

# The Use of Detention for Asylum Seekers and Migrants in Europe and Greece

Policy Paper



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## Executive Summary

This policy paper focuses on the legality of and terms of detention in regards to migration in Europe. The analysis is mainly focused on the legal instruments of the Council of Europe, the European Union, and the Greek domestic system.

The Council of Europe (CoE) passed several resolutions to improve the detention facilities and their conditions among its Member States. The CoE guarantees certain rights to asylum seekers and irregular migrants based on the European Convention on Human Rights. The CoE passed Resolution 1707 as a general legal framework to harmonize when detention of asylum seekers and irregular migrants can be justified, the minimum standards and safeguards that detention centers need to satisfy, and alternative to detentions that member States should take. The CoE, also, focused two resolutions on its Mediterranean member States, particularly Greece. The CoE discussed objectives that Greece's domestic detention policies should meet in order to be in compliance with the CoE's standards.

EU legal instruments establish that detention pursuant to migration occurs by a confinement to a particular place and deprivation of movement and liberty. Individuals may not be detained for the sole reason of seeking international protection or asylum. Detention can only be made on specific grounds and detainees must be held under certain conditions. The EU establishes certain guarantees including legal access, humane treatment, review of detention, etc. Review of the detention's legality and justification must be done judicially or by administrative agencies. Further, review should be done automatically by the competent authorities (*ex officio*) at reasonable intervals or requested by the detainee. Detainees may not be held in ordinary prisons, but instead must be kept in specialized facilities.

An individual can be detained for only a reasonable amount of time, up to six months, or up to 12 months, if he/she fails to cooperate with the competent authorities or a third country causes delays in obtaining proper documentation. Detention for longer than the two timeframes is justified only when there is an exceptionally large number of individuals applying for asylum or international protection. Detention must meet an individual detainee's basic and special needs, by addressing an individual's situation, such as any vulnerability, any factors that may prevent entry to the country, gender, relationships, age, etc.

This paper recommends that the CoE must have better enforcement mechanisms when it comes to monitoring detention facilities' conditions. The CoE must actively try the alternatives to detention that it stated in Resolution 1707 and change its effective remedy standards. The EU must define certain terms regarding detainee rights and conditions, interpret legal instruments for harmonized application, ensure guarantees are implemented, adopted, and abided by the States, and strengthen enforcement mechanisms. Finally, the CoE and the EU must work together to create a truly harmonized immigration detention system.

## Abbreviations

APD = Asylum Procedure Directive

CJEU = Court of Justice of the European Union

CDCJ = European Committee on Legal Co-operation

CDDH = Steering Committee for Human Rights

CoE = Council of Europe

CPT = European Committee for the Prevention of Torture and Inhuman or Degrading Treatment on Punishment

ECHR = European Convention on Human Rights

ECtHR = European Court of Human Rights

ECSR = European Committee on Social Rights

ECRI = European Commission against Racism and Intolerance

RCD = Receptions Condition Directive

RD = Return Directive

UNHCR = United Nations High Commissioner for Refugees

## I. Background Information

Europe has seen a large influx of asylum seekers over the past few years, particularly in Greece. Greece is a Member State of both the Council of Europe and the European Union (“EU”) and therefore bound by both CoE and EU law. Since the mass influx of asylum seekers, there have been many issues relating to the detention of these asylum seekers. Overcrowding in detention centers is a serious problem, with the conditions of the detention centers a key area of concern.<sup>1</sup> Detention centers are often cramped spaces, almost entirely absent or lacking in education, access to the outside and fresh air – wholly inappropriate for migrants and refugees traveling in families.<sup>2</sup> Moreover, national laws and regulations are often insufficient (leaving too much discretion to immigration officials), detention policies are not transparent (leaving individuals open to abuse or arbitrariness), and detainees’ access to lawyers is limited and empirical data concerning detention lacking.<sup>3</sup>

In April 2016, Amnesty International reported that there were about 4,200 individuals being detained in detention centers on Lesbos and Chios, with most arriving after March 20, 2016, when the EU-Turkey Statement took effect.<sup>4</sup> In Paranesti and Amygdaleza, once reception centers, Human Rights Watch (HRW) reported in September 2016 that unaccompanied migrant children were “being locked up in cramped and filthy cells.”<sup>5</sup> Further on the ground interviews by HRW indicate that certain nationalities are treated differently, presumed to be “economic

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<sup>1</sup> EUR. PARL. ASS. *Detention of asylum seekers and irregular migrants in Europe*, 7<sup>th</sup> Sitting, Res. 1707 (2010) (Full text in Appendix).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Greece: Refugees detained in dire conditions amid rush to implement EU-Turkey Deal*, AMNESTY INTERNATIONAL (Apr. 7, 2016), <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/>.

<sup>5</sup> *Greece: Migrant Children Held in Deplorable Conditions*, HUMAN RIGHTS WATCH (Sept. 8, 2016), <https://www.hrw.org/news/2016/09/08/greece-migrant-children-held-deplorable-conditions>.

migrants,” and viewed “as having manifestly unfounded claims.”<sup>6</sup> These individuals are “often detained at police stations and detention facilities inside the hotspots.”<sup>7</sup> It appears that the decision to detain the migrants and asylum seekers changed drastically as the efforts switched to funneling the majority of these individuals back into Turkey, rather than relocate them to Europe.<sup>8</sup>

Once the provisions of the EU-Turkey Statement began to be implemented, reception centers on the Greek islands seem to, according to the European Council of Refugees and Exiles (ECRE) in April 2016, “have been converted to closed ‘prison-like’ detention camps surrounded by barbed wire,” noting that such facilities are “operated by the Greek authorities with the assistance of the EU border agency, Frontex.”<sup>9</sup> Advocates Abroad researchers noted on a March 2017 visit, one year after the implementation of the EU-Turkey Statement and almost one year after the ECRE report, that reception centers still appear like prisons, with individuals being detained in less than ideal conditions.

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<sup>6</sup> *Id.*

<sup>7</sup> *Greece: A Year of Suffering for Asylum Seekers*, HUMAN RIGHTS WATCH (Mar. 15, 2017), <https://www.hrw.org/news/2017/03/15/greece-year-suffering-asylum-seekers>

<sup>8</sup> HRW, *supra* note 5

<sup>9</sup> *Blanket detention in deplorable conditions on the Greek islands*, EUROPEAN COUNCIL ON REFUGEES AND EXILES (Apr. 15, 2016), <https://www.ecre.org/blanket-detention-in-deplorable-conditions-on-the-greek-islands/>



## II. Legal Framework

### Council of Europe

The Council of Europe is made up of 47 Member States. Twenty-eight of these countries are also part of the European Union.<sup>10</sup> The Council consists of two organ bodies: the Parliamentary Assembly and the Committee of Ministers. The Parliamentary Assembly represents the political forces in its member states, has ten committees, and can adopt three different types of texts: recommendations, resolutions, and opinions.<sup>11</sup> The Committee of Ministers is the decision-making body and is both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors member states' compliance with their undertakings.<sup>12</sup> Some of the Committee of Ministers duties include: monitoring respect of commitments by member states, adopting recommendations to member states, and supervising the execution of judgments of the European Court of Human Rights.<sup>13</sup>

The CoE's standards for non-nationals are based on the CoE's Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>14</sup> The scope of the ECHR extends to

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<sup>10</sup> Strasbourg l'européenne Centre d'Information sur les Institutions Européennes, <http://en.strasbourg-europe.eu/member-states.44987.en.html> (last visited Dec. 5, 2016).

<sup>11</sup> *Who We Are*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/about-us/who-we-are> (last visited Dec. 5, 2016); *See also*, Sophia Lobey, *History, Role, and Activities of the Council of Europe: Facts, Figures and Information Sources*, [http://www.nyulawglobal.org/globalex/Council\\_of\\_Europe.html](http://www.nyulawglobal.org/globalex/Council_of_Europe.html) (last visited Dec. 5, 2016).

<sup>12</sup> Lobey, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> Yannis Ktistakis, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter: A Handbook for Legal Practitioners*, COUNCIL OF EUROPE (2013), accessible at [http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb\\_ProtectingMigrantsWeb\\_%20A5.pdf](http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb_ProtectingMigrantsWeb_%20A5.pdf)

any “non-national on the territory or the jurisdiction of the State party.”<sup>15</sup> Historically, detention in CoE member States was limited. Detention was only permissible in order to facilitate either the removal of an irregular migrant from the national territory, or the implementation of the procedure to determine whether a foreign national shall be allowed to stay.<sup>16</sup> Arbitrariness, as defined by the CoE Commissioner for Human Rights, is when “detention...is not closely connected to the grounds on which it has been ordered.”<sup>17</sup>

### Article 5 of the European Convention on Human Rights

Administrative detention of immigrants is limited under Article 5.1(f) of European Convention on Human Rights.<sup>18</sup> In *Saadi v. United Kingdom*, the ECtHR discussed administrative detention for immigrants under Article 5(1) of the ECHR. The Court held that

“detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued.”<sup>19</sup>

The ECtHR also ruled that detention must satisfy a strict necessity standard; detention must be necessary in order to effectively carry out entry or removal controls.<sup>20</sup> This applies to any form of detention, including immigration detention; the duration must not exceed the reasonable period required to achieve the aim pursued.<sup>21</sup>

### Detention of Asylum Seekers and Irregular Migrants in Europe Resolution 1707

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<sup>15</sup> *Id.*

<sup>16</sup> COUNCIL OF EUROPE, ADMINISTRATIVE DETENTION IN COUNCIL OF EUROPE MEMBER STATES – LEGAL LIMITS AND POSSIBLE ALTERNATIVES, AS/Jur (2016) 18

<sup>17</sup> *Id.*

<sup>18</sup> EUR. PARL. ASS., *supra* note 1.

<sup>19</sup> *Saadi v. United Kingdom*, App. No. 13229/03, Eur. Ct. H.R. para 64, 66, 73-74 (2008).

<sup>20</sup> *Id.*

<sup>21</sup> *Massoud v. Malta*, App. No. 24340/08, Eur. Ct. H.R., para 68 (2010).

In 2010, due to the increase of asylum seekers and irregular migrants and the lack of clarity over when detention was legally justifiable, the CoE passed the Detention of Asylum Seekers and Irregular Migrants in Europe Resolution 1707 (Resolution 1707).<sup>22</sup> The resolution provided a 10-step guideline outlining when detention could be legally permissible, including clarifying that detention should be a last resort, and the necessity of distinguishing between asylum seekers and irregular migrants.<sup>23</sup> Further, detention should be for the shortest time possible.<sup>24</sup> Asylum seekers are not to be detained or penalized based solely on the fact that they lodged a claim or based on how they entered into the country (i.e. illegally vs. legally). Resolution 1707 also provides 15 rules governing minimum standards of conditions of detention for migrants and asylum seekers due to the conditions and safeguards afforded to immigration detainees who committed no crimes were often worse than those of criminal detainees.<sup>25</sup>

### **Detention of Asylum Seekers and Irregular Migrants in the Mediterranean**

In March 2011, in response to the influx of asylum seekers and migrants, the CoE released its “Proposal for Council of Europe action in respect of possible massive arrival of asylum seekers and migrants in Mediterranean member States.” The purpose of the proposal was to make the procedures efficient and in compliance with the ECHR, specifically the Right to Life, Prohibition of Torture, Right to Liberty and Security, and Right to an Effective Remedy (articles 2, 3, 5, and 13 respectively).<sup>26</sup> The proposal recommended access to territory/protection, and reception, detention, and detention conditions.<sup>27</sup> Reception facilities, food and living conditions

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<sup>22</sup> EUR. PARL. ASS., *supra* note 1

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> EUR. PARL. ASS., *Proposal for Council of Europe action in respect of possible massive arrival of asylum seekers and migrants in Mediterranean member States*, Doc. No. SG/Inf(2011)6, (2011).

<sup>27</sup> *Id.*

provided to migrants must meet basic standards of decency.<sup>28</sup> Asylum seekers and migrants should be provided with suitable means for sleeping, granted access to their luggage and to suitably equipped sanitary and washing facilities, and allowed to exercise in the open air on a daily basis. Reception conditions should not lead to the institutionalization and marginalization of asylum seekers.<sup>29</sup>

Detention conditions for asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel.<sup>30</sup> Detainees should be systematically provided with information that explains the rules applied in the detention facility and the procedure applicable to them and sets out their rights and obligations. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure of a state to protect them from violence by other detainees.<sup>31</sup>

In 2013, The CoE passed Resolution 1918, surrounding the “mounting tensions in the eastern Mediterranean.” The resolution stated its disappointment with Greece and Turkey. Although, the CoE recognized Greece’s efforts to improve its detention conditions and policies, the Council provided suggestions for Greece to follow.<sup>32</sup> It stated that Greece should refrain from automatic recourse to detention and exploring alternatives to detention, including through the greater use of open reception facilities complying with the Council Directive 2003/9/EC.<sup>33</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> EUR. PARL. ASS., *Migration and asylum: mounting tensions in the eastern Mediterranean*, 7<sup>th</sup> sitting, Res. 1918 (2013).

<sup>33</sup> *Id.*

Reduce periods of detention and distinguish between asylum seekers and irregular migrants.<sup>34</sup>

Close any unsuitable detention facilities and detention conditions are improved quickly.<sup>35</sup> And, improve their access to medical care, communication and translation facilities and proper information on their rights.<sup>36</sup>

### **Ongoing Monitoring of Facilities**

In 2015, the CoE released policy updates based on Resolution 1707, which demonstrates that the CoE has continuously been working on improving and harmonizing detention policies in Europe. One of the changes based on Resolution 1707 has been the CPT monitoring detention centers to make sure that the 15 rules for minimum standards and safeguards are being followed.<sup>37</sup> There has been more cooperation with FRONTEX. There have been two handbook materials created to assist with migration issues: *Protecting Migrants under the European Convention on Human Rights* and the *European Social Charter-a handbook for legal practitioners and Handbook on European law relating to asylum, borders and immigration*.<sup>38</sup> These two handbooks were created to help asylum seeker/irregular migrants and their attorneys navigate the immigration process in Europe and to inform asylum seekers of their rights.

### **European Union**

The European Union is comprised of 28 Member States. The EU is divided into three parts: The European Parliament, which represents citizens directly, the European Council, which

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> EUR. PARL. ASS., *Migration challenges for Europe: need for collective action*, Doc. No. SG/Inf(2015)33, (2015).

<sup>38</sup> *Id.*

represents Member States, and the Council of the Europe Union.<sup>39</sup> The European Commission drafts legislation, which the European Parliament and the European Council approve or reject. The European Commission, finally, implements approved legislation.<sup>40</sup> EU law is comprised of regulations, directives, and decisions. Regulations have general application and they are binding directly on all the Members. Directives are not self-executing and must be implemented by each individual Member State. Importantly, there is little to no direction by the EU as to how Directives are to be implemented to achieve the goal of the Directive.<sup>41</sup> The Court of Justice of the European Union (CJEU) is the highest court in the EU law system. It interprets and applies EU law in every Member State and ensures Member States abide by EU law.<sup>42</sup>

The European Union Migration Regime is comprised of the Return Directive (2008/115/EC) (RD), the Receptions Conditions Directive (2003/9/EC) (RCD), the RCD's recast, the Dublin III Regulation (2013/33/EU) (Dublin Regulation), the Asylum Procedures Directive (2005/85/EC) (APD), the APD's recast, Directive (2013/32/EU), the Schengen Borders Code, and the Trafficking Directive.<sup>43</sup> This section will discuss the information and the analysis only on the Directives that explicitly state third-country national detention in the European Union, namely the RD, RCD, the APD and its recasts.<sup>44</sup>

### **The Return Directive (2008/115/EC)**

The RD focuses primarily on the detention of irregular migrants awaiting return and authorizes detention to facilitate the removal process. The RD states that whenever a State

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<sup>39</sup> *The EU in Brief*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en) (last accessed Dec. 1, 2016).

<sup>40</sup> *EU law*, EUROPEAN UNION, [https://europa.eu/european-union/law\\_en](https://europa.eu/european-union/law_en) (last accessed Dec. 1, 2016).

<sup>41</sup> *EU Legal Acts*, EUROPEAN UNION, [https://europa.eu/european-union/law/legal-acts\\_en](https://europa.eu/european-union/law/legal-acts_en) (last accessed Dec. 1, 2016).

<sup>42</sup> *Court of Justice of the European Union*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed Dec. 1, 2016).

<sup>43</sup> Sebastian Lundby, *On the European system of immigration detention*, 5 OXF. MON. OF FOR. MIGR. 7 (2014).

<sup>44</sup> *Id.*

detains a third-country national, it must do so in a humane and dignified manner, respecting the detainee's fundamental rights in compliance with international and national law<sup>45</sup>. Detention is regulated by the State's national legislation and must be carried out in a specialized facility. Article 4(16) of the Directive states that if the State does not have a specialized detention facility and is obliged to put detainees in a state prison it must keep such detainees separate from ordinary prisoners.<sup>46</sup> During detention, such detainees must be allowed to contact legal representatives, relatives, and consular authorities. Further, subject to authorization, States must allow relevant organizations to visit facilities to ensure that they satisfy the guidelines pursuant to the Directive. Detainees must be provided with information on the rules regarding facilities and explanation of their rights and obligations. During detention, particular attention should be paid to vulnerable persons and the State must provide emergency health care and essential treatment of illness.<sup>47</sup>

States should take account of the best interests of the child, the family life, the state of health, and the principle of non-refoulement. A State may only keep a third-country national in detention for the purposes of a successful removal process, especially when there is a risk of absconding or the individual avoids or hampers the removal process<sup>48</sup>. Detention must be ordered, in writing, by either administrative or judicial authorities and include a summary of the facts and the applicable law. When detention is ordered, the State must provide a speedy judicial review on its lawfulness or allow the detainee to initiate proceedings and inform him/her of the possibility of such proceedings. If the detention is deemed unlawful, the detainee must be

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<sup>45</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] L 348/98, preamble, para. 17. [hereinafter, Directive 2008/115/EC]

<sup>46</sup> Directive 2008/115/EC, art. 4, para. 16.

<sup>47</sup> Directive 2008/115/EC, art. 14, para. 2(a).

<sup>48</sup> Directive 2008/115/EC, art. 15, para. 1(b).

released immediately. If the detention is deemed lawful, it shall be reviewed at reasonable intervals by application of the detainee or *ex officio*. If the detention is prolonged, a judicial authority must supervise further reviews. Detention shall be limited and may not exceed six months. Continued detention may only be extended to twelve months if there is a lack of cooperation by the national or there are delays in obtaining the necessary documentation from third countries. If the reasonable prospect of removal no longer exists, detention becomes unlawful and the detainee must be immediately released.<sup>49</sup> Prolonged detention may be lifted if a national court decides that the detainee was deprived of arguing a better defense<sup>50</sup>. Further, the CJEU held that a 15-day limit to appeal through an accelerated procedure was reasonable, proportionate, and sufficient for an effective action.<sup>51</sup>

In the case of minors, the best interests of the child are the primary considerations in the context of detention. Unaccompanied minors and families with minors may only be detained as a last resort and for the shortest appropriate amount of time. Detained families must be guaranteed adequate privacy and minors must have the possibility to engage in leisure activities, to access to education, and if they are unaccompanied, must be provided with institutions that account to the needs of their age.<sup>52</sup>

Lastly, if an exceptionally large number of third-country nationals place an unforeseen burden on capacity of detention facilities or on the administrative/judicial staff, States may allow for longer periods of judicial review. The directive does not apply to third-country nationals who

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<sup>49</sup> Directive 2008/115/EC, art. 15.

<sup>50</sup> Case C-383/13, M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie, 2013 E.C.R. 533.

<sup>51</sup> Case C-69/10, Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration, 2011 E.C.R. 102, para. 67.

<sup>52</sup> Directive 2008/115/EC, art. 17.



are subject to Schengen Code Article 13 refusal of entry or who are apprehended due to irregular crossing and who have not obtained authorization to stay<sup>53</sup>.

### **The Receptions Conditions Directive (2003/9/EC)**

The RCD and its recast apply to an applicant who is seeking international protection. It also establishes minimum standards and authorizes detention for asylum seekers. It defines detention as, “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.” It states that detention should be designed to meet the needs of the detainee’s situation<sup>54</sup>.

According to the RCD, States must ensure that within three days after an asylum application is filed, the applicant must be provided with documents certifying his or her status, or if it is pending or examined, that he or she is allowed to stay and whether he or she is allowed to move within the State’s territory<sup>55</sup>. States do not have to provide such documents when examination of asylum application was made at the border or during a procedure in deciding right to stay. In specific cases, States may provide other evidence equivalent to such documents. Such documentation does not need to certify the identity of the asylum seeker.<sup>56</sup>

Similar to the RD, States shall ensure adequate standard of living conditions and sustenance. They must also ensure specific standard of living situations for people with special needs.

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<sup>53</sup> Directive 2008/115/EC, art. 2.

<sup>54</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] L 31/18, preamble. (hereinafter, Council Directive 2003/9/EC)

<sup>55</sup> Council Directive 2003/9/EC, art. 6, para. 1.

<sup>56</sup> Council Directive 2003/9/EC, art. 5, para. 3.

Finally, when the asylum seeker is in detention or confined to border posts, States may set modalities for material reception conditions different than the ones in the Article for as short as possible<sup>57</sup>.

### **Dublin III Regulation (2013/33/EU)**

The Dublin Regulation defines detention as the “confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.”<sup>58</sup> Detention should not be made for the sole reason that the applicant is seeking international protection. States must act in accordance with Article 31 of the Geneva Convention Relating to the Status of Refugees of 28 July 1951 (“Refugee Convention”)<sup>59</sup>. Detention must be under clearly defined exceptional circumstances, subject to the principles of necessity and proportionality. During detention, States must guarantee access to necessary procedures, such as judicial remedy, judicial review, legal aid, etc. States must also verify that detention is as short as possible and that there is a real prospect that such verification is carried out in the shortest possible time. Detention should not exceed the reasonable time needed to complete relevant procedures. What constitutes a “reasonable time” is not explicitly established in the Regulation.<sup>60</sup>

The Dublin Regulation reiterates the principle that migration detention cannot be made on other grounds other than for administrative purposes and individuals must be treated with dignity. When it is impractical to ensure certain guarantees, detention should be temporary, duly justified, and applied in exceptional circumstances with considerations to the level of derogation severity, duration, and impact. During detention, States must guarantee protection of family life,

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<sup>57</sup> Council Directive 2003/9/EC, art. 14, para. 8.

<sup>58</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180, art. 2(h) [hereinafter, Directive 2013/33/EU]

<sup>59</sup> Directive 2013/33/EU, preamble, para. 3.

<sup>60</sup> Directive 2013/33/EU, art. 9.

access to communication with relatives, provide information on and access to organizations that provide legal assistance, must ensure adequate standard of living, and meet situations of people with specific needs.<sup>61</sup>

According to Article 8, detention is not justified for the mere granting or withdrawing of international protection. States may, however, detain applicants if other less coercive measures do not apply. Applicants may only be detained to determine or verify identity or nationality, to determine elements of international protection, especially if there is a risk of absconding, to decide right of entry, to carry out removal process according to the RD and RCD and if there are reasonable grounds that applicant is applying merely to delay or to frustrate return decision, to ensure national security or public order, or to determine the State responsible for examining an application. These conditions must be set in the State's national law.<sup>62</sup>

Article 9 establishes the guarantees for detained applicants. Applicants can only be detained for as short as possible of a time and only if Article 8 grounds are justified. Administrative procedure delays do not justify continued detention. Detention must be ordered in writing by administrative or judicial authority, stating the relevant facts and applicable law. States must provide, under national law, speedy judicial review on the lawfulness of the detention at the request of the applicant or on ex officio. If the review is conducted ex officio, it must be decided as quickly as possible from beginning of the detention. If the detainee requests review, it must be decided as speedily as possible from the beginning of the proceedings. If the detention is deemed unlawful, the detainee must be released immediately. Detainees must be informed in writing of the reasons for detention and of the procedures for challenging the

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<sup>61</sup> Directive 2013/33/EU, art. 18, para. 9(a).

<sup>62</sup> Directive 2013/33/EU, art. 8.

detention. Detention shall be reviewed at reasonable intervals of time and at the request of the applicant, especially when relevant circumstances or new information arise.<sup>63</sup>

States may provide free legal assistance to those who lack the financial resources. Those providing legal assistance must be qualified under the domestic law of the State to provide such assistance. States may impose certain limitations to these services including monetary and time limits so as long as the State does not arbitrarily restrict access to legal assistance. A State may not provide treatment that is more favorable than that accorded to its nationals. Further, a State may demand reimbursement if an individual's financial situation has improved considerably or if it is found that an individual supplied false information. Procedures for legal access and representation shall be made in national law.<sup>64</sup>

Article 10 establishes the conditions of detention. Similar to the RD and RCD, detention must take place in specialized facilities. If a State does not have a designated facility and must use state prisons as a detention facility for migrants and asylum seekers, it must keep such detainees separate from ordinary prisoners while continuing to apply the Dublin III conditions. Additionally, detainees shall be kept separate from other third-country nationals who have not filed for international protection. If not, State shall ensure that the Dublin III conditions still apply. Detainees must have access to open-air space. States must also ensure that relatives, legal advisers, relevant NGOs, and UNHCR representatives have possibility to communicate with and visit detainees. Limits to such access may only be imposed if not severely restrictive or rendered impossible for security, public order, or administrative management pursuant to stated national laws. States must also ensure that detainees are systematically provided with information in a language they understand, particularly concerning facility rules and their rights

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<sup>63</sup> Directive 2013/33/EU, art. 9.

<sup>64</sup> Directive 2013/33/EU, art. 9, para. 9.

and obligations. In the event that an individual is detained at a border post or in a transit zone, a State may derogate from these provisions if justified and for as short of a time as possible.<sup>65</sup>

Finally, Article 11 establishes the conditions for detained vulnerable persons. The health of such individuals must be the primary concern of the national authorities. When vulnerable persons are detained, States shall ensure regular monitoring and adequate support in regards to their particular situation. Minors may only be detained as a last resort when other less coercive measures do not apply, for the shortest period of time, and with efforts to place them in a suitable accommodation for their age. The minor's best interests shall be a primary consideration and when detained, they shall have possibility to engage in leisure activities.<sup>66</sup>

Unaccompanied minors may only be detained in exceptional circumstances, with efforts to release them as soon as possible, and may never be placed in ordinary prisons. If an unaccompanied minor is detained, he or she must be accommodated with institutions that take into account the needs of their age, separately from adults.<sup>67</sup> Detained families must be guaranteed separate accommodation with adequate privacy. Female detainees must be housed separately from males, unless they are family members and all individuals have consented. Exceptions to separate accommodations include spaces for social and recreational activities. Separate accommodations can also be derogated if duly justified and shortest possible amount of time, if the applicant is detained at border post or transit zone<sup>68</sup>.

#### **Asylum Procedures Directive (2005/85/EC) (APD)/Recast Directive (2013/32/EU)**

The APD and its recast set rules for Member States to determine whether refugee status is to be granted. In terms of detention, an individual may not be detained for the *sole* reason that he

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<sup>65</sup> Directive 2013/33/EU, art. 10.

<sup>66</sup> Directive 2013/33/EU, art. 11.

<sup>67</sup> Directive 2013/33/EU, art. 11.

<sup>68</sup> Directive 2013/33/EU, art. 24.

is seeking asylum.<sup>69</sup> The APD establishes only a few safeguards regarding detention for asylum seekers. Legal advisers for asylum representation must have access to detention facilities.<sup>70</sup> States may only limit access for purposes of security, public order, administrative management, or to ensue efficient examination of asylum application, so long as it does not severely limit or render access impossible<sup>71</sup>. Detention can be enforced, however, for the sole reason that the individual is applying for asylum<sup>72</sup>. If an asylum seeker is held in detention, the State shall ensure the possibility of speedy judicial review. Lastly, States shall allow the UNHCR to have access to detained applicants.<sup>73</sup>

The recast of the APD, Directive 2013/32/EU, states that in order to facilitate access to detention facilities, information should be available for the possibility to apply for international protection<sup>74</sup>. Basic communication should be ensured through interpretive arrangements to enable authorities to understand if applicants have applied for international protection. When a person files such an application to competent authorities under national law, registration must take place no later than three working days from the filing of the application. If application is made to other authorities not under national law, registration must take place no later than six days from the filing of the application.<sup>75</sup> States shall ensure that these other authorities have relevant information and that their personnel receives necessary training appropriate for informing applicants on how to file international protection applications. If there are indications that detainees wish to make an international protection application, States must provide them

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<sup>69</sup> Lundby, *supra* note 43

<sup>70</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] L 326/13, art. 10 [hereinafter, Council Directive 2005/85/EC]

<sup>71</sup> Council Directive 2005/85/EC, art. 34.

<sup>72</sup> Council Directive 2005/85/EC, art. 18, para. 1.

<sup>73</sup> Council Directive 2005/85/EC, art. 10, para. 1(c).

<sup>74</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] L 180/60, preamble, para. 28 [hereinafter, Directive 2013/32/EU (Recast)]

<sup>75</sup> Directive 2013/32/EU (Recast), art. 6, para. 1.

with relevant information. In detention facilities, States shall make arrangements to facilitate access to asylum procedures.<sup>76</sup>

States shall ensure that legal advisers have access to detention facilities for the purposes of consulting with an applicant.<sup>77</sup> States shall allow personal interviews for legal advisers admitted/permitted under national law. States may stipulate that legal advisers may only intervene at the end of personal interviews, may provide rules covering presence of legal advisers, may require presence of applicant at personal interview if he or she is representing under the terms of national law and may require applicants to respond to questions. Absence of legal advisers shall not prevent the competent authority from conducting a personal interview.<sup>78</sup>

Finally, States shall not detain an individual on the sole basis that he or she is an international protection applicant and must be in accordance with the Dublin Regulation. If an international protection applicant is detained, the individual's case must be shall have speedy judicial review of their case. States shall allow the UNHCR and any organization within its territory working on behalf of the UNHCR, to have access to detained applicants.<sup>79</sup>

In Greece, According to Migration Policy the number of Asylum Seekers between 2006 and 2010 has seen a slight fluctuation. In 2006 there were 12,270 applications, 19,880 in 2008 and again a decline to 10,270 in 2010. However, these statistics do not take into account the most recent crisis in Syria.<sup>80</sup> Most recently Greek authorities in cooperation with the agreements made with the European Union, are automatically detaining all asylum seekers and migrant who arrive on the Greek isles, all in deplorable conditions.

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<sup>76</sup> Directive 2013/32/EU (Recast), art. 6.

<sup>77</sup> Directive 2013/32/EU (Recast), preamble, para. 23.

<sup>78</sup> Directive 2013/32/EU (Recast), art. 14.

<sup>79</sup> Directive 2013/32/EU (Recast), art. 12, para. 1(c).

<sup>80</sup> Charalambos Kasimis, *Greece: Illegal Immigration in the Midst of Crisis*, (Mar. 8, 2012), <http://www.migrationpolicy.org/article/greece-illegal-immigration-midst-crisis>.

## Greek Domestic Law

Greek domestic law provides four legal grounds for pre-removal detention. Non-citizens may be detained if they display a risk of absconding, avoid or hamper the preparation of return or the removal process; or present a threat to public order or national security.<sup>81</sup>

The risk of absconding is measured by the following criteria: noncompliance with a voluntary departure obligation, an explicit expression of intent to avoid removal, possession of false documents, providing false information to authorities, convictions for criminal offenses, pending persecution, or serious indications that the person concerned has committed or is about to commit a serious offense, the lack of travel/identity documents, prior escape/ and or noncompliance with an existing entry ban.<sup>82</sup>

An asylum seeker may be detained if for determination of his or her identity or national origin; if he or she threatens national security or public order, according to the reasoned judgment of the police authority; or detention is considered necessary for the prompt and effective completion of the asylum application.

Greece's current detention policies have been influenced vastly by the Joint EU-Turkey Statement, which went into effect on March 20, 2016. This is a particular plan for Syrian refugees and provides that for every Syrian refugee sent back, a Syrian already in Turkey would be resettled in the EU. Turkey would also be able to get additional funding and progress on EU integration, and accelerate visa liberalization for Turkish Nationals. While not directly a Greek

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<sup>81</sup> Nomos (2005:3386), Entry, Residence and Social Integration of Third Country Nationals in Greek Territory, EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2005, A:212 (Greece), Article 76

<sup>82</sup> *Id.*



policy, this Policy has an insurmountable effect in the way in which regular and irregular migrant are treated.<sup>83</sup>

On June 16, 2016 the Parliament of Greece voted in favor of Law 4735/2016. In it, sweeping changes to the asylum policy of Greece were made in cooperation with the EU Turkey Joint Statement. The measure sought to dissolve the backlog of cases and recast the asylum Procedures Directive into the new procedure to include: free legal assistance, detention of asylum seekers at the reception and identification centers, distinctions made between first country of asylum and safe third country, border procedure, and appeals process.<sup>84</sup>

Article 22 provides that individuals who have applied for protective status within the past five years and still have an appeal pending, are automatically entitled to a residence permit if they possess a valid asylum permit and do not pose a security risk. This residence permit is granted for a period of 2 years and can be renewed.<sup>85</sup>

For those who were awaiting appeal, Article 23 imposes a new procedure that puts individuals at risk of having their applications withdrawn. Anyone with pending appeals under the old procedure who have not appeared before the authorities to renew their asylum seeker permit before August 31, 2015 are considered to have implicitly withdrawn their applications.<sup>86</sup>

According to Article 14 of Law 4375/2016, new arrivals may have their movement restricted during the reception and identification procedures.<sup>87</sup>

Article 46 articulates a new detention policy. Asylum seekers who have already been detained for immigration reasons may only remain in detention under certain circumstances.

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<sup>83</sup> Greg Botelho, *Turkey, EU Reach Deal for on Plan for Handling Refugees*, CNN, Mar. 18, 2016, available at <http://www.cnn.com/2016/03/18/europe/eu-turkey-refugees/>

<sup>84</sup> *Greece: Asylum Reform in the Wake of the EU-Turkey Deal*, ASYLUM INFORMATION DATABASE (April 4, 2016), <http://www.asylumineurope.org/news/04-04-2016/greece-asylum-reform-wake-eu-turkey-deal>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

Each individual must be assessed individually, with alternatives to detention considered in all cases. Detention is provided for on the following grounds: (a) to establish their identity or origin; (b) to examine main elements of the claim where there is a risk of absconding; (c) when the person had the opportunity to seek protection and applies solely to avoid deportation; (d) when the person poses a threat to national security or public order; and (e) to conduct a Dublin transfer where there is a significant risk of absconding.<sup>88</sup> Detention may only last for 45 days, but can be renewed for a further 45 days. Unaccompanied minors can only be detained for 25 days, but can be renewed further for 20 days only if the minor cannot be transferred to a dedicated reception facility.<sup>89</sup>

Article 60 covers border procedure with new elements added by Article 60(4). Article 60 (4) enables the Ministers of Interior and Defense to adopt exceptional measures in case of large numbers of arrivals lodging asylum applications at the border or while staying in Reception and Identification Centers. These measures include the possibility for European Asylum Support Office, (“EASO”), officials and interpreters to support the national authorities in registration and the conduct of interviews, a deadline of one day for applicants to prepare for the interview, and a maximum time limit of 3 days for deciding on appeals. They may not be applied to vulnerable groups or persons falling within the family provisions of the Dublin III Regulation.<sup>90</sup>

Article 61 brought about slight change to the Appeals Process, The deadline for appealing a decision from detention has increased from 10 days to 15 days, while the deadline for appeals submitted in a border procedure or in a reception and identification procedure has been extended from 3 to 5 days.<sup>91</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

As of January 10, 2017, the Asylum Information Database reported that 2,287 asylum seekers being held in the facility on Kos, and 871 on Leros.<sup>92</sup> Notably, the Greek Council for Refugees acknowledges that detention on both Kos and Leros is “systematically applied... and subject to inhuman conditions.”<sup>93</sup> These conditions remain problematic while assessing the asylum claims of the individuals housed on the islands.

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<sup>92</sup> Greece: Monitoring Report at Kos and Leros, ASYLUM INFORMATION DATABASE (Jan. 30, 2017), <http://www.asylumineurope.org/news/10-01-2017/greece-monitoring-report-kos-and-leros>

<sup>93</sup> *Id.* (“On Kos, the Greek Council for Refugees also observed that officials were not always aware that unaccompanied children were exempt from the exceptional border procedure under the law.”)

### III. Legal Analysis

#### Council of Europe

The CoE passed a recommendation along with Resolution 1707. The most important recommendation calls for a consultation body, comprised of experts from governmental committee bodies and NGOs, to look further into the 10 guiding principles.<sup>94</sup>

As of 2015, there are many monitoring committees participating in monitoring detention centers since Resolution 1707. The three most important are the CPT, ECSR, and the ECRI.<sup>95</sup> The CDCJ plans on codifying existing international standards relating to detention conditions in closed administrative centers and, as appropriate, in other places of non-penal detention. The committee intends to rely on the European Prison Rules as a model to improve conditions of detention centers.<sup>96</sup> The CoE is still working on finding alternatives to detention. This was included in Resolution 1707. The CDDH has decided to explore further work on the legal and practical effective alternatives to detention, by December 2017.<sup>97</sup>

There must be better enforcement mechanisms in place to ensure compliance with the standards. The resolutions failed to identify any benchmark dates to measure compliance. The resolutions failed to state how the CoE would monitor the Member States or if the CoE would require any follow-up reporting on the recommended changes. Finally, there is an issue with access to information. The two handbooks referred to earlier were not easy to find on the CoE website or with a simple Google search. There is no way an asylum seeker or their attorney could find these handbooks without having knowledge that these two handbooks exist. Although, the

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<sup>94</sup> EUR. PARL. ASS., *supra* note 1.

<sup>95</sup> EUR. PARL. ASS., *supra* note 37.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

handbooks are greatly detailed and useful, it is not helpful that they are so hard to access. One must know they exist in order to search and find them.

## European Union

Certain provisions of the Directives are not being applied properly. Alternatives are necessary in order for detention to be humane, in accordance with international, EU, and domestic law, and to be less costly on the Member States and the Union.

Pursuant to the above-mentioned Directives, problems arise due to lack of mandatory and *ex officio* judicial supervisions of detention. There is also a lack of data pursuant to detention facilities violations, despite the fact that States regularly report violations. States should strive to provide alternatives to detention, as evidence shows that detention may cause undue delays for and is less effective in providing effective removals to third countries or effective repatriation. An effective removal policy is one of the missions the RD establishes in its preamble.<sup>98</sup> Due to the rise in the number of detainees, there is a longer period for judicial review and a more complex legal framework. There appears to be a lack of clear assessment indicators and criteria regarding detention, proportionate measures used by the authorities, and special needs for vulnerable persons.

The RCD and its recast state that detainees have the right to speedy judicial review of their detention, either at the applicant's request or *ex officio*, and officials must make applicants aware of such procedures for requesting review. However, applicants are most likely not aware of procedures or the process of filing for judicial review, especially due to the recent unprecedented increase of migrants. Most States rely on administrative agencies and not a judge

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<sup>98</sup> Directive 2008/115/EC, preamble, para. 4.

to order detention.<sup>99</sup> This means that the possibility for governmental bias looms large. In 16 States, there is no automatic judicial review of detention. Rather, migrants and asylum seekers must apply to administrative courts for review.<sup>100</sup>

Both removal and asylum detainees must be kept in specialized facilities, which must be different than those for ordinary prisoners. In a 2014 Court of Justice of the European Union case, the Court ruled that “absence of specialized facilities in one part of Member States’ territory does not justify using prisons, if specialized facilities are available in other part of its territory.”<sup>101</sup> Problems arise because there is uncertainty and non-uniformity in the meaning of “specialized facilities.” Despite the ruling, many countries continue to use ordinary prisons to detain migrants. For example, Germany uses prisons, Greece uses police stations, and Austria uses police detention centers.<sup>102</sup> States may attempt to disguise such uses of prisons, to which they designate administrative officials or extraordinary prisoners. It is especially important to note that some States do not have the proper capacities and facilities; detention centers tend to be insufficient and cannot be adapted for long-term detention. Pursuant to a report to the EU, detainees are mainly held in specialized facilities. However, such statistics must be read with caution, since they lack academic scope, as they are typically created by each State’s Ministry of Interior without supplemental or external institutional research support.<sup>103</sup> Academic scope is significant in providing impartial facts and for avoiding bias from the reporting countries, which could result in skewed, more favorable results.

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<sup>99</sup> EUROPEAN MIGRATION NETWORK, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies*, (2014), 24, accessible at [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn\\_study\\_detention\\_alternatives\\_to\\_detention\\_synthesis\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf)

<sup>100</sup> *Id.* at 25

<sup>101</sup> Case C-474/13, Thi Ly Pham v. Stadt Scheinfurt, Amt für Meldewesen und Statistik, 2014 E.C.R. 2096.

<sup>102</sup> EUROPEAN MIGRATION NETWORK, *supra* note 99 at 28-9.

<sup>103</sup> Izabella Majcher, *Immigration detention in Europe: What are the facts? A new European Migration Network Study*, EU LAW ANALYSIS (Dec. 24, 2014, 1:27 AM), <http://eulawanalysis.blogspot.com/2014/12/immigration-detention-in-europe-what.html>

The terms “less coercive measures,” used throughout the Directives, are ambiguous. Although the Directives state that provisions must be implemented, it is unclear what exactly creates a “less coercive measure” and what factors each State must apply. The most common alternatives to detention include mandatory reporting to authorities, residence restrictions, surrender of travel documents, and bail release.<sup>104</sup> However, it did not state whether these measures were provided by domestic legislation. The European Commission assessed the legal basis of 87 cases throughout 31 countries, in which it found that 32% of the cases have used less coercive measures, 23% of the cases had no practical application, and that 45% had no information regarding any use or application of less coercive measures.<sup>105</sup>

In regards to the ability of return through detention, a State’s ability to allow an effective return is typically insignificant when it is done through detention or less coercive measures<sup>106</sup>. Non-coercive measures such as granting travel documents typically result into an effective return of the applicant and are less costly than detention.

Further, the RD states that judicial review may be longer if there are exceptionally large numbers of detainees or applicants. While this provision may seem reasonable and must be broad due to different States’ capacities, issues arise in the definition of “longer period” and “exceptionally large.” The Directive merely states that detention should be limited to six months or 12 months if there is a lack of cooperation by the applicant or if there is a delay in obtaining documents from a third country. The RD does not define the reasonableness of delays nor define cooperation among States to mitigate the delay in obtaining documents. Issues regarding these provisions may be at the forefront with the current mass migration of Syrians and Iraqis.

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<sup>104</sup> EUROPEAN MIGRATION NETWORK, *supra* note 99 at 4

<sup>105</sup> *Id.* at 38

<sup>106</sup> *Id.* at 7

Ambiguous and unclear application of judicial review results in prolonged and arbitrary detentions that could be inhumane with a lack of access to essential services.

Another issue arises due to a lack of clear assessment indicators and criteria. Unclear indicators may result in a violation of fundamental rights. Challenges arise for authorities when interviewing individual, interpreting risk of absconding, proportionate measures, and assessing vulnerabilities of individuals or the validity of documents. Misinterpretations could result in placing an applicant in detention due to the lack of clear indicators.<sup>107</sup> Alongside the uncertainty of criteria, there is also a complex legal framework, which results in non-uniformity and possible violations of fundamental rights.<sup>108</sup> For example, Lithuania's domestic legislation does not include explicit criteria for the risk of absconding. Ireland and Norway's different factors create a challenge in providing proportionate measures. Belgium's authorities have challenges in identifying relevant aspects for detention. Cyprus does not have a formal mechanism in assessing vulnerable individuals.<sup>109</sup> Although the very nature of EU Directives allows for state interpretation, the inconsistent policies that are created across Europe pose a challenge to the rights of asylum seekers and migrants alike.

Lastly, evidence suggests that detainees' fundamental rights are more difficult to protect than rights for applicants placed in alternatives to detention.<sup>110</sup> For example, in Belgium, 30 complaints were lodged by detainees, as opposed to zero by persons in family units who were not in detention. Twenty of the complaints were deemed admissible by the judicial authority responsible for reviewing complaints by detainees.<sup>111</sup> In Latvia, nine complaints were filed regarding detention conditions and availability of legal assistance. Although the State found that

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<sup>107</sup> *Id.* at 27

<sup>108</sup> *Id.* at 27

<sup>109</sup> *Id.* at 27

<sup>110</sup> *Id.* at 39

<sup>111</sup> *Id.* at 39



they were unsubstantiated, the numbers hint at the possibility of difference in protections, especially since applicants may not file for judicial review. Many individuals are not made aware of the process by the proper authorities or, rather, may rely on the State to review *ex officio*. This leads to violations of the guarantees to humane and dignified treatment, established by the Directives and Regulations. Although such individuals are detainees, the facilities in which they are held must provide sufficient conditions to warrant that such detention is not similar to ordinary prison detention, which is prohibited on the grounds solely for migration. Thus, conditions in specialized facilities should not derogate from the provisions in the Directives and States must ensure that there are no differences in conditions to warrant complaints.

### **Greek Domestic Law**

As a result of the statement between EU and Turkey and policy enactments by Greece, reception and registration centers in the country have essentially become detention facilities with well-known sub par conditions. Human Rights Watch has reported on the deplorable conditions of the detention facilities, citing that many of these facilities have failed to provide “access to health care, sanitation facilities, or legal aid.” While denying these individuals their basic rights and treating them like criminals, they also have detained women, children, and individuals with physical and mental disabilities.<sup>112</sup>

Before the enactment of the EU’s policy, it was found the “90% of all apprehensions for unauthorized entry into the European Union took place in Greece, compared to 75% in 2009 and

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<sup>112</sup> *Greece: Asylum Seekers Locked Up*, HUMAN RIGHTS WATCH (Apr. 14, 2016 12:00AM), <https://www.hrw.org/news/2016/04/14/greece-asylum-seekers-locked>

50 percent in 2008.”<sup>113</sup> Because of the increase in illegal immigration on the border with Turkey, Greece has seen an increase in anti-immigrant rhetoric and, in 2010, built a nearly 13-kilometer fence to stem the tide of migrants.<sup>114</sup>

Greece continues to be caught between EU and Turkish politics. Even with the EU-Turkey Joint Statement in place, asylum claims made in Greece still have to be considered according to the existing Dublin Regulation, suggesting that those with valid and verified family connections would be transferred to the appropriate EU Member State to complete asylum procedures rather than be returned to Turkey.<sup>115</sup> In the wake of the March 18 summit, EU officials suggested the legal basis of returns of potential candidates for family reunification was still to be determined.<sup>116</sup> This results in leaving many individuals in immigration “purgatory.”

While Greece has not fully abandoned their own immigration and detention policy, in light of the acquiescence to EU policy demands, reform is still needed. Greece needs to continually work to determine and execute a better system of determining who is an irregular migrant and who is an asylum seeker. However, without the backing of the EU with monetary support, the deplorable conditions and back up within the country will remain.

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<sup>113</sup> *Country Profile—Greece*, TRANSNATIONAL OBSERVATORY FOR REFUGEE’S RESETTLEMENT IN EUROPE, <http://www.resettlement-observatory.eu/documents/greece/outputs/countryprofile/countryprofile.pdf>, (last visited Dec. 1, 2016).

<sup>114</sup> *Id.*

<sup>115</sup> Kasimis, *supra* note 80.

<sup>116</sup> Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (Mar. 2016), <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> (last visited Dec.1, 2016).

## IV. Policy Recommendations

### Judicial Review

There should be a clear procedure outlined in the Directives on how to file a judicial review. The Directive merely requires that States must inform the applicants about relevant procedures. The mere act of “informing” has been insufficient to truly inform individuals of the process due to the complexity of some States’ procedures. The EU Charter of Fundamental Rights guarantees a right to effective remedy and a fair trial by a tribunal, especially when a victim alleges EU violation. In that case, the Charter provides for automatic access to effective remedy including judicial protection.<sup>117</sup>

The Directives should still allow domestic legislations to draft their own procedures of judicial review, but the EU should amend the Directives in order to include guidelines to establish judicial review or guidelines for States to unambiguously show the procedures of judicial review and clearly inform the applicants. The EU should emphasize *ex officio* review and enforce reasonable intervals of time. *Ex officio* provides for automatic review by the States’ authorities of the legality of detention, which becomes especially important when the detainees are not aware of the procedures or simply because they have not applied for review. *Ex officio* places the burden on the state to review the legality of detentions and therefore makes the State accountable for any illegal detentions. This may be done by establishing clearer rules for “sufficient” conditions of detention or through implementing laws establishing that States create agencies designed solely to review detentions. By creating a clear body of laws or clear administrative agencies, this would create uniformity. States would maintain sovereignty by drafting their own laws. The EU must enforce the application of the CJEU’s ruling in *Said*

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<sup>117</sup> Charter of Fundamental Rights of the European Union art. 47, 2010 O.J. C 83/02.

*Shamilovich Kadzoev (Huchbarov)*. A State must show during a judicial review of detention that there is a “real prospect” of a successful removal. Such prospect does not exist when it is unlikely that a person could be admitted in another country.<sup>118</sup>

When dealing with administrative detention, Article 13 of the ECHR guarantees the right to an effective remedy before a national authority.<sup>119</sup> Unlike the EU, there is no guarantee of a fair hearing before a court.<sup>120</sup> Article 6 (right to a fair hearing) of the ECHR cannot be used in conjunction with article 13 when dealing with asylum seekers.<sup>121</sup> However, Article 3 (prohibition of torture) can be used in conjunction with article 13.<sup>122</sup> In detention dealing with migrants, Article 5(4) of the ECHR prevails.<sup>123</sup> It requires that an independent and impartial judicial body perform the judicial review.<sup>124</sup> Moreover, the judicial body should be capable to release of the person when appropriate.<sup>125</sup>

The ECtHR in *M.S.S. v Belgium and Greece* held that “applicants must have a remedy at national level capable of addressing the substance of any arguable complaint under the ECHR and, if necessary, granting appropriate relief.”<sup>126</sup> The CoE should follow the EU approach, which allows for a fair trial. The problem with using Article 13 in administrative detention cases is that it gives too much power to national authorities. This is a problem that the CoE wanted to resolve with Resolution 1707. By allowing the right to a fair hearing, the tribunal can make sure remedies are given to victims.

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<sup>118</sup> Case C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*, 2009 E.C.R. 741, para. 65-66.

<sup>119</sup> *Handbook on European law relating to asylum, borders and immigration*, COUNCIL OF EUROPE, at 100 (2014). [hereinafter, Council of Europe Handbook]

<sup>120</sup> *Id.*

<sup>123</sup> Ktistakis, *supra* note 14 at 42.

<sup>124</sup> *Id.* at 43.

<sup>125</sup> *Id.*

<sup>126</sup> *M.S.S. v. Belgium and Greece* [GC], App.No. 30696/09, Eur. Ct. H.R., para 288 (2011).

## Detention Facilities

It is implied from Articles 3 and 5 of the ECHR that detention centers be clean and safe.<sup>127</sup> The CoE's standards of detention facilities must be in compliance with the fundamental principle of human dignity.<sup>128</sup> Families should not be separated, and children and vulnerable individuals should not, normally, be detained.<sup>129</sup> The CPT stated that detention centers should be:

“adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved.... regime activities, should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.”<sup>130</sup>

Furthermore, when detention facilities lack space and are overcrowded, and the combination of very poor conditions such as lack of light, ventilation, access to toilets and showers or outdoors activities such facilities may be considered to constitute inhuman or degrading treatment.<sup>131</sup> The ECtHR can also consider where the individual is detained, whether or not other facilities could be used; the size of the containment area; whether it is shared and with how many other people, and whether the detainees suffer from illnesses and have access to medical facilities.<sup>132</sup> Also, an individual's specific circumstances are of particular relevance.<sup>133</sup> The CPT, as well as the CoE, should make a subcommittee dedicated to monitoring conditions of detention facilities. They should make initial “surprise” visits, submit a report, and give the State a specified time of approximately six months to a year to improve these conditions. If States do not make

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<sup>127</sup> Ktistakis, *supra* note 14 at 34.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> COUNCIL OF EUROPE, CPT STANDARDS, CPT/Inf/E (2002), at 65 (2015).

<sup>131</sup> *Orchowski v. Poland*, App. no. 17885/04, Eur. Ct. H.R., 122 (2010).

<sup>132</sup> Council of Europe Handbook, at 167.

<sup>133</sup> *Id.*

improvements there should be some sort of consequence or sanction, financial or otherwise, issued by the CoE.

Ordinary prisons should not hold migration detainees. The EU should establish an independent body of researchers to conduct studies and site visits to ensure compliance regarding detention facilities. Such studies and reports should not be handled by a State's Ministry of Interior, since it lacks neutrality and could be biased.

There needs to be a uniformed definition of "specialized facilities" alongside the prohibition on the use of ordinary prisons as detention facilities. Such definition may be broad, so as to leave it to the State to decide on an acceptable facility, but should include an exhaustive list of possibilities by looking at all the different facilities States have used and determining those that meet the definition. The EU should also amend the Directives in order to allow for easier access to the CJEU based on violations regarding the use of ordinary prisons instead of specialized facilities. The CJEU or some other EU institution should make advisory opinions on what it deems a specialized facility for detention.

Recently, there has been criticism that certain camps in Greece, particularly the Greek isles, that subject detainees to ordinary prison-like conditions, including refusing asylum claims, sending people to Turkey without following proper procedures, and by violating the principle of non-refoulement.<sup>134</sup> Advocates Abroad has seen a rise in unlawful deportations in late April/early May 2017 and still continues to be concerned that individual cases, where an asylum seeker has not had access to legal aid, are susceptible to having their case denied without sufficient review. This topic regarding access to legal aid will be further explored in a subsequent policy paper.

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<sup>134</sup> ECRE, *supra* note 9.

The EU must explicitly state that ordinary-prison like conditions are not sufficient living conditions for applicants, as they differ in procedural guarantees and standards. The EU must further ensure that State authorities are not responsible or negligent for the result of such conditions. The RD explicitly states that countries must respect the principle of non-refoulement and may not relocate detainees without following certain procedures.<sup>135</sup> The EU must intervene in ensuring Greece does not violate the Directive and that it does not arbitrarily relocate applicants to Turkey, especially because it is not a Member of the EU and will very likely not uphold any of the terms and guarantees in the Directives.

### Least Coercive Measures

The Jesuit Refugee Services (“JRS”) defines alternatives to detention as “any policy, practice or legislation that allows asylum seekers and migrants to live in the community with freedom of movement... while they undertake to resolve their migration status and/or while awaiting removal from the territory.”<sup>136</sup> Article 9 of Resolution 1707 provided a list of alternative solutions to detention that could be used alone or in combination with each other. These alternatives have been shown to be more humane and substantially cheaper than detention centers. The CDDH, the CoE’s steering committee, should, on a trial basis, review these alternatives via reports from state parties to see if these alternatives are in fact better while still working on other alternatives by December 2017.

The EU should amend the Directives in order to ensure that “less coercive measures” are provided for by each State’s domestic legislation. The EU should formulate a list of potential least coercive measures as alternatives to detention. States should implement each measure in its

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<sup>135</sup> Directive 2008/115/EC, art. 47.

<sup>136</sup> Katy Siegfried, *Alternatives to immigration detention prove cheaper, more humane*, IRIN (Aug. 30, 2013), <http://www.irinnews.org/analysis/2013/08/30/alternatives-immigration-detention-prove-cheaper-more-humane>

domestic legislation, so long as its capacities allow. Alongside the list, the EU should include a definition of what is considered to be a “less coercive measures,” explaining that such measures should not amount to detention, corporal restriction of movement, etc.

States should limit detention emphasizing the beneficial effects of effective return of non-detention. The EU should also emphasize the fact that by using lesser coercive measures and non-detention States could save money. Further, such measures serve as better indicators for a potential return to the individual’s home country. The CJEU has already held that when an applicant does not comply within the period for voluntary departure, States must use the least coercive measures for returns and cannot implement a criminal detention sanction for failure to comply with an order to return<sup>137</sup>.

## Detention Period

The EU must define what is considered to be admissible “longer periods” for detention. It must also clarify what is meant by “exceptionally large” number of applicants, so as to avoid a State citing its system is overwhelmed when, in reality, it merely wishes to continue to detain individuals. Although this provision is reasonably based on the possibility of a State’s limited capacity to manage a high number of applicants, continuing to detain an individual beyond what is proportionate is a violation of the Directives.

While the term “longer periods” allows for some flexibility, as it allows a State to respond to the situation on the ground. However, there needs to be a definition and/or a range of what is considered an extended period of time. For example, this time may depend on the number of applicants, in which longer periods may be extended to 30-45 days if there are over 5,000 unforeseen or unexpected applicants. The main issue that arises from the lack of definition

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<sup>137</sup> Case C-61/11, El Dridi, alias Soufi Karim, 2011 E.C.R. 268, para. 59.



is arbitrary detention. The CJEU has ruled that the RD does not preclude penal sanctions for an unlawful stay in determining whether an applicant has a right to stay.<sup>138</sup> The court's decision coupled with the lack of concrete definition of what constitutes a "longer period" may cause undue, prolonged detentions.

A definition or range of what is considered "exceptionally large" number of applicants is needed to further clarify what is allowable for a longer period of judicial review. The definition should be broad, understanding that States do not have identical capacities. This number should be determined by a formula, which would take into account a State's capacities to handle applications and an estimate of the number of workers each State would designate to process applicants. The calculation is obviously a difficult task, but such broad definitions would facilitate agencies in determining priorities and deadlines of applications, which, in turn, would help curb unjustified detentions.

The RD only provides for a detention term of six months or 12 months. The latter term length is only in cases where there is a lack of cooperation from the applicant or a delay for obtaining documents from a third country. However, it is unclear if such terms apply to the situation of an exceptionally large number of applicants. The Directives must be amended to clarify if the terms apply or not in that situation. Further, there needs to be clarification on what makes a delay reasonable under the circumstances. Delays may vary per each State's procedure, but a delay on purpose should render the prolonged detention in violation and unjustifiable.

One of the goals of detention is for status adjudication or to facilitate a return. Unreasonable delays based on domestic procedures should not justify prolonged detention, as in that case, the State, and not the individual causes the undue delay. This issue also highlights the need for inter-State cooperation. The Directive likely foresees such delays as inevitable since

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<sup>138</sup> Case C-329/11, *Achughbabian v. Prefet du Val-de-a Marne*, 2011 E.C.R. 807, para. 37-39, 45.

they are included in the provisions. To facilitate the process and to avoid unjustified detention, there needs to be stronger cooperation between Member States to obtain documents. This can be done through an enforcement mechanism, through the establishment of an agency, or perhaps through directing an agency to undertake the duty of transferring documents. This would facilitate the movement of necessary documents without undue pervasiveness by the EU. The CJEU's *Mahdi* case ruled that a lack of identity papers does not justify immigration detention, which likely extends to the provision of delays due to third countries for proper documents.<sup>139</sup> The EU should enforce the holding by ensuring that prolonged detention does not occur for delays in obtaining documentation.

### **Establishment of Assessment Indicators and Criteria**

There is a lack of clear assessment indicators and criteria, which results in fundamental rights violations. Uniformity is needed to rectify the situation. The EU needs to amend the Directives to include guidelines for determining risks of absconding and assessment criteria. The EU amendments cannot be too broad, but must serve as minimum standards, as States would be compelled to violate them or implement harsher standards in favor of detention.

Several factors are key for determining whether or not there is a risk of absconding. Such factors include the non-compliance with a voluntary departure, an explicit expression of intent to avoid removal, possession of false documents, providing false information to authorities, convictions for criminal offenses, pending prosecution, and serious indications that the criminal has or will commit a crime.<sup>140</sup> The guidelines should include such factors as the applicant's history of absconding, whether the applicant is part of a family unit, whether the applicant has

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<sup>139</sup> Case C-146/14, Bashir Mohamed Ali Mahdi, 2014 E.C.R. 1320.

<sup>140</sup> Directive 2008/115/EC, art. 7, para. 3.

ties or connections to other countries, whether the applicant has a known criminal record anywhere in the world, and whether or not the individual has known vulnerabilities.

Detention based on the risk of absconding is thoroughly established in the Directives. However, the EU must ensure a more uniform interpretation of what constitutes a risk in order to mitigate challenges faced by authorities. This may be the most difficult recommendation to oversee or implement since such authorities are designated by each individual State and according to its domestic law.

### **Vulnerable Persons in Detention**

The EU especially needs to focus on improving detention for vulnerable persons. Such disproportionate measures that do not take into account an individual's particular situation can result in violations of due process, non-uniformity, and human dignity. Therefore, broad, uniform definitions are needed for assessing vulnerabilities during individual interviews. It is understandable that differences may occur in interviews, as different States have different procedures. However, there needs to be broad guidelines to ensure that the most basic needs of these individuals are addressed. The most basic procedures, such as humane conditions, access to legal aid, separate accommodations, etc., are guaranteed and conveyed clearly, and are thus understood by the applicants.

Alongside the special arrangements established for disabled persons, pregnant women, elderly, victims of torture and sexual violence,<sup>141</sup> the EU must define and provide a non-exhaustive list of potential vulnerabilities that could be considered in detention situations. This should include such vulnerabilities as mental, physical, and emotional health, language (foreign and disability) and basic legal competence. This non-exhaustive list would enhance uniformity

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<sup>141</sup> EUROPEAN MIGRATION NETWORK, *supra* note 99 at 30.

and uphold fundamental rights by ensuring that persons with special needs and vulnerabilities are treated humanely.

## **Violation Reporting and Monitoring**

Fundamental rights of persons in detention are more difficult to protect than if an individual is placed in alternatives to detention. The lack of access to individuals to assess the detention, coupled with a lack of a streamlined system for reporting violations, is problematic. There have been few recorded complaints to date. However, given the rise in the number of migrants and asylum seekers, this number may also rise. The EU must investigate these complaints, ensure that they are properly considered by the State, and that there is a satisfactory resolution to the situation. The EU should create a simple reporting process that would allow individuals in detention to lodge a complaint, with the option to file a complaint anonymously. With the creation of this system, there would need to be a group of independent experts who could research the veracity of the claims, work with the State in question to ameliorate the situation, and allow for follow up by the individual who made the complaint. .

The EU may want to consider regulating detention facilities throughout the Union by independently managing facilities with the consent of a host-State. The staff would be a mixture of employees directly employed by the EU, employees from the host-State, and employees from any other State in the EU. This innovative approach would relieve States of many of the administrative and financial burdens of running detention facilities

## Cooperation Between European Union and Council of Europe Systems

The EU must work in cooperation with the CoE. The Council has passed a resolution recommending a new detention system and a consultation body responsible for examining that States follow the guiding principles for grounds of legal detention.<sup>142</sup> In relation to the challenges described that the EU faces, the Council's intent for the new system is, amongst other things, to ensure common guarantees, ensure stricter rules to combat abuses, address necessary reforms for the RCD in order to ensure that asylum seekers can benefit from harmonized standards, and to ensure States apply standards and plans regarding capacity challenges.<sup>143</sup> Forming a EU-CoE partnership for overseeing detention challenges will be tremendously beneficial for the system as a whole. In such a partnership, the EU will gain personnel and expertise in dealing with detention issues. A partnership will also facilitate the movement of applicants upon request, transfer of documents among countries, the control of migration, and the expansion of overseeing, recording, and reporting any detention violations, as the CoE has more Member States than the EU. Thus, a partnership would cover every member from both entities.

Stronger enforcement mechanisms, in general, are needed for directives and regulations passed by the EU and the Council of Europe. The consultation body suggested by the Council would be the ideal establishment.<sup>144</sup> Such a body would be responsible for overseeing activities in different States and for recording violations, conditions, and overall statistics by individual

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<sup>142</sup> COUNCIL OF EUROPE, ADMINISTRATIVE DETENTION, *supra* note 16

<sup>143</sup> *Id.*

<sup>144</sup> EUR. PARL. ASS., *supra* note 1 (“[T]he Assembly recommends that the Committee of Ministers...instruct the relevant expert committee within the Council of Europe to set up a consultation body to examine further the 10 guiding principles on the circumstances in which the detention of asylum seekers and irregular migrants is legally permissible. This consultation body should be comprised of government experts, members of civil society, representatives of UNHCR and other international organisations, the International Committee of the Red Cross, representatives of the European Court of Human Rights, the European Committee for the Prevention of Torture and the Office of the Council of Europe Commissioner for Human Rights and the European Commission. This consultation body should not only examine the principles but also make recommendations on whether the Committee of Ministers should be encouraged to prepare a recommendation, principles or rules on the issue.”)

State reports. Reports would be filed by individual states to the Council of Europe annually. The State authority for reporting to the Council would work in cooperation with the Council to ensure implementation of Council of Europe regulations. Further, if a partnership would form between the Council and the EU, as mentioned above, a consultation body would also ensure implementation of the EU's laws. Additionally, it will be easier to enforce the ECJ's ruling that national courts must provide a remedy for any damages caused by a breach of a EU provision by a EU Member State with the CoE's assistance.<sup>145</sup>

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<sup>145</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci and Others v. Italian Republic*, 1991 E.C.R. 428

## Conclusion

Due to the complexity of the dual systems in Europe, there is no one solution to the issue of migrant detention. There are pitfalls in each system, which need to be addressed to improve the lives of those arriving in Europe. However, as outlined above, each system can take steps to better protect individuals, basic human rights, and preserve human dignity during this ongoing humanitarian crisis.

The CoE needs better enforcement mechanisms to ensure that detention facilities are up to the minimum conditions and safeguards in Resolution 1707 and the ECHR. The ECtHR should allow the right to a fair hearing so as to provide an effective remedy against human rights abuses suffered by detainees. Finally, the CoE needs to try the alternatives to detention that were listed in Resolution 1707 in conjunction with finding other alternatives by December 2017.

The EU needs clear definitions on guidelines for terms regarding detention areas. Further, deficient and non-specialized facilities coupled with mass migration and procedural confusion result to unlawful detentions, degrading treatment, and insufficient living conditions. The EU must promote the suggested recommendations, emphasize alternatives to detention, and open access to review and procedural infrastructure. It must also ensure clear implementation of the guaranteed procedures mentioned above and assessment indicators regarding detention, vulnerable person, and proportionate measures. Lastly, the EU should form a partnership with the Council of Europe in order to implement recommendations and proposals for harmonization of detention policy in Europe, especially in light of the mass migration to Greece.

## Appendix

### A1. Glossary Terms

- Recommendations: contain proposals addressed to the Committee of Ministers, the implementation of which is within the competence of governments.
- Resolutions: embody decisions by the Assembly on questions, which it is empowered to put into effect or expressions of view, for which it alone is responsible.
- Opinions: are mostly expressed by the Assembly on questions put to it by the Committee of Ministers.
- Irregular migrants: entry, stay or work in a country without the necessary authorization or documents required under immigration regulations

### A2. Resolution 1707

#### Detention of asylum seekers and irregular migrants in Europe

1. The detention of asylum seekers and irregular migrants in Council of Europe member states has increased substantially in recent years. While this increase is in part due to the growing number of arrivals of irregular migrants and asylum seekers in certain parts of Europe, it is also to a large extent due to policy and political decisions resulting from a hardening attitude towards irregular migrants and asylum seekers.

2. Overcrowding in detention centers is a serious problem. As the number of detainees exceeds the capacity of detention centers, states are building more and bigger centers. However, if they build more centers, they fill more centers, often to justify the expenditure. Yet this does not necessarily translate into better conditions for the persons detained. Furthermore, alternative facilities, which are inappropriate for detaining asylum seekers and irregular migrants belonging



to this group, such as police stations, prisons, disused army barracks, hotels, mobile containers, etc., are also being used in order to detain growing numbers of persons.

3. Whilst it is universally accepted that detention must be used only as a last resort, it is increasingly used as a first response and also as a deterrent. This results in mass and needless detention. The Parliamentary Assembly is concerned by this excessive use of detention and the long list of serious problems which arise as a result and which are regularly highlighted, not only by Council of Europe human rights monitoring bodies such as the European Court of Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Human Rights Commissioner and the Assembly's Committee on Migration, Refugees and Population, but also by other international and national organizations.

4. Conditions and safeguards afforded to immigration detainees who have committed no crime are often worse than those of criminal detainees. Conditions can be appalling (dirty, unsanitary, lack of beds, clothing and food, lack of sufficient health care, etc.) and the detention regime is often inappropriate or almost entirely absent (activities, education, access to the outside and fresh air). Furthermore, provision for the needs of vulnerable persons is often insufficient and allegations of ill-treatment, violence and abuse by officials persist. This all has a negative impact on the mental and physical well-being of persons detained both during and after detention.

5. Detention is costly in financial terms for the states which often resort to this measure and which detain persons for lengthy periods of time. The European Union Return Directive, which provides for a maximum length of detention for irregular migrants of up to eighteen months, can be criticized for adopting the lowest common standard with regard to length of detention thereby

allowing European Union member states to practice long-term detention, and increasing the possibility for states to increase their minimum duration of detention.

6. The Assembly is particularly concerned about the detention of asylum seekers who should be distinguished from irregular migrants. Under the 1951 Convention Relating to the Status of Refugees there are only specific and narrow exceptions to their right to freedom of movement. According to the convention, asylum seekers should not be detained solely on the basis of lodging a claim for asylum, nor for their illegal entry or presence in the country where they lodge a claim for asylum.

7. It is not just conditions of detention that are of concern. The lack of clarity over when detention may be legally justified preoccupies the Assembly. There is a clear lack of a precise, accessible legal framework governing the use of detention under international human rights law and refugee law. Furthermore, national laws and regulations are often insufficient (leaving too much discretion to immigration officials), detention policies are not transparent (leaving individuals open to abuse or arbitrariness), detainees' access to lawyers is limited, and empirical data concerning detention lacking. In addition, there must be a clear, accessible framework, governing the operation of centers and the conditions afforded, which must also be subject to judicial review.

8. The Assembly reiterates that the grounds for immigration detention are limited by Article 5.1.f of the European Convention on Human Rights (ETS No. 5). Detention should be used only if less intrusive measures have been tried and found insufficient. Consequently, priority should be given to alternatives to detention for the individuals in question (although they may also have human rights implications). Alternatives to detention are financially more attractive for the states concerned and have been found to be effective. Unfortunately, in some states, alternatives to

detention are rarely used or have not even been included in national law, notwithstanding all obligations to consider such alternatives.

9. In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

9.1. follow 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible. These principles aim to ensure that:

9.1.1. detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative;

9.1.2. detention shall distinguish between asylum seekers and irregular migrants; asylum seekers must be protected from penalties on account of their unauthorized entry or presence;

9.1.3. detention shall be carried out by a procedure prescribed by law, authorized by a judicial authority and subject to periodic judicial review;

9.1.4. detention shall be ordered only for the specific purpose of preventing unauthorized entry into a state's territory or with a view to deportation or extradition;

9.1.5. detention shall not be arbitrary;

9.1.6. detention shall only be used when necessary;

9.1.7. detention shall be proportionate to the objective to be achieved;

9.1.8. the place, conditions and regime of detention shall be appropriate;

9.1.9. vulnerable people should not, as a rule, be placed in detention and specifically unaccompanied minors should never be detained;

9.1.10. detention must be for the shortest time possible;

9.2. put into law and practice 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers to ensure that:

9.2.1. persons deprived of their liberty shall be treated with dignity and respect for their rights;

9.2.2. detainees shall be accommodated in centers specifically designed for the purpose of immigration detention and not in prisons;

9.2.3. all detainees must be informed promptly, in simple, non-technical language that they can understand, of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention; during detention, detainees must be provided with the opportunity to make a claim for asylum or complementary/subsidiary protection, and effective access to a fair and satisfactory asylum process with full procedural safeguards;

9.2.4. legal and factual admission criteria shall be complied with, including carrying out appropriate screening and medical checks to identify special needs. Proper records concerning admissions, stay and departure of detainees must be kept;

9.2.5. the material conditions for detention shall be appropriate to the individual's legal and factual situation;

9.2.6. the detention regime must be appropriate to the individual's legal and factual situation;

9.2.7. the detention authorities shall safeguard the health and well-being of all detainees in their care;

9.2.8. detainees shall be guaranteed effective access to the outside world (including access to lawyers, family, friends, the Office of the United Nations High Commissioner for

Refugees (UNHCR), civil society, religious/spiritual representatives) and the right to receive frequent visits from the outside world;

9.2.9. detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge;

9.2.10. detainees must be able periodically to effectively challenge their detention before a court and decisions regarding detention should be reviewed automatically at regular intervals;

9.2.11. the safety, security and discipline of detainees shall be taken into account in order to maintain the good order of detention centers;

9.2.12. detention center staff and immigration officers shall not use force against detainees except in cases of self-defense or in cases of attempted escape or active physical resistance to a lawful order, and always as a last resort and in a manner proportionate to the situation;

9.2.13. detention center management and staff shall be carefully recruited, provided with appropriate training and operate to the highest professional, ethical and personal standards;

9.2.14. detainees shall have ample opportunity to make requests or complaints to any competent authority and be guaranteed confidentiality when doing so;

9.2.15. independent inspection and monitoring of detention centers and of conditions of detention shall take place;

9.3. consider alternatives to detention and:

9.3.1. provide for a presumption in favor of liberty under national law;

9.3.2. clarify the framework for the implementation of alternatives to detention and incorporate into national law and practice a proper legal institutional framework to ensure that alternatives are considered first, if release or temporary admission is not granted;

9.3.3. ensure that their application is non-discriminatory, proportionate and necessary and that the individual circumstances and vulnerabilities of those to whom they are applied are taken into account and that the possibility of review by an independent judicial body or other competent authority is provided for;

9.3.4. commission and carry out empirical research and analysis on alternatives to detention, their use and effectiveness, and best practice, distinguishing between community-based alternatives that allow for freedom of movement and those which curtail freedom of movement. In this respect, the following alternatives can, inter alia, be taken into account:

9.3.4.1. placement in special establishments (open or semi-open);

9.3.4.2. registration and reporting;

9.3.4.3. release on bail/surety;

9.3.4.4. controlled release to individuals, family members, non-governmental organizations (NGOs), religious organizations, or others;

9.3.4.5. handover of travel and other documents, release combined with appointment of a special worker;

9.3.4.6. electronic documents or electronic monitoring.

10. The Assembly invites the Council of Europe's Commissioner for Human Rights and the CPT to continue to monitor closely the situation of the detention of asylum seekers and irregular migrants and to support the guiding principles laid out above in relation to legally permissible detention and minimum standards for conditions of detention. Furthermore, they are invited to encourage member states to examine and use to a much greater extent alternatives to detention.<sup>146</sup>

### **A3. Law 3386/2005, Art. 76 (3)**

3. If the alien is considered, on the basis of the general circumstances, suspect for escape or dangerous for the public order or avoids or obstructs the preparation of his departure or the procedure of his expulsion, his temporary detention is ordered, upon decision of the bodies referred to in the previous paragraph, until the issue, within three (3) days, of the decision regarding his deportation. Once the above decision is issued, detention still continues until deportation, but cannot last more than six (6) months in any case. If deportation is delayed because the alien refuses to cooperate or the documents necessary for his deportation are not sent timely from the home country or the country of origin of the alien, his detention may be extended for a limited time which cannot exceed twelve (12) months. The alien should be informed in a language he understands about the reasons for his detention and his communication with his attorney-at law should be facilitated. The alien in detention, along with his rights according to the Code of Administrative Procedure, may also express objections against the decision for his detention before the president or the judge of the first instance court defined by the latter, in the region of his detention.

### **A4. Law 3907/2011 Art. 30 (1)**

Third- country nationals who are the subject of return procedures, pursuant to article 21, paragraph 1 are kept in detention in order to prepare the return and to carry out the removal process only if, in a specific case, no other sufficient but less coercive measure, such as those stipulated in article 22 paragraph 3, can be applied effectively. The measure of detention is applicable when (a) there is a risk of absconding or b) the third-country national concerned

avoids or hampers the preparation of return or the removal process or c) for reasons of national security.

Detention is imposed and maintained for as short a period as possible and as long as removal arrangements are in progress and executed with due diligence. In any case, the imposition or the continuation of the detention measure may take into account the availability of adequate detention facilities and the ability to provide decent living conditions.