DETENTION IN EUROPE

JRS-EUROPE Observation and Position Paper 2004

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During the last two decades the number of refugees, who were seeking refuge in Europe, in particular in EU Member States, increased considerably. However, only 20% of the global refugee population came to Europe. The vast majority of people, who had to flee to save their life, were received in the poor regions of this world. EU Member States as well as their neighbouring States, most of them among the new Member States after 1 May 2004, tightened their refugee policies, which became ever more repressive and restrictive. “Protection of refugees” turned into “Protection from refugees”. This policy trend is even stronger after the terrorist attacks of 1 September 2001. In the European Union domestic security as well as refugee protection fall within the competence of Justice and Home Ministers, and now they clearly give priority to domestic security over refugee protection.

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

The EU Council Directive laying down minimum standards for the reception of asylum seekers defines “detention” as the “confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”, and in the Amended Proposal of the EU Commission for an EU Council

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

EU Member States detain asylum seekers and other refugees as well as migrants in order to make forcible return, especially deportation, easier, but also to facilitate processing of asylum claims. Reliable data about the total number of detainees in Europe are not available. Yet, on the grounds of data, which are partially available, the number of detainees in Europe may be in the 100,000s persons per year.

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

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

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

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

II. Detainees in Europe

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

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

11 Article 2 (j), COM (2002) 326 final/2, 3 July 2002
12 Article 61
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 Spain\(^{13}\), 60 days in Italy\(^{14}\), three months in Greece, five months in Belgium\(^{15}\) 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 detained\(^{16}\). 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”)
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”\(^{18}\). 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 for detention in the framework of a future Directive on Minimum Standards for Return Procedures”\(^{19}\).

The EU Council picked this reminder of human rights and the suggestion of common “minimum standards” up, transformed it, however, in spirit and content – from safeguarding human rights to facilitating operational co-operation. In November 2002, in a note from the Danish EU Presidency to the EU Council concerning a Proposal for a return action programme\(^{20}\), the EU Presidency stated, “there are already international instruments requiring that detention must be in accordance with the basic human rights in place. Consideration should, however, be given to whether certain minimum standards for...

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\(^{17}\) 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
detention pending removal or during transit are needed in order to facilitate operational co-operation between Member States.

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

2. Detention pending a decision by the determining authority

Against this background of detention pending removal, detention then began to make its political and legislative way to the area of “asylum”. The 2003 EU Council Directive laying down standards for the reception of asylum seekers is dealing with detention. Also, the EU Commission’s Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status of 3 July 2002 is addressing detention. Article 17 and 18 lengthily deal with “Detention pending a decision by the determining authority”:

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

Article 17 says:

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

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22 agence europe, 23 January 2004
24 COM (2002) 326 final/2
2.2. Article 18 of the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

Article 18 says:

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

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

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

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

Article 18 was completely deleted.

V. International norms and guidelines for detention and detention practises

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

1. International Public Law

The most important treaties under International Public Law, which should govern detention and detention practices, are:

- The Universal Declaration of Human Rights of 1948
- The European Convention on Human Rights of 1950
- The Geneva Convention relating to the Status of Refugees of 1951
- The International Covenant on Civil and Political Rights of 1966/1976
- The International Covenant on Economical, Social and Cultural Rights 1966/1976
- The Charter of Fundamental Rights of the European Union of 2000

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25 10295/03, 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”.
The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990/2003

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

1.1. Principle of proportionality

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

2.2. Right to freedom of movement

Detention is the contrary to the freedom of movement. According to Article 45 of the Charter of Fundamental Rights of the European Union, freedom of movement is granted not only to citizens of EU Member States, but freedom of movement may be granted to "nationals of third countries legally resident in the territory of a Member State", too.

National legislation determines who is considered to be "legally" residing, but national legislation in the EU Member States vary in this respect. Generally, refugees are not considered "illegal", when there are no legal grounds for expulsion; thus, when there are no legal grounds for expulsion, refugees need to be considered as "legally resident."

The European Convention on Human Rights, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights also protect the right to freedom of movement.

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

Article 31 of the Convention relating to the Status of Refugees forbids, in general, limitations on the freedom of movement and only allows necessary restrictions until the status of a refugee is clarified. Thus, this Convention forbids in principal detention of 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. States, which are not EU Member States

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."

Article 5, European Convention on Human Rights

Article 3, Universal Declaration of Human Rights

Article 9, International Covenant on Civil and Political Rights


Guideline 2, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers
prompted, for example, by interests of national security\textsuperscript{36}, special circumstances of a mass influx, or if necessary after illegal entry.\textsuperscript{37}

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

1.3. Right to medical care

Article 23 of the Geneva Convention relating to the Status of Refugees states “the Contracting States shall accord to refugees lawfully staying\textsuperscript{38} in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals, including medical attendance and hospital treatment.

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

1.4. Right to be informed

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

1.4. Protection of minors

Minors, i.e. children who are not yet of age, are additionally and especially protected.

Concerning the detention of minors, the Convention on the Rights of the Child is the most important document. It is the most widely ratified human rights treaty in history; only two countries, the United States and Somalia, have failed to endorse it. Article 37 of this Convention forbids the detention of minors except as a last resort and then only for the shortest possible time.

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

\textsuperscript{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.

\textsuperscript{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.”

\textsuperscript{39} Cf. Fox, Campbell and Hartley vs GB, ECHR 182, § 40
1.5. Protection of families

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

2. UNHCR’s Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers

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

2.1. Exceptional Grounds for Detention

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

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

2.2. Alternatives to detention

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

- Monitoring Requirements
- Provision of a Guarantor/ Surety
- Release on Bail
- Open Centres
UNHCR has emphasized that while detention may be used in exceptional circumstances, consideration should always be given first to all possible alternatives. Thereafter, detention should be used only if it is reasonable and proportional and, above all, necessary.

VI. JRS-EUROPE’s positions

1. Political and legal language

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

2. Use of detention

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

3. Principle of proportionality

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

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

4. Grounds of detention

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

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40 Guideline 3, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers
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
detention orders must clearly state that the order must be based on objective evidence regarding the facts and the personal behaviour in the past and that due to this behaviour no other less restrictive means exists to enforce return. The behaviour can only be considered when the concerned person knew about his/her obligation to leave the country (was informed about his/her obligation in a language he/she understands), and when he/she had informed access to the appeal process.

JRS-EUROPE acknowledges the contribution made by UNHCR’s Revised Guidelines on Detention of Asylum Seekers, which point out that “the detention of asylum-seekers who come ‘directly’ in an irregular manner should (...) not be automatic, or unduly prolonged,” and that “the use of detention is in many instances contrary to the norms and principles of international law.” Nevertheless, JRS-EUROPE considers the exceptional grounds for detention in Guideline 3 to be too far-reaching, especially regarding the verification of identity and determination of the elements on which the claim for protection is based. Given that many asylum seekers do not have or cannot present a passport or other documents proving their identity, the authorities can abuse the first exception to justify detention in many cases. Thus, most asylum seekers would be detained, as the strict conditions for getting a visa oblige them to enter the host state irregularly and, often, with the help of a non-profit private or commercial smuggler. In consequence, asylum seekers have no valid travel documents either at the beginning of

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

5. Procedures while being in detention

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

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

6. Domestic security

JRS-EUROPE is concerned that domestic security is used more and more as a reason to detain refugees. If public order and/or national security are a consideration in such cases, any measures to detain must be based on criminal law. Administrative detention is neither an adequate nor a reasonable response. Criminal and administrative law can and should address the problem of threats to national security and public order without criminalizing innocent refugees and migrants.

7. Detention duration

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

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

\textsuperscript{46} Cf. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), Principles 11
\textsuperscript{47} Cf. Article 5 of the European Convention on Human Rights; Article 9 of the International Covenant on Civil and Political Rights
\textsuperscript{48} Cf. Principle 32 of the Body of Principles
in Europe, JRS-EUROPE also recognizes danger in not doing so and leaving it to the
discretion of the states to fix a term – or indeed not to fix any term.

8. Compensation

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

9. Detention conditions

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

- Detainees should be kept separate from persons charged with and/or convicted of
criminal offenses.\textsuperscript{49}
- Men and women should be accommodated separately. If married couples or
family members\textsuperscript{50} are detained, they should be permitted to live together.
- Detainees should be permitted to move freely on the compound of the detention
centre.
- Detainees should have the opportunity to prepare their own food.
- Detainees should have the opportunity for paid work.
- Detainees should have free access to a telephone and the means to finance at
least calls to UNHCR, church institutions, NGOs, lawyer and family.
- Detainees should have free access to legal counselling.
- Detainees should receive full medical care, including psychological help,
complemented by a doctor of their own choice.
- Detainees should have access to adequate leisure facilities.
- Detainees should have the right to receive visitors during the day and to
communicate freely and in privacy with family members, friends and persons
providing legal advice.
- Detainees should be provided with adequate social care, preferably provided by
NGOs or church institutions.
- Pastoral workers, medical doctors, UNHCR and NGOs should have access to the
centre or camp in order to offer assistance care and advice to the detainees.
- The personnel working in detention centers must be trained for working with
foreigners in a field related to human rights\textsuperscript{51}
- The personnel working in detention centers must wear badges, which clearly
identify them as staff. The badges should contain the staff person’s name and/or
identification number.
- An independent body should be appointed for every centre – with free access to
the building and to whom the detainees can submit complaints concerning the
conditions and the treatment by both guards, administrative and social staff on the
one hand, and other detainees on the other hand.
- A system should be established that guarantees an immediate, impartial and
thorough investigation in cases of alleged violations of basic rights.

\textsuperscript{49} Cf. Principle 8 of the Body of Principles
\textsuperscript{50} As protected by Article 8 oft the European Charter of Human Rights
\textsuperscript{51} Sensitization to migration and refugee background and traumatized persons, language skills, human rights
instruction etc.
10. Special protection for especially vulnerable persons

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

- Minors
- Pregnant women
- Traumatized persons
- Persons with special physical or mental health needs
- Persons older than 65 years
- Mothers or fathers accompanying minors under 14 years
- Chronically or seriously ill persons

11. Detention as a push factor for irregular immigration

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

VII. JRS-EUROPE's appeals

1. To governments and legislators in European States

- JRS-EUROPE urges governments and legislators in European States to avoid the use of detention because detention implies restrictions of fundamental human rights.
- JRS-EUROPE urges governments and legislators in European States not to use detention as a deterrent or as a reception or return policies element that is applied in a systematic and general way because in an “area of freedom, justice and security” there is no place for systematic restrictions of human rights.
- JRS-EUROPE urges governments and legislators in European States not to detain 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, a refugee organization etc. of their choice and confidence in order to obtain legal advice and avoid re-traumatization and intimidation. “Final decision” means the exhaustion of all administrative and judicial appeals even if there is no suspensive effect.
- JRS-EUROPE urges governments and legislators in European States, which detain refugees and migrants, that such detention should be 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 released, he/she must not be left in an illegal status and/or destitute. These are requirements of the Principle of proportionality.
- JRS-EUROPE urges governments and legislators in European States to transpose and implement International Public Law concerning detention and detainees and to adhere to the UN Body of Principle for the protection of all persons under any form of detention or imprisonment, the UN Standard Minimum Rules for the Treatment of Prisoners as well as to the UN Rules for the

52 A/RES/173, General Assembly, 9 December 1988
Protection of Juveniles Deprived of their Liberty\textsuperscript{54} and the Standards of the European Committee for the Prevention of Torture (CPT) in order to prevent human rights violations of refugees, asylum seekers and migrants in detention.

- Concerning Article 17 and Article 18 of the EU Commission’s Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status of 3 July 2002\textsuperscript{55} JRS-EUROPE urges the EU Member States to ensure that a future EU Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status complies with International Public Law, especially with Article 31 of the Geneva Convention relating to the Status of Refugees\textsuperscript{66}; there is strong legal evidence that the way in which Article 17 (2) and (3) are/were formulated might be in breach of Article 31 of this Convention. JRS-EUROPE urges the EU Member States not use vague formulations only in order to fulfil political time requirements of Article 63 of the 1999 Amsterdam Treaty, which says that “the Council (…) shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt (…) minimum standards on procedures in Member States for granting or withdrawing refugee status”. JRS-EUROPE reminds that Article 63 of the 1999 Amsterdam Treaty states, too, that these measures must be “in accordance with the Geneva Convention (…) and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.” Vague formulations leave room for interpretation to the detriment of asylum seekers and thus could lead to the detention of asylum seekers in almost all cases and violate the Geneva Convention. JRS-EUROPE generally supports the changes made by the EU Council for Justice and Home Affairs in June 2003\textsuperscript{57}, which say, “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. (…) Where an applicant for asylum is held in detention, Member States shall ensure that there is the possibility of speedy judicial review.” However, JRS-EUROPE would prefer to see it stated that asylum seekers should generally not be detained, in particular especially vulnerable people, absent compelling reasons to the contrary.

2. To relevant EU institutions

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

- JRS-EUROPE urges relevant EU institutions not to promote the use of detention.

- JRS-EUROPE urges relevant EU institutions not to promote detention as a deterrent or as a reception or return policies element that is applied in a systematic and general way because in an “area of freedom, justice and security” there is no place for systematic restrictions of human rights.

\textsuperscript{54} Resolution 45/113, 14 December 1990
\textsuperscript{55} COM (2002) 326 final/2
\textsuperscript{56} Article 31 (Refugees unlawfully in the country of refuge) \textquotedblleft(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.\textquotedblright
\textsuperscript{57} 10235/03, LIMITE, ASILE 35

\hspace{1cm} Jesuit Refugee Service Europe

\hspace{1cm} 1 April 2004
• 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.