

A study of immigration detention practices and the use of alternatives to immigration detention of children



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**Parliamentary Campaign to End
Immigration Detention of Children**

**Parliamentary Assembly of the
Council of Europe Committee on
Migration, Refugees and
Displaced Persons**

French edition:

Étude sur les pratiques de rétention des migrants et les alternatives à la rétention d'enfants migrants

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This study has been prepared by Professor Dr Athanassia P. Sykiotou, Faculty of Law, Democritus University of Thrace, for the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, in the framework of the Parliamentary Campaign to End Immigration Detention of Children.

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Note:

All legal cases cited in this report are from the European Court of Human Rights, unless otherwise stated.

"They", "them" and "their" are used as gender-neutral equivalents of "he/she", "him/her" and "her/his".

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Abbreviations

ATD	alternative to detention
BiH	Bosnia and Herzegovina
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECPRD	European Centre for Parliamentary Research and Documentation
EU	European Union
EU FRA	European Union Agency for Fundamental Rights
HRC	Human Rights Council
HRW	Human Rights Watch
IDC	International Detention Coalition
IOM	International Organization for Migration
NOAS	Norwegian Organisation for Asylum
NGO	non-governmental organisation
OHCHR	Office of the UN High Commissioner for Human Rights
PACE	Parliamentary Assembly of the Council of Europe
PICUM	Platform for International Cooperation on Undocumented Migrants
SRSR	Special Representative on Migration and Refugees of the Council of Europe Secretary General
UAM	unaccompanied minor
UDI	Norwegian Directorate of Immigration
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNFPA	United Nations Population Fund
UNODC	United Nations Office on Drugs and Crime
UNOHR	United Nations Office of the High Representative

Aims and objectives of this study

In January 2015 the Parliamentary Assembly of the Council of Europe (PACE) joined the Global Campaign to End Immigration Detention of Children. The Global Campaign was launched in 2012 as a joint initiative of the International Detention Coalition (IDC) and the Office of the UN High Commissioner for Human Rights (OHCHR).

The Parliamentary Campaign to End Immigration Detention of Children is intended to raise awareness of the situation that many children experience daily around the world and in some of the member states of the Council of Europe. The campaign's objective is to end the detention of migrant children in those Council of Europe member states in which this practice still persists and to support states in putting an end to this harmful practice. The need is not only to end this practice, but also to find and adopt valuable alternatives to detention in order to protect children and guarantee their fundamental rights at the time when their immigration status has not yet been resolved.

In March 2015, the Assembly's Committee on Migration, Refugees and Displaced Persons appointed Ms Doris Fiala – Switzerland, ALDE¹ – as General Rapporteur for the Parliamentary Campaign, in order to raise awareness of the issue and to attract the attention of parliamentarians of member states so they would take initiatives in their national parliaments to discuss and actively support the campaign. One of the specific objectives of the campaign is to raise awareness among parliaments and the general public on the issues and consequences of the immigration detention of children. Therefore, in the framework of the campaign, a study of qualitative and quantitative information about immigration detention practices and use of alternatives to immigration detention of children was launched.

This study aims to develop an understanding of issues relating to immigration detention practices, and to promote the use of alternatives to immigration detention of children (ATDs). The geographical scope of the study is focused on member states of the Council of Europe which are not members of the

European Union.²The study primarily addresses the following issues:

1. The national provisions regulating immigration detention and alternatives to detention for children;
2. The national screening and assessment procedures for incoming migrants;
3. The national referral and support systems;
4. The existence and types of national community-based placement options;
5. The most recent nationwide statistics, examining in particular the existence of provisions criminalising irregular entry and/or presence, as well as the number of migrant children in detention, and the basis of that detention, disaggregated both on age and immigration status;
6. The existence of safeguards for family unity and prevention of family separation in any decisions on detention;
7. The detention conditions and the criteria applying to the detention of families/unaccompanied minor (UAM) children, in particular as regards the regime applied; and the existence of facilities specialised and equipped to cater for specific needs of different categories of children;
8. Access of migrant children to national services, including health, education and social protection/child protection systems and how these are provided to children in all facilities (specialised and non-specialised) used to hold children in immigration detention.

Methodology

The current study has been based on desk review and on a selection of qualitative and quantitative information about immigration detention practices with regard to children in the member states of the Council of Europe, especially in non-EU members.

1. Alliance of Liberals and Democrats for Europe (political group).

2. The European Union Agency for Fundamental Rights (EU FRA) undertook a similar study in the member states of the EU and therefore the two studies are complementary.

In particular, the study is based on an analysis of the legislative and policy framework produced at international and European level, as well as of previous studies and surveys carried out in this field, especially PACE Recommendation 1686 (2004) on human mobility and the right to family reunion; PACE Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return; PACE Recommendation 1985 (2011) on undocumented migrant children in an irregular situation: a real cause for concern; PACE Recommendation 1237 (1994) on the situation of asylum seekers whose asylum applications have been rejected; PACE Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe; and PACE Recommendation 1440 (2000) on the restrictions on asylum in the member states of the Council of Europe and the European Union.

The study has also relied on reviewing practices in the immigration detention of children by analysing relevant reports and other bibliographical sources on this issue.

The study has been completed with information gathered through interviews with parliamentarians and members of the UNHCR Field Offices and with a comparable request, in the form of a questionnaire that was sent through the network of the European Centre for Parliamentary Research and Documentation (ECPRD), to all parliaments of member states (Request No. 3044; see Appendix 2). A total of 27 members and non-member states of the Council of Europe replied to the questionnaire, out of which 18 were EU member states³ and nine non-EU (seven members of the Council of Europe and two observer states of the Council of Europe).⁴ The replies from an ECPRD questionnaire in 2014 on “Detention of children for immigration purposes” (Request 2612/2613) were also used in this study to supplement other information, in particular, the replies sent back by three non-EU member states (Iceland; Republic of Moldova and Russia) and five replies of EU member states (Belgium; Greece; Italy; Lithuania; Luxembourg) that did not reply to the later questionnaire (No. 3044). Replies sent by non-members of the Council of Europe (observers: Canada and Israel) have not been inserted into this study.

It needs to be emphasised that the replies received from the member states, as regards their quality and relevance to the specific questions, were quite disappointing, showing not only how few measures have been taken to address the issue of immigration detention of children and in favour of alternatives, but also a lack of the due consideration with which the authorities should treat such a serious issue. Some member states confused migrants with asylum seekers in their replies, which rendered it impossible to distinguish between measures taken for these two categories, and in some cases the only statistics provided were for asylum seekers.



3. Austria; Croatia; Cyprus; Czech Republic; Estonia; Finland; France; Germany; Hungary; Latvia; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Sweden; and United Kingdom.

4. Albania; Andorra; Bosnia and Herzegovina; Georgia; Norway; Serbia; and Switzerland; and the non-members of the Council of Europe: Canada and Israel.

Introduction

General remarks

Accompanied or unaccompanied, all children travelling without official documents, whether seeking asylum or as refugees or irregular migrants, are at risk of being detained, given that in many countries illegal entry and illegal residence are considered as criminal offences. Despite the fact that detention of children is internationally perceived as a measure of last resort,⁵ immigration detention of children still persists. The 2015 “migration crisis” in Europe has exacerbated this problem in many of the Council of Europe member states to an unprecedented level, with the conditions of detention being well below the accepted minimum standards. The use of detention continues to increase despite well-established concerns that it does not deter irregular migrants and asylum seekers, and also that it violates human rights and harms the health and well-being of detainees (see IDC 2015).

Despite some improvements in legislation and practice in a number of European states, hundreds of immigrant children still end up in detention. The phenomenon is under-reported and accurate statistics on this practice are difficult to find, as has been highlighted by the Parliamentary Assembly (PACE 2014b). Among children who enter Europe (especially unaccompanied children), a large number of them remain undocumented and thus (if not rapidly registered by the authorities in the country of arrival) face numerous risks, such as falling victim to criminal networks.

Under the Clandestino Project, it is estimated that there were between 44 000 and 144 000 undocumented children born in the United Kingdom out of a total of 417 000-863 000 undocumented migrants. Following the data collated by Clandestino, the Compas Research Project at the University of Oxford has published an estimate of 120 000 undocumented children in the United Kingdom in 2011, of which over 85 000 were thought to be born there (PICUM 2013). According to a study conducted by the Swiss Monitoring Office for Asylum and Foreigners’ Law, children make up at least 10% of undocumented migrants in Switzerland (ODAE 2008).

However, detention has severe negative short- and long-term effects on children’s physical and mental health and is always contrary to the best interests of the child, as defined in the United Nations Convention on the Rights of the Child (CRC) and underlined by the UN Children’s Fund (UNICEF) and the UN Special Rapporteur on the Human Rights of Migrants (UNGA HRC 2009, paragraph 62). Migration-related detention of children cannot be justified on the basis of maintaining family unity (for example, detention of children with their parents when all are irregular migrants). Hence, ideally, the full application of a rights-based approach would imply adopting alternative measures for the entire family; states should therefore develop policies for placing the family in alternative locations instead of closed detention centres.

While detention is a traumatic experience in general, children are particularly vulnerable to the negative effects of detention and can be severely traumatised. Psychiatric research indicates that even short periods of detention negatively impact children’s cognitive and emotional development and have direct consequences that can cause them lifelong trauma and developmental challenges (Grassian 1983). Also, there is a high risk of detained children being subjected to different forms of violence and/or being deprived of the right of access to education and health care.

Even though the national legislations provide alternative measures for unaccompanied migrant children, many member states still resort to detention in too many instances. Children are detained for health and security screening, and for identification and status-determination purposes, as well as with a view to their removal from the country. Some children are incarcerated in facilities exclusively for minors, but others are detained with unrelated adults. In some states, children end up in detention facilities which are unsuitable for catering to their needs. Sometimes, states detain children because the authorities are not in a position to determine their age. On the other hand, age-assessment procedures are often used for the benefit of the state seeking to justify detention (IDC 2015). Despite the existing standard that persons who claim to be minors should be treated as such until proven otherwise, unless the claim is manifestly unfounded, a number of states do not apply that standard and still detain such persons in institutions for adults.

5. Notably in Articles 3 and 8 of the European Convention on Human Rights; Articles 4, 19 and 24 of the EU Charter; Articles 7, 17 and 24 ICCPR; and Articles 3, 9, 10 and 22 CRC.

Following the terrorist attacks in Europe,⁶ many countries have increased their efforts to reduce the number of irregular migrants on their territory, as a result of intensifying security measures. As a direct consequence, different states use immigration detention at various stages of the process from arrival; throughout the processing of claims; and until deportation.

Immigration detention of children should be seen as a phenomenon with multiple issues that should be given specific consideration in order to be addressed correctly, such issues as the following:

- ▶ type of detention facility
 - children detained at borders/hotspots⁷
 - children detained in other facilities (e.g. social welfare centres)
- ▶ legal and policy framework:
 - countries with a legal framework for the immigration detention of children
 - countries with no such framework
- ▶ the child's legal status
 - accompanied by parents or another person with a proven relationship
 - unaccompanied or accompanied by a person with a non-proven relationship (and thus at risk of human trafficking)
- ▶ the child's gender
- ▶ the child's age⁸
 - infants (0-1)
 - toddlers (1 to 3)
 - pre-schoolers⁹ (3 to 6)
 - middle-childhood (6 to 12)
 - adolescents (12 to 18)
- ▶ age determination
 - documented children
 - undocumented children, in which case:
 - age is assessed based on a medical process according to the legal system
 - age is assessed based on testimonies from persons with a proven relationship with the child

Other than the result of an official immigration detention order, there are many situations of restriction of

freedom that are not considered officially as detention, but which may constitute *de facto* detention. Migrants and asylum seekers are sometimes detained without official legal decision at airport transit zones and other points of entry, under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies, before being returned to their countries. The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons concerned to challenge the lawfulness of the detention and the deportation decision and to apply for asylum, even in the presence of legitimate claims. This detention, in inadequate conditions, can last for prolonged periods of time (OHCHR 2016: 16-17).

Reasons for immigration detention

Immigration detention is used by governments mainly as a migration management tool although, according to the International Detention Coalition, it is also used as a "political tool" (IDC 2015: 10). It is used to limit the entry of migrants to the territory, to house non-citizens with no valid visa while their status is assessed and/or resolved, and to ensure compliance with negative outcomes of visa applications, including deportation. In this sense, it is part of a system for managing the entry and exit of non-citizens to and from the territory. Detention is also sometimes used by governments to address broader social and political issues, such as deterring future asylum seekers and irregular migrants, to provide a sense of control over borders for citizens and to respond to political pressure. In this sense, detention is a symbolic act used to convey a message to a range of people.

The Council of Europe Commissioner for Human Rights has noted that the migration crisis is more of a political crisis, but has also deplored the criminalisation of migrants and asylum seekers, which is done by establishing offences related to illegal crossing of the border fence and using a specific fast-track criminal procedure applicable to these offences that is problematic in terms of fair trial standards. "Migrants and asylum seekers are not criminals and should never be treated as such" Nils Muižnieks has said, urging the authorities to remove the newly created criminal offences related to migration (Council of Europe Commissioner for Human Rights 2015).

There are many different forms of immigration detention, including prisons, closed camps, detention facilities and airport transit zones, but in all such places freedom of movement is restricted and the only opportunity to leave the limited area seems to be deportation or recognition of refugee status. Any form of management that is designed to substantially restrict or completely deny freedom of movement to migrants is counted as immigration detention.

6. Among the main terrorist attacks in Europe organised by al-Qaeda and "Islamic State" are: 11 Mar. 2004 in Madrid; 7 Jul. 2005 in London; 13 Nov. 2015 in Paris; 22 Mar. 2016 in Brussels.

7. The term "hotspot" is used mainly for a designated place, typically in the border areas of a state, where reception, registration and screening of irregular migrants takes place (European Parliament 2016a).

8. According to development milestones, US CDC (2017), positive parenting.

9. For the age categories, see US CDC (2017), positive parenting/preschoolers.

According to the UN Convention on the Rights of the Child, immigration detention for children should be used only as a last resort and where it is necessary, always on legitimate, reasonable and proportionate grounds and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors (UN Human Rights Committee 2014). Legitimate grounds for detention are the same for all migrants: when someone presents a risk of absconding from future legal proceedings or administrative processes, or when someone presents a danger to public security. In all cases, immigration detention should be used only after having considered non-custodial, community-based alternatives to detention (ATDs) in each individual case (EU FRA 2015; UNHCR 2012).

Unfortunately, the use of unnecessary immigration detention is growing worldwide (IDC 2014). In many countries, it is among the most problematic areas of public administration. Many human rights violations can and do occur in these circumstances, and the physical, mental and psychological impacts of even very limited immigration detention are considerable for children.

Children continue to be held in administrative detention centres either as unaccompanied minors (UAMs) or with their parents in closed camps or detention centres with:

- ▶ conditions in most countries falling below international human rights standards;
- ▶ restrictions on access to asylum for children who need protection from serious human rights abuses; and
- ▶ serious protection problems for UAMs.

As presented below, under international and European law, governments do have the right to protect their national sovereignty. However, international law also provides for the right to seek and enjoy asylum as it protects any person against arbitrary and unlawful detention. In many cases, irregular migrants are immediately detained on discovery, and in some cases irregular entry may be a criminal offence punishable under national law.

Men, women and children, the elderly and disabled – the great majority of whom have committed no crime, but have entered and/or are residing illegally in the country – are held in removal centres, immigration detention centres, prisons, police stations, airports, hotels, camps, ships or containers, pending a final decision in their case or removal from the country. This (decision on) removal can take months or years to effect because of bureaucratic problems. The reasons for which a migrant may be held in detention include:

- ▶ to effect removal:
 - detained for illegal entry at the border (waiting to be “pushed back”);
 - detained until deported for illegal residence (if arrested on the mainland);
 - detained as a consequence of a criminal offence followed by conviction, waiting to be deported;
 - detained pending a final decision in an application for asylum or other request to remain in the country;
- ▶ to establish a person’s identity or basis of claim;
- ▶ to ensure compliance, where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release, i.e. a risk of absconding;
- ▶ to prevent harm, where there is a risk of harm to the migrant or a risk to public security; and
- ▶ as part of a fast-track detention system whereby asylum seekers can be detained if their claims appear straightforward and capable of being decided quickly.

There are also occasions when the reasons for a migrant’s detention change while he or she is already being held in detention.

Border officials in many countries may detain irregular migrants:

- ▶ upon arrival;
- ▶ upon presentation to an immigration office within the country;
- ▶ during a check-in with immigration officials;
- ▶ once a decision to remove has been issued;
- ▶ and after a prison sentence or following arrest by a police officer.

The impact of immigration detention on children

After more than ten years of research in Europe and beyond, Human Rights Watch has documented the serious violations of children’s rights arising from immigration detention of children (see Human Rights Watch 2016; Farmer 2013; Human Rights Watch 2008).

According to the Parliamentary Assembly of the Council of Europe (PACE 2014b) “children are first and foremost children and should never be detained for immigration purposes, since immigration detention of children has a detrimental impact on their mental and physical health” (PACE2014b; PICUM 2015: 24). The detention of children not only violates their rights and deprives them of access to general education and proper health care, but it also exposes children to physical, sexual and emotional violence (Cappelaere

2005). Unsatisfactory reception conditions in most member states generate violence, including sexual violence, especially against migrant girls.

In practice, when identity documents have been destroyed or forged, the national authorities may choose to detain a child (even an asylum seeker) while the child's identity is being established. In many countries, separated children are routinely denied entry or detained by border or immigration officials and given no opportunity to seek asylum.

This denial of rights has two aspects: firstly, the denial of applying for asylum, which puts children in danger of *refoulement*, and secondly, the harm that detention may cause to children in cases where they are not immediately subject to *refoulement*, but are detained until removed from the country (IOM 2008b: 33).

Unfortunately, in many member states, children are treated in the same way as adults and are also detained upon arrival. In such cases, children may have difficulty in understanding the situation and consider it as a "punishment". The situation may be aggravated if children are denied the right to information about their detention and their right to be represented by a lawyer in immigration proceedings conducted in a language they understand.

Undocumented children may be arbitrarily detained, held in cells with adults and subjected to mistreatment by police and other authorities and also by inmates. They are most often detained with adults who are not related to them and they may even be detained with criminals.¹⁰ Children in detention may suffer different types of violation of their basic rights, including a lack of basic medical care. They are often held in conditions that are below international standards for appropriate facilities for children deprived of their liberty (IOM 2008b: 31). Much of the research on detention centres has focused on the fact that these centres are usually ill-equipped for housing children (IOM 2008b: 31). Conditions for detained children can be even inhumane and degrading, as it is reported that in many cells it is too hot and dirty, which can cause illnesses (Farmer 2013). In some countries, the food regime is not adapted to children. In some detention facilities, boys who are detained in small cells together with adult men may develop health problems due to the smoking of adults.

10. On 30 Apr. 2014, the Advocate General of the EU Court of Justice, Yves Bot, issued an opinion on the detention of immigrants with ordinary prisoners. The Advocate General supported the view that migrants should not be detained with prisoners or in prison facilities, even with their consent. See summary in: Advocate General's Opinion in Joined Cases C-473/13 and C-514/13 and in Case C-474/13, Court of Justice of the European Union, Press Release No. 68/14, Luxembourg, 30 Apr. 2014.

While some migrants, including families, are released within hours or days,¹¹ others may be held for extended periods, especially asylum seekers until their claim is being processed and also those denied asylum who can be detained until deportation is executed. The problem is worse when deportation cannot be executed, e.g. in countries where flights cannot be operated due to embargo or war, and then migrants may remain in detention for an indefinite period of time.

Detention therefore impacts directly on the physical health of children, but also on their psychological health (Keller et al. 2003; IDC 2012: 48-9). Children experience psychological deterioration connected to the prolonged, ill-defined wait in immigration detention. The duration of the confinement in a closed space also impacts the social life of the child. The research on "vulnerability in detention" conducted in the EU member states shows that minors have great difficulty in coping with the conditions of detention. "Slightly over half the children admit that they have experienced a change in the level of severity of the difficulties imposed by detention [and] 85% [of those] say that such difficulties have worsened. For most minors the difficulties of detention are a daily occurrence. Almost three quarters do not know when they will be released, which causes very high levels of stress, tension, anxiety and self-uncertainty" (JRS 2010: 82)

It should be noted that, according to the Havana Rules, placement in any type of closed institution should be considered as a deprivation of liberty (UNGA 1990b). Therefore, even temporary placement of a child in a social or educational institution should be considered a deprivation of liberty and may have negative impact on their resocialisation (UNICEF-PRI 2012).

When children in families are subject to immigration detention, states should ensure that the children are not separated from their parents against the children's will. However, until states conform to the international guidelines and end immigration detention of children, they should at least impose strict time limits to the child's detention in order to minimise the loss of education and negative impact on their physical, psychological, emotional and mental health.

11. See below, pages 19-25, for the legal provisions and duration of detention in member states.

International standards on detention of children

Under international and European law, governments have the right to protect their national sovereignty. However, international texts and guidelines contain a number of restrictions on this right and its application, so that it does not violate the human rights of migrants who may cross borders illegally. The European Court of Human Rights also has considerable case law on the issue of immigration detention.

International principles against detention of children

The applicable principles for the protection of children from detention have been enshrined in numerous international and regional human rights instruments, such as:

- ▶ The International Convention on the Rights of the Child of 1989;
- ▶ The UN Rules and Guidelines for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) of 1990;
- ▶ The Geneva Convention of 28 July 1951 relating to the Status of Refugees, and the Protocol of New York of 31 January 1967 on the Status of Refugees;
- ▶ The 2012 UNHCR Guidelines on applicable criteria and standards relating to the detention of asylum seekers and alternatives to detention;
- ▶ The 1994 UNHCR Refugee Children – Guidelines on Protection and Care;
- ▶ The 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles);
- ▶ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990, adopted by the General Assembly of the United Nations;
- ▶ Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1596 (2003) on the situation of young migrants in Europe;
- ▶ PACE Recommendation 1686 (2004) on human mobility and the right to family reunion;
- ▶ The final Declaration and Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, Poland, 16-17 May 2005), and in particular

Part III.2 of the Action Plan entitled “Building a Europe for children”;

- ▶ PACE Recommendation 1703 (2005) on protection and assistance for separated children seeking asylum;
- ▶ PACE Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return;
- ▶ PACE Recommendation 1985 (2011) on undocumented migrant children in an irregular situation: a real cause for concern;
- ▶ PACE Resolution 2020 (2014) on the alternatives to immigration detention of children.

A series of principles also derive from international texts applying to detention in general, such as:

- ▶ The 1955 UN Standard Minimum Rules for the Treatment of Prisoners;
- ▶ The UN procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners (adopted by Council Resolution 1984/47);
- ▶ The 1990 UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines);
- ▶ The 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);
- ▶ The 1990 UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules);
- ▶ The UN Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (Economic and Social Council Resolution 2002/12);
- ▶ The 1997 UN Guidelines for Action on Children in the Criminal Justice System (Recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997);
- ▶ The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders – Resolution 65/229 adopted by the General Assembly on 16 March 2011 (the Bangkok Rules).

Together with the above, similar principles also derive from other, more general human rights texts, such as:

- ▶ The International Covenant on Civil and Political Rights of 1966 (ICCPR);

- ▶ The Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights); and
- ▶ The European Charter of Fundamental Rights.

The International Convention on the Rights of the Child (CRC) is one of the most widely ratified instruments and constitutes the most all-encompassing basis for the protection of children, including children who are outside their state of origin.

In particular, the following provisions are related to the detention of children: Article 2 (protection of children from all forms of discrimination or punishment); Article 3 (the best interests of the child as a primary consideration); Article 9 (right of children not to be separated from their parents against their will); Article 22 (appropriate protection and assistance to minors who are asylum seekers or recognised refugees, whether accompanied or not); and Article 37(b) (detention of minors only as a last resort and for the shortest appropriate period of time, and always properly justified). Article 37 also mandates that all children deprived of their liberty (including children in immigration detention) have the right to have prompt access to legal and other appropriate assistance; to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority; and to have a prompt decision (UNICEF 2002: 540).

It needs to be underlined that Article 22 of CRC is the only article which directly refers to UAMs (Detrick 1992).

The fundamental international principles for the treatment of children deriving from the Convention of the Rights of the Child are the following:

1. the best interests of the child;
2. non-discrimination;
3. de-institutionalisation;
4. legality of treatment;
5. protection of the child from physical, sexual and emotional violence;
6. separation from adults;
7. confidentiality;
8. individualisation of treatment;
9. reintegration.

The above principles apply mainly to children in conflict with the law, but also to those whose only "crime" is to have crossed a border illegally and/or to reside illegally in a country.

As underlined by international texts (UNODC/ Interagency Panel on Juvenile Justice 2011; UNODC 2006; UNICEF/UNODC2006), interventions in the

best interests of children should focus on the needs of children rather than their deeds, and should be based on the involvement of social workers assisting the justice system in a professional capacity. All actions taken should be assessed according to the standards of the child's best interests, and the system should be responsive to the child's care and developmental needs.

According to the Commissioner for Human Rights of the Council of Europe, "the principle of the best interest of the child fully applies to migrant children, as do all other fundamental children's rights. Migrant children should be treated on an individual basis, with consideration for their circumstances, and should be able to influence their situation by expressing their own views" (Council of Europe Commissioner for Human Rights, 2010b). The Commissioner also emphasised that "as a principle, migrant children should not be subjected to detention. Moreover all detentions of children must be strictly and closely monitored" (Council of Europe Commissioner for Human Rights, 2010b).

Specific attention should be given to the rights (and needs) of girls in detention and the protection of motherhood in detention and the special treatment of young mothers and babies in such cases.

It is also important to underline that Article 37 of the CRC prohibits torture, cruel treatment or punishment,¹² and Article 40 of the CRC requires respect for the dignity of any child. The prohibition of ill-treatment applies to children deprived of their liberty for any reason (OHCHR 2003: 412).

Acts which may not be considered to constitute unlawful treatment of an adult might be unacceptable in the case of children because of their specific sensitivity and particular vulnerability (OHCHR 2003: 412).

With regard to asylum seekers, according to UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers "detention is inherently undesirable (UNHCR 2012). This is even more so in the case of vulnerable groups such as single women, children, UAMs and those with special medical or psychological needs" (UNHCR1999). The UNHCR Guidelines apply to all asylum seekers who are being considered for detention, or who are in detention or detention-like situations. Detention is considered here as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave

12. For the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, see the Istanbul Protocol submitted to the UN High Commissioner for Human Rights on 9 Aug. 1999 (OHCHR 2004).

this limited area is to leave the territory (UNHCR 1999: Guideline 1).

A key provision in the issue of child detention is Article 31 of the 1951 Geneva Convention. Article 31 exempts refugees coming directly from a country of persecution from being penalised on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This article also provides that contracting states shall not apply, to the movements of such refugees, restrictions other than those which are necessary, and that any restrictions shall be applied only until such time as their status is regularised, or they obtain admission into another country. This provision banning unnecessary restrictions applies not only to recognised refugees but also to asylum seekers pending determination of their status, as recognition of refugee status does not make an individual into a refugee, but declares that person to be one. Conclusion No. 44 (XXXVII) of the Executive Committee on the Detention of Refugees and Asylum-Seekers examines more specifically what is meant by the term “necessary”. This Conclusion also provides guidelines to states on the use of detention and recommendations as to certain procedural guarantees to which detainees should be entitled.

Unfortunately, some member states do not apply the above-mentioned principles, and subject children to immigration detention. According to the UN Special Rapporteur on the Human Rights of Migrants, the principle that migrant children should not be subjected to detention, or only in exceptional circumstances as a last resort and for the shortest period of time, should be explicitly protected (UNGA HRC 2012).

At the level of the Council of Europe and in the context of the European Convention on Human Rights, the special protection of children and unaccompanied children in migration derive from Article 3 (prohibition of torture and inhuman or degrading treatment or punishment), Article 5 (right to liberty and security) and Article 8 (right to respect for private and family life), but also from the principles deriving from the case law of the European Court of Human Rights, as mentioned below (see overview in next section on this page).

In addition, both the Committee of Ministers and the Parliamentary Assembly have established a series of principles on the issue of the detention of children and unaccompanied migrant minors. Regarding asylum seekers, the Committee of Ministers has established that “[c]hildren, including unaccompanied minors, should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance” (Council of Europe 2009, Guideline XI.2). See also Council of Europe Commissioner for Human

Rights (2010b), which advises states to establish and implement “life projects” for all unaccompanied migrant minors, as recommended by the Committee of Ministers (Council of Europe 2007).

The PACE has adopted Resolution 1810 (PACE 2011a) on unaccompanied children in Europe: issues of arrival, stay and return; Recommendation 1985 on undocumented migrant children in an irregular situation: a real cause for concern (PACE 2011c); and Resolution 2020 (PACE 2014c) on the alternatives to immigration detention of children, which deal with the status and protection of migrant children and emphasise the following:

- ▶ a child should, in principle, never be detained; where there is any consideration of detaining a child, the best interest of the child should always come first;
- ▶ if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;
- ▶ if detention does take place, it must be in separate facilities from those for adults, or in facilities meant to accommodate children with their parents or other family members, and the child should not be separated from a parent, except in exceptional circumstances;
- ▶ unaccompanied children should, however, never be detained;
- ▶ no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;
- ▶ where a doubt exists as to the age of the child, the benefit of the doubt should be given to that child.

Overview of case law relating to the immigration detention of children

In light of the absolute nature of Article 3 of the European Convention on Human Rights, the European Court of Human Rights has stressed the positive obligation of states to protect and provide care for extremely vulnerable individuals, such as UAMs,¹³ regardless of their status as irregular migrants, nationality or statelessness. These principles have also been enshrined by the Committee on Migration, Refugees and Displaced Persons (PACE 2011b, paragraphs 5.2 and 5.15).

The Court has posed a presumption of vulnerability of children, considering that when authorities are placing children in detention, they are neglecting the consideration that children are suffering anguish and feelings of inferiority, which are likely

13. *Rahimi v. Greece*, 5 Apr. 2011, paragraph 109 (on arbitrary detention of an unaccompanied minor).

to hinder their development.¹⁴ The European Court of Human Rights considers that detention exposes children to a level of suffering beyond the threshold of ill-treatment set by Article 3 of the Convention on Human Rights.¹⁵ The Court, interpreting Article 3, which also prohibits torture as well as any cruel, inhuman or degrading treatment,¹⁶ has considered detention to be “inhuman” treatment, because it was applied with premeditation and for hours at a stretch and had caused “if not actual bodily injury, at least intense physical and mental suffering”. Also, the Court considered detention “degrading”, because it was “such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance”.¹⁷ According to the Court, the prime characteristic of the positive obligation is that it requires national authorities to take the necessary measures to safeguard a right or, more precisely, to adopt reasonable and suitable measures to protect the right of an individual. The European Court recalls also that the best interest of the child implies that states ensure, in so far as possible, family unity and use detention only as a measure of last resort.

According to the European Court of Human Rights case law,¹⁸ detention should not exceed the reasonably required time for the purpose pursued (Ktistakis 2013: 37-41), otherwise it can be considered as arbitrary. In the examined case,¹⁹ a 5-year-old UAM was detained for two months in a centre with adults and with no person assigned to take care of her. The Court noted that “[n]o measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose”. Noting the inevitable distress and serious psychological effects that such conditions would necessarily have on the child, the European

Court concluded that the authorities had “demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment”. In addition, the authorities failed to advise the child’s mother of her daughter’s deportation, which she discovered only after the removal had been executed. The Court had no doubt that this disregard of the authorities caused the applicant deep anxiety, which led the Court to conclude that the requisite threshold of severity had been attained in the case.²⁰ Thus, the European Court held that the conditions of detention of the UAM had led to a violation of the prohibition of inhuman and degrading treatment regarding both the child and her parent.

Furthermore, the European Court of Human Rights has enshrined the principle that the detention of children is a measure of last resort and limited to very exceptional circumstances where it would be justified by the best interest of the child. Should the authorities fail to demonstrate that this is the case and that they examined all alternatives to deprivation of liberty, the minor’s detention will amount to arbitrariness and violate the right to liberty and security of Article 5. It has also found that detaining a mother in a place manifestly inadequate for her children was unlawful and violated the protection against arbitrariness of Article 5.1(f) of the European Convention on Human Rights.²¹

In this regard, the Court has further insisted on the importance of reducing to a minimum the detention of families with children. Considering that it is crucial to preserve the family’s unity, while avoiding depriving minors of their liberty, the European Court found that, in the absence of reasons to suspect that the family would try to evade the authorities; the measure was disproportionate and violated the right to respect for family life guaranteed by Article 8. Similarly, the Court found that the deportation of an unaccompanied foreign minor constituted a violation of Article 8, due to the positive obligation the authorities had to facilitate family reunification and their failure to do so.

Lastly, according to the principles of the Council of Europe, detained migrant children should enjoy the same right to education as children in liberty. This right should be implemented in accordance with the principle of non-discrimination, and is guaranteed by Article 2 of Protocol No. 1 of the Convention.²² “In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education

14. *Kanagaratnam and Others v. Belgium*, 13 Dec. 2011 related to the case of minors detained with their mother in a closed transit centre. The Court held the centre to be inappropriate for the needs of children because of the conditions of detention, as described in various national and international reports.

15. *Kanagaratnam and Others v. Belgium*, 13 Dec. 2011, paragraphs 67-69. The court decided on the presumption of vulnerability of children in detention and violation of Article 3 of the Convention due to the feelings of anguish and inferiority they were exposed to, endangering their development.

16. The concept of “torture” was initially defined in the judgment *Ireland v. the United Kingdom*, of 18 Jan. 1978, Series A No. 25, p. 66, §167. See also *Adkoy v. Turkey*, judgment of 18 Dec. 1996, *Reports of Judgments and Decisions*, 1996-VI, p. 2279; *Selmouni v. France*, judgment of 28 Jul. 1999, *Reports of Judgments and Decisions*, 1999-V, §§96-106.

17. *B. v. France*, judgment 25 Mar. 1992, Series A No. 232-C, p. 87; *Ireland v. the United Kingdom*, 18 Jan. 1978, Series A No. 25, p. 66; *Soering v. the United Kingdom*, judgment of 7 Jul. 1989, Series A No. 161, p. 39.

18. See *Saadi v. the United Kingdom* (2008), §74.

19. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 Oct. 2006.

20. *Ibid.*, §§50, 58 and 70.

21. *Kanagaratnam and Others v. Belgium*, 13 Dec. 2011, §§94-95 (detention of children with their mother in inadequate conditions for them).

22. Article 2 says “[n]o person shall be denied the right to education”, Protocol No. 1 of the Convention.

and teaching in conformity with their own religious and philosophical convictions” (European Court of Human Rights 2015).

Council of Europe measures regarding detention of children

The Council of Europe has repeated that the principles and minimum standards of international law in matters of detention apply to all persons detained for the purposes of immigration control in the same way as they apply to individuals held on other grounds (Council of Europe 2016: 8, point 32). The Committee of Ministers has set out the procedural safeguards to which persons in detention are entitled, including the right to be informed as quickly as possible in a language they understand, of the legal and factual grounds for their detention and the remedies available to them, as well as the possibility of immediately contacting a lawyer, a doctor and another person of their choice to inform of their situation (see Council of Europe 2005).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has described in detail its position in relation to safeguards and conditions for foreign nationals deprived of their liberty under aliens’ legislation (CPT 2015d: 69). The CPT has also underlined the importance of an effective legal remedy for detained irregular migrants enabling them to challenge the lawfulness of detention before a judicial body, which must quickly reach a decision. It has also underlined the importance of independent monitoring of the detention facilities for irregular migrants as an element for the prevention of ill-treatment and ensuring satisfactory conditions of detention. When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; all efforts should be made to allow the immediate release of the unaccompanied or separated children from a detention facility and their placement in more appropriate care. Nevertheless, “as a principle, migrant children should not be subjected to detention” (Council of Europe Commissioner for Human Rights 2010b). Taking into account the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly when they are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives (CPT 2009a: 6). In addition, steps should be taken to ensure a regular presence and individual contact with a social worker and a psychologist in detention establishments.

The Parliamentary Assembly has underlined several times in its recommendations and resolutions the primary consideration that member states should give to the best interests of the child and has called for the prohibition of immigration detention of

children and for the adoption of alternative measures in: Recommendation on the situation of young migrants in Europe; Recommendation 1703 (2005) on protection and assistance for separated children seeking asylum; Resolution 1707 (2010) on detention of asylum seekers and irregular migrants in Europe; Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return; Resolution 2020 (2014); and Recommendation 2056 (2014) on alternatives to the immigration detention of children. In its Resolution 2073 (2015) on countries of transit: meeting new migration and asylum challenges, PACE expressed its concern about the incoherent European Union response that revealed a reluctance to accept protection responsibilities for migrants and refugees.

In 2016, with its Resolution 2109²³ on the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016, PACE noted (in §§2.2/2.3 of Resolution 2109) that this agreement raises several serious human rights issues relating to both its substance and its implementation, now and in the future, in particular (among other issues):

- ▶ detention of asylum seekers in “hotspots” on the Aegean islands may be incompatible with the requirements of the European Convention on Human Rights (European Treaty Series No. 5), due notably to procedural failures undermining the legal grounds for detention and inadequate detention conditions;
- ▶ children and vulnerable persons are not systematically referred from detention to appropriate alternative facilities.

For many of the issues raised, the Assembly (in §§4.1/4.2 of Resolution 2109) recommended (PACE 2016c) that Greece, as an implementing party of the EU–Turkey Agreement, and the European Union, insofar as it provides relevant operational assistance to the Greek authorities, should:

- ▶ refrain from automatic detention of asylum seekers and ensure strict adherence to the requirements of national law, the European Convention on Human Rights and European Union law concerning both the grounds for and conditions of detention, with adequate provision for alternatives where detention is not justified or otherwise inappropriate, including following the expiry of time limits; and also
- ▶ systematically ensure that children and vulnerable persons are promptly excluded from detention and referred to appropriate alternative facilities.

23. Assembly debate and text adopted on 20 Apr. 2016 (15th Sitting). See also PACE (2016c). The voting results are interesting: 58 members voted in favour, 47 against, and 7 abstained.

States use a wide range of reasons to justify detention of irregular migrants. However, the Council of Europe has underlined that they have an obligation to establish a presumption in favour of liberty and develop alternatives, while applying non-custodial and less restrictive measures.

In January 2016, Mr Tomáš Boček was appointed as the Special Representative on Migration and Refugees of Council of Europe Secretary General (SRSG), with one of his priorities being to improve the situation of the high number of refugee and migrant children currently in Europe.²⁴ The SRSG's Thematic Report on migrant and refugee children called for urgent measures to find alternatives to the detention of children and guarantee minimum living conditions in camps (SRSG 2017). The main concerns identified

in this report are to be addressed by the recently prepared Council of Europe Action Plan on protecting refugee and migrant children in Europe, adopted at the 127th Session of the Committee of Ministers in Nicosia on 19 May 2017 (Council of Europe 2017a). The Action Plan's second pillar, Providing Effective Protection specifies the objective of avoiding resort to the deprivation of liberty of children on the sole ground of their immigration status (see Council of Europe 2017b). In this respect, one of the proposed immediate actions is a guide for monitoring places where children are deprived of their liberty as a result of migration procedures, to be issued in the framework of the Parliamentary Campaign to End Immigration Detention of Children.



24. See www.coe.int/en/web/portal/special-representative-secretary-general-migration-refugees-tomas-bocek.

National immigration detention practices

European and non-European countries have developed different practices that allow detention of irregular migrants, including children. It needs to be noted that while policies of immigration control increase, government interest in alternatives (see below, chapter Alternatives) to detention has also increased; a number of member states have introduced changes to their legislation on migration detention. However, even if alternative measures are provided by law, in practice they are not always implemented, and many states resort more often to detention (Human Rights Watch 2016).

In general, there are non-EU member states of the Council of Europe that allow immigration detention of children, such as Azerbaijan, Albania, Bosnia and Herzegovina, Georgia, Liechtenstein, Republic of Moldova, Norway, Russia, San Marino, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine (most of them not having separate provisions on detention for adults and detention for minors); member states that do not apply immigration detention to children, such as Andorra, Armenia and Iceland; and member states that prohibit immigration detention of children below a certain age (and consequently allow detention above that age), such as Switzerland that prohibits detention of children below the age of 15 and Montenegro that prohibits detention of children below the age of 16. A more detailed presentation of the national framework is made below.

National provisions on immigration detention

There are non-EU member states where immigration is less considerable than others, such as Albania²⁵ or the Republic of Moldova, where immigration is negligible (UNGA HRC 2012: 16) in comparison with the large number of migrants leaving the country. However, even countries without considerable migration influx have provisions allowing immigration detention of children.

From the elements gathered for this study it appears that most national provisions present considerable

flaws in the protection of migrant children. Indeed, one of the major issues of concern is that most member states lack child-specific legislation in the area of immigration detention. Furthermore, there are member states where the law allows immigration detention of children as “derogation”, whereas in practice it appears to be the rule. Even states which expressly provide for alternatives (see below) have provisions which are often vague, leaving room for arbitrary implementation.

The trends in national legislations (see Appendix 1, Table 1) show that there are:

1. member states applying detention to all migrants, with no distinction of age;
2. member states that envisage immigration detention of children as “derogation”;
3. member states that do not have specific rules on immigration detention, but which in practice detain immigrants with no distinction of age;
4. member states that envisage a restriction of movement or placement in closed centres; and
5. member states that do not apply immigration detention to children or that exclude children below a certain age from detention.

Member states applying detention to all migrants with no distinction of age

Azerbaijan’s legislation²⁶ provides for the placement of foreigners together with their family members in the detention centres for irregular migrants under the State Migration Service. This placement is “under individual request” until implementation of a decision on administrative expulsion or (if the person has applied for asylum) until a decision granting or refusing the refugee status. The legal provisions expressly mention that foreigners shall be placed into the centre “voluntarily”, giving the impression that it is an open centre. However, from a reading of the provisions it seems that this centre could easily be compared to (or confused with) a correctional facility of high security. In particular, point 3.7 of

25. The UN Special Rapporteur is concerned at protection gaps in Albanian law and practice in the current response to irregular migration and immigration detention, with negative consequences also for a human rights based-asylum and refugee regime (UNGA HRC 2012: 16).

26. Decree No. 047 of 2012, Guidelines on Managing Detention Centres for Irregular Migrants under the State Migration Service of the Republic of Azerbaijan, points 2.1 and 2.2.

these guidelines gives no doubt that this centre is no different from any other correctional facility as it provides that: "Detained foreigners shall have daily 3 (three)-hour walk in a designated outdoor area of the Centre's courtyard". Point 3.11 states that records shall be made in the log book on the basis of permits presented by every foreigner placed voluntarily who enters and exits the centre through the checkpoint located at entrance to the centre. However, there is no indication on what grounds a migrant may obtain that 'permit' to exit the centre.

Particularly worrying is that point 3.19 of the legislation allows the use of "physical force and of special devices against foreigners who violate internal rules" without exception of age or gender and so, without theoretically sparing minors (boys and girls) from that use, contrary to international rules. According to Rule 63 of the Havana Rules, recourse to instruments of restraint and to force for any purpose should be prohibited (UNGA 1990b). However, point 2.14 of the law provides that, when the migrant is leaving the centre they shall be provided with a "reference paper" that proves their placement and detention in the centre.

The 2006 Law on Foreigners of "**the former Yugoslav Republic of Macedonia**" foresees immigration detention in closed centres –as an administrative measure– for foreigners, including children, with orders of removal, removal by force or expulsion, and for foreigners readmitted on the basis of international agreements.

In particular, a foreign national may be detained by the Ministry of Internal Affairs for a maximum of 24 hours for illegal entry onto the national territory. If their deportation cannot be enforced during that time limit, a temporary decision on the detention and accommodation at the Reception Centre for Foreigners in Skopje is issued by the same ministry. An UAM may also be detained in the same reception centre, but in a special unit (separated from adults).

In addition, other vulnerable categories of foreign nationals – such as victims of human trafficking – can also be detained at the Reception Centre pending their identification and issuance of identity documents. However, there is no information on the existence of screening procedures of irregular migrants for eventual identification of such victims.

In the **Republic of Moldova** irregular immigration is under-reported as numbers of immigrants are rather low, knowing that the Republic of Moldova is a net emigration country (Migration Policy Centre 2013; IOM 2012: 89). The latter report shows an 8.3% growth in foreigners' numbers in the Republic of Moldova from previous years. According to an interview with the UNHCR, there are around 26 000 migrants in the Republic of Moldova and approximately 100 irregular migrants enter the country each year. These data

coincide with the data from the Population State Register that show that in 2012 there were 26 200 foreign citizens residing in the Republic of Moldova, which is around 0.6% of the population Migration Policy Centre (2013).

Foreign citizens and stateless persons in an irregular situation receive expulsion orders and are requested to leave the territory. As reported, shortening the period of stay in the country has been one of the practices for tackling migration legislation violations (IOM 2008a: 29).

Normally, any person who enters irregularly in the Republic of Moldova or who is arrested without a residence permit is asked to leave the country within 5 days. However, if the person does not obey, they are referred to a court that decides on their placement in public custody for up to six months with the possibility of a court renewal of one more month. There is no provision for different treatment of migrant children in an irregular situation. There is only one migrant accommodation centre for the entire territory of the Republic of Moldova, created in 2004 with a capacity for 200 migrants.²⁷

If a person applies for asylum, the procedure may last six months (and may be extended to nine months). During that time, this person remains in detention (open asylum centres are envisaged by the new draft Asylum Law that is under adoption). The asylum seeker has the right to appeal against the detention decision in court. However, applications on release are rarely accepted. In practice, unlike migrants, asylum seekers are released after 30 days of detention. Persons who are denied refugee status and who choose voluntary repatriation, remain under the observation and monitoring of the Migration and Asylum Bureau until their departure from the Republic of Moldova, which in most cases means that they stay detained.

In **Norway**, the Immigration Act²⁸ and the Criminal Procedure Act²⁹ contain provisions regarding immigration detention and therefore permit the administrative detention for immigration control purposes.

However, there are no specific provisions regulating immigration detention of children. Under the Immigration Act, a foreign national may be arrested and remanded in custody. According to the

27. For details, see:

www.iom.md/index.php/migrants-accommodation-centre.

28. Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act). Available at the site of the Norwegian Ministry of Justice and Public Security: www.regjeringen.no/en/dokumenter/immigration-act/id585772/. This is not an official translated version of the law, and that there may have been changes to the law since it was translated.

29. Norwegian Criminal Procedure Act. The English version is available at the site of UNODC: www.unodc.org/res/cld/document/nor/2006/the_criminal_procedure_act_html/The_Criminal_Procedure_Act.pdf.

preparatory works,³⁰ these provisions are applicable to both adults and children. However, the preparatory works for the proviso³¹ emphasise that detention of children is generally not desirable. A foreign national who is arrested and remanded in custody shall, as a general rule, be placed in a detention centre for foreign nationals. This is regarded as deprivation of liberty and can be compared with a prison. Trandum detention centre is the only closed detention centre in Norway. Persons detained at this facility generally fall into one of the two following categories: those whose identity needs to be established and persons with risk of not leaving Norway voluntarily or with assistance (European Migration Network 2015).

A coercive measure may only be applied where there is "sufficient reason to do so".³² Only the Criminal Procedure Act prohibits detention of persons under 18 years, unless according to §174 it is "absolutely necessary". Alternatives to immigration detention, as mentioned below (see page 50, *The use of alternatives in non-EU member states*), do exist and apply to migrants (without distinction of age) based on individual assessment.

In **Russia**, matters of foreign citizens' status, including detention and deportation, are covered by the federal laws³³ which provide for the detention of irregular migrants, including minors who are to be deported.

Migrants awaiting deportation are kept in special immigration centres; in the various regions more than 80 such centres are in operation.³⁴

As reported in reply to ECPRD questionnaire 2613, the majority of detained persons in the centres are adult

foreign citizens, though "minors can be kept together with their parents, grandparents, adult brothers or sisters". Nevertheless, the Federal Migration Service (FMS) of Russia³⁵ reports that foreign citizens who are subject to administrative expulsion from the Russian Federation are confined in the premises of internal affairs' bodies and correctional facilities (see below, under Statistical data, on page 27).

The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) completed an ad hoc visit to the North Caucasian region of the Russian Federation in February 2016. In the course of the visit, the CPT's delegation returned to the republics of Dagestan and Kabardino-Balkaria in order to review the implementation of recommendations made after previous visits regarding the treatment of persons deprived of their liberty by law enforcement agencies. For this purpose, the delegation interviewed numerous detained persons who had recently been, or were still, in the custody of the police or other law enforcement agencies. The delegation also reviewed conditions of detention in pre-trial remand establishments (known as SIZOs) in both republics.³⁶

The legislation prohibits restriction of freedom of movement only for asylum seekers and refugees, but the Federal Law on Refugees and Asylum Seekers and persons provided with temporary asylum (Articles 6 and 8) also provides for their placement in a closed "temporary placement centre" together with members of their family. Children are also placed in such centres that restrict freedom of movement (see below, *Statistical data on detention of migrant children*) and there is no information on how long the "temporary placement" may last.

In **Turkey**, immigration detention in Turkey is regulated by (i) 2013 Law on Foreigners and International Protection (LFIP) and (ii) the Temporary Protection Regulation (TPR). Under these provisions there are two types of administrative detention (making no distinction for children): (i) detention pending review of an international protection application, and (ii) detention pending removal. For temporary protection beneficiaries, only the latter is applicable.

Detention for up to 30 days pending review of an international protection application is authorised (but not legally required) as an exceptional measure in enumerated circumstances, but mainly if alternative measures are insufficient. The exhaustive list of circumstances includes a reference to "constituting

30. Proposisjon til Stortinget (forslag til lovvedtak). Endringer i utlendingsloven (utvidet adgang til fengsling mv.) Proposisjon No. 138L (2010-2011), p. 54. Available at the site of the Norwegian Ministry of Justice and Public Security: www.regjeringen.no/contentassets/83e2be9d23984bcc8b7d81b3669e47f1/no/pdfs/prp201020110138000dddpdfs.pdf.

31. Om lov om utlendingers adgang til riket og der es opphold her (utlendingsloven), Odelstingsproposisjon Nr. 75 (2006-2007), pp. 345-6, point 17.2.2.6. See: www.regjeringen.no/contentassets/f0a671a54de9453a8409a3abc04ed4c8/no/pdfs/otp200620070075000dddpdfs.pdf. Also, Om lov om endring i utlendingsloven (utlendingsinternat), Odelstingsproposisjon Nr. 28 (2006-2007) p. 14. See: www.regjeringen.no/contentassets/6d4ae61f735c4d82a8d08018f68264ef/no/pdfs/otp200620070028000dddpdfs.pdf.

32. Section 99, §1 of the Immigration Act.

33. Law No. 195-FZ of 30 Dec. 2001 on the legal status of foreign citizens in the Russian Federation; and Law No. 114-FZ of 15 Aug. 1996 related to orders to enter and exit the Russian Federation, as well as a number of resolutions of the government, and decrees by the Federal Migration Service.

34. Special facilities created in the form of a federal public institution exist and function in 17 regions of the Russian Federation: the North Ossetia–Alania and Komi republics, Kamchatka and Khabarovsk territories, Bryansk, Kostroma, Pskov, Yaroslavl, Vologda, Kurgan, Novgorod, Rostov, Novosibirsk, Sakhalin and Astrakhan oblasts, and the Yamal-Nenets and Khanty-Mansi autonomous areas.

35. Data provided to the Global Detention Project on 2013 following Questionnaire No. MC-3/12358 related to special detention facilities for non-Russian citizens.

36. The report has not been made public yet; see www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-returns-to-the-north-caucasian-region-of-the-russian-federati-3, accessed 19 Jul. 2017.

a serious danger to public order and public safety” as grounds for detaining international protection applicants. It should be noted that such broad formulations are prone to misuse in Turkey and can lead to arbitrary detention decisions (Norwegian Organisation for Asylum 2016: 32), particularly considering that administrative detention under the LFIP is not subject to automatic judicial review. A problem is that when persons held in detention pending removal subsequently lodge an international protection application, their “detainee status” is not always changed to the correct category, that is, the category under which detention may not exceed 30 days (AIDA 2015: 92). Until 2013, non-citizens awaiting deportation tended to be detained for anywhere between a few days and 12 months (Norwegian Organisation for Asylum 2016: 32).

Detention of temporary protection beneficiaries, like the detention of all other foreigners in Turkey, is supposed to be subject to the legal procedures and safeguards set out in the LFIP, which constitutes the legal basis of the TPR. The TPR however, contains a “hidden” provision that seems to unlawfully allow arbitrary detention: it states that those who are excluded from temporary protection may, until their removal, be accommodated, for humanitarian reasons, in a special section of temporary accommodation centres or in a separate temporary accommodation centre, or in other places, determined by the provincial authorities without an administrative detention decision required under the LFIP. Despite the use of the word “accommodation”, this provision relates to an informal type of detention.

During his visit in 2012, the UN Special Rapporteur on the Human Rights of Migrants denounced Turkey’s widespread detention of migrants, including families and children. He argued that the EU focus on increasing border security was leading to an increased prioritisation of detention as a solution (see UNGA HRC 2013b).

The Law on Foreigners provides that the best interest of children shall be respected. However, the only migrant children who are not detained are UAMs who apply for international protection. Children below 16 years are placed in a government-run shelter, while those over 16 can be placed in “reception and accommodation centres provided that favourable conditions are ensured” (Article 66). This law also provides that families can be detained until deported, but in separate accommodation facilities at removal centres.

As of March 2015, there were 15 active removal centres in Turkey with a total detention capacity of 2 980 persons (AIDA 2015).

There are also concerns that the recent adoption of the EU–Turkey Readmission Agreement could add to the already considerable migratory pressures

confronting Turkey because it will lead to growing numbers of third-country nationals being “sent back” to the country, where they will likely be detained on arrival (Global Detention Project 2014).

In **Ukraine**, Article 30 of the Law on the Legal Status of Foreigners and Stateless Persons from 2001 (reviewed in 2012) provides that irregular migrants (with no distinction of age) should remain detained in the centres of temporary stay for foreigners and stateless persons until their expulsion, but for not more than 12 months. For individuals who are apprehended in the border regions while attempting to make an illegal border crossing, the Law on the State Border Guard Service of Ukraine as amended in 2012 gives authority to the State Border Guard to detain them in the Migrant Custody Centre. Previously, such detentions were authorised by a court. The Code of Administrative Offences (CAO) contains provisions for specific punishments for various immigration-related offences. For illegal entry or border crossing, Article 204-1 of the CAO authorises a fine and administrative arrest for up to 15 days.

Asylum seekers reside separately, in an accommodation centre opened in Odessa in October 2004 and funded by the Ukrainian Government and the European Union. Many rejected asylum seekers also remain in detention for 12 months, as the authorities do not attempt to deport them for various practical or financial reasons. They are released after the maximum detention period has been served with no solution available to them, other than to attempt to cross the border into the European Union once again. However, in many cases, the authorities re-arrest migrants and rejected asylum seekers upon their release from detention, a common practice in Ukraine that has been widely criticised (Global Detention Project 2012: 2; Human Rights Watch 2010). The European Court of Human Rights has found that this practice constitutes a violation of the right to liberty and security in the European Convention on Human Rights.³⁷ To limit the re-arrest of released detainees, advocates have argued that Ukraine should use the amended Law on Refugees and Persons in need of Complementary or Temporary Protection in Ukraine to extend complementary protection to persons who are not recognised as refugees, but who cannot be returned to their countries because of ongoing conflicts (Human Rights Watch 2012).

According to estimates (Global Detention Project 2012: 8), as of late 2012, there were 13 migrant detention facilities in operation in Ukraine, including two long-term migrant accommodation centres, nine temporary holding facilities used to confine persons for periods of more three days, and one “dormitory” used to confine women and children. These

37. See *John v. Greece*, 29 Apr. 2007 (Application No. 199/05).

centres are often overcrowded. According to the Global Detention Project the estimated capacity of dedicated long-term immigration detention centres for 2012 was 343 persons while the total number of immigration detainees reached 10 922 in 2011 and the persons expelled 1 488. Even if the number of detained persons may change every day there is still a big gap in the capacity of the centres (Global Detention Project 2017a).

Member states that envisage immigration detention of children as “derogation”

In **Albania**, according to the Law of Foreigners though only “as derogation”, UAMs may be detained if a detention order is issued against them and be put in a state social centre which is established for this purpose, or in “any other centre”.

In **Georgia**, according to the law,³⁸ an alien may be detained and placed in a temporary accommodation centre on the grounds of expulsion and after a decision has been taken by the responsible body. The Ministry of Internal Affairs prescribes the procedure for detaining and transferring aliens to a temporary accommodation centre.³⁹

Under Article 64 §6 of the 2014 Law, UAMs without supervision (without a guardian, caring person or/ and any legal representative) may be placed in a temporary accommodation centre only in extreme cases and for the shortest possible period of time, taking into consideration their best interests. However, this provision is extremely vague, not determining a maximum of the “shortest possible detention period”. Also, the English translation of Article 2 §8 of the Order on the approval of detention and placement of aliens in the temporary accommodation centre uses the term “isolator”, which may leave some questions about the true identity of this “temporary accommodation centre”. Article 65 of the Law on the Legal Status of Aliens and Stateless Persons provides for a number of alternative measures which can be decided by a court, but there are doubts if these apply in practice.

In **Serbia**, the Law on Foreigners provides that migrant children can be detained only exceptionally and for reasons of securing a forced expulsion, in the premises

of the competent authority (like any other foreigner), but for not longer than 24 hours. Article 48, on the detention of foreigners, does not distinguish between adults and minors.

Member states that do not have specific rules on immigration detention, but which in practice detain immigrants with no distinction of age

In **Liechtenstein**, there are no specific rules on immigration detention (Global Detention Project 2017b). However, undocumented migrants – with no distinction of age – are held in the criminal prison of Vaduz, operating since 2007 (CPT 2008).

In 2014 there were 14 undocumented migrants in Liechtenstein who were detained and subsequently expelled (Global Detention Project). There is no available information on the number of any children among them. The detention of foreign nationals held under aliens legislation is not governed by a specific legal framework. Thus, immigration detainees are subject to the rules applicable to remand and sentenced prisoners. Following its visit in 2007, CPT recommended that the situation of immigrant detainees be governed by specific rules reflecting their particular status (CPT 2008: §29).

In addition to the above-mentioned states, there is the particular case of San Marino that should also be of concern. In **San Marino**, irregular migrants fall within the competence of the gendarmerie and of civilian police. Under Law No. 97 from 2003, if a person is apprehended on the territory without a valid document of sojourn, they can be held in police premises for identification (for not more than 24 hours), the prosecutor being informed of the beginning and end of the procedure. However, at the end of the identification procedure, all irregular migrants with no exception for age are returned to the Italian police forces, without any national legal provision or bilateral agreement with Italy providing for this possibility. CPT pointed this out during its visit to San Marino in 2013 and asked to receive relevant information, including the applicable legal provisions for the return of irregular migrants to the Italian police authorities (CPT 2014b). In some cases where migrants cannot be returned to the Italian forces before nightfall, the police of San Marino claim that the migrants are accommodated on a “humanitarian basis” for one night in the prison (ibid: point 38). CPT considered it unacceptable that a prison (“even empty”) was used as an allegedly “humanitarian” accommodation structure and recommended that, in future, the prison is never used again for this type of accommodation (ibid: point 39).

San Marino has not ratified the Convention of 1951 relating to the status of refugees and the applicable

38. The rules about immigration detention and alternatives to detention in Georgia are laid down in Chapter XI of the Law on the Legal Status of Aliens and Stateless Persons of 2014 (amended by Law No. 3602 of 8 May 2015) and in the Order of the Minister of Internal Affairs of Georgia related to the approval of detention and placement of aliens in a Temporary Accommodation Centre (see Georgia: Ministry of Internal Affairs 2017).

39. Order of the Minister of Internal Affairs of Georgia No. 588 of 6 Aug. 2014 on Approval of the Regulations of the Migration Department (see Georgia: Ministry of Internal Affairs 2017).

national law includes no specific provisions on the possibility of a person asking for international protection against a real risk of torture or ill-treatment if returned to the country of origin or to a third country (CPT 2014b: point 39).

Member states that envisage a restriction of movement or placement in a closed centre

In **Bosnia and Herzegovina**, aliens are placed under surveillance until they leave the national territory. The Rulebook on the Surveillance and Removal of Aliens prescribes detailed procedures for placing an alien under surveillance in the process of removal from the territory.

The law provides for immigration centres that are supposed to be specialised institutions for the reception and accommodation of aliens under surveillance. Under Article 117 of the Law on Aliens, monitoring of these institutions is carried out by the Ministry of Security, but there are no available data on this issue.

The fact that the alien has claimed/is claiming asylum does not affect the decision or execution of the surveillance of that person in the Immigration Centre.

Unaccompanied children are placed in a shelter run by an NGO. There is no specific timeframe for this placement, but one can reasonably gather that it could not be longer than the placement of adults in accommodation centres, which must not exceed 18 months.

In **Montenegro**, according to the Law on Foreigners, which covers the issues of irregular entry, residence and exit of foreigners from the country, irregular migrants who cannot be immediately expelled or those whose identity has not been determined “have their freedom of movement restricted” (meaning they are detained) by being accommodated in a reception centre for foreigners. According to UNHCR Montenegro, the centre is regulated by house rules, in addition to a Rulebook that regulates all detention facilities, which the government issued in 2012. Only foreigners who cannot be expelled and who have sufficient financial resources to find their own accommodation are asked to regularly report their place of residence to the police. For the rest, after the expiry of the period of compulsory “accommodation”, either they are expelled or set free.

Unaccompanied minors who do not seek asylum are “accommodated” in the Ljubović youth detention centre until they are identified, when the procedure is terminated and they are forcibly expelled unless they seek asylum. Upon submission of the asylum claim, minor asylum seekers are referred to social workers from the relevant centre for social work. However, in a large number of cases, children disappear from

the centre a few days after admission, presumably in order to continue their journey further to Western Europe.

Asylum seekers (including minors) are accommodated in an asylum reception centre. They may have restricted movement outside the centre or other collective accommodation for up to 15 days, under the circumstances listed in the Law on Foreigners (if their identity cannot be established, in case of need to protect public law and order etc.), but this provision has been rarely used in practice. Unaccompanied children below 16 years of age do not have limited movement imposed, unless as a last resort. However, the question is how this measure applies in practice.

Member states that do not apply immigration detention to children or that exclude children below a certain age from detention

Based on the collected information, it seems that the only member states which prohibit immigration detention for children in their legislation are: Andorra, Armenia, Iceland and Switzerland. However, Switzerland prohibits immigration detention only for children below 15 years of age.

In **Andorra**, according to its reply to ECPRD questionnaire No. 2612 of 2014, Article 124 of the Immigration Law states that forced return cannot be applied to minors. In that case and according to Article 51 of the Law for Minors the state should designate a guardian for UAMs and place them in an appropriate social institution. The law does not set any maximum period, so it can be interpreted that this guardianship and the placement in this institution could operate until adulthood.

In **Armenia**, from information sent by the Ministry of Justice to the Global Detention Project, children are not detained for immigration reasons. According to national legislation, minors and their families are not kept in detention. Detention can be ordered only for criminal matters. The Armenian legislation does not stipulate criminal liability for irregular migration. There is no information, however, on what happens to UAMs who are set free and whether they are supported by a national system or not.

In **Iceland**, in reply to the ECPRD questionnaire (Request 2612/2613) on detention of children for immigration purposes, the Parliament of Iceland stated in 2014 that children were not being detained. It seems there is no explicit provision prohibiting immigration detention of children. However, since the main emphasis in the legislation is laid on children's well-being, and judging from the fact that families with children are not detained and have only the obligation to report to the police or receive an order to stay in a specified place, UAMs are probably not

detained either. However, this is an assumption, since there is no specific information on UAMs.

In **Switzerland**, Article 80 of the Federal Law on Foreign Nationals provides that “in no event may a detention order in preparation for departure, detention pending deportation or coercive detention be issued in respect of children or young people who have not yet attained the age of 15”. On the other side, detention of children older than 15 years appears to be widespread. When expulsion or deportation is not possible, Article 83 of the Foreigners’ Law allows for the provisional release of the foreign national. Under Article 79, detention can be suspended if, *inter alia*, the foreign nationals co-operate with the authorities and if their voluntary departure from Switzerland is impossible, or if departure takes place in a timely manner, or if a request for a waiver of detention is filed and approved.

However, it seems that the practices in the 26 cantons of the Confederation differ greatly from one canton to another regarding administrative detention of children. According to the Terre des Hommes Foundation, at least seven cantons have detained children for immigration- or asylum-related reasons during the last four-year period, given the statistics provided by the cantons; only nine cantons reported that they do not detain children for immigration purposes; and it is not possible to confirm the specific practices regarding minors in deportation or asylum procedures in 10 cantons due to lack of data (Terre des Hommes 2016: 24).

The latest CPT report on Switzerland (CPT 2016c) states that, despite its previous recommendations, foreign nationals subject to measures of constraint continue to be placed in penitentiary institutions.

Maximum length of detention and authority responsible for the decision

From the conducted research, it appears that there are member states where the decision on immigration detention is taken by an administrative authority (e.g. the Ministry of the Interior or a border and migration service), such as Albania, Bosnia and Herzegovina, Montenegro, Russia, San Marino, Serbia, “the former Yugoslav Republic of Macedonia” and Turkey; there are member states where this decision is ordered by a court, such as Georgia, Republic of Moldova and Norway; and there are member states with a mixed system (administrative authority and court), such as Azerbaijan, Switzerland and Ukraine.

The length of detention (in legislation) varies from several hours to several months (12 months in “the former Yugoslav Republic of Macedonia” and Ukraine). It can also be an unlimited placement in a closed NGO shelter (Bosnia and Herzegovina) or subject to the limit set by a court decision (Azerbaijan).

Decision on migrant detention taken by an administrative authority

In **Albania**, according to the Law on Foreigners, the maximum detention of immigrants is six months. In general, however, the responsible authorities can extend detention (up to six more months) if the foreigner refuses to give personal information and travelling documents needed for their return, if they give false information or if they have impeded or blocked their return in different ways. The decision on detention is taken by a local administrative authority of border and migration.

In **Bosnia and Herzegovina**, the responsible authority is the Service for Foreigners’ Affairs, which makes a decision on imposing surveillance of an alien, which could mean movement restricted to a specified area or place, or placement in an institution specialised for reception of aliens (the Immigration Centre). The law provides that the total period of surveillance in the Immigration Centre “may not be longer than 18 months, continuously”. As mentioned above, unaccompanied children are placed in an NGO shelter. However, there is no specific timeframe for this placement, but it is presumed that it cannot be longer than the placement of adults in accommodation centres (maximum 18 months).

In “**the former Yugoslav Republic of Macedonia**”, the maximum period of detention of a foreign national (including children) at the Reception Centre for Foreigners in Skopje may reach 12 months by a decision of the Ministry of Internal Affairs.

In **Montenegro**, the mandatory stay of foreigners in the accommodation centre is 90 days, with the possibility of extension for another 90 days. However, the border points are not equipped to be used as detention facilities. Even for child asylum seekers, the Law on Asylum does not provide any limitation when it comes to detention in the border area. This issue is reportedly being amended to correspond to international standards in the new draft Law on Asylum that is to be in force in 2017. If a person does not seek asylum, Montenegro applies readmission agreements and returns the concerned person to their country of origin, or to the territory from which they entered Montenegro. This equally applies to minors.

In **Russia**, the General Directorate on Migration Affairs of the Ministry of Interior Affairs is competent to deal with the detention in special centres⁴⁰ of migrants awaiting deportation.

In **San Marino**, as previously explained, any migrant can be detained for reasons of securing removal from the country (return to Italy) for 24 hours by the police.

40. Presidential Order No. Пп-1729 of 15 Jun. 2010 authorised the Federal Migration Services to create “special facilities” for placement of non-citizens subject to administrative expulsion from the Russian Federation.

In **Serbia**, migrant children can be detained exceptionally, and for reasons of securing a forced expulsion (like any other foreigner), for 24 hours by the police.

In **Turkey**, with the adoption of Law on Foreigners and International Protection (in force since April 2014), the Directorate General for Migration Management took over from the National Police and is the agency currently mandated to manage immigration detention and deportation practices. The 2013 law has shifted all issues regarding migration, including the issuance of deportation decisions and surveillance of immigration removal centres, from the police to the local offices of the Directorate General for Migration Management in each province. By Article 57(3), immigration detention may be ordered for six months, extended for an additional period of up to six months where the removal cannot be executed due to the migrant's failure to co-operate. The Special Rapporteur on the Human Rights of Migrants has argued that this is too long a period for immigration-related detention and that monthly reviews of detention should ensure that migrants are not detained for prolonged periods (UNGA HRC 2013b).

Decision on migrant detention taken by a court

In **Georgia** the maximum period of immigration detention varies from several days to three months. Within not later than 48 hours after arrest, an alien is brought before the court that decides on their transfer to a temporary accommodation centre.⁴¹ Unless the court makes the decision within 24 hours to place the alien in a temporary accommodation centre, they must be immediately released. On the basis of the grounds of this article, a detained alien⁴² may be placed in the temporary accommodation centre either before or after the decision on their removal is made.⁴³ However, after the expiration of the maximum of three months, the alien is to be released from the centre. The Ministry of Interior prescribes the procedure for detaining and transferring aliens to a temporary accommodation centre.

In the **Republic of Moldova**, the Bureau on Migration and Asylum⁴⁴ (under the Ministry of Interior) has the primary responsibility for controlling and managing migration processes. Other responsible authorities for migration are: the Border Guards Service⁴⁵ (monitoring border crossings, acting to identify and deport illegal

migrants); the Bureau on Migration and Asylum,⁴⁶ dealing with immigration and repatriation, refugees, the accommodation centre for asylum seekers and the centre for temporary reception of foreigners; and the Information and Security Service,⁴⁷ acting to counter and prevent irregular migration, human trafficking and organised crime.

As mentioned previously, any person entering the Republic of Moldova irregularly or arrested without a residence permit receives an administrative decision to leave the country within five days. If they do not obey, they are referred to a court which decides on their placement in detention for up to six months with the possibility of a court renewal of one more month. There is no provision for different treatment of child migrants.

In **Norway**, there are no specific provisions in the Immigration Act relating to the length of detention of children. Detention of irregular migrants may not be authorised for more than four weeks.⁴⁸ However, the overall period of custody may reach 12 weeks, unless there are particular reasons to the contrary.

Pursuant to a message from the Ministry of Justice to the Parliament, the detention of children shall be as short as possible and should not exceed 24 hours.⁴⁹ According to the reports of the Immigration Police, most migrants are detained only for a limited period of time that usually does not exceed 24 hours.⁵⁰ A proposal to introduce a formal limit of 48 hours of detention for children into legislation was dismissed.⁵¹

The chief of police or an authorised person may issue an order of arrest against an irregular migrant. When there is a danger associated with the presence of the alien in the territory, any police officer may affect the arrest. However, if the police wish to detain the arrested alien for a longer period they must, at the earliest opportunity, and if possible on the day following the arrest, bring the person before the district court with an application that they be remanded in custody.

Member states with a mixed system

In **Azerbaijan**, the decision on placement can be taken by the administration or by the court. According

41. Law on the Legal Status of Aliens and Stateless Persons of 2014 (amended by Law No. 3602 of 8 May 2015), Article 64 §3.

42. For the detention conditions, see CPT (2015c).

43. Article 64 para. 4.

44. Bureau on Migration and Asylum: www.mai.gov.md/biroul-migratie/.

45. Border Guards Service: www.border.gov.md/index_m.htm.

46. Bureau on Migration and Asylum: www.mai.gov.md/biroul-migratie/.

47. Information and Security Service: www.sis.md/md/.

48. Pursuant Section 106 (3) of the Immigration Act.

49. Melding til Stortinget 27 (2011-2012) p. 89. The Immigration Police circular on detention is available only in Norwegian: <http://docplayer.me/4624768-Meld-st-27-2011-2012-melding-til-stortinget-barn-pa-flukt.html>.

50. See the site of the National Police Immigration Service (Politiets utlendingsenhet): www.politi.no/politiets_utlendingsenhet/politiets_utlendingsinternat/.

51. Om lov om endring i utlendingsloven (utlendingsinternat), Odelstingsproposisjon Nr. 28 (2006-2007) p.14. See: www.regjeringen.no/contentassets/6d4ae61f735c4d82a8d08018f68264ef/no/pdfs/otp200620070028000dddpdfs.pdf.

to the law, foreigners can be detained in the Centre for administrative detention: (1) either up to 24 hours, in order to establish the facts of the offence, if they are subject to a case on administrative offences, and to identify them; (2) up to three days until a decision is taken by a judge in cases of a lack of identity documents if the foreigner has committed an offence; (3) until execution of the court decision against a foreigner suspected of avoiding or absconding from implementation of a decision on their administrative expulsion. Therefore, there is no limit for detention of migrants under expulsion. The provisions only set a limit for the detention of asylum applicants until a decision is made to grant/refuse refugee status to the claimant, but for no more than three months; or until employment or settlement of the foreigner who is granted refugee status, but (again) for no more than three months. Given that placement in the centre is considered “voluntary”, the law seems to “allow” them to stay in the centre. According to point 2.1.3. of Decree No. 047 of 2012, the foreigner can stay in the centre “under individual request until implementation of decision on administrative expulsion from the Republic of Azerbaijan”. In case of extension, point 2.12 of the same decree provides that the relevant court decision on extension of the detention’s duration shall be read to the foreigner against receipt.

In **Switzerland**, the competent cantonal authority issues the initial decision for detention. The cantons are responsible for the organisation of the courts, the administration of justice in criminal cases and the execution of penalties and measures, unless the law provides otherwise. Therefore, the different cantonal regulations provide further information on execution of penalties and measures.

In general, under Article 75 of the Federal Act on Foreign Nationals, the maximum period of preparatory administrative detention of foreign nationals (while a decision is being made on their right to remain in the country) is six months. Foreign nationals awaiting the execution of a deportation or expulsion order (Article 76) or for insubordination (Article 78) can be detained for up to six months with the possibility of an additional 12 months (for adults), and six months (for minors aged between 15 and 18 years), if the person concerned refuses to co-operate with authorities or where more time is required to obtain the necessary travel documents (Article 79). Cantonal courts are required to agree to any extension of detention beyond six months (Article 79). The total maximum length of detention for adult foreign nationals is 18 months and one year for minors. Unfortunately, despite the maximum time in detention required by the CRC, Switzerland continues to detain migrant children (under expulsion) for one year on the grounds that “more time is required to obtain the necessary travel documents”.

In **Ukraine**, irregular migrants (with no distinction of age) who have received a decision on forcible expulsion⁵² remain detained in the centres of temporary stay for foreigners and stateless persons until their expulsion, but for no more than 12 months. The maximum length of time in custody prior to issuance of a detention order is three days. There is a difference between forcible return and forcible expulsion. The decision on forcible return is made by an administrative body (State Migration Service, State Border Guard Service, Security Service) and the individual is given up to 30 days to leave the country by their own means. The decision on forcible expulsion is taken by an administrative court, and the individual is detained pending their expulsion. Since 2012 a person can be detained only if a decision on their forcible expulsion has been adopted.

The law provides⁵³ that a court should issue the decision on forced expulsion of a foreigner. This decision is to be implemented by local offices of the central executive body, implementing the government policy on migration and on foreigners or stateless persons who have been detained within controlled border areas, during or after an attempt at illegal crossing, by the state border protection agency.⁵⁴ It seems that, for individuals apprehended in the border regions while attempting to make an illegal border crossing, the Law on the State Border Guard Service of Ukraine as amended in 2012 authorises the State Border Guard to detain them in the Migrant Custody Centre. Previously, such detentions had also been authorised by a court. Asylum seekers reside separately, in an accommodation centre opened in Odessa in October 2004 and funded by the Ukrainian Government and the European Union.

Statistical data on detention of migrant children

Unfortunately there are no accurate data on the detention of migrant children, as statistics are often not available. Some member states do not publish such data and others have not disaggregated data by age, immigration status, etc. According to the Commissioner for Human Rights of the Council of Europe (2010b), “States must collect data to repair the lack of information about the situation of migrant children”.

52. Law on the Legal Status of Foreigners and Stateless Persons No. 3929-XII of 4 Feb. 1994, amended on 22 Sep. 2011, Article 26(1) [on forcible return] and Article 30 [on forcible expulsion].

53. Article 30.5 of the Law on the Legal Status of Foreigners and Stateless Persons of 7 Jun. 2001, amended on 22 Sep. 2011.

54. Detention to prevent unauthorised entry at the border is also provided for by the Code of Ukraine on Administrative Offences (CAO), Law No. 8073-X of 7 Dec. 1984, Article 204.

The statistics available for **Albania** are very poorly documented (no source available). In addition, they concern only minors accompanied by their parents or “familiar” with no explanation of the criteria for classification in such a category. In his observations (UNGA HRC 2012), the UN Special Rapporteur pointed to the absence of reliable data as a significant challenge confronting Albania in ensuring human rights protection of migrants. Concerning the lack of systematic and reliable data collection on returnees, the Special Rapporteur recognised the establishment of the Total Integrated Management System installed at all border points by the police to collect data on the exit and entry of all Albanians and foreign citizens. However, the authorities argued that this information is not disclosed or available for analysis and that it does not register asylum claims or other protection needs (ibid: 9). From the data provided for the ECPRD questionnaire it appears that, for the period 2011-2014, there were in total 32 children in immigration detention. In particular, in 2015 there were two detained children accompanied by their parents; in 2014, seven; in 2013, eight; in 2012 and 2011, one. In the same period, children accompanied by other members of the family were: none in 2015; two in 2014; three in 2013; three in 2012; and five in 2011.

It needs to be noted that the official data presented for immigration detention of children may be below the real number. For instance, **Bosnia and Herzegovina** reported that, since the beginning of 2016, only two minors with their parents have stayed in a family pavilion in the Immigration Centre.

For **Georgia**, according to the Migration Department’s report, until mid-August 2016, there were no facts on the immigration detention of children.

In recent years, “**the former Yugoslav Republic of Macedonia**” has experienced a steady increase in the number of irregular migrants. The number of irregular migrants detected at border crossings or within the country increased from 272 in 2009 to 1 132 during 2013 and was further growing in the course of 2014, with approximately 1 300 foreign nationals intercepted during the first 10 months of 2014 (CPT 2016b: 61). At the time of CPT’s visit in 2014, the Reception Centre for migrants was accommodating 265 foreign nationals (245 male and 20 female), including 29 minors, of whom 13 were unaccompanied.

For the **Republic of Moldova**, there are no available data for detained migrants. According to the UNHCR Office in the Republic of Moldova, in 2015, among the 276 registered asylum seekers, three were UAMs. Until the end of July 2016, there were 86 asylum applications in total and no children. However, we cannot draw any conclusion on migrant children from these data for asylum seekers.

In **Montenegro**, from 2006 to 2014, there were 365 foreign nationals in the Ljubović youth detention centre, and 54 only in 2014, mainly from Serbia, Kosovo,⁵⁵ Albania and Syria. However, these figures (supplied by UNHCR Montenegro) refer to all inmates of the centre, including child offenders and children in immigration detention. There are no separate available data for detained migrant children.

In **Norway** also there are no complete relevant official statistics. The Immigration Police issue monthly statistics regarding only enforced returns of irregular migrants, without desegregation of age.⁵⁶ However, a research report (Norwegian Organisation for Asylum 2015) estimates that in 2014 there were 330 cases of children being detained under the Immigration Act, which amounted to approximately 8% of the total cases of detained migrants. According to the same report, it is estimated that in 2013 there were 229 children detained.

In **Russia**, according to the Federal Migration Service (FMS) during the period 2010-2012, there were 40 623 foreign citizens (13 638 in 2010; 12 481 in 2011; and 14 504 in 2012) subject to administrative expulsion from the territory, and confined in the premises of internal affairs’ bodies and correctional facilities established for the Russian Federation subjects. The FMS of Russia does not maintain statistical data on foreign citizens placed in the special facilities under deportation proceedings or on minors (foreign citizens) and their accompanying persons confined in the special facilities. Data are available only for asylum seekers.

The FMS of Russia has at present three centres for temporary placement of asylum seekers, refugees and persons provided with temporary asylum: the federal public institutions at Ocher, Goryachy Klyuch and Serebryaniki. The Ocher migration centre in Ocher town, Perm Territory, is designed for 100 persons. At present, 33 children are placed here with their families. The centre in Goryachy Klyuch town, Krasnodar Territory, is designed for 20 persons. At present, 3 children are placed here with their families. The Serebryaniki migration centre in Vyshnevolotsky district of the Tver Oblast is designed for 200 persons. In 2013, nine minors were placed there with their families. These data were provided to the Global Detention Project in 2013 following a questionnaire (No. MC-3/12358) related to the special detention facilities for non-Russian citizens.

In **Liechtenstein**, there were 14 undocumented detained migrants in 2014, who were subsequently

55. All references to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with UN Security Council Resolution 1244 without prejudice to the status of Kosovo.

56. www.politi.no/nn/aktuelt-tall-og-fakta/tall-og-fakta/uttransporteringer/.

expelled (Global Detention Project). There is no available information on the possible number of children among them.

Switzerland is one of the few member states which provide statistical data on immigration detention of children.

The data on children in “secured accommodation” are generally segregated by nationality or status (foreign nationals with residence in Switzerland; asylum seekers; foreign nationals with residence abroad).⁵⁷ They are separated from adults according to the type of detention (defined typically by the number of coercive measures, based on the Law on Aliens).

Statistics provided in reply to the ECPRD questionnaire show that in 2015, at the federal level, there were 147 minors in detention. Data for the period 2011-2014 showed a small overall decrease in the instances of child immigration detention: 176 in 2011; 177 in 2012; 130 in 2013; and 131 in 2014 (Terre des Hommes Foundation 2016: 32).

In **Turkey**, removal centres are used for both the detention of migrants under removal orders and for persons who have applied for international protection. The overall detention capacity is reported to have more than tripled (Norwegian Organisation for Asylum 2016: 33). Detention capacity was planned for 10 000 people by 1 June 2016, when the EU–Turkey Readmission Agreement came into full effect (AIDA 2015: 97). However, there are no data on detention of children.

Measures to safeguard family unity

Based on the research for this study, it appears that the non-EU Council of Europe member states that apply immigration detention to children fall into four groups. There are: 1. those whose legislation allows detention of children with their parents (see Appendix 1, Table 3), namely Albania, Azerbaijan, Bosnia and Herzegovina, Norway, Russia, Switzerland, “the former Yugoslav Republic of Macedonia” and Turkey; 2. member states whose legislation clearly prohibits separation of a child from their parents against their will (Georgia and Serbia, which has only related specific provision for asylum seekers); 3. member states that do not have specific provisions on family unity for irregular migrants, but in practice apply the related provisions that exist for asylum seekers (Republic of Moldova and Montenegro); and 4. states that do not have related provisions on family unity and keep family members separated (Ukraine).

57. Swiss Federal Statistical Office, Persons in placement and detainee: www.bfs.admin.ch/bfs/en/home/statistics/crime-criminal-justice/execution-penal-sentences-justice/persons-placement-detainee.html.

In general, there is very little information on specific measures taken by the legislation, policy or other resources of member states to safeguard family unity of irregular migrants and to prevent family separation in case of decisions related to detention. However, the overall impression is that families in most member states are, in practice, placed together.

Member states with provisions on family unity

Based on the information taken from the Directorate General of Borders and Migration, in **Albania**, children are “allowed” to stay with their detained parents in the Closed Centre for Foreigners. According to 1998 Law on Asylum, if the child’s parents are illegal migrants and the child has obtained Albanian citizenship, the parents are allowed to obtain residence permits. According to the Law on Albanian Citizenship, in some circumstances citizenship is granted to children born in Albania to non-Albanian parents, for example, if that child holds no other nationality at the time of birth (i.e., is stateless).

In **Azerbaijan**, the law⁵⁸ provides for the placement of family members in the detention centres for irregular migrants under the State Migration Service until a decision on administrative expulsion is implemented or, if the person has applied for asylum, until the decision to grant or refuse refugee status.

In **Bosnia and Herzegovina**, in the case of a decision for migrants under surveillance in an institution for the reception and accommodation of aliens until their removal, families stay in a separate part of the Immigration Centre: the “family pavilion”.

In “the former Yugoslav Republic of Macedonia”, the 2006 Law on Foreigners provides for temporary accommodation at a Reception Centre for Foreigners in Skopje for all irregular foreigners (including families with children and UAMs) with orders of removal, removal by force or expulsion, and for foreigners readmitted on the basis of international agreements.

The **Norwegian** Immigration Act does not contain any specific provisions relating to family unity in the case of immigration detention. The preparatory works to the Immigration Act assume that children remain with their family in case of immigrant detention.⁵⁹

58. Decree No. 047 of 2012, Guidelines on managing detention centres for irregular migrants under the State Migration Service of the Republic of Azerbaijan, points 2.1 and 2.2.

59. Proposisjon til Stortinget (forslag til lovvedtak). Endringer i utlendingsloven (utvidet adgang til fengsling mv.) Proposisjon No 138L (2010-2011), p.54. Available at the site of the Norwegian Ministry of Justice and Public Security: www.regjeringen.no/contentassets/83e2be9d23984bcc8b7d81b3669e47f1/no/pdfs/prp201020110138000dddpdfs.pdf.

Pursuant to the Immigration Detention Regulations,⁶⁰ families should be accommodated in such a way that safeguards family unity. The detention centre has its own family section where families with minor children are being accommodated. According to a report conducted by the Norwegian Directorate of Immigration (UDI), families are accommodated in separate facilities (Utlendingsdirektoratet 2014: 14).

As previously explained, migrants under deportation are kept in special immigration centres in **Russia**. The law provides that minors are detained together with their parents or other family members (grandparents, adult brothers or sisters).

In **Switzerland**, accompanied children are placed together with their family (parents, siblings) in apartments or in civil protection infrastructures (Terre des Hommes Foundation 2016: 25).

In **Turkey**, the Law on Foreigners and International Protection from 2013 provides that families can be detained together until deported, but in accommodation facilities separated from other irregular migrants at the removal centres. As mentioned above, until March 2015, there were 15 active removal centres in Turkey with a total detention capacity of 2 980 persons.

Member states whose legislation expressly prohibits the separation of a child from their parents against their will

In **Georgia**, according to the Order on approval of the rule of detention and placement of aliens in a temporary accommodation centre (Article 2 §10 on Rules for Detention), separation of a child from their parents against their will is not allowed, except in cases when an “authorised agency applying acting legislation and procedures” decides that separation is necessary for the protection and in the best interests of the child.

In **Serbia**, the Law on Foreigners provides that a minor foreigner should be placed in transit accommodation shelter together with their parents, or other legal representatives, “except if the competent authority of guardianship estimate that another accommodation is more appropriate for him/her”. An immigrant child should not be returned to the country of origin or the third state which is ready to accept them, until they are provided with “an adequate reception”. However, there is no explanation of what constitutes “adequate reception”.

Specific reference on family unity is made only in the Law on Asylum, where Article 9 states that the competent authorities “shall take all the available measures for the purpose of maintaining family unity during the asylum procedure and after granting the right to asylum.”

60. International Immigration Regulations: <https://lovdata.no/dokument/SF/forskrift/2009-12-23-1890>.

Member states that do not have specific provisions on family unity for irregular migrants, but in practice apply the related provisions that exist for asylum seekers

In the **Republic of Moldova**, the only provisions on family unity are contained in the Law on Asylum,⁶¹ stating that the “competent authorities should respect the principle of family unity”. However, these provisions are related to the right of family reunification and not to the method of placement of family members in case of detention. This is obvious in the provisions on UAMs, where Article 77 clearly mentions that “family reunification of unaccompanied minors refugees or beneficiaries of humanitarian protection shall be carried out with due regard to the best interests of the child”. In practice, family members of irregular migrants also stay together.

In **Montenegro**, the centre for foreigners may be also used for the detention of families. Minors are accommodated in the Centre together with their parents or with another legal representative, unless it is assessed that some other accommodation is more favourable for them. In the past, however, there were certain instances of families being separated in prison, due to the fact that all members, including minors, were punished by short prison sentences for illegal entry to Montenegro.

Preservation of family unity is only mentioned in the Law on Asylum and only in respect of family reunification. However, there is no unified practice in this field. According to UNHCR, Montenegro records one case of successful family reunification, a Yemeni family who joined the head of the household in Montenegro after four years of separation. The Yemeni case was largely based on an ad hoc arrangement and the willingness of the government to go beyond the legal obligations in this regard.

Member states that do not have related provisions and keep family members separated

In **Ukraine**, the legislation does not have specific provisions on family unity. Families do not stay together since women and children are kept in one “dormitory”, separated from the rest of the migrant detention facilities.

Support systems in place

Member states’ legislation may contain provisions related to guardianship, social assistance and/or interpretation, or medical and legal assistance. However, as reflected in international reports, very few of these

61. Law No. 270-XVI of 18 Dec. 2008, Article 12 related to Family unity.

services are provided in practice. Regarding social assistance, few national legislations refer to the mandatory character of the presence of a social worker and/or psychologist and their opinion on children's immigration detention. There is no information available for all member states of support systems in place (see Appendix 1, Table 4). More specifically, it is not generally reported what type of health care is provided for detained children and, in particular, for the most vulnerable categories such as asylum seekers and victims of trafficking who, apart from any physical injuries, may experience extremely high rates of anxiety, depression and post-traumatic stress disorder.

In addition, from the states that have provisions for medical care for detained children (see Appendix 1, Table 4), there is no information as to whether the specific needs and health care of girls are taken into consideration, especially if pregnant, nor the needs and health care of babies and children detained with young mothers. According to Rule 39 of the UN Rules for the Treatment of Women in Prison, "pregnant juvenile female prisoners shall receive support and medical care equivalent to that provided for adult female prisoners. Their health shall be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age".

Access to legal counsel is sporadic or non-existent in many detention places. Administrative detainees rarely receive information in a language they understand on the reasons for detention and their rights. Interpretation is also rarely available. Educational services are often not provided for children who are held for immigration control. The reason for this might be that the facilities do not have specialised staff, as in Albania and "the former Yugoslav Republic of Macedonia". According to the UN Special Rapporteur on the Human Rights of Migrants, Albania should review the Law on Foreigners and ensure that the right to education is not restricted to "permanent residents" (Article 30) and include an explicit provision on the right to a nationality of children born to foreigners in Albania. The law should also contain the principle of the best interest of the child wherever it impacts on the situation of children in the context of migration (UNGA HRC 2012; CPT 2016b: 23). Taking into account that children can be detained for one year or more, detention can have serious impacts on their physical, psychological, mental and emotional levels, as well as on their education.

Based on the gathered information, it appears that the following support systems exist.

In **Albania**, in compliance with Article 127, paragraph 1 of the Law on Foreigners, a detained alien in the Closed Centre for Foreigners shall be informed in a language that they understand, "or at least in English", about every action taken by the responsible

authorities on their detention. The same law stipulates that, before detaining a minor, the opinions of a social worker and psychologist are mandatory. However, according to the UN Special Rapporteur on the Human Rights of Migrants (UNGA HRC2012), under the public administration system, social workers are primarily in charge of distribution of cash benefits and do not undertake case management which would allow for follow-up on individual cases at community level. According to the Special Rapporteur, Albania appears to be lacking a tradition of social work and social administration, which results in the absence of co-ordinated and sustainable community-based social services and institutional capacity.

In **Azerbaijan**, the law does not distinguish minors from adults. It envisages, however, for all detained migrants: free interpretation, medical, psychological and legal assistance and the possibility to be in contact with their consular authorities.

In **Bosnia and Herzegovina**, in accordance with the protocol of co-operation between the government and the NGO Vaša prava BiH,⁶² the Service for Foreigners' Affairs has enabled all migrants in the Immigration Centre to receive free legal aid from this organisation.

Regarding children, Article 123 of the Law on Aliens provides that a minor alien who has illegally entered BiH and is not accompanied by a parent, guardian or legal representative upon entering BiH, and whom the Service cannot immediately return to the country from which they arrived, or deliver them to the representatives of the country of their citizenship, is temporarily placed by the Service in the unit of the specialised institution for minors. The competent centre for social work should be informed accordingly. In accordance with the law, the centre for social work should immediately appoint a temporary guardian for the child. The appointed guardian of the Centre for Social Work should decide on the child's best interests and protection of their rights.

However, it seems that in BiH vulnerable groups have considerable problems related to access to justice.⁶³ As has been shown in previous reports (Sykiotou 2015b), since there is no free legal aid, detained persons do

62. Signed by the Ministry of Security and the NGO Vaša prava BiH; see: www.vasaprava.org/.

63. Among the main human rights problems reported for BiH in the 2010 Report of the US Department of State, Bureau of Democracy, Human Rights, and Labor, appear: government corruption; discrimination and violence against women and ethnic, sexual and religious minorities; discrimination against persons with disabilities; trafficking in persons; limits on employment rights; mistreatment of prisoners; poor and overcrowded prison conditions with violence among prisoners; police failure to inform detainees of their rights or allow effective access to legal counsel prior to questioning; harassment and intimidation of journalists and civil society; and obstruction of the return of internally displaced persons and refugees (US Department of State 2011).

not always have the possibility to access a lawyer. It is also reported that there are cases of illegal detention, especially in the immigration centres. According to the Ombudsman of BiH, one person has been detained illegally for six years without justification (Sykiotou 2015b: section II.1).

In “the former Yugoslav Republic of Macedonia”, the Law on Foreigners provides, for UAMs found to be in violation of the legislation within the national territory, that the Ministry of Internal Affairs should inform the competent diplomatic or consular authorities and, if the UAM has to be detained, the Social Work Centre should be informed and a guardian appointed in accordance with the Family Law. However, according to the recent CPT’s report, none of these requirements has been fulfilled (CPT 2016b: 67).

In **Georgia**, according to the Legal Status of Aliens and Stateless Persons Law, a detained alien is allowed to immediately notify a “desired/close person” of their detention, if necessary, through an “authorised body” (Article 64 §8). If a detained alien is a minor or “helpless” – the law explains that this term refers to a person temporarily deprived of the ability to claim their own rights independently (i.e. they are vulnerable) – the obligation to give notice of their detention rests with the Ministry of Internal Affairs. The legal representative of the minor and/or an authorised body shall be notified of their detention. However, there is no clarification in the legal provisions of who is deciding on the legal representation of the child in the case where they do not have a representative. The Ministry of Foreign Affairs and the consular office of the relevant state shall immediately be notified of the detention of an alien (without distinction of age). According to the Migration Department’s report, the latter office provides migrant children with free interpreters and free legal assistance.

In **Liechtenstein**, according to a CPT report, no educational activities were offered to inmates irrespective of their legal status (CPT 2008).

In the **Republic of Moldova**, the social workers have an official role, especially when a child is detained. According to Law from 2008 (Article 67), the Child Protection Units of the municipality see that a social worker is appointed to assist the child in the procedure, e.g. to assist in finding a guardian. However, according to UNHCR, appointing a guardian is rather problematic, as is also the communication between the immigration authorities and the child protection authorities (at the municipalities), which come under the responsibility of the Ministry of Social Protection and Family Affairs. For asylum seekers, according to the law, the Refugee Directorate initiates the procedure for appointing a legal representative (within 15 days from the date of registration of the UAM). In addition, the competent guardianship authority

appoints a representative to act as a guardian for every UAM asylum seeker. According to the law, the asylum procedure is suspended pending the appointment of a legal representative for the UAM asylum seeker. Throughout the suspension period the minor enjoys all the rights granted to asylum seekers. The Refugee Directorate takes measures, as soon as possible, to ensure that UAMs who were granted refugee status or humanitarian protection are represented in accordance with the legislation in force.

In general, for all migrants residing in the migrant accommodation centre, it is reported (IOM 2017) that legal and medical services and social and psychological assistance are offered, together with assistance to return to their countries of origin through the Assisted Voluntary Return programme supported by the International Organization for Migration. A local NGO, the Institute for Penal Reform, administers a special hotline for migrants residing in the centre and also outside the centre to assist them in access to legal, consular and interpretation services.

In **Montenegro**, UAMs who are detained in the Ljubović centre are provided with guardians. However, in practice, the system of assigning a guardian is not structured and, in most cases, the involvement of guardians in the protection of children is rather formal as they do not have meaningful and purposeful communication with their beneficiaries. In addition, communication is limited due to the lack of interpretation and, in some cases, cultural barriers.

For asylum seekers, upon submission of the asylum claim, minors are referred to social workers from the relevant centre for social work.

According to UNHCR, certain NGOs are engaged in monitoring detention facilities in Montenegro. However, they cover only correctional facilities and only on a sporadic basis.

The **Norwegian** Immigration Act, Section 92, provides free legal aid to all aliens without distinction of age. Under Article 106, detained aliens are automatically assigned a legal counsel (provided free of charge) appointed by a court to represent them during the proceedings concerning a review of the legality of detention. The law stipulates that the same applies to persons whose freedom of movement is restricted under Section 105 §2, “unless appointing a legal counsel would entail particular inconvenience or waste of time or the court has no misgivings about not appointing counsel.” However, this last provision is rather vague, leaving much room for the non-appointment of a legal counsel. If such were the case, there would be violation of the fundamental right to defence.

The use of interpreters is not explicitly required under the law, but it seems that the services of interpreters are in practice used when needed (Norwegian

Organisation for Asylum 2014). However, there is no information on the criteria for their use (e.g. qualification). By Section 135 of the Courts of Justice Act, the court has the responsibility to either appoint or approve an interpreter in regard to interpreting during a judicial review of detention.

The Child Welfare Service must be notified when a child under 18 years is detained. In addition, the Service has the obligation to be present at each detention hearing before the court,⁶⁴ and to comment on the need for detention. In addition, the police are obliged to co-operate with the Child Welfare Services.⁶⁵

In **Serbia**, according to Article 54 of the Law on Police, foreigners may be detained on the condition that they are informed, in their native language or in a language that they understand, of the reasons of their detention; that they have the right to an attorney of their choice; and that their family and diplomatic mission or consular authority is accordingly informed. Also, authorised officers must defer all further proceedings until the arrival of their attorney for a maximum of two hours from the time the detainee was given the opportunity to call an attorney. There is no provision for free legal aid or any other support system for irregular migrants other than in relation to an asylum application or temporary protection. Only the Law on Asylum contains provisions related to the principle of representation of UAMs and persons without legal capacity and specifies that a guardian should be appointed before the submission of an asylum application, in conformity with the law, for an UAM or a person without legal capacity who does not have a legal representative. This applies also to foreign citizens with granted temporary protection. An asylum seeker has the right to free legal aid and representation by UNHCR and NGOs (Law on Asylum, Article 10 §2), and persons with refugee status have rights equal to those of Serbian citizens, such as free access to courts and legal aid (Article 42). Foreign citizens with granted temporary protection have the right to legal aid under the same conditions as those prescribed for persons seeking asylum (Article 38§1 part 5).

Previous studies (see Sykiotou 2015a) have shown that there is a need for specific amendments to the law in order to include such categories of persons in legal aid. At present, several NGOs attempt to cover the existing gap in legal aid. Often their client

eligibility criteria are focused on the provision of legal aid to the most vulnerable, and their scope of work may include legal representation, legal information and advice, community awareness and sometimes non-legal services, such as psychosocial counselling. However, they may be limited in their geographic reach (Belgrade) or the type of cases/issues they address (for example, only cases of victims of trafficking).

In **Switzerland**, according to Article 81 of the Federal Act on Foreign Nationals, conditions of detention and procedural guarantees include: the right to correspond with a representative, family members and consular authorities; detention in "suitable premises"; and the support of special needs for vulnerable persons, including UAMs and families with children.

According to the same act, the needs of vulnerable persons, UAMs and families with minor children must be taken into account in the detention arrangements.

By Article 64, paragraph 4, if an ordinary removal order is issued, the competent cantonal authorities shall immediately appoint a representative for any UAM (foreign national) to safeguard the child's best interests during the removal proceedings. By Article 69§4, the competent authority is obliged to ensure before the deportation that the UAM will be returned in the state of origin to a family member or a nominated guardian or a reception facility that can guarantee the protection of the child.

Given that the cantons are responsible for the organisation of the courts, the administration of justice in criminal cases (as well as for the execution of penalties and measures, unless the law provides otherwise), different cantonal regulations provide further information on the execution of penalties and measures and thus the detention of irregular migrants. With the revision of the Asylum Act, free legal assistance is provided for all asylum seekers. Since 2011, the Health Insurance Regulation has included a provision in Article 92d stating that everyone in need of emergency medical aid is compulsorily health insured. Rejected asylum seekers, and asylum seekers with a decision to dismiss an application without entering into the substance of the case, have the right to remain under the control of the compulsory health insurance system until their departure from Switzerland.

In **Turkey**, persons under immigration detention have the right to legal assistance but, as there is no free legal aid, most detainees cannot afford a lawyer. It is reported that lawyers and UNHCR have been prevented from accessing the Istanbul Ataturk Airport transit zone, described as a rule of law "black zone". It is reported that there are a number of practical limitations on the ability of detainees to receive proper legal assistance, and only a handful of NGOs have

64 · Act No. 100 of 17 Jul. 1992 relating to Child Welfare Services (the Child Welfare Act): www.regjeringen.no/contentassets/s/049114cce0254e56b7017637e04ddf88/the-norwegian-child-welfare-act.pdf. Please note that this is not an official translated version of the law, and that there may have been made changes to the law since it was translated into English.

65 · Immigration Detention Regulation, Section 12: <https://lovdata.no/dokument/SF/forskrift/2009-12-23-1890>.

operational capacity to provide free legal assistance (Global Detention Project 2014).

In **Ukraine**, in general, persons accused of administrative offences have a number of rights, including: the right to legal counsel; right to appeal the decision; and the right to interpretation services.⁶⁶ In addition, administrative detainees have the right to inform a relative or a third party of their detention and relevant consular authorities must be informed within 12 hours of the administrative detention of their nationals, except if they seek asylum.⁶⁷ However, external observers, including CPT, have reported that persons are often not able to effectively avail themselves of these rights (CPT 2011a).

With the amendments of 2012, the law included express provision for the right to information; right to legal counsel; access to consular assistance; access to asylum procedures; right to appeal the lawfulness of detention; complaints mechanism regarding detention conditions; compensation for unlawful detention; and the access to free interpretation services.

Non-discriminatory access for migrant children to national services

Based on the collected information, it appears that there are member states whose legislation provides access to most national services for all irregular migrants, including children; and member states that provide access mainly to the health system (see Appendix 1, Table 5). Access to all levels of education for migrant children is the least guaranteed; member states provide mainly for basic education, or their provisions do not clarify the levels of education to which irregular migrant children have access.

Access to health services covers mainly emergency cases, and social protection is limited to the appointment of a guardian.

According to the **Albanian** Constitution, foreigners enjoy the same rights as Albanian citizens, except for cases where the Constitution specifically associates the exercise of particular rights and freedoms with national citizenship, which should not be discriminated on the basis of gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status or ancestry. However, there are no concrete provisions on access to national services for migrant children. The Law on Compulsory Health Insurance provides expressly that asylum seekers are entitled to health care, covered by the state or other legal sources.⁶⁸

66. Code of Ukraine on Administrative Offences, Articles 267, 268, 270, 271, 274, 275.

67. Order No. 494 of the Border Guard Service of 30 Jun. 2004, section 3.4.

68. Law No. 10383 on "Compulsory Health Insurance in the Republic of Albania", Article 5 §2, point 4.

In **Bosnia and Herzegovina**, according to the aforementioned protocol between the government and NGOs, the child, until their repatriation to the country of their habitual residence or a country which is willing to receive them, receives accommodation and proper care, access to emergency medical protection, psychological assistance, education and protection of the rights of aliens before any competent authority.

In **Georgia**, the law provides that migrant children have access to health and education services without any further clarification.

In **Liechtenstein**, it is reported that no educational activities are offered to detained persons, irrespective of their legal status (CPT 2008). All detained persons have the right to consult the prison doctor or their own doctor. Furthermore, it appears that there is a system for specialist consultations outside the prison, and for emergencies, that is satisfactory. The CPT report recommended that measures should be taken to ensure that all remand and sentenced prisoners, as well as immigration detainees, are examined by a doctor, or by a qualified nurse reporting to a doctor, within 24 hours of their admission to Vaduz Prison (CPT 2008: paragraph 40).

In **Norway**, under Section 5 of the Immigration Detention Regulations, migrants in detention have the right to access health services and the police should ensure this access. However, medical treatment for children is free only for children below 12 years of age.

Asylum seekers aged 6 to 16 are generally entitled to –and required to receive– education. This also applies to those at the initial asylum-seeking stage, if they are deemed likely to stay in Norway for more than three months and also to rejected asylum seekers aged from 6 to 16 years. If the asylum seeker is aged from 16 to 18 years, they may be entitled to education.

By Section 4 of the regulations, detained children, dependent on the length of the detention, have access to education (with no other clarification). Migrant children also have access to social protection and child protection, under the Child Welfare Act. For this purpose, they are assigned to social services or welfare structures operated by the municipalities.

In **Serbia**, discrimination on any grounds is prohibited by Article 7 of the Law on Asylum. Foreign nationals have therefore presumably equal rights and services as nationals and to services available for nationals.

In **Switzerland**, articles 19 and 41b of the Federal Constitution guarantee the right to an adequate and free basic education, as well as access to health care for all. Migrant children, even when staying illegally in the country have the right to go to elementary school. However, there is no related information with regard to detained migrant children.

In **Turkey**, Law of 2013 on Foreigners and International Protection, Article 59 provides that children under deportation should have access to education but it does not clarify to which level(s).

Screening and assessment procedures in place

Age assessment of children and assumption of a child's status

On the issue of age determination of undocumented children, there are member states whose legislation does not set any indicators on the issue—namely Azerbaijan, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine – and member states that provide for determination of age by forensic examination or DNA examination, namely Albania, Norway and Switzerland (see Appendix 1, Table 6). However, only in some of the member states is there the existence of an express assumption of child's status until proven otherwise (Albania, Bosnia and Herzegovina, Republic of Moldova and Montenegro).

In cases where a migrant child is not documented, one of the first steps is to decide whether they are under 18 years of age. The true determination of the child's age is very important to ensure that they are identified and treated appropriately. Absence of an official document proving the age, or in cases where the child's physical appearance is different from the one on the official ID photograph, will require additional efforts/procedures so as to determine the age, such as a forensic examination.

However, it should be noted that, even if/when conducted, a forensic examination does not give precision as to the exact age (a forensic doctor may say that a person is between 16 and 18 years, but without further specification of months, even if this is crucial for the child's treatment). In practice, state authorities presume that adults who accompany children without documents are their parents or relatives and take note of the child's age, as declared by them. However, this practice is very risky, because some children may actually be victims of human trafficking that is not identified by the authorities.

As mentioned above, age-assessment procedures are often used for the benefit of the state seeking to justify detention. Despite the existing principle that persons who claim to be children should be treated as such until proven otherwise, unless the claim is manifestly unfounded, a number of states still detain children in institutions based on an argument of the need to assess their age.

Even if according to international guidelines, the methods and the persons conducting the assessment must be adapted to the person's age, gender and culture, there are very few member states that have

such methods, most of which cannot give precise information on the age of the person concerned.

In **Albania**, the screening and assessment procedures are conducted in compliance with the Council of Europe Convention on Action against Trafficking in Human Beings. In cases where the migrant's age is uncertain and there are reasons to believe that they are a victim of trafficking and a minor, special protection measures need to be accorded pending verification of their age. As soon as an unaccompanied child is identified as a victim of trafficking, the government provides for representation by a legal guardian, organisation or authority which shall act in the best interests of the child, take the necessary steps to establish their identity and nationality, and make every effort to locate their family if this is in the best interests of the child.

By Article 125, paragraph 4, the Law on Foreigners provides that in case of doubt on the age of a detained alien, the responsible border authority requests the specialised state bodies to carry out a DNA test for age verification. In cases where there is still a doubt after the tests, the law provides that the person should be presumed as a minor. However, there is no evidence that this applies in practice.

In **Bosnia and Herzegovina**, the status of all irregular immigrants is assumed until carrying out verification in the country of origin from which the migrant comes. If it is not possible to absolutely determine the age of the alien and there are “reasons” that indicate that the person is a minor, they will be treated as such. However, the legislation does not set any indicators on this issue.

In **Georgia**, as reported by the authorities in reply to ECPD questionnaire No. 3044, if a migrant child is undocumented, the Migrant Department checks the border crossing database and other facts, and if necessary a diplomatic mission/consular office is involved. This is rather vague and does not give any evidence of the efficiency of the system on age determination.

In the **Republic of Moldova**, age determination relies on the applicant's statement or on the court's decision, in case the doubt persists. Normally, the court gives the benefit of the doubt and decides in favour of minority.

In **Montenegro**, as reported by the UNHCR office, there is no procedure for age determination. Age assessment is done solely on the basis of available personal identification documents or statements of the migrant or asylum seeker. There are several cases reported by UNHCR in which it was not determined whether the person claiming to be a minor was indeed below 18 years of age, but in these cases the authorities gave the benefit of the doubt and treated them as minors.

Section 88 of the **Norwegian** Immigration Act provides that a foreign national whose minority or majority cannot be established with reasonable certainty may be requested to be examined. The age examination is carried out on a voluntary basis. However, it is not mentioned if UAMs can give valid consent to this examination or if a guardian is appointed for this issue. The age examination consists of a medical examination, and an X-ray of the person's hand and teeth.⁶⁹ It is not mentioned either whether all UAMs are subject to this examination or whether it is reserved only for asylum seekers.

The Norwegian Directorate of Immigration (UDI) has issued a circular regarding age examination of UAM asylum seekers.⁷⁰ UDI does not request an age examination if the applicant's age, based on the available information, is presumed. It is however unclear if there is a presumption of minority.

In **Serbia**, according to the authorities' reply to ECPRD questionnaire No. 3044, there are no specific regulations about age determination of (undocumented) children. Article 64 of the Law on Foreigners, regulating the types of Identity Proving Documents, provides that a foreigner proves his identity with travel documents, an identity card or other public document which includes his photograph. If they have lost their documents, Article 73 requires that they should notify the diplomatic authorities in order to issue a new document. There is no provision on UAMs without documents and the fact that they may have never been registered at birth in their country of origin.

In **Switzerland**, according to the authorities' reply to ECPRD questionnaire No. 3044, if there are indications that a foreign minor has reached the age of majority, the competent authorities may arrange an expert report on that person's age (based mainly on X-rays of the hand/teeth). The different cantonal and communal regulations provide further information. However, it is not indicated on the basis of which criteria this "expert report" on age determination is drafted and if such criteria are common at federal level.

Screening system to identify specific categories of children entering and/or residing illegally

Since 2001, it is reported that the number of asylum applications in industrialised countries has decreased by 40% (IDC 2017). This means that there are many persons who may need protection from serious human rights abuses, but who are unable to gain access to it or who become undocumented migrants

in countries of potential asylum, thereby surviving without protection or access to basic services.

Very little information exists on the issue of screening systems in place to identify specific categories of children entering and/or residing illegally in a country, especially potential asylum seekers and victims of trafficking (see Appendix 1, Table 6). Despite the existence of binding international texts for the interdiction of detention of such persons, many countries still penalise and detain vulnerable categories of children, mainly because they do not have any appropriate policy and/or trained personnel to identify them (OSCE 2013). However, the identification and assistance of refugees and victims of trafficking are essential prerequisites for the application of the "non-punishment principle".

The Council of Europe and the Organization for Security and Co-operation in Europe (OSCE) organised a joint side event in Vienna in 2016 on identifying victims of human trafficking in places of detention. The side event addressed the barriers to early identification of victims of trafficking and the investigation of those who have abused them. The side event also explored the role of national preventive mechanisms and other bodies inspecting places of deprivation of liberty in detecting victims of trafficking and ensuring that they are referred for identification and assistance (OSCE 2014).

As a result, in many countries, UAMs, who may be refugees or victims of trafficking, may be detained as irregular migrants without the authorities processing their identification and providing appropriate protection.

Many refugees face serious protection problems within closed refugee camps. They may have fled persecution in their country of origin and then be forced into living in danger of ongoing persecution (sometimes by other groups or individuals from their country of origin) inside a refugee camp. These protection problems often lead refugees to flee for a second time – and to risk arrest and imprisonment in the next country to which they flee, as so-called "irregular secondary movers". Worse, poor conditions may force many to return to their home countries before it is safe to do so. This constitutes constructive *refoulement*, i.e., indirectly, but effectively, forcing refugees back to their persecutors (Human Rights Watch 2002).

Based on the research conducted in the framework of this study, it appears that very few member states (Bosnia and Herzegovina, Norway and Serbia) have screening systems for effective identification of specific categories entering or residing in their territory among the general category of irregular migrants and it is not clear if such systems are tailored to children.

69. See: www.udi.no/en/word-definitions/age-examination-of-unaccompanied-minor-asylum-seekers/.

70. RS 2010-183, available in Norwegian at: www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2010-183/. This circular is currently under review.

In **Bosnia and Herzegovina**, in response to ECPRD questionnaire No. 3044, the authorities reported that there are specialised inspectors for foreigners in charge of recognising vulnerable categories of aliens through interviews and using other evidence. Whenever there is a suspicion or evidence that a person may belong to a vulnerable group of aliens, proceedings are conducted in accordance with the Law on Aliens and relative regulations. There is no record of how this may function in practice in cases other than asylum seeking.

Case study

A characteristic example is the situation of a minor girl from Sri Lanka, who was found at the border of Bosnia and Herzegovina using a forged visa and a travel document. The Service for Foreigners' Affairs was responsible for this case. In the beginning there were reasonable grounds to believe that the child was a potential victim of human trafficking and she was sent to a safe house. After the proceedings were completed it was established she was not a victim of human trafficking, but an under-age alien who was heading to France with the intention of joining her parents who had already obtained refugee status there. The contact between child and parents was established via Skype. Since the parents spoke only the Tamil language, an interpreter was provided. After a few months of correspondence with the competent authorities in France, the minor was accepted in France on the basis of family reunification, and the necessary travel document was issued at the French embassy in Sarajevo. UNHCR BiH assisted in organising the meeting with the parents and the UNHCR representative at the airport in Paris. After authorisation of a temporary guardian, the girl departed to France, accompanied by an employee of the safe house, where she was handed over to parents in the presence of a UNHCR representative. It is important to emphasise that during her stay in the safe house, the girl attended an intensive French-language course in order to enable her to easily fit into her new environment. (Source: BiH reply to ECPRD questionnaire No. 3044)

In **Montenegro**, although the UNHCR has been calling for the creation of special screening and assessment procedures in law, this has not taken place. Upon interception of persons, the police identify the person based on an inspection of the identification documents, if the person holds such documents. If that is not the case, the police detain the person and initiate a procedure of identification at the diplomatic or consular representation of the alleged country of origin or through other mechanisms of international co-operation. UNHCR continues to train members of the border police and other relevant authorities on the asylum system, in order to increase their capacity

to work with vulnerable groups, such as children, including UAMs.

In **Norway**, potential asylum seekers are registered by the Immigration Police. Specific sublegal measures regulate how to identify possible victims of human trafficking and domestic violence.⁷¹ Also, specific provisions regulate the situation of unaccompanied asylum seekers who are under the age of 18 years. The Norwegian Directorate of Immigration has issued a circular, RS 2011-002V1, regarding the arrival of UAM asylum seekers.

From relevant reports (Sykiotou 2015a), it appears that in **Serbia** there is still a lot to be done in the area of identification of vulnerable undocumented groups, because the authorities (including cross-border) lack the knowledge to distinguish specific categories of UAM asylum seekers and victims of trafficking from ordinary foreigners and also from criminals, for example, when victims of trafficking are forced by the offenders to commit crimes. The creation of the State Centre for identification of victims in 2012 is an improvement. However, it is reported that the government has not provided staff or resources for this new entity (US Department of State 2016). See also the comments of the CPT after their visit to Serbia in 2011: "The Committee would like to be informed of the precise legal basis for the detention of unaccompanied foreign juveniles at the Juvenile Education Institution of Nis" (CPT 2012a: point 143).

Detention conditions

In Article 3.3, the Convention on the Rights of the Child stipulates that states are obliged to ensure that the institutions, services and facilities responsible for the care or protection of children conform to the standards established by the competent authorities, particularly in the areas of safety, health, the number and suitability of their staff and competent supervision. Despite specific legislative provisions, conditions of detention in most member states do not satisfy international human rights standards, especially Nelson Mandela Rules 10, 12 and 20 (UNGA 2015).

Administrative detainees, including children, often receive less protection, both relating to the procedures governing their detention and the conditions of detention, than persons awaiting criminal trial or criminal convicts. As reflected in CPT reports following visits to some member states, poor sanitation conditions and absence of hot water are frequent in many immigration detention centres and sometimes there is no separation of sanitation facilities for men and women/boys and girls. On many occasions, the

71. UDI Circular RS 2011-007V1 "Veiledning for samtale med mulige ofre for menneskehandel", available at www.udiregelverk.no/en/documents/udi-circulars/rs-2011-007/ (in Norwegian).

European Court of Human Rights has ruled that poor detention condition may amount to inhuman and degrading treatment.⁷²

From the information gathered, it appears that the situation in specific countries is as follows.

In **Albania**, irregular migrants are kept in the closed detention centre in Kareç in a remote location outside Tirana, practically inaccessible due to extremely bad road conditions. Such circumstances seriously obstruct the enjoyment of detainees' right to legal defence and independent monitoring by national and international bodies. According to the UN Special Rapporteur on the Human Rights of Migrants, its external and internal infrastructure, with high fences and detainees' rooms with bars, and the rules of "daily routine" remind him of a mid- to high-security prison.

According to the UN Special Rapporteur, there should be an urgent, comprehensive review and human rights assessment in Albania, especially for the closed detention centre in Kareç. Issues of accessibility, the physical infrastructure, the right to be informed in a language understandable to detainees of their fundamental rights, contact with the external world, outdoor exercise and independent monitoring should be addressed as matters of priority. Of particular concern to the Special Rapporteur were the cells in three of the visited reception centres. One had nothing but a cement floor, open windows and humid conditions (UNGA HRC 2012; Amnesty International 2004).

The UN Special Rapporteur was also concerned at the lack of adequate training and sensitisation of staff on international human rights standards and principles regarding the rights and treatment of persons deprived of liberty. He also noted that significant infrastructure improvements are required. While appreciating that all border points have separate reception rooms for children and women, some rooms lacked natural light (UNGA HRC 2012:18).

When the CPT visited "**the former Yugoslav Republic of Macedonia**" in 2014, and saw for the first time the Reception Centre for Foreigners in Skopje, they found extremely poor conditions in its state of repair and level of hygiene. Both male and female units and separate rooms/dormitories were seriously overcrowded. One particular room in the male detention unit measuring 22 m² and lacking natural light and ventilation was accommodating three children together with ten adults, most of who smoked.

72. See judgment *Aden Ahmed v. Malta* of 23 Jul. 2013 (application No. 55352/12) related to a Somali national. The applicant alleged violation of Article 3 in respect of the conditions of detention. See also judgment *Mahmundi and Others v. Greece* of 31 Jul. 2012 (application No. 14902/10), related to an Afghan family detained in the Pagani detention centre in Greece in inhuman and degrading conditions and without effective judicial review.

By the time of the visit, 13 UAMs were accommodated in the male section of the centre, while the remaining 16 children were staying with their relatives. Three separate rooms/dormitories were used in order to accommodate newly arrived male detainees for a number of days, the so-called *karantena* (CPT 2016b). No educational or purposeful activities were offered to children, and many of them did not even possess adequate clothing or proper footwear. Some of the UAMs had been in detention at the Reception Centre for more than two months (ibid: 65). Police officers had no specific training for working with irregular migrants.

The CPT recommended that: a) children should not be accommodated at the Reception Centre; b) the authorities should avoid, as much as possible, detaining irregular migrant families; and c) the official minimum living space per person in multi-occupancy rooms should be set at 4 m². If, in exceptional circumstances, detention cannot be avoided, CPT recommended that families be accommodated in a dedicated unit of the Reception Centre for Foreigners providing an adequate environment, and the period of detention should be limited (ibid: 62, 65).

As mentioned above, in **Liechtenstein**, irregular migrants with no distinction of age are held in the criminal prison of Vaduz. Following a visit in 2007, the CPT found that material conditions of detention were excellent; however, no educational activities were offered to inmates, irrespective of legal status (CPT 2008).

In **Montenegro**, the Ljubović youth detention centre provides basic services of accommodation and food, but psychosocial work with children and rehabilitation activities are largely restricted due to the language barrier. Another problematic aspect is the fact that Ljubović has been used to accommodate both illegal immigrant minors and juvenile criminal offenders.

According to information provided by UNHCR, detention conditions in the Republic of **Moldova** are better, because the Centre for Temporary Accommodation was renovated in 2012 by IOM with EU funds, and it is not overcrowded. The centre has special rooms for families (in 2016 there were no families in the centre), space for recreational activities and sports, medical facilities and access to legal counsel.

Turkish detention facilities have repeatedly been criticised because of abuse and insanitary conditions (Global Detention Project 2014:25; AIDA 2015: 95); according to the European Court, they have operated without adequate legal authority.⁷³ CPT carried out an ad hoc visit to Turkey in June 2015 with the purpose to

73. *Abdolkhani and Karimnia v. Turkey*, judgment of 22 Sep.2009 (Application No. 30471).

examine the treatment and conditions of detention of foreign nationals detained under aliens' legislation as well as the procedures applied to them in the context of their detention pending removal.⁷⁴ Previously the CPT had urged Turkish officials to consider adopting the term "detention centres" rather than "guest houses", since the persons held in these centres are undoubtedly deprived of their liberty (CPT 2015a). In addition, there is no free legal aid. Access to legal counsellors is provided, but not to NGOs.

Article 81-3 of the Law on Foreigners and International Protection states that international protection applicants and status holders shall be allowed to benefit from counselling services provided by NGOs, and this safeguard must also extend to detained international protection applicants. However, Article 68 fails to make explicit reference to the right of detained applicants to meet with NGO representatives. It is considered that this deliberate absence is meant to limit or deny detained applicants' access to NGO legal counsellors, which must be seen as an arbitrary reduction of the safeguard in Article 68 (AIDA 2015, CPT 2015a: 98).

An account of detention conditions was also provided in the European Commission's progress report on Turkey's EU accession process (European Commission 2012). As reported in all these sources, while there had been some improvements in treatment and detention conditions at the removal centres, pending the adoption and implementation of the Law on Foreigners and International Protection, critical gaps in law and policy remain. In particular, UAMs remain at risk of being detained alongside adults and without access to state child protection services as well as with difficult access to UNHCR services and asylum procedures, and to psychosocial services. In 2010 the European Court of Human Rights found that the conditions at two Turkish detention facilities constituted inhuman or degrading treatment in violation of Article 3 of the Convention.⁷⁵

The UN Special Rapporteur on the Human Rights of Migrants was also gravely concerned about issues related to detention conditions, legal safeguards and the treatment of migrants in Turkey, as well as the lack of independent monitoring by national and international bodies. He also underlined the insufficient training and sensitisation of staff in the removal centres on international human rights standards and principles regarding the rights and treatment of persons deprived of their liberty, with respect to detention conditions and safeguards (UNGA HRC 2013b).

74. The report has not been published, but see www.coe.int/en/web/cpt/turkey

75. *Z.N.S. v. Turkey*, 19 Jan. 2010 (Application No. 21896/08), available at: www.refworld.org/docid/4b56d5cf2.html.

Right to physical and mental health and development and access to health services (Article 24 CRC)

Facilities where migrant children are held in non-EU member states are often in a bad state, with very few exceptions (Liechtenstein). Most migrants are kept in overcrowded, unhygienic conditions. Men, women and (unaccompanied) children are in some cases held in the same facilities while, conversely, families may be split and held in separate facilities (IDC 2017). As a result, children kept in such conditions together with adults, risk being severely traumatised (Fiala 2016). As mentioned below (section *Specific groups of children in immigration detention*), the immigration detention centres also fail to respond to the needs of specific vulnerable groups such as girls, physically and mentally disabled children and babies. It needs to be noted that conditions appear less promising in the transit camps. The conditions in transit camps fail to comply with the standards and do not offer women and girls sufficient basic services and protection from multiple forms of violence or exploitation (Women's Refugee Commission 2016: 5). There is no gender sensitivity in transit camps as they do not have experienced and specialised staff. Unfortunately, government actors are not sufficiently responding to or preventing risks of gender-based violence. There is no co-ordinated response inside or across borders to assist survivors of gender-based violence, and in most states there is a lack of clinical care. In addition, the conditions in transit camps are below standard for a detention facility. Showers and latrines are rarely separated by sex at transit centres, there are no female-specific shelters and transit centres offer no private spaces for females.

In transit camps there is no separation of different groups according to their status because identification rarely occurs.

Judicial review

The right to judicial review, ensuring protection of the procedural and the substantive rights of every detainee, is expressly guaranteed by Article 5.4 of the European Convention on Human Rights and should allow a detained person to challenge the grounds and legality of detention as well as the conditions of detention. There is important case law of the European Court of Human Rights on the lawfulness of detention.⁷⁶ The Court has established that the lawfulness of the deprivation of liberty must be

76. See judgment *Mahmundi and Others v. Greece* of 31 Jul. 2012, detained without effective judicial review; *Aden Ahmed v. Malta* of 23 Jul. 2013 (Application No. 55352/12) on the non-opportunity to appeal against the lawfulness of detention. See also *Al-Nashif v. Bulgaria*, 20 Jun. 2002, §92; *M. and Others v. Bulgaria*, 26 Jul. 2011.

sufficiently clear and certain, and should be assessed in light of the domestic law as well as of the principles embodied in the Convention.⁷⁷

According to the Court, the right to judicial review must be real and effective, in law as well as in practice. It therefore needs to be effectively accessible, which means that practical obstacles, such as a lack of understanding of the language or of the proceedings, should not impede detained migrants in exercising their right. Thus, in order to ensure a real possibility for the migrant to challenge the decision on detention, they should be provided with translation and legal assistance where necessary. The need for accessibility is also emphasised by the Council of Europe Committee of Ministers, which has stated that “detained asylum seekers shall have ready access to an effective remedy against the decision to detain them, including legal assistance” (Council of Europe 2009, Guideline XI.6). For children, it is also necessary to ensure that a guardian is appointed to assist UAMs. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.⁷⁸

Moreover, the judicial review should be carried out by an independent and impartial judicial body, and should be capable of leading to the release of the person concerned, where appropriate. Their legal representative or the detainees themselves should be allowed to be heard before a court or a tribunal. The European Court has further indicated that the proceedings should have an adversarial character and provide the guarantees of due process, such as equality of arms. In addition, judicial review must be available promptly during detention.⁷⁹

Moreover, national authorities cannot avoid effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.⁸⁰

Some member states (Norway, Turkey, Switzerland and Ukraine) provide expressly for the possibility for a detained migrant, irrespective of age, to challenge a detention decision before a court. However, this

is only possible when (free) legal aid is offered to migrant detainees. In Ukraine, such a challenge is allowed by Article 26.4 of the 2001 Law on the Legal Status of Foreigners and Stateless Persons. However, according to UNHCR, the amendments of 2012 to the law have failed to introduce periodic judicial review for detained asylum seekers whose applications are under consideration (UNHCR Ukraine 2012a).

As mentioned previously, in **Norway** the chief of police or an authorised person may issue an order of arrest against an irregular migrant, or even any police officer when there is a danger associated to the presence of the alien in the territory. However, if the police wish to detain the arrested migrant for a longer period they must, at the earliest opportunity, and if possible on the day following the arrest, bring the person before the district court to decide if this person should be remanded in custody.

In **Switzerland**, the first order of detention must be reviewed within 96 hours by a judicial authority. Under Article 80 of the Federal Act on Foreign Nationals, foreign nationals can request review by a judicial authority of any extension of their detention.

In **Turkey**, administrative detention under the Law on Foreigners and International Protection is not subject to automatic judicial review. This type of detention is required to be reviewed by the provincial administrative authorities on a monthly basis and should, as a general rule, not exceed six months. It may, however, be extended for an additional period of up to six months where the removal cannot be executed because of the detainee’s failure to co-operate. However, in both cases, the detainee may apply to the local criminal court to challenge the detention decision. The judge’s ruling, which is required to be issued within five days, is non-appealable and can only be revisited if the relevant facts have changed, in which case the detainee’s only remedy is to make a new application to the same court (Norwegian Organisation for Asylum 2016: 33). This is potentially problematic for the purposes of Article 13 of the Convention, which guarantees the right to effective remedy before national authorities.

In **Ukraine**, administrative appeals courts have a heavy caseload, and reviews of detention for purposes of deportation are not given priority consideration, especially since applicants frequently file after the terms of appeal have expired. In several jurisdictions but particularly in Lviv, which handles a large proportion of these cases, it takes approximately six months for cases to be heard (UNHCR Ukraine 2012b).

Complaint and monitoring mechanism

Apart from the right to contest the legality of immigration detention, any detained migrant has the right to complain for any violation of their rights. Any

77. *A. and Others v. the United Kingdom* (GC), 19 Feb. 2009, §202.

78. *Nasrulloev v. Russia*, 11 Oct. 2007, §86; *Rahimi v. Greece*, 5 Apr. 2011, §§120-21 (no access to judicial review because the leaflet was not provided in a language the applicant could understand; he could not in practice contact a lawyer as he was an unaccompanied minor and no guardian had been appointed).

79. *Bouamar v. Belgium*, 29 Feb. 1988; *Al-Nashif v. Bulgaria*, 20 Jun. 2002. Also, *Nasrulloev v. Russia*, 11 Oct. 2007, §86: “[a] remedy must be made available during a person’s detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release”.

80. *Chahal v. the United Kingdom* (GC), 15 Nov. 1996, §131; *A. and Others v. the United Kingdom* (GC), 19 Feb. 2009.

detained person should have the right to formulate a complaint to a body independent of the detention institution; therefore in each immigration detention centre an independent system for monitoring and reporting abuse cases should be established. Unfortunately, in practice many countries fail to apply this right.

In light of Article 12 of the Convention on the Rights of the Child and its General Comment No. 12 on the right of the child to be heard, the UN Committee on the Rights of the Child recommends that the state party ensure that all relevant legislation guarantees the right of the child to be heard in judicial and administrative proceedings and in accordance with their evolving capacities.

Azerbaijan is one of the few countries that make specific provision⁸¹ for the possibility of the Human Rights Commissioner (Ombudsman) and members of the National Preventive Group to enter the detention centre for migrants without notice. The purpose of this is to hold meetings and interviews with the detainees and with any other person who can give relevant information, with the participation of an interpreter and another specialist (when so required), as well as to look into and take copies of all the documents confirming the lawfulness of placing and detaining foreigners in question in these institutions.

Recently, Amnesty International made recommendations to **Turkey** suggesting that the country should establish a truly independent and effective complaints mechanism with no structural or organisational connection to the police (Amnesty International 2015). This mechanism should be adequately staffed and headed by professionals of acknowledged competence, impartiality, expertise, independence and integrity, who are not members of the law enforcement agencies, and with its own corps of independent expert investigators.

The necessity for the establishment of such a mechanism becomes obvious for UAMs, who cannot easily recognise violations of their rights and/or abuse against them (UNOHR–PICUM 2013: 25), and thus they cannot form a complaint. Even if they recognise such violations, children do not know where to turn due to lack of available information (PACE 2014a; PACE 2010; PICUM 2015). As mentioned above, detention takes an enormous toll on children, particularly on their physical, psychological and mental health. Ill-treatment is a risk in every form of detention, especially for children held on immigration and national security grounds. Children may also face violence and other abuses from detainees (Human Rights Watch 2016).

81. According to Point 3.17. of Decree No. 047 of 2012, Guidelines on managing detention centres for irregular migrants under the State Migration Service of the Republic of Azerbaijan.

Sexual assault is a specific risk for both girls and boys, particularly when children are held with unrelated adults. The lack of privacy in bathrooms exacerbates the risk of sexual harassment or assault. This is why independent national and international institutions and bodies should continuously monitor immigration detention centres (UNHCR 2012, Guideline 10: 40). States should ratify the Optional Protocol to the Convention against Torture, which provides a strong legal basis for regular and independent monitoring of places of detention.

UNHCR emphasises the need for having access to a complaints mechanism (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

Civil society's monitoring role should also be strengthened. Associations and other organisations should be given access to visit detention centres and to assist in the treatment of children in detention (by providing various services, e.g. legal and psychological counsel) together with social workers and psychologists, whose role is of great importance for children, in particular to avoid trauma.



Specific groups of children in immigration detention

Detention of mentally or physically disabled children

According to Guideline 9.5 of the detention guidelines of UNHCR, as a general rule, asylum seekers with long-term physical, mental, intellectual and sensory impairments should not be detained (UNHCR 2012: 38). All detainees, including migrants who suffer from mental illness or physical disability, should have appropriate conditions of detention and be provided with the necessary medication. Failing to provide such conditions not only infringes the 2006 International Convention on the Rights of Persons with Disabilities,⁸² but would amount to inhuman or degrading treatment under Article 3 of the European Convention on Human Rights.

The European Court of Human Rights has considerable case law on that issue, considering that detention of a severely disabled person in poor conditions constitutes degrading treatment contrary to Article 3 of the Convention.⁸³ These principles have been reiterated by the Council of Europe in the Recommendation of the Committee of Ministers No. R (1998) 7 on the ethical and organisational aspects of health care in detention, stating that persons suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff.⁸⁴

Unfortunately, there is no available information or provided statistics on whether member states take specific measures for cases of children with mental disabilities in immigration detention. Even if civil society has access to immigration detention centres, it is not easy to verify the existence of such cases and therefore this area remains undocumented.

82. This Convention was adopted by UN General Assembly Resolution A/RES/61/106 on 13 Dec. 2006. Along with its Optional Protocol (allowing its parties to recognise the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals) it came into force on 3 May 2008.

83. See *Musial v. Poland*, 20 January 2009; *Price v. the United Kingdom*, 10 July 2001.

84. See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, §§50, 58 and 70.

Detention of girls

In general, we can note a total absence of specific provisions and measures for the specific needs of girls in non-EU member states. Since the beginning of the refugee and migrant crisis in Europe, women and children outnumber adult men. According to the Council of Europe, whereas in 2015 men constituted approximately 70% of the population on the move who crossed into Europe, in 2016 women and children were nearly 60% of the total (Council of Europe Commissioner for Human Rights 2016; UNHCR 2008: 66 especially for risk factors faced by women and girls). The vulnerability of girl detainees has been highlighted on many occasions during field visits of the CPT in member states, underlining in some cases that conditions fall below “CPT standards”. CPT has often devoted separate chapters to women and girls deprived of their liberty and to the principles ensuring their “safe and decent custodial environment”. In states where irregular migrants are penalised as criminal offenders, girls – like any other irregular migrant – are considered to be in conflict with the law. In such cases the Bangkok Rules should be applicable (UNGA 2011).

According to the Bangkok Rules women and girls shall be provided with gender-specific health-care services at least equivalent to those available in the community, counselling for sexual abuse or violence, facilities to contact their relatives, access to legal advice, interpretation and access to consular representatives. According to Rule 12, “Individualised, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health-care needs in prison or in non-custodial settings”. The UN Rules for the Treatment of Women in Prison stipulate that prison authorities shall put in place measures to meet the protection needs of girls (Rule 36).

Babies and infants

Prison should be the final measure for mothers with children, including girls who are already mothers. In view of the adverse effects on babies of imprisonment

of mothers, the Parliamentary Assembly of the Council of Europe has recommended that the Committee of Ministers invite member states to develop and use community-based penalties for mothers of young children and to avoid the use of prison custody (PACE 2000). "Pregnant women and women with young children should not be imprisoned unless absolutely necessary. Appropriate legislation should be in place and sentencing guidelines for courts should underline this principle. If they are imprisoned, the state takes on the responsibility to provide adequate care for the women and their babies" (UNODC 2008).

If mothers are detained, efforts should be made to ensure that babies and infants who are kept together with their migrant parent(s) benefit from the minimum standards as provided in the Bangkok Rules for mothers in prison (UNGA 2011). When sentencing or deciding on pre-trial measures for a pregnant woman

or a child's sole or primary caretaker, non-custodial measures should be preferred (where possible and appropriate) and custodial sentences considered mainly when the offence is serious or violent (point 9). Given that migrants may spend a long time in detention facilities, the environment provided for the child's upbringing should be as close as possible to that of a child outside detention.

According to the UN Convention against All Forms of Discrimination against Women (Article 12), states should ensure that women have "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation". Specialised staff should also be present in those facilities. Mechanisms should be in place to protect children from all forms of physical and psychological abuse.

Detention practices in the EU member states

Immigration detention is also widely used in the EU member states, even if restricted in specific cases (Lundby 2015). Despite the specific EU legislation on the matter, the situation in the member states does not seem any better regarding detention of migrant children.

Available information reveals that detention is used in a broad variety of cases and situations: asylum seekers, irregular migrants, minors, older persons, medically ill and the healthy can all be subject to detention, irrespective of their special needs and vulnerabilities (JRS 2010: 104; European Migration Network 2014b: 21-8). Migrants in EU member states can be detained with a view to their return; the detention decision is a measure adopted to prepare for the return or to ensure that it will be possible to implement it in cases of a forced return. Detention in the return framework is not a criminal punishment (see Council of Europe 2005) and is in most cases decided by the administration and not by a judge. Although exceptions may exist in some member states for persons with special needs, the “average detainee” finds that they are unable to exercise a degree of personal choice and must accept detention as one accepts a punishment (JRS 2010: 13).

Asylum seekers can also be detained, on the grounds listed by the Reception Conditions Directive; however, detention is not permissible solely because an asylum request has been made. The grounds for detention are defined within this context in European law (European Migration Network 2014b: 12). The Return Directive No. 2008/115/EC envisages detention only in the following cases: to prepare the return and/or carry out the removal process, in particular, to prevent the risk of absconding and when third-country nationals avoid or hamper the preparation of return.

Detention of vulnerable persons, including children, is not forbidden in the Return Directive, but it should be exceptional. Families with minors can only be

detained as a measure of last resort and for the shortest period possible. They must be provided with separate accommodation guaranteeing their privacy, and minors must have access to leisure activities as well as to education (depending on the length of their stay). Unaccompanied minors must as far as possible be accommodated in institutions providing personnel and facilities adapted to the needs of their age.

The recast Reception Conditions Directive 2013/33 EC also contains a list of guarantees and defines detention for vulnerable persons as exceptional. Minors are to be detained only “as a measure of last resort” and “for the shortest period of time” while “all efforts shall be made to release and place them in accommodation suitable for minors”. Unaccompanied minors are to be detained only in “exceptional circumstances” and “all efforts shall be made to release the detained unaccompanied minor as soon as possible”. The recast directive also states that UAMs can never be detained in prison accommodation.

For non-asylum-seeking UAMs, a distinction can be made between EU member states that can refuse entry to all third-country nationals who do not fulfil the entry conditions, irrespective of age (so, including UAMs) and those that apply a special policy to UAMs based on humanitarian grounds. The latter countries always grant non-asylum-seeking UAMs access to the territory, regardless of whether they fulfil the entry conditions.

Most EU member states apply a similar reception system for all UAMs, hosting asylum- and non-asylum-seeking minors in similar facilities. A small number of states have different reception systems, depending on the migration status of the UAM, and thus place asylum and non-asylum-seeking UAMs in different facilities. Most EU states accommodate asylum-seeking UAMs in separate reception facilities specifically for minors, in foster families or in designated areas for minors within the mainstream reception facility.

The most common ground for detention, in force in 25 EU member states, is “risk of absconding” which is applied mainly in the context of return (European Migration Network 2014b: 15). Another ground, prescribed in the national legislations of 22 EU states is “establishing identity” of the third-country national, applied mostly in the context of international protection. Further grounds applicable to all categories of third-country nationals (minors included) are “threat to national security and public order”, “non-compliance with the alternatives to detention”, “presenting destroyed or forged documents” and “reasonable grounds to believe that the person will commit an offence” (European Migration Network 2015).

The legal framework in EU member states

National legal frameworks do show variations across EU member states (European Migration Network 2015: 40) with regard to the categories of third-country nationals that can be placed in detention. Most notably, detention of applicants for international protection is regulated by separate national legal provisions from detention of other categories of third-country nationals (such as persons subject to detention in the context of illegal entry, illegal stay or return) in all EU member states except Finland, Sweden and the United Kingdom, where the same national provisions equally apply for all categories of third-country nationals.

Until mid-August 2016, in all but three member states’ legislation, irregular entry of migrants, irrespective of their age, is punishable by criminal or administrative penalties in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state (EU FRA 2014; Council of Europe Commissioner for Human Rights 2010a). Malta, Spain and Portugal do not punish irregular entry, exit or residence, but return procedure is initiated. Legislation in 17 EU states provides for imprisonment and/or fine for irregular entry.⁸⁵ Eight member states envisage only a fine,⁸⁶ although in aggravated circumstances it may be increased to imprisonment.

CPT carried out an ad hoc visit to Hungary in 2015 to examine the treatment and conditions of detention of foreign nationals deprived of their liberty under aliens’ legislation or the recently amended criminal legislation, according to which crossing the border fence or damaging it constitutes a criminal offence. Attention was also paid to the legal safeguards offered to the detainees concerned. To this end, the delegation

visited several detention centres for foreigners, police detention facilities and a prison. In addition, the delegation visited two so-called “transit zones” located at the border with Serbia. The report is not yet public.

Depending on the state, if the migrant has no means to pay the fine it may be converted into a custodial sentence.

Similarly to irregular entry, legislation in 25 EU member states includes penalties for irregular stay, with 10 applying a fine and and/or imprisonment⁸⁷ and 15 a fine only.⁸⁸

In Malta, Portugal and France, irregular stay does not imply a fine or imprisonment; instead a return procedure is initiated. By the Law of 31 December 2012, France has modified (deleted) the provisions penalising irregular stay from the Code on Entry and Stay of Aliens and the Right to Asylum⁸⁹ following the cases of *El Dridi*⁹⁰ and *Achughbaban*⁹¹ in front of the Court of Justice of the EU.

EU Directive 2008/115 pursued the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. The maximum period laid down in articles 15.5 and 15.6 of the directive served the purpose of limiting the deprivation of third-country nationals’ liberty in a situation of forced removal.⁹² The directive is, thus, intended to take account of the case law of the European Court of Human Rights and the relative principle of proportionality. The latter requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued, in accordance with (the eighth of) the “Twenty guidelines on forced return” (Council of Europe 2005). According to the latter, any detention pending removal is to be for as short a period as possible.

There are two main forms of immigration detention under EU law: pre-removal detention, regulated

85. Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Romania, Sweden and the United Kingdom.

86. Austria, the Czech Republic, Hungary, Italy, the Netherlands (only if declared an “undesirable alien”), Poland, Slovakia and Slovenia.

87. Belgium, Croatia, Cyprus, Denmark, Estonia, Germany, Ireland, Luxembourg, the Netherlands and the United Kingdom.

88. Austria, Bulgaria, the Czech Republic, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

89. Loi n° 2012-1560 du 31 décembre 2012 relative à la retenue pour vérification du droit au séjour et modifiant le délit d’aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées, JO, 1er janvier 2013, Article 8; available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026871211&dateTexte=&categorieLien=id.

90. CJEU C-61/11 *PPU El Dridi*, judgment of 28 Apr. 2011.

91. CJEU C-329/11 *Alexandre Achughbaban*, judgment of 6 Dec. 2011.

92. CJEU C357/09 *PPU Kadzoev* [2009] ECR I11189, paragraph 56.

by the Returns Directive (2008/115/EC), and asylum detention, governed mainly by the Reception Conditions Directive (2003/9/EC) and its adopted recast (2013/33/EU).

The Returns Directive is considered as “ambiguous towards children and families”: it refers to the principles of family unity and the best interests of the child, but it fails to explicitly prohibit detention of minors.

In March 2016 an EU–Turkey agreement was concluded, following the mass arrival of refugees and migrants mainly to the Greek islands.⁹³ The agreement is considered by PACE to exceed the limits of what is permissible under European and international law (PACE 2016c; see also JRS 2016). It raises serious questions of compatibility with basic norms on refugees’ and migrants’ rights. The Assembly of the Council of Europe was invited to take a position on these issues and make practical recommendations to states and the European Union on how they should be handled so as to ensure compliance with EU, European and international legal standards on refugees’ and migrants’ rights.

Relevant EU texts on irregular migration

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

2002/946/JHA: Council Decision of 28 November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals

Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals

2004/191/EC: Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals

2004/573/EC: Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are subjects of individual removal orders

Readmission agreements with: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Hong Kong, Macao, Republic of Moldova, Montenegro, Pakistan, Russian Federation, Serbia, Sri Lanka, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine.

93. The CPT visited hotspots in Greece on 13-18 Apr. 2016: www.cpt.coe.int/en/states/grc.htm. See also the CPT report on Greece after the visit on 14-23 Apr. 2015: www.coe.int/en/web/cpt/greece.

Alternatives to immigration detention

International standards

As explained previously, various reasons are used by national actors to justify administrative detention of irregular migrants. However, the same national actors, when dealing with migrants, have the obligation to establish presumption in favour of liberty and seek non-custodial solutions.

EU FRA defines alternatives to immigration detention (ATDs) as “any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country” (EU FRA 2015).

The severe negative consequences for a child having been already explained, it is important to note that detention has also a financial cost for the state. Research commissioned by IDC shows that cost-effective and reliable ATDs are currently used in a variety of settings and have been found to benefit a range of stakeholders affected by this area of policy (IDC 2015).

As explained in the PACE Report on the matter, alternatives are much more cost-effective than detention (PACE 2014c; also PACE 2014b). Other reports also explain that finding ATDs is less costly than the detention itself (European Migration Network 2014b: 41). On the other side, the risk of absconding can be greater in the case of using ATDs, which may be the reason why states are not motivated to use them. According to Article 3(7) of the EU Return Directive (2008/115/EC): “risk of absconding” means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond.

Even in EU member states, once a risk of absconding is established, ATDs are no longer considered. When considering whether an alternative is applicable, the national authorities make an assessment of the risk of absconding based on objective criteria such as: if the person has provided false information on identity or false information in general; if the person has forged, falsified or used another name for a residence permit or an ID or travel document; violated the obligation of reporting their designated residence, or even violated the entry ban. The assessment may be also based on

subjective criteria such as the foreigner’s age and health or whether they have previously stayed at a known address. The economic cost of the decision to choose between detention or an alternative could be a factor in the overall assessment (Mananashvili 2015: 6).

As explained, even though children should not be detained for migration-related purposes, and the principle of the best interest of the child should be taken as the primary consideration, in accordance with the CRC, detention of this vulnerable group is still widely present. Also, according to the Beijing Rules (UNGA 1985), efforts should be made to provide community programmes for juveniles. Moreover, as children should not be separated from their caregivers, alternative measures should be sought for parents as well. States should implement ATDs that ensure protection of the rights, dignity and well-being of children.

It needs to be emphasised that the confinement of refugee children in closed camps also constitutes detention. UNHCR suggests a series of alternative measures for asylum seekers, including accommodation in open centres, deposit or surrender of documents, periodic reporting requirements, provision of a guarantor/surety, structured community supervision and/or case-management programmes (UNHCR 2012: 41). The proposed alternatives are not exhaustive. They identify options which provide state authorities with a degree of control over the whereabouts of asylum seekers while allowing asylum seekers basic freedom of movement.

ATDs need to be legally regulated in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement (UNHCR 2012: 22). It needs to be underlined that, even when alternatives apply, access to legal aid should be given to migrants, especially to children.

The choice of alternative would be influenced by an individual assessment of the migrants’ personal circumstances, such as age, health condition, the risk of absconding and prevailing local conditions. A number of countries have introduced streamlined identity, health and security checks to minimise the use of detention, for example Australia, the United Kingdom, the United States (see IDC 2015: 38). The community context should be assessed to identify the existing infrastructure in order to decide on the needs

and placement options of the child (IDC 2015: 60). Before placing the child, it is of specific importance to assess the existence of protection mechanisms in the community. If such mechanisms do not exist, they should be created for (or expanded to) the specific communities – for example, the expansion of national child protection programmes to include unaccompanied children, such as in Hungary (ibid: 46).

According to the Guidelines of the Council of Europe Committee of Ministers on child-friendly justice: “Children should be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Based on adequate information, both legal and otherwise, a choice should be available to use either court procedures or alternatives for these proceedings whenever they exist” (Council of Europe 2010: point 25).

Vulnerable categories of children, such as survivors of trauma, trafficking victims or those with physical or mental health needs, should not be placed in detention. Children with disabilities should enjoy their right to live in a community, with appropriate support for themselves and for their families. When institutional treatment is necessary, a strict therapeutic protocol, including strict safeguards on involuntary treatment, should be followed. Appropriate legal and other support should be provided, to enable children to make important life decisions, such as those related to medical treatment, but also to give them the possibility to challenge institutionalisation before a court.

Child drug-users should also receive appropriate treatment and care. Compulsory stay at drug detention centres cannot be considered as a form of “treatment” or an “alternative to imprisonment”. In line with the calls of the UN Special Rapporteur on Torture and 12 UN agencies, states should immediately close all drug detention centres (UNGA HRC 2013a: point 40; Human Rights Watch 2016).

To ensure that deprivation of liberty is really used as a last resort, governments should first establish and employ true alternatives⁹⁴ to detention. As explained, alternatives are any law, policy or practice by which children should be able to reside in a community, without being detained for migration-related reasons. For migrant children and families, community-based alternatives – housed in settings that allow asylum seekers, refugees and other foreigners to attend regular schools, work and otherwise interact regularly with others – are preferable to detention, as the experience of supervision and case-management programmes

94. The International Detention Coalition (IDC) has identified over 250 examples of alternatives from 60 countries around the world: <http://idcoalition.org/interactive-map-alternatives-to-detention/>.

in Australia, Canada, Indonesia, Thailand, the United Kingdom and the USA have shown (IDC 2015: 10).

States should do more to facilitate the placement of unaccompanied and separated children with existing relatives in the destination country or in third countries.

Worldwide, ATDs– which reduce the application of custodial measures – include a wide range of alternatives, such as the duty to report regularly to the police, residence restrictions, counselling, the duty to surrender documents, sureties/bail or electronic monitoring. However, it needs to be underlined that alternatives must always respect the rights and legal safeguards of the child according to Article 40(3)(b) of the CRC (see also UN Committee on the Rights of the Child 2007). Consequently, placement of an electronic bracelet should not be envisaged for children (or for any migrant), because it is a disputable “alternative”. It is not only an attack on privacy, but it has also physical, psychological and emotional effects on the person and provokes a social stigma of criminalisation (the person being confused with a criminal) and humiliation (Immigrant Rights Clinic 2012:17).

According to points 3.8 and 3.9 of the Tokyo Rules, non-custodial measures shall not involve undue risk of physical or mental injury and the dignity of the offender subject to non-custodial measures shall be protected at all times (UNGA 1990a).

The Beijing Rules suggest alternative measures to detention for children, such as close supervision, intensive care or placement with a family or in an educational setting or home (UNGA 1985).

Some states have opted for different models developed by leading organisations in the field such as the IDC, more specifically the Community Assessment and Placement (CAP) model, which is built on the following principles:

- ▶ the presumption that detention is not necessary;
- ▶ screening and assessing the individual case;
- ▶ assessing the community setting;
- ▶ applying conditions in the community if necessary;
- ▶ detention only as a last resort in exceptional cases.

The use of alternatives in non-EU member states

Despite the rising trends in immigration control, national interest in ATDs is also on the rise (Sampson and Mitchell 2013). Efforts to reduce child detention in Europe have been reflected in the introduction of alternatives in the legislation of the Council of Europe member states and the adoption of new policies.

It seems that a number of EU member states have made changes to their legislation since 2011 to include ATD. Croatia has introduced the duty to surrender documents, to deposit sureties, to have a fixed address and to report to the authorities regularly; Cyprus has the possibility for migrants to apply for alternatives, without however defining the type of alternatives available; Slovakia has introduced detention with designated residence and the possibility of financial guarantees. According to PACE (2014b) and the EU FRA, Malta appears to be the only remaining EU member state that envisages alternatives only when release is expected.

However, despite this positive trend, there is no uniform approach and national practices differ. While some states are taking measures to avoid the unnecessary detention of children, the majority of them still resort to detention in practice, while applying different policies and using specialised institutions (Human Rights Watch 2016).

Non-EU member states (see Appendix 1, Table 7) fall into five categories:

1. states that apply alternatives to immigration detention of children;
2. states that apply alternatives for children of a certain age;
3. states that do not have alternatives and only apply detention;
4. states that provide for alternatives but do not apply them in practice; and
5. states whose alternatives are equal to detention (e.g. placement in a closed institution).

An issue for consideration is that the applied alternatives (where they are applied) are not monitored or are monitored only sporadically by some NGOs.

In addition, for some states that do not apply immigration detention to UAMs, such as Andorra and Armenia, it is not clear what happens to the minors. Are they left in freedom with no additional measures? Is there any support system offered to them?

States that apply alternatives to immigration detention of children

In **Iceland**, the main alternative to detention of families with children for immigration purposes is the obligation to report or the order to stay in a specified place. There are no specific provisions for UAMs. The Ministry of Interior has contracted with two municipalities in the south-west of Iceland, which provide (only) refugee families with housing, financial support and different services, such as medical care, interpretation, counselling and hobbies. Reykjanesbaer, which lies near the country's international airport, has run a

centre for this purpose since 2003, and in the capital Reykjavik up to 50 refugees may be sheltered at the same time. However, no statistics or other data are available for migrant children.

In **Norway**, in all cases of migrants, the police and the court make an individual assessment as to whether to apply an alternative to detention and whether detention is necessary and proportionate (Utlendingsdirektoratet 2014). Consequently, each individual case is subject to a separate assessment of whether the conditions for detention or alternatives are met. Pursuant to the Immigration Act, there are several alternatives such as: reporting to the police or immigration authorities at regular intervals; obligation to surrender a passport or a travel document (Section 104); and obligation to stay in a specific place, either a private address or an open reception centre (Section 105). Failure to comply with an order relating to an obligation to report or with an order to stay in a specific place is a criminal offence. If the foreign national fails to comply with the obligations, they can be arrested and remanded in custody. According to Section 106 §2 of the Immigration Act, a decision to arrest or remand in custody a migrant cannot be made if an obligation to report or an order to stay in a specified place is considered to be sufficient.

No distinction is made between the different categories of third-country nationals when considering whether alternatives to remand in custody can be applied. In the case of remand, assessment of the foreign national's age and health condition are taken into consideration. When considering whether an alternative is applicable, the authorities also look into the risk of absconding and whether the foreigner has previously stayed at a known address. The economic cost of the decision can play a role in the overall assessment.

States that apply alternatives for children of a certain age

As previously explained, in **Switzerland**, children below 15 years of age are not detained. However, each canton follows its own system; some cantons consider special accommodation centres for children (IDC 2016). From information obtained during an interview with UNHCR, evidently the standards in the centres differ: some may be very good and others bad. Some cantons have specific structures for children and others place children together with adults. Some of the alternatives (as used in the canton Basel-Stadt, for instance) are: assigning a caregiver to the child, finding foster care accommodation and imposing "reporting requirements". Terre des Hommes has found "a worrying lack of information and transparency", both for the central authorities in Bern, but also for authorities of the cantons regarding the different

practices on the detention of children (Terre des Hommes 2016: 34).

A recommendation adopted by the Confédération des Directrices et Directeurs Cantonaux des affaires sociales (CDAS) regulates the harmonisation of accommodation standards at cantonal level for UAMs in the framework of an asylum application (CDAS 2016).

States that do not have alternatives and apply only detention

In **Albania**, even if the legislation envisages the detention of children only “as derogation”, UAMs are still detained since there is no system of alternatives. According to the UN Special Rapporteur on the Human Rights of Migrants, Albania should revisit its system of immigration detention to introduce a system of alternatives, including community-based alternatives, to encourage regularised migration and human rights-based migration management (UNGA HRC 2012).

States that provide for alternatives but do not apply them in practice

Article 65 of the **Georgian** Law on the Legal Status of Aliens and Stateless Persons provides for alternative measures which can be decided by a court. These alternatives can be: (a) regular reporting to a relevant territorial department of the police, maximum twice per week; (b) release on bail backed by guarantor who is a Georgian citizen, supplying either a bank guarantee of at least GEL 1 000 (one Georgian Lari, or GEL, equals 0.39 euro) or a certificate of regular income; or (c) a maximum bail of GEL 2 000.

In Georgia, the implementation of alternative measures has a fixed term (determined by the court) that does not exceed three months. However, there is no provision for what may happen to the child after the expiration of this term if they are still in an irregular situation and their removal from the territory cannot take place. In practice, UAMs are placed in a temporary (closed) accommodation centre.

In **Turkey**, articles 57-4, 68-3 and 71-1 of the Law on Foreigners and International Protection provide that migrants in an irregular situation are placed in non-custodial facilities, such as a free residence in an assigned province with an obligation of regular reporting; or “any other alternative measure” decided by the provincial authority. The law provides that an administrative detention decision shall be issued only where the alternative measures are not deemed sufficient (Article 68). Express exclusion of detention is made for UAMs seeking international protection. They must instead be placed in appropriate accommodation facilities under the authority of the Ministry for Family and Social Services. However, the law provides

for the possibility of detention to prevent absconding (AIDA 2015: 93; Global Detention Project 2014).

It seems that, in practice, alternatives do not apply, since the UN Special Rapporteur on the Human Rights of Migrants has strongly recommended that the Turkish authorities rely more on non-custodial measures. In order to limit the use of detention and rely more on non-custodial measures, the Special Rapporteur encouraged the Turkish Government to study his report presented to the Human Rights Council in June 2012 (UNGA HRC 2013b) on the detention of migrants in an irregular situation, which sets out a list of ATDs and how to make use of them (see also UNGA HRC 2013b).

States whose alternatives are equal to detention

In **Andorra, Bosnia and Herzegovina and Liechtenstein**, UAMs are placed in special, closed accommodation centres. These are considered to be ATDs. However, as mentioned above, according to the Havana Rules (UNGA 1990b), placement in any type of closed institution should be considered as deprivation of liberty.

The CRC, in Article 37(b), underlines the urgency of finding alternatives to the imprisonment of children: “[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

However, the introduction of alternatives in national laws is not itself a guarantee of their application. Non-application of alternatives remains a serious matter of concern, as many states resort more often to detention than to the different alternatives that their legislation may already prescribe (Human Rights Watch 2016). On the other hand, some of the member states that do apply ATDs do not produce proper related statistics (confusing irregular migrants with asylum applicants), which makes it rather difficult to assess how far ATDs are applied. What is more, alternative measures are not monitored or evaluated.

Referring to the relevant parts of Article 40 of the CRC, the UN Committee on the Rights of the Child (2007:§§22-27) re-emphasises that any alternative measure has to be designed to fit the special needs of girls, particularly in education, trauma recovery, family relationships, substance abuse and medical needs (Chesney-Lind and Sheldon 1998). Alternatives should also be shaped by the issues confronting ethnic minorities, seeking to adapt them to cultural resources available in ethnic communities in the state of their reception.

Conclusion

Despite significant legislative changes and attempts to change practice, detention of migrant children still remains a matter of serious concern in the majority of non-EU Council of Europe member states. As a result, children end up behind bars in various institutions, including prisons, police facilities and special accommodation centres, which are not appropriate for their needs and violate their fundamental rights.

It should be noted that immigration detention of children remains a rather under-reported area of research, with scattered and incomplete information available. In the framework of this study, the collection of data for the 18 non-EU member states was very difficult. One of the major findings and issues of concern is that most states lack child-specific legislation in the area of immigration detention and, particularly, alternatives to detention of children, as well as screening systems for the identification of children in need of specific protection.

If “detention” is considered – in accordance with the Havana Rules – as any placement of children in a closed environment restricting their freedom of movement, irrespective of the competent authority (administrative or social), as a result the number of states that practice detention is much higher (see Appendix 1, Table 1). Thus, it appears that immigration detention of children is practised by Azerbaijan, Georgia, Liechtenstein, Republic of Moldova, Montenegro, Norway, Russia, San Marino, “the former Yugoslav Republic of Macedonia”, Turkey and Ukraine.

Albania and Serbia consider immigration detention of children as “derogation”, but they still apply it, as does Bosnia and Herzegovina, which authorises restriction of movement or placement in a closed centre (usually the latter). From the data collected, it appears that very few states (Iceland, Norway, Switzerland) have express provisions on alternatives in their legislation, while others provide for alternatives for children to be placed in closed national institutions (social or educational) called “accommodation centres” (as is the case in Bosnia and Herzegovina and Montenegro). Even for states that prohibit immigration detention for children, such as Andorra, Armenia, Iceland and Switzerland (for children below 15 years), or Montenegro (for UAMs below 16 years there is no restriction of movement unless as a last resort), there are no available data on alternatives for children.

Alternatives may vary from reporting to the police or immigration authorities at regular intervals; obligation to surrender a passport or a travel document; obligation to stay in a specific place (private address or open reception centre); or placement in a foster family or closed accommodation centre. Placement of children in closed accommodation centres, which are often ill-equipped for housing children and restrict their freedom of movement, do not present adequate conditions for children. Very few states consider placing children in foster families instead of placing them in closed institutions; Switzerland’s federal law provides for this, but there is no information on the practice of each canton.

In general, provisions on alternatives are often vague, leaving room for arbitrary implementation. In some member states, it appears that alternative measures may be provided for by law; however, in practice only detention is used, as in Georgia and Turkey.

In addition, there are no accurate data on the number of children kept in detention; how many of them are UAMs; how many boys and girls; in which facilities and in what conditions they are held; what their particular needs are; or even what their legal status is (as statistics often confuse irregular migrants with asylum seekers).

Referral and support systems may be provided by law in most of the member states (e.g. guardianship for UAMs), but in practice this does not seem to function correctly and there is no indication of when the guardian is actually appointed (at which stage of the process) and if there is a temporary guardian for UAMs. In some states, social workers are appointed to monitor the child’s well-being (Albania, Azerbaijan, Bosnia and Herzegovina, Republic of Moldova, Norway, “the former Yugoslav Republic of Macedonia”) and in some their opinion is mandatory (Albania). However, this is not the rule for all states. In some countries, social assistance is expressly provided only to asylum seekers (Montenegro).

Effective access to justice, with regard to lodging an appeal against detention, is also a matter of concern. Although certain national legislations (Norway, Turkey, Switzerland, Ukraine) expressly envisage the possibility of a detained migrant, irrespective of age, challenging the detention decision before a court, there are doubts as to its implementation, since this

seems practically possible only when (free) legal aid is offered to children. In Ukraine, Article 26.4 of the Law on the Legal Status of Foreigners and Stateless Persons from 2001 allows such a challenge but, according to UNHCR, the amendments of 2012 to the law have failed to introduce periodic judicial review for detained asylum seekers whose applications are under consideration (UNHCR Ukraine 2012a).

Legal assistance appears to be offered mainly in theory. Among the states that do contain provisions on legal assistance (Azerbaijan, Bosnia and Herzegovina, Georgia, Norway, Serbia, Switzerland, Turkey, Ukraine), free legal aid is expressly mentioned only in three national legislations (Bosnia and Herzegovina, Georgia and Norway).

Moreover, there are no express provisions on the existence of an independent system for monitoring and reporting abuse cases in detention places, despite its extreme importance to detained persons, especially to unaccompanied children (both asylum-seeking children and children in an irregular situation, particularly those who are victims of violence or other abuse; or who are in a particularly difficult situation) as they may be reluctant to lodge a complaint. Only Azerbaijan expressly provides for a monitoring mechanism.

Interpretation also seems to be a problem as it not expressly provided as mandatory (only in Azerbaijan), although it should be; some NGOs are undertaking to cover this absence in practice (as in Republic of Moldova). Very few countries contain specific provisions on interpretation for migrant children or migrants in general (Georgia, Ukraine). The legislations of only three states mention that a migrant child must be provided with information in a language they can understand (Albania, Norway and Serbia).

Regarding medical care of children in detention, express provisions are made in the legislation of Azerbaijan, Georgia, Republic of Moldova and Ukraine, while Albania, Serbia and Switzerland offer general access to national health services and Norway provides free medical care for all minors below the age of 12 years. Only a few states clarify whether medical care covers regular or only emergency problems (only Bosnia and Herzegovina clarifies that only emergency cases are covered).

Access to education appears to be more widely offered in immigration detention (Albania, Bosnia and Herzegovina, Georgia, Norway, Serbia and Turkey), at least in theory, though it is not clear if it covers other than the elementary level.

There was no available information on the existence of independent case-management services for migrant children in any of the examined states (Council of Europe non-EU members).

Additionally, screening and assessment procedures are absent in almost all of the countries examined. Only Bosnia and Herzegovina, Norway, Serbia and Switzerland appear to have related specific provisions for the identification of specific categories of children.

Age determination appears to be rather problematic as very few countries make provision for a forensic examination (Norway and Switzerland) and fewer still for a DNA test (Albania); some add information received by witnesses and/or consular authorities (Georgia and Norway). More states accept an assumption of the child's status until proven otherwise (Albania, Bosnia and Herzegovina, Republic of Moldova and Montenegro), but in general it appears that express provisions on such assumptions are missing in most member states.

On the other side, the principle of family unity also faces certain challenges as not all national legislations expressly enshrine this principle. Related provisions for family unity exist in Albania, Azerbaijan, Bosnia and Herzegovina, Norway, Russia, Switzerland, "the former Yugoslav Republic of Macedonia" and Turkey, while in Serbia and Georgia the separation of family members is expressly prohibited. In the Republic of Moldova, Montenegro and Serbia, there are related legal provisions for asylum seekers, which also apply in practice for irregular migrants. However, in cases where family members are separated (such as in Ukraine) there are no indications in the national legislation or policy as to the maximum length of separation or on how the authorities should support the child in maintaining contact (e.g. visits) with detained family members.

There are also serious concerns about the lack of adequate reception conditions for children in all but one of the examined member states (Liechtenstein), and about facilities where children are held are in bad conditions, which have a serious negative impact on children's physical safety, dignity and health. In addition, except for the provisions on asylum seekers, none of the member states have provisions for the specific needs of girls or babies, or for mentally and physically disabled children, in immigration detention.

As an overall conclusion, it can be said that a broad international co-ordinated response is necessary to end the immigration detention of children. A change of attitude and the allocation of resources and trained personnel are required to achieve positive results.

In order to achieve this aim, states should prioritise more humane migration policies and implement the relevant PACE resolutions and recommendations, in particular, the PACE Resolution 2020 on putting an end to detention and promoting and facilitating the application of alternatives (PACE 2014c; see also PACE 2014b).

Recommendations

1. States should immediately put an end to the immigration detention of children by implementing the relevant PACE resolutions and recommendations, in particular, PACE Resolution 2020 (2014) on putting an end to detention and promoting and facilitating the application of alternatives.
2. In cases of arrest for irregular entry or residence, a child should be brought before a judge immediately (within the following 24 hours).
3. States should set a maximum time limit after which children should be given access to the territory if their return is not implemented.
4. States that have not already done so should ratify international texts on the protection of vulnerable groups e.g. the Geneva Convention and additional Protocol on the status of refugees, the Convention on Transnational Organised Crime and the Protocols that complement the Convention, such as the Protocols related to Smuggling of Migrants and Trafficking in Persons, as well as the European Convention on Action against Trafficking in persons.
5. Screening systems should be established to identify specific categories of children entering and/or residing illegally in the country (potentially train border and immigration officers, as well as law enforcement officials to examine the reasons for entering and residing of irregular migrants), especially potential asylum seekers and victims of trafficking. Establish a screening system at the borders to allow the identification of vulnerable categories and children who are in need of special protection. Social workers should be included in this process (at each checkpoint there should be trained social workers to assist in the identification process).
6. Referral mechanisms and support systems should be created, common to the whole country.
7. States should produce proper nationwide statistics, by collecting data on the detention of migrant children and applicable alternative measures, disaggregated by criteria such as age, gender, immigration, family status, nationality/ethnic origin and level of education.
8. States should provide for secure, adequate state funding for the Accommodation Centres (including Temporary Centres) and their maintenance and staffing.
9. Service delivery and protection must be expanded and improved, taking into consideration the specific needs and vulnerabilities of children.
10. Legislation should provide for the immediate appointment of a guardian for UAMs with a specific indication at which stage of the process the guardian should be appointed, with the possibility of an immediate appointment of a temporary guardian for UAMs to decide on their best interests and protection of their rights.
11. States should add express provisions and take appropriate measures for the protection of family unity and unobstructed communication between family members in immigration centres.
12. States should ensure that there is a separation of unaccompanied children from unrelated adults in reception centres.
13. Qualified professionals, such as social workers, psychologists, medical staff, educators, and legal counsellors specialised in children's issues should be able to assist children, especially unaccompanied children, from the first stage of the process.
14. Social workers and/or psychologists should be involved in all stages of the asylum procedure, including during the first interview of the child by the competent authority, to monitor the child's well-being. Their opinion should be mandatory.
15. The specific needs and health care of pregnant girls should be taken into consideration, as well as the specific needs of babies and children detained with young mothers.
16. States should develop continuous and mandatory training on issues of child protection for immigration and law enforcement agencies, judicial authorities, administrative agents and social workers.
17. States should develop and include specific training curricula on human rights, the protection of children and the identification of vulnerable groups in the National Academies for judges and in the Police Academies and National Administration Institutes, as well as methods of developing skills and techniques for interviewing children to avoid traumatising them.
18. States should establish common standards for age-assessment procedures and develop operational rules on how these methods should apply in practice. Appropriate examination for age determination should not be invasive for the child and should require the valid consent of the parent or guardian. For unaccompanied minors a guardian should be appointed for this issue.

19. States should include express legal provisions for the clear presumption of minority if there is a doubt about the age.
20. States should develop provisions for the non-discriminatory access of migrant children to national services such as health and social services and education.
21. Reception centres and accommodation facilities should be safe, accessible and responsive to the needs of both boys and girls. They should also respond to the needs of specific vulnerable groups, such as physically and mentally disabled children and babies.
22. In transit camps, states should provide for the separation of different groups according to their status, gender and age, with the exception of families, which should be kept together.
23. States should provide experienced and specialised staff for the transit camps.
24. The civil society should be allowed to have access to detention/reception centres and all facilities where children are kept (also in places used as alternatives to detention such as educational centres) for the purposes of effective external monitoring.
25. States should develop an internal and external monitoring system as well as a complaint system for both accompanied and unaccompanied migrant children who are subject to immigration detention measures.
26. States should provide effective access to justice, available for all children, with express provision for the possibility of the detained migrant, irrespective of age, being able to challenge the detention decision before a court, with immediate appointment of a guardian and legal counsellor on free legal aid.
27. States should add specific provisions in their legislation for the right of the child to communicate regularly and freely with a legal counsellor.
28. Free legal aid should be offered to all aliens without distinction of age. Detained aliens, especially children, should be automatically assigned free legal counsel. Free legal aid should extend to the exemption from court fees, which in many cases are not exempted, making it impossible for migrants to afford access to justice.
29. Interpretation (free of charge) should be available to children. States should develop nationwide qualification standards for the services of interpreters.
30. States should provide information, in a language children understand, to explain the reasons for their detention/placement in reception centres, the procedure and their rights.
31. Educational services should be provided to all migrant children, including those held for immigration control. Legal provisions should provide for compulsory education for migrant children in national schools or within a reception facility. Inside the reception facility, education should be based on the normal school curriculum in a language children can understand (the Ministry of Education should be involved). A child should be immediately provided with access to education. Qualified educators/teachers monitored by the Ministry of Education should be appointed for the education of migrant children.
32. States should provide free medical care to cover not only emergency cases, but also regular medical problems of migrant children, including those held in detention.
33. States should immediately improve reception conditions and adopt immediate alternatives to detention, and facilitate safe access for asylum. In developing and implementing these policies, particular attention should be paid to the situation of girls, notably victims of sexual and gender-based violence, who might be reluctant to report such crimes.
34. States should establish a co-ordinated state response system within and across borders that protects children. In developing and implementing these policies, particular attention should again be paid to the situation of girls, notably victims of sexual and gender-based violence, who might be reluctant to report such crimes, taking into consideration the recommendations found in UNHCR, UNFPA and Women's Refugee Commission 2016.⁹⁵
35. States should establish presumption in favour of liberty and develop alternatives to detention, while applying non-custodial, non-institutional and overall less restrictive measures for children.
36. States should take immediate steps to explore the implementation of alternatives by first carrying out studies and implementing pilot projects to introduce systematic policy developments and change.
37. States should develop effective systems of alternatives. States should consider the adoption of community housing with individual case managers (after having assessed the community setting), placement in a foster family or regular reporting, duty to report regularly to the police, residence restrictions and counselling, the duty to surrender documents, sureties or bail, as some of the examples of alternatives

95. UNHCR, UNFPA [UN Population Fund] and the Women's Refugee Commission (2016), Initial assessment report: Protection risks for women & girls in the European migrant and refugee crisis. Greece and "the former Yugoslav Republic of Macedonia", New York: United Nations, available at: www.unhcr.org/uk/protection/operations/569f8f419/initial-assessment-report-protection-risks-women-girls-european-refugee.html, accessed 19 Jul. 2017.

to child immigration detention, until the migration status of children is resolved or their removal takes place. States should train their officials in the application of alternative measures to detention.

38. Any alternative measure should be designed to fit the special needs of girls, particularly in education, trauma recovery, family relationships, substance abuse and medical needs. Alternatives should also be shaped by the issues confronting ethnic minorities, seeking to adapt them to cultural resources available in ethnic communities in the state of reception.

39. States should establish a reintegration policy for unaccompanied minors, with the official input of social workers, the support of local authorities and a detailed operational framework. States should assume greater responsibility for the local integration of migrant children, particularly in the areas of housing, medical care and language training, with the implementation of integration strategies and programmes.

40. States should implement public awareness campaigns to combat stereotypes and prejudices among the general public related to migrants to facilitate the integration of migrant children into the local society.

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Appendix 1: Tables

Table 1: National provisions of non-EU member states on immigration detention of children

Member states applying detention to all migrants irrespective of age in closed centres	Member states that permit immigration detention of children as "derogation"	Member states without specific rules on immigration detention, but detaining immigrants irrespective of age	Member states that permit restriction of movement or placement in closed centres	Member states not applying immigration detention to children or excluding from detention children below a certain age
Azerbaijan	Albania	Liechtenstein	Bosnia and Herzegovina	Andorra
Republic of Moldova	Georgia	San Marino	Montenegro ^a	Armenia
Norway	Serbia			Iceland
Russia				Switzerland ^b
"the former Yugoslav Republic of Macedonia"				
Turkey				
Ukraine				

a. For unaccompanied children below the age of 16 years there is no restriction of movement unless as last resort.

b. For unaccompanied children below the age of 15 years there is no restriction of movement.

Table 2: Maximum length of detention and the authority responsible for the detention decision

Decision by administrative authority	Decision by Court	Mixed system
Albania 6 months (+6 months) local authority of border and migration	Georgia up to 3 months	Azerbaijan 3 days by administration + Unlimited (depending on court's decision)
Bosnia and Herzegovina placement in NGO shelter (no limit) Service for Foreigners' Affairs	Republic of Moldova 6 months (+ 1 month)	Switzerland 6 months (+6 months) Cantonal authority (extension agreed by cantonal court)
Montenegro 90 days (+90 days)	Norway 24 hours Immigration Service	Ukraine^a 3 days (preliminary administrative detention) 12 months State Border Guard Service + court
Russia indefinite General Directorate on Migration Affairs		
San Marino 24 hours Police		
Serbia 24 hours Police		
"the former Yugoslav Republic of Macedonia" 12 months Ministry of Internal Affairs		
Turkey 6 months (+ 6 months) Directorate General for Migration Management		

a. Since 2012 a person can be detained only if a decision on their forcible expulsion has been adopted by a court.

Table 3: Measures to safeguard family unity

	Specific provisions on family unity	Prohibition of separation of a child from their parents	No provision but in practice family members stay together	Related provisions only with regard to asylum seekers	No provision -families separated
Albania	✓				
Andorra ^a					
Armenia ^b					
Azerbaijan	✓				
Bosnia and Herzegovina	✓				
Georgia		✓			
Iceland ^c					
Liechtenstein					
Republic of Moldova			✓	✓	
Montenegro			✓	✓	
Norway	✓				
Russia	✓				
San Marino ^d					
Serbia		✓		✓	
Switzerland	✓				
"the former Yugoslav Republic of Macedonia"	✓				
Turkey	✓				
Ukraine					✓

a. No immigration detention for minors.

b. No immigration detention for minors and families.

c. No immigration detention for minors and families.

d. All irregular migrants are returned within the day to Italy. There is no information on families.

Table 4: Support systems in place^a

<i>In this table, a/s = asylum seeker</i>	Guardianship	Social assistance	Information in language they understand	Interpreter	Medical care	Psychological assistance	Legal assistance	Contact with family member and/or consular authorities
Albania	✓	✓ mandatory opinion of social worker	✓			✓ mandatory opinion of psychologist		
Azerbaijan		✓		✓	✓	✓	✓	✓
Bosnia and Herzegovina	✓	✓					✓ free legal aid	
Georgia				✓			✓ free legal aid	✓
Liechtenstein						✓		
Republic of Moldova	✓	✓		✓ part: NGO	✓	✓	✓	✓
Montenegro	✓	only to a/s						
Norway	✓	✓	✓				✓ free legal aid	
Russia								
Serbia	✓ for a/s		✓				✓	✓
Switzerland ^b	✓						✓	✓
“the former Yugoslav Republic of Macedonia”	✓	✓						✓
Turkey							✓	
Ukraine				✓			✓	✓

a. Only member states that hold children in immigration detention are listed here.

b. This depends on each canton's regulations. The Federal Law provides for the “support of special needs” of vulnerable persons.

Table 5: Non-discriminatory access for migrant children to national services

<i>In this table, a/s = asylum seeker</i>	Access to national health services	Access to social services	Access to education
Albania	✓ (Clear provision only for a/s)	✓	✓
Azerbaijan		✓	
Bosnia and Herzegovina	✓ Only emergency cases	✓	✓
“the former Yugoslav Republic of Macedonia”			
Georgia	✓		✓
Liechtenstein			
Republic of Moldova			
Montenegro			
Norway	✓ free medical care for children below age 12	✓	✓
Russia			
Serbia	✓	✓ For a/s	✓
Switzerland ^a	✓		
Turkey			✓
Ukraine			

a. This depends on each canton’s regulations. The Federal Law provides for the “support of special needs” of vulnerable persons.

Table 6: Screening and assessment procedures

	System for age determination of undocumented children				Screening system in place to identify categories of children
	Forensic/ other medical examination	DNA test	Witnesses/ consular authorities	Presumption of minority	
Albania		✓		✓	
Azerbaijan					
Bosnia and Herzegovina				✓	✓
Georgia			✓		
Republic of Moldova				✓	
Montenegro				✓	based on documents or information from consular authorities
Norway	✓		✓		✓
Russia					
Serbia					✓
Switzerland ^a	✓				✓
“the former Yugoslav Republic of Macedonia”					
Turkey					
Ukraine					

a. This depends on each canton’s regulations. No information available on the existence of identification systems.

Table7: Alternatives to immigration detention for children

	States that provide for alternatives	States that apply alternatives for children of certain age	States that do not provide for alternatives to detention	States that provide for alternatives but they do not apply them in practice	States with alternatives equal to detention (placement in a closed institution)
Albania			✓		
Andorra ^a			✓		✓
Azerbaijan			✓		
Armenia ^b					
Bosnia and Herzegovina					✓ placement in NGO shelter
“the former Yugoslav Republic of Macedonia”			✓		
Georgia				✓	
Iceland ^c	✓ obligation to report or order to stay in a specified place				
Liechtenstein					✓
Republic of Moldova			✓		
Montenegro		✓ no restriction of movement for child under 16 unless as last resort			✓ for children over 16 years
Norway	✓ reporting to the police or immigration authorities; obligation to surrender a passport or travel document; obligation to stay in a specific place (private address or open reception centre)				
Russia			✓		
San Marino			✓		
Serbia					
Switzerland ^d		✓ some cantons consider as an alternative placing the child in a special accommodation centre; some provide for foster care accommodation and/ or impose reporting requirements			
Turkey				✓	
Ukraine			✓		

a. Immigration detention for children is prohibited.

b. Immigration detention for UAMs and families with children is prohibited.

c. Immigration detention for families with children is prohibited.

d. For children below the age of 15 years detention is prohibited. Alternatives depend on each canton’s regulations.

Appendix 2: Questionnaire ECPRD No. 3044 to Council of Europe member states

Questionnaire for the Council of Europe Study on Immigration Detention Practices and the Use of Alternatives to Immigration Detention of Children addressed to the member states through the European Centre for Parliamentary Research and Documentation (ECPRD) – Request No. 3044

1. In your country, what are the national provisions regulating immigration detention and alternatives to detention for children? (Please specify if there is a maximum length of detention and which authority issues the decision for detention.)
2. Could you provide the most recent statistical data on how many migrant children are being detained and on what basis? (Please answer the question in a way to allow disaggregating data based on age, gender and immigration status.)
3. What are the measures taken by your legislation, policy or other resource to safeguard family unity and to prevent family separation in case of decisions related to detention?
4. What support systems are in place in your country? (Specify if there is e.g. mandatory free legal assistance, free interpretation for all children, independent case-management services and if social workers have access in immigration detention.)
5. Do migrant children have non-discriminatory access to national services, including health, education and social protection/child protection systems in your country? Please support with examples.
6. What Screening & Assessment procedures are in place in your country?
 - a. What is the system for age determination of (undocumented) children – and is there an assumption of child status until proven (burden of proof on the state) otherwise?
 - b. If your legislation criminalises irregular entry and/or presence and/or residence is there a screening system to identify the specific categories of children entering and/or residing illegally (potential asylum seekers, victims of human trafficking)?

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. The Parliamentary Assembly, consisting of representatives from the 47 national parliaments, provides a forum for debate and proposals on Europe's social and political issues. Many Council of Europe conventions originate from the Assembly, including the European Convention on Human Rights.

