidelines establish minimum standards for
 305 detention and detention practices.
 306

307 **1. International Public Law²⁶**
 308

309 The most important treaties under International Public Law²⁷, which should govern
 310 detention and detention practises, are:

311

- 312 • The Universal Declaration of Human Rights of 1948
- 313 • The European Convention on Human Rights of 1950
- 314 • The Geneva Convention relating to the Status of Refugees of 1951
- 315 • The International Covenant on Civil and Political Rights of 1966/1976
- 316 • The International Covenant on Economical, Social and Cultural Rights 1966/1976
- 317 • The Convention on the Rights of the Child of 1989/1990
- 318 • The Charter of Fundamental Rights of the European Union of 2000²⁸

²⁵ 10235/03, LIMITE, ASILE 35

²⁶ 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.

²⁷ 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”.

²⁸ 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.

- 319 • The International Convention on the Protection of the Rights of All Migrant
320 Workers and Members of Their Families of 1990/2003

321
322 These international codices establish internationally recognized standards, namely the
323 following ones.

324
325 **1.1. Principle of proportionality**

326
327 Detention and detention practises must comply with the Principle of proportionality. Article
328 49 of the Charter of Fundamental Rights of the European Union explicitly refers to this
329 principle, which demands that any measure of a public authority that affects a human
330 right must be appropriate, necessary and reasonable. It is a general common principle of
331 law limiting legislative and administrative power, if a basic right is subjected to limitations.
332

333 **2.2. Right to freedom of movement**

334
335 Detention is the contrary to the freedom of movement. According to Article 45 of the
336 Charter of Fundamental Rights of the European Union, freedom of movement is granted
337 not only to citizens of EU Member States, but freedom of movement may be granted to
338 “nationals of third countries²⁹ legally resident in the territory of a Member State”, too.
339 National legislation determines who is considered to be “legally” residing, but national
340 legislation in the EU Member States vary in this respect. Generally, refugees are not
341 considered “illegal”, when there are no legal grounds for expulsion; thus, when there are
342 no legal grounds for expulsion, refugees need to be considered as “legally resident.”³⁰
343

344 The European Convention on Human Rights³¹, the Universal Declaration of Human
345 Rights³², and the International Covenant on Civil and Political Rights³³ also protect the
346 right to freedom of movement.
347

348 In particular, detention must be compatible with the ban of arbitrary detention. Article 9 of
349 the International Covenant on Civil and Political Rights states that “no one shall be
350 subjected to arbitrary arrest or detention.” The United Nations Commission on Human
351 Rights clarifies: “The notion of ‘arbitrariness’ must not be equated with ‘against the law’,
352 but be interpreted more broadly to include such elements as inappropriateness (...) The
353 fact of illegal entry may indicate a need for investigation, and there may be other factors
354 particular to the individuals, such as the likelihood of absconding and lack of cooperation,
355 which may justify detention for a period. Without such factors detention may be
356 considered arbitrary, even if entry was illegal.”³⁴
357

358 Article 31 of the Convention relating to the Status of Refugees forbids, in general,
359 limitations on the freedom of movement and only allows necessary restrictions until the
360 status of a refugee is clarified. Thus, this Convention forbids in principal detention³⁵ of
361 asylum seekers as the most intensive form of restriction. Exceptions are possible when

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

²⁹ States, which are not EU Member States

³⁰ 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.”

³¹ Article 5, European Convention on Human Rights

³² Article 3, Universal Declaration of Human Rights

³³ Article 9, International Covenant on Civil and Political Rights

³⁴ Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1997)

³⁵ Guideline 2, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

362 prompted, for example, by interests of national security³⁶, special circumstances of a
363 mass influx, or if necessary after illegal entry.³⁷

364

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

370

371 **1.3. Right to medical care**

372

373 Article 23 of the Geneva Convention relating to the Status of Refugees states “the
374 Contracting States shall accord to refugees lawfully staying³⁸ in their territory the same
375 treatment with respect to public relief and assistance as is accorded to their nationals,
376 including medical attendance and hospital treatment.

377

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

385

386 **1.4. Right to be informed**

387

388 When detainees, refugees and migrants, are not told why they are detained, several
389 provisions in international human rights conventions are elementary, namely Article 5 of
390 the European Convention on Human Rights, which provides as follows: first, the right to
391 be informed promptly of the reasons for detention; second, that everyone who is deprived
392 of her/his liberty, shall be entitled to proceedings by which the lawfulness of his detention
393 shall be decided speedily by a court; and, finally, the right to compensation for unlawful
394 detention. The content of Article 5 of the European Convention on Human Rights has
395 been defined and interpreted by the European Court of Human Rights³⁹: “Any person
396 arrested must be told, in simple, non-technical language that he can understand, the
397 essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply
398 to a court to challenge its lawfulness.”

399

400 **1.4. Protection of minors**

401

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

408

³⁶ Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

³⁷ 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.

³⁸ 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.”

³⁹ Cf. Fox, Campbell and Hartley vs GB, ECHR 182, § 40

409 **1.5. Protection of families**

410
411 Family life and family unity enjoy special protection, too. Regarding detained family
412 members, especially the detention of mothers and single fathers of young children whom
413 detention separates from their children, but also regarding administrative rules on family
414 visits to detainees, Article 33 of the Charter of Fundamental Rights of the European Union
415 states, that “the family shall enjoy legal, economic and social protection.” Also, Article 23
416 of the International Covenant on Civil and Political Rights as well as Article 8 of the
417 European Convention on Human Rights and Article 10 of the International Covenant on
418 Economical, Social Cultural Rights oblige States to protect family life.

419
420 **2. UNHCR’s Revised Guidelines on Applicable Criteria and Standards Relating**
421 **to the Detention of Asylum Seekers**
422

423 In 1999 UNHCR established Guidelines on Applicable Criteria and Standards Relating to
424 the Detention of Asylum Seekers. The detention of asylum-seekers is, in the view of
425 UNHCR, “inherently undesirable”. (...) This is even more so in the case of vulnerable
426 groups such as single women, children, unaccompanied minors and those with special
427 medical or psychological needs. Freedom from arbitrary detention is a fundamental
428 human right and the use of detention is, in many instances, contrary to the norms and
429 principles of international law. (...) As a general principle asylum-seekers should not be
430 detained. According to Article 14 of the Universal Declaration of Human Rights, the right
431 to seek and enjoy asylum is recognised as a basic human right. In exercising this right
432 asylum-seekers are often forced to arrive at or enter a territory illegally. However, the
433 position of asylum-seekers differs fundamentally from that of ordinary immigrants in that
434 they may not be in a position to comply with the legal formalities for entry. This element,
435 as well as the fact that asylum-seekers have often had traumatic experiences, should be
436 taken into account in determining any restrictions on freedom of movement based on
437 illegal entry or presence.”

438
439 **2.1. Exceptional Grounds for Detention**
440

441 Guideline 3 deals with “Exceptional Grounds for Detention”: Detention of asylum-seekers
442 may exceptionally only be resorted to, if necessary, for several reasons. These are:

- 443
- 444 • To verify identity
 - 445 • To determine the elements on which the claim for refugee status or asylum is
446 based
 - 447 • In cases where asylum-seekers have destroyed their travel and /or identity
448 documents or have used fraudulent documents in order to mislead the authorities
449 of the State, in which they intend to claim asylum
 - 450 • To protect national security and public order

451 **2.2. Alternatives to detention**
452

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

- 458
- 459 • Monitoring Requirements
 - 460 • Provision of a Guarantor/ Surety
 - 461 • Release on Bail
 - 462 • Open Centres

463 UNHCR has emphasized that while detention may be used in exceptional circumstances,
 464 consideration should always be given first to all possible alternatives⁴⁰. Thereafter,
 465 detention should be used only if it is reasonable and proportional and, above all,
 466 necessary.⁴¹

467 **VI. JRS-EUROPE's positions**

468 **1. Political and legal language**

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

473 **2. Use of detention**

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

475 **3. Principle of proportionality**

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

- 479 • Detention for deportees is in most cases unnecessary and ineffective because:
 - 480 ○ Research has shown that only 2 % of people released on bail have
 481 absconded.⁴²
 - 482 ○ Serious factors motivating a person to leave his/her home country and to
 483 go to another country, such as civil war, human rights violations,
 484 disastrous economical or environmental situations, are more decisive than
 485 the deterrent effect of detention.
- 486 • Detention criminalizes people who have not committed a crime.
- 487 • Detention causes unnecessary harm and injustice.
- 488 • Detention itself does not help to verify a person's identity.
- 489 • Detention has enormous financial costs.
- 490 • Detention has an adverse effect on the morals of society as it normalizes
 491 exclusion and administrative imprisonment of a part of the society and provokes
 492 racism and xenophobia.

493 **4. Grounds of detention**

494 If detention cannot be avoided, a detention order must be based on grounds provided by
 495 a formal law. A detention order itself must be issued in accordance with a procedure
 496 prescribed by law, whether issued by a court or another public authority. A detention
 497 order should never be based solely on the fact that a person has entered the territory of
 498 the state "illegally" or stays "illegally" because this does not automatically imply an
 499 intention not to comply with the duty to leave the country, for instance after a negative
 500 asylum procedure, and may be unnecessary. Any regulation providing grounds for

⁴⁰ Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

⁴¹, 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.

⁴² 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

510 detention orders must clearly state that the order must be based on objective evidence
 511 regarding the facts and the personal behaviour in the past and that due to this behaviour
 512 no other less restrictive means exists to enforce return. The behaviour can only be
 513 considered when the concerned person knew about his/her obligation to leave the
 514 country (was informed about his/her obligation in a language he/she understands), and
 515 when he/she had informed access to the appeal process.
 516

517 JRS-EUROPE acknowledges the contribution made by UNHCR's Revised Guidelines on
 518 Detention of Asylum Seekers, which point out that "the detention of asylum-seekers who
 519 come 'directly' in an irregular manner should (...) not be automatic, or unduly
 520 prolonged"⁴³, and that "the use of detention is in many instances contrary to the norms
 521 and principles of international law"⁴⁴. Nevertheless, JRS-EUROPE considers the
 522 exceptional grounds for detention in Guideline 3⁴⁵ to be too far-reaching, especially
 523 regarding the verification of identity and determination of the elements on which the claim
 524 for protection is based. Given that many asylum seekers do not have or cannot present a
 525 passport or other documents proving their identity, the authorities can abuse the first
 526 exception to justify detention in many cases. Thus, most asylum seekers would be
 527 detained, as the strict conditions for getting a visa oblige them to enter the host state
 528 irregularly and, often, with the help of a non-profit private or commercial smuggler. In
 529 consequence, asylum seekers have no valid travel documents either at the beginning of

⁴³ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999); Introduction 3.

⁴⁴ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999); Introduction 1.

⁴⁵ 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 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.

530 their voyage, often because they have to hand them over to the commercial smuggler. It
 531 is not reasonable to think that the reasons for the claim can better be determined when
 532 the applicant is in detention rather than free and able to access legal and social services
 533 which would aid in establishing the bona fides of the asylum claim.

534

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

536

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

- 538 • The person who is detained shall be informed promptly, in a language, which
 539 she/he understands, of the reasons for his/her arrest.
- 540 • The detainee must have the right to be heard during the procedure, if necessary
 541 with the help of an interpreter.⁴⁶ If the information and hearing is not possible in
 542 the native language or any other language the person understands, he/she must
 543 be released as in this case; the lawfulness of the detention is not guaranteed.
- 544 • The person who is deprived of liberty by detention shall be entitled to take
 545 proceedings by which the lawfulness of his/her detention shall be decided
 546 speedily by a court and his/her release ordered if the detention is not lawful;⁴⁷ this
 547 court must be different from the issuing body; the possibility of appeal must not
 548 only be given at the beginning of the detention but at any appropriate time.⁴⁸
- 549 • The person must be informed about the above-mentioned right in a language
 550 he/she understands.
- 551 • Each person must be provided with legal assistance.
- 552 • The costs for the interpreter must be covered by the State responsible for
 553 detention.
- 554 • Any detention order should automatically and regularly be reviewed by the issuing
 555 body in order to ascertain that the detention remains appropriate.

556

557 **6. Domestic security**

558

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

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

565

566 **7. Detention duration**

567

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

573

574 JRS-EUROPE is aware that it may be problematic to suggest a maximum duration by
 575 proposing a precise term. However, given the enormous differences in national provisions

⁴⁶ Cf. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), Principles 11

⁴⁷ Cf. Article 5 of the European Convention on Human Rights; Article 9 of the International Covenant on Civil and Political Rights

⁴⁸ Cf. Principle 32 of the Body of Principles

576 in Europe, JRS-EUROPE also recognizes danger in not doing so and leaving it to the
577 discretion of the states to fix a term – or indeed not to fix any term.

578 **8. Compensation**

580 Compensation should be provided to any person who has been unlawfully detained or in
581 case of a breach of Article 5 of the European Convention on Human Rights or Article 9 of
582 the International Covenant on Civil and Political Rights.
583

584 **9. Detention conditions**

585 Since refugees and migrants do not belong to the category of people, who are charged or
586 convicted of crimes, detention conditions must differ significantly in a positive way from
587 the conditions established for convicted criminals. The status of detainees must be
588 recognized as a non-criminal status.
589

- 591 • Detainees should be kept separate from persons charged with and/or convicted of
592 criminal offenses.⁴⁹
- 593 • Men and women should be accommodated separately. If married couples or
594 family members⁵⁰ are detained, they should be permitted to live together.
- 595 • Detainees should be permitted to move freely on the compound of the detention
596 centre.
- 597 • Detainees should have the opportunity to prepare their own food.
- 598 • Detainees should have the opportunity for paid work.
- 599 • Detainees should have free access to a telephone and the means to finance at
600 least calls to UNHCR, church institutions, NGOs, lawyer and family.
- 601 • Detainees should have free access to legal counselling.
- 602 • Detainees should receive full medical care, including psychological help,
603 complemented by a doctor of their own choice.
- 604 • Detainees should have access to adequate leisure facilities.
- 605 • Detainees should have the right to receive visitors during the day and to
606 communicate freely and in privacy with family members, friends and persons
607 providing legal advice.
- 608 • Detainees should be provided with adequate social care, preferably provided by
609 NGOs or church institutions.
- 610 • Pastoral workers, medical doctors, UNHCR and NGOs should have access to the
611 centre or camp in order to offer assistance care and advice to the detainees.
- 612 • The personnel working in detention centers must be trained for working with
613 foreigners in a field related to human rights⁵¹
- 614 • The personnel working in detention centers must wear badges, which clearly
615 identify them as staff. The badges should contain the staff person's name and/or
616 identification number.
- 617 • An independent body should be appointed for every centre – with free access to
618 the building and to whom the detainees can submit complaints concerning the
619 conditions and the treatment by both guards, administrative and social staff on the
620 one hand, and other detainees on the other hand.
- 621 • A system should be established that guarantees an immediate, impartial and
622 thorough investigation in cases of alleged violations of basic rights.
623

624

⁴⁹ Cf. Principle 8 of the Body of Principles

⁵⁰ As protected by Article 8 of the European Charter of Human Rights

⁵¹ Sensitization to migration and refugee background and traumatized persons, language skills, human rights instruction etc.

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

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

- 629 • Minors
- 630 • Pregnant women
- 631 • Traumatized persons
- 632 • Persons with special physical or mental health needs
- 633 • Persons older than 65 years
- 634 • Mothers or fathers accompanying minors under 14 years
- 635 • Chronically or seriously ill persons

636

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

638

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

642

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

644

645 **1. To governments and legislators in European States**

646

- 647 • JRS-EUROPE urges governments and legislators in European States to avoid the
648 use of detention because detention implies restrictions of fundamental human
649 rights.
- 650 • JRS-EUROPE urges governments and legislators in European States not to use
651 detention as a deterrent or as a reception or return policies element that is applied
652 in a systematic and general way because in an “area of freedom, justice and
653 security” there is no place for systematic restrictions of human rights.
- 654 • JRS-EUROPE urges governments and legislators in European States not to
655 detain asylum seekers and other people applying for a status until a final decision
656 is made, as this is the only way to ensure the right of a fair asylum procedure by
657 enabling applicants to easily consult a lawyer, a refugee organization etc. of their
658 choice and confidence in order to obtain legal advice and avoid re-traumatization
659 and intimidation. “Final decision” means the exhaustion of all administrative and
660 judicial appeals even if there is no suspensive effect.
- 661 • JRS-EUROPE urges governments and legislators in European States, which
662 detain refugees and migrants, that such detention should be as short as possible,
663 and should never exceed a total time period of two months, be it in one or multiple
664 periods of detention even after release or transfer to another centre. This
665 suggestion of a maximum time period should not be used as a justification to
666 detain or to increase any maximum duration of less than two months under
667 current legislation. In case a person cannot be returned within this two-month
668 period and therefore must be released, he/she must not be left in an illegal status
669 and/or destitute. These are requirements of the Principle of proportionality.
- 670 • JRS-EUROPE urges governments and legislators in European States to
671 transpose and implement International Public Law concerning detention and
672 detainees and to adhere to the UN Body of Principle for the protection of all
673 persons under any form of detention or imprisonment⁵², the UN Standard
674 Minimum Rules for the Treatment of Prisoners⁵³ as well as to the UN Rules for the

⁵² A/RES/173, General Assembly, 9 December 1988

⁵³ 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

675 Protection of Juveniles Deprived of their Liberty⁵⁴ and the Standards of the
 676 European Committee for the Prevention of Torture (CPT) in order to prevent
 677 human rights violations of refugees, asylum seekers and migrants in detention.
 678 • Concerning Article 17 and Article 18 of the EU Commission's Amended Proposal
 679 for a Council Directive on minimum standards on procedures in Member States for
 680 granting and withdrawing refugee status of 3 July 2002⁵⁵ JRS-EUROPE urges the
 681 EU Member States to ensure that a future EU Council Directive on minimum
 682 standards on procedures in Member States for granting and withdrawing refugee
 683 status complies with International Public Law, especially with Article 31 of the
 684 Geneva Convention relating to the Status of Refugees⁵⁶; there is strong legal
 685 evidence that the way in which Article 17 (2) and (3) are/were formulated might be
 686 in breach of Article 31 of this Convention. JRS-EUROPE urges the EU Member
 687 States not use vague formulations only in order to fulfil political time requirements
 688 of Article 63 of the 1999 Amsterdam Treaty, which says that "the Council (...)
 689 shall, within a period of five years after the entry into force of the Treaty of
 690 Amsterdam, adopt (...) minimum standards on procedures in Member States for
 691 granting or withdrawing refugee status". JRS-EUROPE reminds that Article 63 of
 692 the 1999 Amsterdam Treaty states, too, that these measures must be "in
 693 accordance with the Geneva Convention (...) and the Protocol of 31 January 1967
 694 relating to the status of refugees and other relevant treaties." Vague formulations
 695 leave room for interpretation to the detriment of asylum seekers and thus could
 696 lead to the detention of asylum seekers in almost all cases and violate the Geneva
 697 Convention. JRS-EUROPE generally supports the changes made by the EU
 698 Council for Justice and Home Affairs in June 2003⁵⁷, which say, "Member States
 699 shall not hold a person in detention for the sole reason that he/she is an applicant
 700 for asylum. (...) Where an applicant for asylum is held in detention, Member
 701 States shall ensure that there is the possibility of speedy judicial review."
 702 However, JRS-EUROPE would prefer to see it stated that asylum seekers should
 703 generally not be detained, in particular especially vulnerable people, absent
 704 compelling reasons to the contrary.

705

706 2. To relevant EU institutions

707

- 708 • JRS-EUROPE addresses the appeal concerning Article 17 and Article 18 of the
- 709 EU Commission's Amended proposal for a Council Directive on minimum
- 710 standards on procedures in Member States for granting and withdrawing refugee
- 711 status also to the EU Commission and the European Parliament.
- 712 • JRS-EUROPE urges relevant EU institutions not to promote the use of detention.
- 713 • JRS-EUROPE urges relevant EU institutions not to promote detention as a
- 714 deterrent or as a reception or return policies element that is applied in a
- 715 systematic and general way because in an "area of freedom, justice and security"
- 716 there is no place for systematic restrictions of human rights.

⁵⁴ Resolution 45/113, 14 December 1990

⁵⁵ COM (2002) 326 final/2

⁵⁶ 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."

⁵⁷ 10235/03, LIMITE, ASILE 35

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- JRS-EUROPE urges relevant EU institutions not to promote the detention of asylum seekers and other people applying for a status until a final decision is made, as this is the only way to ensure the right of a fair asylum procedure by enabling applicants to easily consult a lawyer or a refugee organization of their choice and confidence in order to obtain legal advice and avoid re-traumatization and intimidation.
 - JRS-EUROPE urges relevant EU institutions to influence the governments and legislators in European States, which detain refugees and migrants, to make sure that such detention is as short as possible, and should never exceed a total time period of two months, be it in one or multiple periods of detention even after release or transfer to another centre. This suggestion of a maximum time period should not be used as a justification to detain or to increase any maximum duration of less than two months under current legislation. In case a person cannot be returned within this two-month period and therefore must be released, he/she must not be left in an illegal status and/or destitute. These are requirements of the Principle of proportionality.
- 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.