“Towards a Robust Human Rights & Equality Framework”

UNHCR’s submission to the scoping consultation by the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties.
Consultation Questions

Do you think that human rights and equality are sufficiently protected and promoted in Malta? If not:
   a. Which human rights do you believe need further protection and promotion?
   b. How can Malta better protect and promote human rights and equality overall?
   c. Are there any models that you would propose that government should consider looking at in terms of legislation, institutional frameworks or both? If yes, what is especially good about such models?
I. Introduction

During recent years, UNHCR’s dialogue with the Maltese authorities has focused on several issues relating to the human rights and treatment of asylum-seekers, refugees and other persons of concern in Malta.

The following is a summary of UNHCR’s positions and suggestions in relation to three specific topics which are relevant to the questions asked by the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties in the scoping consultation exercise.

The first part relates to Malta’s reception system for asylum seekers and in particular the policy that requires mandatory detention for those arriving irregularly in Malta.

The second main topic is related to the situation of those granted international protection in Malta as regards freedom from discrimination and their access to education, employment, long-term status, family unity and eventual naturalization.

The third element presents the issue of statelessness and potential problems for people who may find themselves stateless and in need of a process to obtain protection and a possible pathway towards citizenship.

To complement and elaborate on these brief summaries we also include as part of our submission several documents that provide relevant information, observations and analysis from UNHCR on the above:

- Note on UNHCR role and mandate;
- UNHCR Position on the detention of asylum-seekers in Malta;
- UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention;
- UNHCR note: Elements for a National Integration Policy Framework in Malta.
II. Malta’s Detention System and Policy

Malta’s detention policy, which affects asylum-seekers arriving irregularly in the country, has been addressed by UNHCR in various contexts in the past. Since the establishment of the national asylum system in 2001, UNHCR has consistently and publicly stated its position against the detention of asylum-seekers, regardless of their mode of entry. Despite UNHCR’s and other agencies’ consistent efforts over a number of years to influence positively Maltese legislation and practice, asylum-seekers who arrive in an irregular manner are systematically and routinely detained, and at times face harsh detention conditions in migration detention facilities.

UNHCR is concerned that asylum-seekers face serious challenges in accessing adequate reception conditions in Malta. These challenges relate to the material conditions of detention and also the duration of their detention, which in some respects are not in line with international and European legal standards.

In Malta, there are no specific legislative provisions regulating the administrative detention of asylum-seekers. Under Maltese immigration law, detention is the automatic consequence of a refusal to grant admission to national territory or the issuance of a removal order in respect of a particular individual. The Immigration Act itself does not provide for differential treatment to be accorded to asylum-seekers who fall under these circumstances. In addition, the Immigration Act does not make a direct reference to the non-refoulement provision which is found in the Refugees Act. Under the Immigration Act, the position of asylum-seekers who enter irregularly is, thus identical to that of any other migrant. The authorities, the Immigration Appeals Board and the courts do not consider the non-refoulement provision in the Refugees Act to affect the application of the Immigration Act as regards the decision to detain asylum-seekers.

Although the law does not explicitly provide for exemptions from detention on grounds of vulnerability or special circumstances, procedures for release are regulated by policy and practice, and are implemented by the immigration

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1 Article 10 of the Immigration Act, Chapter 217 of the Laws of Malta.
2 Article 14(2) of the Immigration Act.
3 Article 14(1), Refugees Act, Chapter 420 of the Laws of Malta.
authorities. In practice, persons in special circumstances and needs, including children, are usually released from detention after they undergo a vulnerability or age assessment procedure by the Agency for the Welfare of Asylum Seekers (AWAS), which then recommends to the Principal Immigration Officer that the particular individual be released. It is UNHCR’s view that such exemptions ought to be based on law, rather than being left only to policy and practice.

Further, Maltese law does not contain guarantees to ensure compliance with Article 31 (on non-penalization of refugees who enter or stay illegally in the country of refuge) of the 1951 Convention. Asylum-seekers arriving in Malta without leave from the Principal Immigration Officer are termed as “prohibited migrants.” UNHCR is concerned that asylum-seekers are subject to prolonged periods in detention without access to adequate avenues to challenge effectively their detention. There is also no general mechanism in place to consider alternative and less coercive measures than detention at the time of the decision to detain, and the bail system, the only alternative available, is neither effective nor generally accessible to asylum-seekers.

In view of the above, UNHCR is particularly concerned that the current practice in Malta is not in line with Article 31 of the 1951 Convention, and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments. On this basis, it is UNHCR’s position that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrive on the territory in an irregular manner, is both unlawful as well as arbitrary in terms of well-established international standards.

UNHCR has developed concrete proposals which are based not only on UNHCR’s own assessment of the operation and management of the reception and asylum system in Malta, but also on consultation with refugees, other stakeholders and experts. The proposals are intended to contribute in a practical way to the Maltese authorities’ own review of the reception system.

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4 With the exception of bail, which is provided for in the Immigration Act and the Criminal Code (Chapter 9 of the Laws of Malta).
5 Article 5 of the Immigration Act.
6 For more on this point refer to UNHCR’s Position on the Detention of Asylum-Seekers in Malta, 18 September 2013, available at: http://www.refworld.org/docid/52498c424.html
The following are among the specific suggestions for practical steps that can address multiple objectives in the coming years:

- Developing a more sustainable reception system, building on the infrastructure and institutional capacity currently available.
- Establishing the judicial capacity, competence and jurisdiction to review the legality of detention in each individual case, in an automatic manner or upon request of the detained individual.
- Strengthening the capacity to provide individual legal aid and care arrangements for all persons who are held in administrative detention.
- Adjusting laws, policies and practices to ensure compliance with international and European law standards, including recent European Court of Human Rights judgements, while taking into account Malta's legitimate interest in maintaining control mechanisms.
- Developing a comprehensive approach to durable solutions, including better-defined arrangements for facilitating local settlement and integration.
- Ensuring effective engagement of international organisations, European institutions and agencies, as well as civil society to make the best possible use of the available capacity and the expertise of all stakeholders.
- Moving towards a system that effectively distinguishes between the different and diverse needs of asylum-seekers and migrants, including as regards solutions for rejected asylum-seekers in line with human rights standards.
- Taking into account the emerging Common European Asylum System and the recast EU Directives regularizing standards as regards reception conditions, qualification for protection, and the return of persons not in need of international protection.

UNHCR notes that Malta’s existing reception framework may serve as a starting point for adjustments towards a better-managed system for receiving asylum-seekers who arrive in an irregular manner. Valid considerations about security and effectiveness need to be reconciled with the fundamental rights to liberty and security of person and freedom of movement as expressed in all the major international and regional human rights instruments.
The overall objective should be to do away with the automatic and mandatory detention for all asylum-seekers by allowing for measures of control which may include the use of detention only in cases where it is acceptable under international and European human rights law. Specifically, measures are needed to address the lengthy period of detention for asylum-seekers, the lack of speedy judicial review and possibility to challenge the legality of one’s detention, and the consideration of less coercive measures or alternatives to detention.

UNHCR makes reference to the following attached documentation which elaborate on the points above:


III. Freedom from discrimination, access to education, employment, long term status, family unity and naturalisation

While Malta has gained important experience managing reception of asylum-seekers and asylum-claims, the increase in the presence of refugee and asylum-seekers has created considerable obstacles to Malta’s integration efforts. A Migrant Integration Policy Index (MIPEX) report highlights weaknesses in Malta’s integration policy, ranking it only 28 out of 31 European countries in this respect. Integration refers to citizenship laws, racial discrimination, and access to social services such as education and employment.

Persons who have resided in Malta for 5 years are in principle allowed to apply for citizenship through naturalisation under the Citizenship Act. However, in line with policy and practice of the Department for Citizenship and Expatriate Affairs, applications by persons granted full refugee status will only be considered after 10 years of residence in Malta. For other beneficiaries of protection, it seems that access to apply for Maltese citizenship is not foreseen at all under the current policy. Furthermore, the naturalisation process remains discretionary with no reasoned decision for rejections and with no access to a review.

This policy leaves the bulk of beneficiaries of protection in Malta without any real prospects of ever obtaining citizenship while the small percentage granted full refugee status has to wait a full decade before even being considered eligible to apply. The only other avenue to citizenship for beneficiaries of protection is through marriage to a Maltese national or adoption by Maltese parent(s).

Data shows that only 2,401 people have acquired citizenship through naturalization in Malta since 1991, very few of them were beneficiaries of international protection. (In 2013, the Home Affairs Minister stated to Parliament that not a single refugee or humanitarian migrant has been naturalized.) In line with the

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8 Citizenship Act (Chapter 188 of the Laws of Malta) and related subsidiary legislation.
10 According to data obtained informally from the Department for Citizenship and Expatriate Affairs it is less than 20 persons.
letter and spirit of the 1951 Refugee Convention, Malta should consider making citizenship opportunities more accessible to refugees and other beneficiaries of protection.

While Malta’s anti-discrimination law, the 2007 *Equal Treatment of Persons Order*, has been improved, further amendments are still needed. While the law prohibits racial discrimination in all fields, including the public and private sectors, religion and nationality in the employment sector is not covered. UNHCR welcomes the broadened mandate of the National Commission for the Promotion of Equality, which implements anti-racist campaigns, and oversees and investigates racial discrimination claims through independent advice. However, this agency should be strengthened to promote awareness, follow up and monitor responses in all cases of abuse and discrimination and institute legal proceedings in this regard.

UNHCR welcomes the Government’s intention to create a national human rights institution with a wider remit. In addition, according to the ODIHR 2012 *Annual Report on Hate Crimes in the OSCE Region: Incidents and Responses*,[12] Malta amended its *Criminal Code* to expand the list of protected characteristics from racial hatred to “hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or similar.”[13] Yet, the reporting of official hate crimes remains low.

Maltese law grants asylum-seekers access to free education,[14] and refugees and beneficiaries of subsidiary protection have a right to state education and training. However, for many beneficiaries of protection pursuing an education is impossible without additional assistance. The Government may consider a framework to establish transition and preparatory courses at various levels as well as possibly facilitating access to financial support loan schemes. Furthermore, language support and the provision of extra teachers may be useful for ensuring effective inclusion in the school system of children of asylum-seekers and refugees.

UNHCR notes that LGBTI refugees and beneficiaries of subsidiary protection face particular difficulties. Given that LGBTI persons are often at the margins of the refugee population and usually lack community support because they are LGBTI, they are often struggling with finding basic adequate accommodation. Many cannot

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13. *Id.*
afford private housing and some are also not in a position to reside in the open reception centres, even temporarily, because of exposure to harassment.

While asylum-seekers released from detention are able to obtain employment through the sponsorship of an employer, the individual is then tied to that particular employer. Refugees and beneficiaries of subsidiary protection are given a general employment license, but a UNHCR study shows that often times work is without contract and paid below minimum salary requirements. Monitoring of employers to ensure fair treatment and prevent discrimination and abuse is required, as well as additional awareness raising among within the refugee community.

To combat racism and xenophobia, further information campaigns and information initiatives are required also in Malta. This will require concerted and sustained efforts by Government as well as international organizations and civil society. It is essential in this context that refugees themselves are encouraged to take action to engage with Maltese society at various levels.

UNHCR considers that facilitation of integration and related rights as outlined above could best be addressed through development of a policy framework document. UNHCR has submitted an informal document to present ideas as regards elements that may be included as a starting point for such a discussion (attached).
IV. Prevention and reduction of statelessness

With regard to statelessness, UNHCR acknowledges that while the Maltese Citizenship Act\textsuperscript{15} contains some provisions that are in line with international standards to prevent or reduce statelessness, such as the protection of foundlings (although this is currently limited to new-born or infant foundlings), there are some elements within the Act that are inadequate measured against international law standards.

First, there is no facilitation process for stateless persons or persons with undetermined or unknown citizenship to acquire Maltese citizenship. Similarly, those children born prior to 31 July 1989 to a Maltese mother and a foreign father are at risk of statelessness, as before that date only children born to male nationals would automatically acquire nationality; Maltese women were only able to confer nationality by registration. The identification of current gaps in the national legislation and policy, especially regarding documentation and citizenship issues that affect children residing in Malta, is needed to serve as a basis for a review of relevant laws and policies to prevent statelessness. UNHCR Malta is in the process of completing a mapping exercise of the situation as regards statelessness in Malta. It is planned to be published in the course of May 2014.

Stateless persons who satisfy the refugee definition contained in the 1951 Refugee Convention are afforded the necessary international protection associated with the latter status. However, the international refugee protection regime does not specifically address the rights of non-refugee stateless persons who are in need of international protection. In many countries, stateless persons are subject to discrimination, in particular where they do not enjoy a legal status in any country. The 1954 Convention relating to the Status of Stateless Persons is an important instrument to ensure enjoyment of human rights by stateless persons. The Convention establishes an internationally recognized status for stateless persons. It also recognizes a number of key rights such as freedom of religion; freedom of association; access to courts; freedom of movement; identity documentation and; internationally recognized travel documents.

The 1961 Convention on the Reduction of Statelessness establishes a range of standards to prevent statelessness at birth and later in life, in particular that States

\textsuperscript{15}Citizenship Act (Chapter 188 of the Laws of Malta) and related subsidiary legislation.
shall grant their nationality to children who have ties with these States through birth on the territory or descent and who would otherwise be stateless. Discharging this responsibility requires the establishment of safeguards against statelessness in nationality law. Malta is not a signatory to the Convention.

Malta is not a signatory to the two main Statelessness conventions, as one of only four EU Member States who are in the same situation.

Despite the legal safeguards in place for children born in Malta who would otherwise be stateless (because they are born to stateless parents or foreigners who are unable to confer their nationality on a child born abroad), it is not clear whether this safeguard is operational in practice. In this context, a stateless-specific determination mechanism in Malta may be required for various authorities to identify stateless persons as such for purposes including granting citizenship in line with national legislation; keeping accurate statistics; and in order to provide protection of stateless persons.

In this context, Malta should consider acceding to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. It is also important to point out that Malta is yet to follow up on its signature, in 2003, of the 1997 European Convention on Nationality by way of ratification.

UNHCR notes that a letter was handed over by the High Commissioner to the Maltese delegation in the context of a meeting in Geneva on 19 March 2014, formally inviting Malta to deposit their instruments of accession to the 1954 and 1961 Conventions at a Special Treaty Event in Geneva on 1 July 2014.
UNHCR’s mandate and role

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.\(^1\) Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 *Convention relating to the Status of Refugees*\(^2\) ("the 1951 Convention") obliges State parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising that application of the provisions of the 1951 Convention.

UNHCR’s supervisory responsibility is also reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union,\(^3\) as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees […] on matters relating to asylum policy.”\(^4\) Secondary EU legislation also emphasizes the role of UNHCR. UNHCR’s supervisory responsibility is specifically articulated in Article 29 of the EU Asylum Procedures Directive 2013 (recast)\(^5\) and Recital 22 of the EU Qualification Directive 2011 (recast).\(^6\) In relation to the detention of asylum-seekers, UNHCR’s role is explicitly recognized in the EU Reception Conditions Directive 2013 (recast).\(^7\)

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\(^6\)European Parliament, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 2011 L 337/9, available at: [http://www.refworld.org/docid/4f197d0f2.html](http://www.refworld.org/docid/4f197d0f2.html)

UNHCR’S POSITION ON THE DETENTION OF ASYLUM-SEEKERS IN MALTA

18 September 2013
United Nations High Commissioner for Refugees
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EXECUTIVE SUMMARY

Malta’s comprehensive detention policy, which affects asylum-seekers arriving irregularly in the country, has been addressed by UNHCR in various contexts in the past. Since the establishment of the national asylum system in 2001, UNHCR has consistently and publicly stated its position against the detention of asylum-seekers, regardless of their mode of entry. The continued public attention given to this issue, with an increasing number of requests for information directed towards UNHCR – from lawyers, civil society, the media and academia – has demonstrated the need for a more detailed public position by UNHCR on the use of administrative detention of asylum-seekers in Malta, in the context of international and regional law, domestic legislation and government policy.

To this end, this document provides an overview and analysis of the legal framework and government policy applying to the detention of asylum-seekers who arrive in Malta in an irregular manner. It is developed against the background of the 1951 Convention relating to the Status of Refugees¹ (the “1951 Convention”) and other international and European human rights instruments including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms² (the “European Convention on Human Rights” or ECHR) and the EU asylum acquis. Specific reference is also made to UNHCR’s Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.³ It calls into question the purpose and effectiveness of detention as a central policy in the Maltese asylum and migration context.

The paper assesses the prevailing legislative and policy framework on detention in Malta, as measured against international and regional law standards and relevant UNHCR guidance. It is not the aim of this paper, however, to elaborate in any detail about the specific conditions of detention or the services available within the detention facilities in Malta.

There is no empirical evidence that the prospect of being detained deters irregular migration or discourages persons from seeking asylum.⁴ Threats to life or freedom in the country of origin (or transit) are likely to be a greater push factor than any possible disincentive created by a reception regime based on detention.⁵ Given the steady number of arrivals into Malta, there is no evidence that the mandatory detention system in Malta has had a deterrent effect.⁶ The negative and at times

⁶In fact, aside from a peak observed in 2008 (2800 arrivals) and a significant drop in 2010 (30 arrivals), the number of asylum-seekers arriving in Malta has remained close to an average of 1600 persons a year.
severe physical and psychological consequences of detention are well documented, yet appear to have had limited impact on national policy-making on the detention of asylum-seekers. UNHCR believes that there are also additional reasons, such as social and financial ones, why the practice of detaining asylum-seekers should be reviewed. Moreover, UNHCR encourages Malta to explore concrete and effective alternatives to detention, including reviewing its bail system to make it more effective and accessible.7 UNHCR stands ready to provide technical and other advice on all of these matters.

In Malta, there are no specific legislative provisions regulating the administrative detention of asylum-seekers. Under Maltese immigration law, detention is the automatic consequence of a refusal to grant admission to national territory8 or the issuance of a removal order in respect of a particular individual.9 The Immigration Act does not provide for differential treatment to be accorded to asylum-seekers who fall under these circumstances. In addition, the Immigration Act does not make a direct reference to the non-refoulement provision found in the Refugees Act.10 Under the Immigration Act, the position of asylum-seekers who enter irregularly is, thus identical to that of any other migrant. The authorities, the Immigration Appeals Board and the courts do not consider the non-refoulement provision in the Refugees Act to affect the application of the Immigration Act as regards the decision to detain asylum-seekers.

Although the law does not explicitly provide for exemptions from detention on grounds of vulnerability or special circumstances, procedures for release are regulated by policy and practice, and are implemented by the immigration authorities.11 In practice, persons in special circumstances and needs, including children, are usually released from detention after they undergo a vulnerability or age assessment procedure by the Agency for the Welfare of Asylum Seekers (AWAS), which then recommends to the Principal Immigration Officer that the particular individual be released. It is UNHCR’s view that such exemptions ought to be inserted into the law, rather than being left only to policy and practice.

Further, Maltese law does not contain guarantees to ensure compliance with Article 31 (on non-penalization of refugees who enter or stay illegally in the country of refuge) of the 1951 Convention. Asylum-seekers arriving in Malta without leave from the Principal Immigration Officer are termed as “prohibited migrants”.12 Despite consistent efforts by UNHCR and other entities over a number of years to influence positively Maltese legislation and practice, asylum-seekers who arrive in an irregular manner are still systematically and routinely detained, at times facing tough detention conditions in immigration detention facilities, some of which are lacking basic minimum standards in several respects.13 UNHCR is concerned that asylum-seekers are subject to prolonged periods in detention without access to adequate avenues to challenge effectively their detention. There is also no general mechanism in place to consider alternative and less coercive measures than detention at the time of the

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7This is also in line with Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter referred to as “EU Reception Conditions Directive 2013 (recast)”).
8Article 10 of the Immigration Act, Chapter 217 of the Laws of Malta.
9Article 14(2) of the Immigration Act.
10Article 14(1), Refugees Act, Chapter 420 of the Laws of Malta.
11With the exception of bail, which is provided for in the Immigration Act and the Criminal Code (Chapter 9 of the Laws of Malta).
12Article 5 of the Immigration Act.
13See UNHCR Detention Guidelines, para. 48.
decision to detain, and the bail system, the only alternative available, is not effective nor generally accessible to asylum-seekers.

In view of the above, UNHCR is particularly concerned that the current practice in Malta is not in line with Article 31 of the 1951 Convention, and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments. On this basis, it is UNHCR’s position that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrive on the territory in an irregular manner, is both unlawful as well as arbitrary in terms of well-established international law standards.\textsuperscript{14}

UNHCR’s dialogue with the Maltese authorities has included discussions about practical recommendations to alleviate the major concerns relating to conditions in the detention centres in Malta. In this context, UNHCR has put forward specific recommendations addressing a variety of issues to the authorities. Civil society organizations have also actively engaged with the authorities on this issue. While some improvements have been noted in recent years as regards infrastructure and detention conditions, many of UNHCR’s recommendations have yet to be implemented.

In calling upon the Government of Malta to consider effective alternatives to detention, and starting from the premise that the rights to liberty, security of person and freedom of movement are fundamental human rights which apply to all persons, including asylum-seekers, UNHCR urges policy makers and legislators to further develop Malta’s reception system based on international refugee and human rights law standards.

It is UNHCR’s experience that the introduction of alternatives to detention is an effective means of balancing the rights of asylum-seekers with the efficient management of the asylum system. UNHCR stands ready to engage with the relevant authorities to contribute to improvements to the current system. This could include provision of support in exploring adjustments to the reception arrangements with the aim to further improve the overall management of Malta’s asylum system.\textsuperscript{15}

\textsuperscript{14}For more on this point, refer to Parts 3.1, 3.2 and 3.4.

\textsuperscript{15}In recent years, Malta has made important progress in several areas: rescue at sea, reception infrastructure, further development of the national asylum system, and the pursuit of long term solutions, both for those who qualify for international protection and those who do not. UNHCR acknowledges that Malta is facing real challenges in terms of facilitating long term solutions, however it is not within the scope of this Paper to address these. UNHCR intends to shortly publish a separate document outlining practical proposals for adjustments and improvements to the national asylum system.
1. UNHCR’s mandate and role

1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.\(^{16}\) Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention relating to the Status of Refugees\(^{17}\) (“the 1951 Convention”) obliges State parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

2. UNHCR’s supervisory responsibility is also reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union,\(^{18}\) as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees […] on matters relating to asylum policy”.\(^{19}\) Secondary EU legislation also emphasizes the role of UNHCR. UNHCR’s supervisory responsibility is specifically articulated in Article 29 of the EU Asylum Procedures Directive 2013 (recast)\(^{20}\) and Recital 22 of the EU Qualification Directive 2011 (recast).\(^{21}\) In relation to the detention of asylum-seekers, UNHCR’s role is explicitly recognized in the EU Reception Conditions Directive 2013 (recast).\(^{22}\)

3. UNHCR has access to all detention centres in Malta, as do civil society organizations offering services and support to asylum-seekers and migrants in detention. UNHCR, in line with its supervisory role conducts regular visits to detention centres in pursuance of its protection-related and advocacy activities in Malta. During these visits UNHCR observes day-to-day operations within detention centres, interviews and counsels persons of concern, and also engages with Detention Service staff and management on various issues relating to the operation of detention centers and treatment of persons of concern. UNHCR also engages in continuous dialogue with the relevant authorities on specific issues relating to detention. Such authorities include the relevant ministries, senior management of

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Detention Service, the Board of Visitors for Detained Persons, and the Agency for the Welfare of Asylum Seekers (AWAS).

4. UNHCR’s dialogue with the authorities has included the discussion of practical recommendations aimed at alleviating some of the major concerns relating to the conditions of detention centres in Malta. In 2012 UNHCR also had discussions with the Maltese authorities in the context of a review of the reception system in Malta. Recommendations on improvements to the reception system were submitted and they included specific reference to the UNHCR Detention Guidelines.23 UNHCR intends to make further recommendations towards improvements to the reception system which take into account Malta’s current infrastructure as well as international and European standards relating to the use of detention.

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23 UNHCR Detention Guidelines 2012, op. cit.
2. Introduction

5. This paper seeks to outline and address specific aspects regarding legislation, policy and practice concerning the detention of asylum-seekers in Malta. It is grounded in the right to seek asylum\(^{24}\) and the right to liberty and security of person\(^{25}\) as fundamental human rights protected under international and European law.

6. It is UNHCR’s position that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrive on the territory in an irregular manner, is arbitrary and unlawful in terms of well-established international law standards.\(^{26}\) UNHCR is particularly concerned that this practice violates Article 31 of the 1951 Convention and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments.\(^{27}\)

7. The negative and at times severe physical and psychological consequences of detention are well documented, yet appear to have had limited impact on national policy-making on the detention of asylum-seekers. A study by the Jesuit Refugee Service, for example, reveals that regardless of whether asylum-seekers present with symptoms of trauma at the start of their detention, they show such symptoms within a few months. The research concludes that everyone is vulnerable in detention.\(^{28}\) UNHCR considers that there are both legal and practical grounds for Malta to explore and look at concrete and effective alternatives to detention, including less coercive and intrusive measures.\(^{29}\) Moreover, UNHCR believes that there are additional reasons, such as social and financial ones, why the practice of mandatory detention of asylum-seekers should be reviewed.

8. In view of the hardship which it entails, and consistent with international refugee and human rights standards, the detention of asylum-seekers should normally be avoided and be a measure of last resort. The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.\(^{30}\) These rights are expressed in all major international and regional human rights instruments, and are applicable to asylum-seekers.\(^{31}\) As seeking


\(^{25}\)Article 10 of the 1948 Universal Declaration of Human Rights, Article 9 and 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.


\(^{27}\)Article 10 of the 1948 Universal Declaration of Human Rights, Article 9 and 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.


\(^{29}\)This is also in line with the EU Reception Conditions Directive 2013 (recast).

\(^{30}\)UNHCR Detention Guidelines 2012, op. cit. para. 1.

\(^{31}\)Ibid. para. 12.
asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed, assessed as to their necessity and proportionality in each individual case, and subject to prompt review.\textsuperscript{32} These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of persons and freedom of movement – mean that the detention of asylum-seekers should be exceptional rather than routine, with liberty being the default position.\textsuperscript{33}

9. Detention can only be applied for a legitimate purpose in the individual case. Without such a purpose, detention will be arbitrary, even if entry was illegal.\textsuperscript{34} The purposes of detention ought to be clearly defined in legislation and/or regulations.\textsuperscript{35} In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order (that is, to carry out initial identity and security checks, to record basic elements of their asylum claim in an initial preliminary interview at entry, to prevent absconding, or for manifestly unfounded or clearly abusive claims in the context of accelerated procedures), public health or national security.\textsuperscript{36}

10. When considering the implementation of a detention policy, less coercive and intrusive measures (alternatives to detention), including no detention or release with or without conditions, need to be available and given preference, in particular for vulnerable individuals or persons in special circumstances.\textsuperscript{37} Any decisions to detain need to conform to minimum procedural safeguards.

11. There are various ways for governments to address irregular migration – other than through detention – that take due account of the concerns of governments as well as the particular circumstances of the individual concerned.\textsuperscript{38} In fact, there is no empirical evidence that detention has any deterrent effect on irregular migration.\textsuperscript{39} Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law, as they are not based on an individual assessment as to the necessity to detain. Research has also shown that asylum-seekers rarely abscond if they are in their destination country and awaiting an outcome of a status determination procedure.\textsuperscript{40}

12. Despite UNHCR’s consistent efforts over a number of years to influence positively Maltese legislation and practice,\textsuperscript{41} asylum-seekers who arrive in an

\textsuperscript{32}Ibid. para. 2.
\textsuperscript{33}Ibid. para. 14.
\textsuperscript{34}A. v. Australia, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9 available at: http://www.refworld.org/docid/3ae6b71a0.html
\textsuperscript{35}WGAD, Report to the Tenth Session of the Human Rights Council, 16 February 2009, A/HRC/10/21, para. 67, available at: http://www.unhcr.org/refworld/docid/502e0de72.html. Some regional instruments explicitly limit the grounds of immigration detention: for example, Article 5(f) of the ECHR: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”
\textsuperscript{36}UNHCR Detention Guidelines 2012, op. cit. para. 21.
\textsuperscript{37}These include victims of trauma or torture, children, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers, lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.
\textsuperscript{39}Edwards, op. cit. page 1.
\textsuperscript{40}See Costello and Kaytaz, op. cit. p. 13.
\textsuperscript{41}Through on-going dialogue with relevant ministries and policy makers, as well through a letter submitted to the Civil Court, First Hall in the case of Tafarra Besabe Berhe vs Commissioner of Police as Principal Immigration Officer and
irregular manner are systematically and routinely detained, and at times face harsh detention conditions in immigration detention facilities.

13. UNHCR is concerned that asylum-seekers face serious challenges in accessing adequate reception conditions when detained in Malta. These challenges relate to the material conditions of detention\(^{42}\) and also the duration\(^{43}\) of their detention, which in some respects are not in line with international and European legal standards.

14. Over a ten-year period (2002–2012) 16,617 individuals, of 46 different nationalities, the vast majority single men from Somalia and Eritrea, arrived in Malta by boat in an irregular manner, and almost all were immediately detained upon arrival.\(^{44}\) The Office of the Refugee Commissioner received 15,832 asylum applications between January 2002 and December 2012.\(^{45}\) Asylum-seekers are usually detained in Lyster Barracks in Hal Far, and in Safi Barracks.\(^{46}\)

15. Part 3 of this paper addresses the systematic detention of undocumented asylum-seekers in Malta, including an analysis of the relevant legal framework against international standards. It deals first with the overall national legislative and policy framework, followed by a description of the practice in Malta, the treatment of asylum-seekers with vulnerabilities or special needs, and the avenues available for an individual to challenge that detention. Part 4 gives an overview of the relevant principles of international and European law governing the detention and the expulsion of asylum-seekers, refugees and persons recognized as being in need of international protection.
3. Detention of asylum-seekers in Malta

3.1 Legislative and policy framework for the detention of asylum-seekers arriving in an irregular manner


17. In Malta, there are no specific legislative provisions regulating the administrative detention of asylum-seekers. In terms of Maltese immigration law, detention is the automatic consequence of a refusal to grant admission into national territory or the issuance of a removal order in respect of a particular individual. In this context, UNHCR notes that any detention or deprivation of liberty must be in accordance with and authorised by national law. Any deprivation of liberty that is not in conformity with national law would be unlawful, both as a matter of national as well as international law. At the same time, although national legislation is the primary consideration for determining the lawfulness of detention, it is "not always the decisive element in assessing the justification of deprivation of liberty." In particular, a specific factor that needs to be considered is the underlying purpose of preventing persons deprived of their liberty arbitrarily.

18. The Immigration Act does not in itself provide any guidance for differential treatment to be accorded to asylum-seekers who are either refused admission, or who enter or are otherwise present in the territory in an irregular manner. In addition, the Immigration Act does not make a direct reference to the effects of the relevant non-refoulement provision found in the Refugees Act. In the Immigration Act, the position of asylum-seekers who enter irregularly is considered to be identical to that of any migrant in breach of the regulations in the same Act. In this context, it is

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48 Article 10 of the Immigration Act: *"10(1) Where leave to land is refused to any person arriving in Malta on an aircraft, such person may be placed temporarily on land and detained in some place approved by the Minister and notified by notice in the Gazette until the departure of such aircraft is imminent."
49 Article 14(2) of the Immigration Act: *"Upon such order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta..."
50 UNHCR Detention Guidelines 2012, op. cit para. 15.
51 Ibid. The ECHR stated: "It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of the relevant provision, which is to prevent persons from being deprived of their liberty in an arbitrary fashion." See UNHCR Detention Guidelines, op. cit. para. 15.
52 Chapter 217 of the Laws of Malta.
53 Article 14(1), Chapter 420 of the Laws of Malta: *"14(1) A person shall not be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
relevant to note that every person has the right to seek and enjoy asylum.\textsuperscript{55} Seeking asylum is not, therefore, an unlawful act.\textsuperscript{56} Furthermore, the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.\textsuperscript{57} This is so because, in exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation.\textsuperscript{58} In this context States should ensure, through the implementation of their law and practice, that no person who is entitled to benefit from Article 31 is subject to penalties due to irregular entry. Likewise, penalties imposed on refugees and asylum-seekers who are legally in the territory would be in breach of international law. The position of asylum-seekers thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry.\textsuperscript{59}

19. According to Article 10(3) of the Immigration Act persons who, whether arriving by aircraft or by any other means, are refused access to national territory and detained “shall be deemed to be in legal custody and not to have landed.”

20. Article 5 of the Immigration Act states that any person who enters Malta without leave from the Principal Immigration Officer is considered to be a prohibited migrant and may be refused entry.\textsuperscript{60} The Immigration Act goes on to state, in Article 14, that the Principal Immigration Officer may issue a removal order against a prohibited migrant,\textsuperscript{61} and the person against whom the order is issued shall be detained until he or she is removed from Malta.\textsuperscript{62} The decision to refuse admission to the territory or to grant a visa or permission to enter is discretionary.

21. Article 16\textsuperscript{63} of the Immigration Act provides for powers of arrest. Any police officer has the power to arrest without a warrant an individual who is in Malta without the required leave from the immigration authorities or who is reasonably suspected of being in Malta without the authorization of the Principal Immigration Officer. Any person arrested on the basis of Article 16 is deemed to be in legal custody.

\textsuperscript{55}See UNHCR Detention Guidelines, op. cit. para. 11.
\textsuperscript{56}Article 14, Universal Declaration of Human Rights, 1948 (UDHR); Article 22 (7) ACHR; Article 12(3), ACHPR; Article 27, American Declaration of the Rights and Duties of Man, 1948 (ADRDM); Article 18, Charter of Fundamental Rights of the European Union, 2000, (CFREU).
\textsuperscript{57}Article 31, 1951 Convention.
\textsuperscript{58}UNHCR Detention Guidelines 2012, op. cit para. 11.
\textsuperscript{59}Ibid.
\textsuperscript{60}Article 5(1): “Any person, other than one having the right of entry, or of entry and residence, or of movement or transit under the preceding Parts, may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant”.
\textsuperscript{61}Article 5(2): “Any person who acts in contravention of article 5(1), or is reasonably suspected of having so acted, may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant”.
\textsuperscript{62}Article 5(2) of the Immigration Act lists the instances where a person is also considered to be a prohibited migrant notwithstanding that he has landed or is in Malta with the leave of the Principal Immigration Officer or that he was granted a residence permit. Among the several instances mentioned, the Act states that if such person is “unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds...”, then he or she is considered to be a prohibited migrant. This reason is commonly cited in removal orders and return decisions issued to asylum-seekers who arrive by boat in an irregular manner.
\textsuperscript{63}Article 14: "(1) If any person is considered by the Principal Immigration Officer to be liable to removal as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a removal order against such person who shall have a right to appeal against such order in accordance with the provisions of article 25A...
(2) Upon such order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta...”
\textsuperscript{64}16. Any person who acts in contravention of article 5(1), or is reasonably suspected of having so acted, may be taken into custody without warrant by the Principal Immigration Officer or by any Police officer and while he is so kept in custody shall be deemed to be in legal custody.”
22. It is relevant to note that Article 14(5) of the same Act states “nothing in this article shall preclude or prejudice the application of Maltese law on the right to asylum and the rights of refugees and of Malta’s international obligations in this regard.” However, the Immigration Act (or any other law) does not include specific provisions regulating the exercise of discretion in decisions to issue removal orders against asylum-seekers or persons with prima facie or clear and manifest international protection needs (e.g. persons coming from countries where there is widespread conflict and/or severe human rights violations).

23. UNHCR notes that in practice, the immigration authorities in Malta systematically issue removal orders to all persons arriving irregularly by boat from Libya, which constitute the majority of asylum-seekers who arrive on the island. The removal orders issued typically refer to the lack of means to sustain themselves or to their irregular entry. Persons against whom a removal order is issued are not informed of the considerations leading to the Removal Order, or given an opportunity to present information, documentation and/or other evidence in support of a request for a period of voluntary departure.

24. UNHCR notes that persons who arrive in an irregular manner but who are not immediately detected by the immigration authorities may avoid being detained if they first register their interest in applying for refugee status with the Office of the Refugee Commissioner. These asylum-seekers are given an “asylum-seeker’s document” proving that they have, in fact, lodged an asylum application and are subsequently directed to the immigration authorities for the issuance of identity documents in the form of an immigration certificate or an interim authorisation to stay. In such situations asylum-seekers are normally not detained by the Immigration Police but allowed freedom of movement during the asylum-procedure. In this context, UNHCR is concerned that this approach, which is in itself a good practice and should be adopted in a more consistent manner, raises issues of discrimination and arbitrariness in the implementation of the legal norms established in the Immigration Act as regards other asylum-seekers who are rescued by the Maltese authorities and subsequently brought to Malta.

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64 The majority are brought to Malta by the Armed Forces of Malta after they are rescued at sea.
65 In practice, even though persons arriving irregularly by boat could have such means, the immigration authorities do not conduct an individual assessment but issue the removal order and return decision in an automatic manner. All possessions are confiscated by the Immigration Police (including money) and a receipt is given to the person. The confiscated items may be collected from the immigration authorities after release from detention.
66 ...in terms of Article 5(2) of the Immigration Act. Since the enactment of the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, S.L. 217.12 (Legal Notice 81 of 2011) (Returns Regulations) transposing Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (EU Returns Directive), a Return Decision is given which informs the individual of the right to apply for a period of voluntary departure while, at the same time, a Removal Order is given stating that such an application was rejected.
67 In terms of Regulation 4(2) of the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, Subsidiary Legislation 217.12, Legal Notice 81 of 2011, the Principal Immigration Officer shall inform the third-country national in the return decision that he may submit an application to be granted an appropriate period for voluntary departure. In practice persons arriving in an irregular manner are given a return decision stating that their stay has been terminated and that they have a right to apply for an appropriate period of voluntary departure. However, the decision to terminate their stay is notified without them even having made such a request for voluntary departure in the first place. In terms of Regulation 3(3) of the same Regulations, “where a third-country national staying illegally in Malta is the subject of a pending procedure for renewing his residence permit or other authorisation offering a right to stay, the Principal Immigration Officer shall consider refraining from issuing a return decision, until the pending procedure is finished...” Regulation 3(4) further states that “Nothing in this regulation shall be construed as preventing the Principal Immigration Officer from ending a legal stay and issuing a return decision and, or a decision on a removal and, or entry ban in a single administrative decision.”
68 The same kind of identification document is given to persons whose claim for international protection has been rejected, after they have been released from detention.
25. Article 14 of the Refugees Act sets out the principle of *non-refoulement*. The practical effect of this provision is the *de facto* suspension of removal proceedings. The immigration authorities halt all removal proceedings once an individual expresses his/her wish to apply for asylum in Malta by filling in the Preliminary Questionnaire and submitting it to the Office of the Refugee Commissioner. Upon receipt of the Preliminary Questionnaire, the Office of the Refugee Commissioner notifies the immigration authorities that a request to submit an asylum application has been filed. However, the individual remains in detention.\(^{69}\) UNHCR contends that it is at this point that the detention of an asylum-seeker becomes unlawful since the legal ground (removal) is no longer applicable. Asylum-seekers in on-going asylum proceedings are not available for removal until a final decision on their claim has been made. Detention for the purposes of removal should only occur after the asylum claim has been finally determined and rejected.\(^{70}\)

26. Regulation 6 of the Returns Regulations\(^ {71}\) also provides for the ‘postponement’ of removal where:

(a) “it violates the principle of non-refoulement; or

(b) an appeal has been filed with the [Immigration Appeals] Board in accordance with the provisions of article 25A(7) of the Act and a decision thereon is pending:

Provided that the Principal Immigration Officer may postpone removal for an appropriate period taking into account the specific circumstances of the case, in particular the third-country national's physical state or mental capacity, or technical reasons.”

27. The law cited above specifies the circumstances when removal should be postponed. In addition, it gives a rather wide margin of discretion to the Principal Immigration Officer with regard to removal proceedings. However, even in circumstances where the removal is postponed, asylum-seekers are still detained by the immigration authorities. In terms of law and policy, no exception is made in Article 5 (Immigration Act) to ensure conformity with Article 31 of the 1951 Convention, Article 5(1)(f) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\(^ {72}\), or Article 18(1) of the 2005 EU Asylum Procedures Directive\(^ {73}\) which states that “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.” The new EU Asylum Procedures Directive 2013 (recast) further elaborates on this principle and states “Member States shall not hold a person in detention for the sole reason that he

\(^{69}\)It should also be noted that for some cases, removal of persons whose claim for international protection has been rejected is not effected because of the practical difficulties of returning persons to particular countries of origin. Such persons are normally released after 18 months, as per the government policy dated 2005.


or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU [EU Reception Conditions Directive 2013 (recast)].

3.2 The practice in Malta regarding the detention of asylum-seekers who arrive in an irregular manner

28. Maltese law sets no maximum limits on the duration of detention of asylum-seekers. In practice, asylum-seekers are released from detention only once they have obtained a form of protection granted by the Office of the Refugee Commissioner.74

29. Prior to December 2003, when the first releases took place, Malta employed a policy, in accordance with the provisions of the Immigration Act, of blanket and indefinite detention of persons found entering or staying in Malta in an irregular manner, including asylum-seekers. In January 2005, through the adoption of a policy document jointly published by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity (the “2005 policy document”), Malta formally started implementing the policy of detaining persons who are refused admission into the territory or found to be prohibited migrants in terms of the Immigration Act for a maximum period of 18 months. This document provides that “irregular immigrants will remain in closed reception centres until their identity is established and their application for asylum processed. No immigrant shall, however, be kept in detention for longer than eighteen months.”75

30. However, the 2005 policy document contains no reference to the time limit applied to the detention of asylum-seekers as it only mentions a time limit for “irregular migrants”. The one-year time limit for the detention of asylum-seekers is inferred from Regulation 10(2)76 of the Reception of Asylum Seekers (Minimum Standards) Regulations77 (“Reception Regulations”) [transposing Article 11(2) of the EU Reception Conditions Directive 2003].78 The Regulations stipulate that asylum-seekers should be given access to the labour market after one year. Given that it is not possible to work while in detention, this provision has been interpreted to mean that asylum-seekers should be released after one year if their asylum application is still pending. According to the new EU Reception Conditions Directive 2013 (recast), Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged.79 UNHCR considers that it is not appropriate to use laws and policies

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74UNHCR notes that in August 2013 some asylum-seekers were released from detention after they filled in their Preliminary Questionnaire. These individuals were granted an “Emergency Provisional Humanitarian Protection” certificate stating “this certificate is to declare that you have lodged an asylum application with the Office of the Refugee Commissioner. You are therefore to be considered as an asylum seeker.”

75It is not sufficiently clear whether persons who arrive in an irregular manner by boat still fall within the remits of the policy document since, on one hand, the Returns Regulations clearly exclude persons who arrive by boat (many of whom are asylum-seekers) from the purview of the Special Procedural Safeguards, while on the other hand, the IAB (in Ibrahim Suzo vs. PIO, 2012) has decided that these safeguards do in fact apply to persons who arrive by boat.

76“If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant or his legal representative, the Ministry responsible for issuing employment licenses shall decide the conditions for granting access to the labour market for the applicant.”

77Subsidiary Legislation 420.06, Legal Notice 320 of 2005.


79Article 15(1).
regulating access to the labour market as a means to regulate detention practices. The grounds for detention are provided for in European and international law, and are set out in UNHCR’s Detention Guidelines, and these rules provide ample clarity on the circumstances in which asylum-seekers may or may not be detained.80

31. The lack of a time limit established by law and the policy set in the 2005 policy document have led to a practice whereby asylum-seekers are detained for a maximum of one year (or less if they have obtained a form of protection before then), and persons whose claim for protection is rejected are detained for a maximum of 18 months. The processing of an asylum application by the Office of the Refugee Commissioner does not have a specific period established by law stating the time frame within which an application is decided. However, the Office of the Refugee Commissioner aims to concludes most cases within an average of six months.81 UNHCR considers that there should be no link between the processing time for a status determination procedure and the grounds for one’s detention. These need to be separate assessments, otherwise there is a risk of prolonging the detention of an individual for no reason other than delays in the asylum procedure. This would not be in alignment with international legal standards. Further, it is UNHCR’s view that decisions on detention should not be within the responsibility of the Office of the Refugee Commissioner.82

32. To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose. Furthermore, failure to consider less coercive or intrusive means (alternatives to detention) could also render detention arbitrary.83 As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening or assessment tools can guide decision-makers in this regard, and should take into account the special circumstances and needs of particular categories of asylum-seekers.84

33. Mandatory or automatic detention is arbitrary, as it is not based on an examination of the necessity of the detention in the individual case.85

3.3 The special circumstances and needs of particular asylum-seekers in detention86

34. Maltese law does not provide for explicit exemptions from detention on grounds of their vulnerability or special circumstances. That said, particular attention is to be given to specific categories of irregular migrants in the 2005 policy document.

80See UNHCR Detention Guidelines, Guideline 4, para. 18 to 42.
82See also footnote 74.
84Ibid. para. 19.
85Ibid. para. 20.
86In terms of the UNHCR Detention Guidelines, Guideline 9, these include victims of trauma or torture, children, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers, lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.
35. According to the policy document,87 “Irregular Immigrants, Refugees and Integration” published in 2005, “particular attention is to be given to those irregular immigrants who are considered to be more vulnerable, namely unaccompanied minors, persons with disability, families and pregnant women.”

36. Regulation 14(1) of the Reception Regulations also provides that, “in the implementation of the provisions relating to material reception conditions and health care, account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation.” This Regulation further states that with regard to the material reception conditions for vulnerable asylum-seekers, where these refer to children, the best interests of the child shall constitute a primary consideration.88

37. Regulation 15 of the same Regulations provides that “an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers.”89 Taken in the context of a system which implements a policy of mandatory and automatic detention in all cases, and considering that detention centres are not suited for the needs of children, Regulation 15 raises serious protection concerns. It is relevant to note that the new EU Reception Conditions Directive 2013 (recast), very clearly states inter alia that “minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.”90 It furthermore states that “unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.”91

38. Guideline 9 of the UNHCR Detention Guidelines offers guidance on the principles applying to the special circumstances and needs of particular asylum-seekers, including children.92 General principles relating to detention apply a fortiori to children, who should in principle not be detained at all. The United Nations Convention on the Rights of the Child provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children.93

39. Overall, an ethic of care – and not enforcement - needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration.94 The extreme vulnerability of a child takes precedence over the status of an “illegal alien”.95 It is UNHCR’s view that Regulation

88Regulation 14(2) of the Reception Regulations.
89“Accommodation centre” means any place used for collective housing of asylum-seekers (Regulation 2).
90Article 11(2).
91Article 11(3).
92Guideline 9 also offers guidance on the detention of victims of trauma and torture, women, victims or potential victims of trafficking, asylum-seekers with disabilities, older asylum-seekers, and lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.
94Ibid. para. 52.
95Muskhadzhiyeva and others v. Belgium, App. No. 41442/07, Council of Europe: European Court of Human Rights, 19 January 2010, available at: http://www.unhcr.org/refworld/docid/4bd55f202.html, in which it was held inter alia that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.
15 does not presently reflect the standards in international law and it will have to be revised in order to conform to the EU Reception Conditions Directive 2013.\(^{96}\)

40. In practice, vulnerable persons such as unaccompanied and separated children, pregnant women, families with children and persons with severe medical and psychological conditions are usually released after they undergo a vulnerability or age assessment procedure by AWAS.\(^{97}\) That said, release from detention is not automatic, and vulnerable persons arriving in an irregular manner are still immediately detained upon arrival and only released from detention once AWAS recommends early release to the Principal Immigration Officer.\(^{96}\) There are no prescribed time limits for early release on grounds of vulnerability and the procedure can take a number of days, weeks, and in some cases even months, since AWAS has limited capacity and at times struggles with the number of arrivals by boat, particularly during the summer months.\(^{99}\) There is currently no procedure of automatic judicial oversight over the age and vulnerability assessment procedures.\(^{100}\) AWAS is also the agency responsible for the management and administration of open reception centres housing unaccompanied children and families. UNHCR considers that AWAS is not sufficiently resourced to effectively carry out both the age and vulnerability assessment procedures and the placement of persons in the open reception centres.

### 3.4 Legal remedies to challenge detention

41. Maltese law provides for a number of legal avenues to challenge one’s detention: a remedy under the Criminal Code, various remedies under the Immigration Act, a remedy under the EU Returns Directive, and a remedy through constitutional proceedings. These, however, are not considered to be effective in practice.

42. In fact, there have been a number of decisions finding that Malta imposes prolonged periods of administrative detention for asylum-seekers without providing adequate avenues to effectively challenge their detention,\(^{101}\) and without considering alternative and less coercive measures than detention, including liberty and freedom of movement. In the context of less coercive measures and freedom of movement, it is relevant to note the opinion of the European Court of Human Rights in *Louléd Massoud v. Malta*, wherein it stated that “the Court finds it hard to conceive that in a small island like Malta, where escape by sea without endangering one’s life is unlikely and fleeing by air is subject to strict control, the authorities could not have

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\(^{96}\)In the 2013 Manifesto for Children, the Maltese Commissioner for Children stated that the effect of the detention policy is not an acceptable one in terms of rights and the best interests of children (at para. 3.2.6, available in Maltese at: http://www.tfal.org.mt/MediaCenter/PDFs/1_Manifesto%20for%20Children%202013%20-%20%203.1.pdf

\(^{97}\)AWAS was established by Subsidiary Legislation 217.11, Legal Notice 205 of 2009.

\(^{98}\)UNHCR has noted that on a few occasions children were not automatically detained but were placed in open centres after ministerial care orders were issued immediately after arrival, thus avoiding detention.

\(^{99}\)Up to 18 September 2013, 481 persons were referred to AWAS as minors in detention. According to UNHCR’s observations from July to August 2013 the average time period for age assessment procedures was 15 days, a shorter time period than UNHCR has observed in past years. However, due to capacity constraints many children are still detained for several weeks after they have been formally recognized as minors by AWAS.

\(^{100}\)See UNHCR Detention Guidelines, para. 47(v).

had at their disposal measures other than the applicant’s protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion.\(^{102}\)

43. The European Court of Human Rights has held, in **Suso Musa v. Malta**,\(^{103}\) that it “considers it worthwhile to reiterate that it has already found in **Louled Massoud**... that the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation.”\(^{104}\)

### 3.4.1 Remedy under the Criminal Code

44. Under Article 409A of the Criminal Code,\(^{105}\) a detained person may seek recourse before the Court of Magistrates and request it to examine the lawfulness of detention and order release from custody. However, in the case of **Karim Barboush v. Commissioner of Police**,\(^{106}\) the Court held that “it is not within the competence of the Court of Magistrates or the Criminal Court to examine whether, beyond the fact that there is a clear law authorising continued detention, there are other circumstances which could render it illegal, such as an incompatibility with the rights granted by the Constitution or the Convention [ECHR].”\(^{107}\) The Court also held that the fact Mr Barboush, who was detained on the basis of Article 14(2) of the Immigration Act, was also an asylum-seeker does not render his detention illegal. The Court ordered the re-arrest of Mr Barboush.

### 3.4.2 Remedies under the Immigration Act

45. According to Article 25A of the Immigration Act, the Immigration Appeals Board (hereinafter the “IAB”) has the “jurisdiction to hear and determine appeals or applications in virtue of the provisions of [the Immigration] Act or regulations made thereunder or in virtue of any other law...”\(^{108}\) These are discussed below.\(^{109}\)

#### (i) Appeals against removal orders

46. Article 14(1) of the Immigration Act grants the right of appeal against the issuance of a removal order. Any appeal has to be filed in the Registry of the Board within three working days from the decision subject to appeal.\(^{110}\) UNHCR notes that in practice, it is difficult for detained asylum-seekers to access legal assistance immediately after arrival and consequently to file an appeal within three days from when they are served with the removal order, that is, from the day of their arrival in

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\(^{103}\) **Suso Musa v. Malta**, App. No. 42337/12, Council of Europe: European Court of Human Rights, 23 July 2013 (not final), available at: [http://www.refworld.org/docid/52025a8f4.html](http://www.refworld.org/docid/52025a8f4.html)

\(^{104}\) At para. 105.

\(^{105}\) Chapter 9 of the Laws of Malta.


\(^{108}\) Article 25A(1)(c).

\(^{109}\) In terms of the Board of Visitors for Detained Persons Regulations, Subsidiary Legislation 217.08, Legal Notice 251 of 2012, the Board (known as the “Detention Visitors Board”) acts as the body of persons responsible for a National Preventive Mechanism for the prevention of torture, as provided for in the Optional Protocol to the United Nations Convention against Torture. It has several functions relating to inter alia monitoring of detention conditions, treatment of detainees, inquiring and reporting on any matter which it deems proper, and advising the Minister. However, its mandate is limited to making recommendations and it does not have decision-making powers in terms of policy.\(^{110}\) Article 25A(7).
There is currently no system in place to ensure that legal aid lawyers visit detention centres to offer legal services for the purposes of providing access to legal proceedings to challenge detention.

(ii) Applications requesting release on the grounds of unreasonableness

47. According to Article 25A(9) the IAB also has the “jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation or removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation…” The law further states in sub-article 10 that the IAB shall only grant release “where in its opinion the continued detention of such person is taking into account all the circumstances of the case, unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time: Provided that where a person, whose application for protection under the Refugees Act has been refused by a final decision, does not co-operate with the Principal Immigration Officer with respect to his repatriation to his country of origin or to any other country which has accepted to receive him, the Board may refuse to order that person’s release.”

48. It is relevant to note that according to Article 25A(10) the IAB only has the competence and jurisdiction to decide on the reasonableness of the duration of detention, but not on the legality.

49. In addition, Article 25A(11) states that “the Board shall not grant release in the following cases:

a) when the identity of the applicant including his nationality has yet to be verified, in particular where the applicant has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities;  

b) when elements on which any claim by applicant under the Refugees Act is based, have to be determined, where the determination thereof cannot be achieved in the absence of detention;

c) where the release of the applicant could pose a threat to public security or public order.”

50. Specifically on the limitation raised in Article 25A(11)(b), UNHCR notes that a number of asylum-seekers are released from detention after they undergo vulnerability assessment procedures by AWAS. Applications for international protection normally continue to be processed. In this context, the absence of detention does not affect the determination of the asylum application. On this point, UNHCR notes that it is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection. However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the

111 This kind of legal assistance is offered by one civil society organization on a consistent basis. However, the relevant NGO does not have the capacity to provide legal assistance to all detained asylum-seekers and sometimes visits take place after three days from arrival because of logistical and other reasons.

112 This is particularly relevant in the case of undocumented asylum-seekers or persons who are otherwise in need of international protection.

113 UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) –1986, para. (b), available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html
full merits of the claim. This exception to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.  

51. In Suso Musa v. Malta, the European Court of Human Rights observed, “that release under the said provisions may be granted only if it is shown that the detention was unreasonable on account of its duration or if there is no prospect of deportation. It follows that such a remedy is not applicable to a person in the initial stages of detention, pending a decision on an asylum application, and in consequence cannot be considered as a remedy for persons in that situation.”

(iii) Applications requesting release on bail

52. Article 25A(6) provides that the IAB may grant provisional release to any person arrested or detained, under such terms and conditions as it may deem fit, and the provisions relating to bail in the Criminal Code are applicable in this context. According to the Criminal Code, considerations of the Court include whether the accused will appear before the relevant authority, whether he or she will abscond or leave Malta, and whether the accused will observe any conditions imposed by the Court. UNHCR notes that the IAB sets a number of conditions which the vast majority of asylum-seekers who arrive by boat are unable to fulfil: bail is usually set at around €1000, a sum which they usually cannot afford; the IAB requires a guarantor who would provide subsistence and accommodation and it also prohibits the person released on bail from working.

53. In the context of bail, UNHCR notes that for bail procedures to be genuinely available to all asylum-seekers, bail hearings would preferably need to be automatic. Alternatively, asylum-seekers must be informed of the availability of bail procedures in a form and language they understand, and these procedures need to be accessible and effective. Access to legal counsel is an important component in making bail accessible. The bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical; and the provision of a guarantor should be available as a substitute for the payment of a bond.

54. The remedies provided by Article 25A of the Immigration Act have been declared to be ineffective by the Civil Court, First Hall (Constitutional Jurisdiction), in the case of Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs. In this preliminary ruling the Court held that the remedy in Article 25A does not ensure a complete fair and certain remedy in cases where a person has been detained even for a short while. The ineffectiveness of this remedy has also been confirmed, for various reasons.

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115 Judgment not yet final at the time of writing.
116 At para. 56.
117 Title IV of Part II of Book Second of the Criminal Code, Chapter 9 of the Laws of Malta.
118 Article 575(1) of the Criminal Code, Chapter 9 of the Laws of Malta.
119 Upon arrival, the immigration authorities confiscate any money which they might have with them for the entire duration of their detention, and it is not available to those who apply for bail.
120 UNHCR is only aware of a few cases where asylum-seekers have been released on bail.
122 Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs, First Hall (Constitutional Jurisdiction), 20 June 2007, Application No. 27/2007. This was a preliminary ruling on admissibility. Case is still pending final judgment.
reasons, in the case of *Louled Massoud v. Malta*, where the Court held that such a remedy is “devoid of any legal or practical effect.”

3.4.3 *Remedy under the Returns Regulations*

55. Another remedy may be found under the heading of “Special Procedural Safeguards” in Part IV, Regulation 11(10) of the Returns Regulations, which states:

“The third-country national subject to the provisions of subregulation (8) [detention for the purpose of removal] shall be entitled to institute proceedings before the Board to contest the lawfulness of detention and such proceedings shall be subject to a speedy judicial review.”

56. The Returns Regulations also specify limits for the duration of detention for the purposes of removal. Regulation 11 of the Returns Regulations states:

“(14) Detention shall be maintained until the conditions laid down in sub-regulation (8) [detention for the purpose of removal] are fulfilled and it is necessary for removal to be carried out:
Provided, however, the period of detention may not exceed six months.

(15) The period of six months referred to in the preceding proviso may be extendable by a further twelve months where:
(a) there is a lack of cooperation by the third country national; or
(b) there are delays in obtaining the necessary documents from the third country in question; or
(c) the Principal Immigration Officer may deem necessary.”

57. In this context, it is particularly relevant to note that Regulation 11(1) refers to the non-application of special procedural safeguards:

“The provisions of part IV shall not apply to third country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta and who have not subsequently obtained an authorisation or a right to stay in Malta.”

58. Due to Malta’s geographical position and the mixed migratory trends affecting the country in the past years, the phrase “irregular crossing by sea” has a particular significance in the context of asylum-seekers who arrive in Malta. Regulation 11(1) thus clearly excludes the majority of asylum-seekers who arrive on the island from seeking a remedy (on the basis of the Returns Regulations) before the IAB since they typically arrive in an irregular manner by sea.

59. Nevertheless, in a decision on the case of *Ibrahim Suso v. Principal Immigration Officer*, the IAB concluded that the provisions in Part IV are, in fact, applicable to asylum-seekers stating that “the appellant entered Malta illegally by crossing the external frontier of Malta, and subsequently obtained the right to remain

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123 Application No. 24340/08, European Court of Human Rights, 27 July 2010.
124 At para. 44. See also *Suso Musa v. Malta*, at para. 57-59.
126 See *Ibrahim Suzo v. Principal Immigration Officer*, 5 July 2012, Immigration Appeals Board.
UNHCR has not however seen any impact on the current practice of the IAB as a result of this decision.

60. Judicial review of administrative detention of asylum-seekers is ineffective in Malta in many instances, as the relevant body, the IAB, fails to address the lawfulness of detention in individual cases, or to provide individualised reasoning based upon the specific facts and circumstances of the applicant.128

61. Administrative decisions imposing detention on prohibited migrants may be challenged before the IAB. However, UNHCR notes that it takes very long for the IAB to decide cases challenging detention,129 and decisions given are not based on any considerations relative to refugee law nor based on an individualized review.130

3.4.4 Constitutional proceedings

62. Another remedy lies with constitutional law. It is possible to file an application before the Civil Court (First Hall) in its Constitutional Jurisdiction, and where necessary, appeal to the Constitutional Court. However, in the case of Sabeur Ben Ali v. Malta131 and Kadem v. Malta132 the European Court of Human Rights held that “this procedure was rather cumbersome and therefore lodging a constitutional application would not have ensured a speedy review of the lawfulness of the applicants’ detention”. This position was reiterated by the European Court of Human Rights in Louled Massoud v. Malta,133 Suso Musa v. Malta134 and Aden Ahmed v. Malta.135

63. Maltese law also provides for the possibility of a speedy resolution of a matter involving constitutional and conventional matters under Part I of the Court Practice and Procedure and Good Order Rules136 where an applicant may request that the case be treated, heard and concluded with urgency. UNHCR notes that the case of Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs,137 wherein the Court took cognizance of UNHCR’s position on the detention of asylum-seekers in Malta submitted by the applicant, the applicant specifically requested that the case be heard with urgency. However, this case is still pending final judgement since October 2008.

64. In another case filed in 2008, Essa Maneh v. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs,138 the case was finally decided on the 29 April 2013. UNHCR notes that in this case, the

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127 UNHCR Malta translation: “...J-appellant daħal Malta illegalmente b‘mod illi qasam il-fruntiera esterna ta’ Malta, u sussegventement kiseb dritt joqgħod Malta billi applika biex jinghata status ta’ rifuġiżat ...”, Ibrahim Suzo v. Principal Immigration Officer, 5 July 2012, Immigration Appeals Board.
128 See Aden Ahmed v. Malta, para. 119, 120, 121.
129 See Suso Musa v. Malta. Applicant filed an application before the IAB on 28 June 2011 and the IAB decided the case on 5 July 2012.
130 At para. 45.
131 At para. 52.
132 At para. 62.
133 Application No. 35892/97, European Court of Human Rights, 29 June 2000, para. 40.
134 Application No. 24340/08, European Court of Human Rights, 27 July 2010, para. 20.
135 At para. 45.
137 Tafarra Besabe Berhe vs. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs, First Hall (Constitutional Jurisdiction), 20 June 2007, Application No. 27/2007.
138 Essa Maneh v. Commissioner of Police as Principal Immigration Officer and Minister for Justice and Home Affairs, 53/2008/1, Malta: Constitutional Court (Qorti Kostituzzjonali), 29 April 2013, available at: http://www.refworld.org/docid/519f71d74.html
Constitutional Court (as a court of appeal and last instance) upheld the judgment of the first court, which stated, inter alia, that “in this case it does not result that the detention in question is intended to 'humiliate and debase' the applicant. Detention can be considered, in the particular circumstances of our country, as a necessary measure required for the stability of the country so as to, as much as possible, avoid a deluge of 'irregular' people running around Malta, and this without having established the prima facie interest and disposition of the person.”

65. The Court also held that: 141

“42. It is also noted that this large influx of prohibited migrants may be a threat to public order in the country, as well as national security, because of their number and also because of the time necessarily required to verify their identity.” 142

“43. That when one considers the factors indicated above, particularly the failure on the part of the applicant to apply for provisional release [bail in terms of Immigration Act], also considering the just balance which has to be achieved between the interests of society in general and the need to protect the right enshrined in Article 5, it cannot be said that his detention exceeds that which is reasonable in the circumstances.” 143

66. UNHCR notes that the Constitutional Court’s assessment in Essa Maneh of the domestic legal framework, policy and practice relating to the detention of asylum-seekers in Malta does not reflect well-established principles of international and European human rights law. 144

67. In summary, the legal remedies available under Maltese law do not provide sufficient guarantees to prevent arbitrary detention of asylum-seekers because they are ineffective in terms of their accessibility, scope and speed.

68. In this context it is pertinent to note that Article 18(2) of the 2005 EU Asylum Procedures Directive 145 states that “where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.” The new EU Reception Conditions Directive 2013 (recast) 146 provides, in Article 9(3) that “where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant. When conducted ex officio, such review shall be decided on as speedily as possible from the beginning of

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141 UNHCR translation of: “Ma jirriżultx f’dan il-każ li d-detenzjoni in kwistjoni hija intiża “to humiliate and debase” ir-nikorrenti. Id-detenzjoni tista’ titqies, fic-cirkostanzi partikolari ta’ pajiżna, bhala mizura meħtieġa għall-istabiliita ta’ pajiż biex kemm jista’ jkun, jiġi evitat duluju ta’ nies “irregolari” jiġġerrew ma’ Malta, u dan mingħajr ma l-interess u d-disposizjoni ta’ kull persuna tiġi almenu prima facie, stabbilita.”

142 See footnote 136.

143 UNHCR translation of: “42. Jiġi osservat ukoll li dan l-influss kbir ta’ immiġranti pproġibit jista’ jkun ta’ theddida ghal buon ordni fil-pajiż, kif ukoll għas-sigurta’ nazzjonali, kemm minħabba n-numru taghhom kif ukoll iż-żmien li neċessarjament jeħtieġ sabiex jigu verifikati l-identita’ tagħhom.”


145 See UNHCR Detention Guidelines 2012, op. cit. Guideline 4, para. 18 to 42.


detention… To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted.”

3.5 Positions of other stakeholders

69. Following its visit to Malta in 2009, the UN Working Group on Arbitrary Detention recommended, among others, that the Government of Malta “[c]hange its laws and policies related to administrative detention of migrants in an irregular situation and asylum seekers, so that detention is decided upon by a court of law, on a case-by-case basis and pursuant to clearly and exhaustively defined criteria in legislation, under which detention may be resorted to, rather than being the automatic legal consequence of a decision to refuse admission of entry or a removal order.”

70. In March 2011 the Commissioner for Human Rights of the Council of Europe visited Malta. In his report to the Maltese Government he urged “the Maltese authorities to reconsider their law and practice relating to the detention of migrants, including asylum seekers, and to bring them fully and effectively into line with the requirements of the European Convention on Human Rights as interpreted by the Court.”

71. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) has visited Malta on several occasions. The most recent visit was held in September 2011 and in its report to the Maltese Government the CPT made a number of recommendations addressing the material conditions in detention centres.

72. Throughout the years, civil society organizations have been active in advocating for changes to the current reception system and have also engaged in dialogue with the authorities on several issues relating to detention. Local civil society organizations have also assisted individuals who were detained in seeking various remedies, including through the European Court of Human Rights. International civil society organizations have also contributed to the debate on detention and made recommendations to the Maltese authorities.

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4. Relevant principles of international and European law

4.1 The right to freedom of movement and the right to liberty and security of person

73. The right to freedom of movement, including the right to leave any country, including one’s own, is established in all the major international human rights instruments, and is an essential component of legal systems upholding the rule of law, including those of Malta and the other Member States of the European Union. Similarly, the fundamental right to liberty and security of person is expressed in all the major international and regional human rights instruments. These rights apply to all persons, regardless of their immigration or other status. The right to liberty and security of the person is a substantive guarantee against unlawful as well as arbitrary detention. For any detention or deprivation of liberty to be lawful, it must be applied in accordance with a procedure prescribed by law. The foreseeability and predictability of the law and the legal consequences of particular actions also inform the assessment of whether the detention will be considered lawful. There must be legal certainty, meaning that the law must be sufficiently accessible and precise, in order to allow an individual to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

74. With respect to the requirement that any deprivation of liberty or detention not be arbitrary, restrictions on the right to liberty and security of the person should only be resorted to when they are determined to be necessary, reasonable in all the

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157 The necessity requirement was expressed by the UN Human Rights Committee in its General Comment No.8 and a number of its decisions, and is reflected in Article 31(2). It should also be noted that the EU Reception Conditions Directive 2013 (recast) limits detention of asylum-seekers by introducing in Article 8(2), a necessity test (“When it proves necessary and on the basis of an individual assessment of each case” and “if other less coercive measures
circumstances and proportionate to a legitimate objective. Analysis of potential arbitrariness must consider whether there were less restrictive or coercive measures that could have been applied to the individual concerned. The availability, effectiveness and appropriateness of alternatives to detention must be considered before recourse to detention.\textsuperscript{158}

4.2 The detention of asylum-seekers, refugees and persons in need of international protection should not be used as a penalty for illegal entry or as a deterrent to seeking asylum under international refugee law

75. The fundamental right to liberty and security of person, and the correlated right to freedom of movement, are also reflected in international refugee law.\textsuperscript{159} Article 26 of the 1951 Convention provides for a general right of free movement for those refugees “lawfully in” the territory of the host State, subject only to necessary restrictions which may be imposed.\textsuperscript{160} This provision also applies to asylum-seekers.\textsuperscript{161} Persons who are found to be in need of international protection, for example in accordance with Regulation 14\textsuperscript{162} of the Maltese Procedural Standards in Examining Applications for Refugee Status Regulations\textsuperscript{163} are entitled to remain in Malta and are granted residence permits to lawfully reside in Malta, and should therefore be considered to be “lawfully staying” there within the meaning of the 1951 Convention.\textsuperscript{164}

76. In addition to Article 26, the 1951 Convention contains a non-penalization clause, which provides that even entry without authorization does not give the State an automatic right to detain under international refugee law. Article 31(1) of the 1951 Convention stipulates that refugees “coming directly” shall not be penalized for their “illegal entry or presence” if they present themselves to the authorities without delay

\textsuperscript{158} C v. Australia, HRC, Comm. No. 900/1999, available at: \url{http://www.unhcr.org/refworld/docid/3f588ef00.html}, where the HRC observed that: “the State party has failed to demonstrate that those reasons justify the author’s continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party’s immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee’s view, arbitrary and constituted a violation of article 9, paragraph 1”; and Sahin v. Canada, (Minister of Citizenship and Immigration) [1995] 1 FC 214 available at: \url{http://reports.fja.gc.ca/eng/1995/1995fca0233.html}
\textsuperscript{159} See, e.g. UN High Commissioner for Refugees, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17, available at: \url{http://www.unhcr.org/refworld/docid/3bfa81864.html}
\textsuperscript{161} See, UNHCR, Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems, EC/GC/01/17, 4 September 2001, at para. 3. See also, R. v. Uxbridge Magistrates Court, ex parte Adimi, [1999] 4 All ER 520, 29 July, 1999, at 527.
\textsuperscript{162} “Lawful stay” within the meaning of the 1951 Convention embraces both permanent and temporary residence.

1414.(1)(a) Notwithstanding the provisions of any other law to the contrary, and notwithstanding any deportation or removal order, a person declared to be a refugee shall be entitled –
(i) without prejudice to the provisions of articles 9 and 10 of the [Refugees] Act, to remain in Malta with freedom of movement, and to be granted, as soon as possible, personal documents, including a residence permit for a period of three years, which shall be renewable…”
\textsuperscript{164} Subsidiary Legislation 420.07, Legal Notice 243 of 2008.
and show good cause for their illegal entry or stay. The prohibition against penalization for illegal entry included in Article 31 applies to asylum-seekers. A policy of prosecuting or otherwise penalizing, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant’s asylum claim, amount to a breach of a State’s obligations under international law. Further, Article 31(2) of the 1951 Convention provides that States shall not apply restrictions to the movement of refugees or asylum-seekers except when it is considered necessary. Such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

77. The right to asylum is recognized as a basic human right. In exercising this right, asylum-seekers are often forced to arrive at, or enter, state territory without prior authorization. The position of asylum-seekers often thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry, not least because they may be unable to obtain the necessary documentation in advance of their flight, e.g., because of their fear of persecution or the urgency of their departure. This element, as well as the fact that

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165 The expression “coming directly” in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept “coming directly” and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression “without delay”. “Illegal entry” would, inter alia, include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. “Illegal presence” would cover, for example, remaining after the lapse of a short, permitted period of stay. See, UNHCR, Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised, 8-9 November 2001 (hereinafter “Global Consultations Summary Conclusions”), available at: [http://www.unhcr.org/3bf4ef474.html](http://www.unhcr.org/3bf4ef474.html)

166 In R. v. Uxbridge Magistrates Court, ex parte Adimi, see footnote 158, a case involving an asylum-seeker who had used false documents to enter the United Kingdom prior to lodging his application for asylum, the High Court of the UK concluded: “That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.” Upheld in R. v. Asfaw [2008] UKHL31, at para. 26.


168 Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union’s asylum acquis. The protection it confers plainly goes beyond protection from refoulement and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of refoulement but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees, 1 February 2011, C-411/10 and C-493/10, available at: [http://www.unhcr.org/refworld/docid/4d493e822.html](http://www.unhcr.org/refworld/docid/4d493e822.html). The right to seek and enjoy asylum is also recognized in Article 14 of the UDHR. Read together, the right to asylum and the right to liberty and security of the person give rise to a presumption against detention for asylum-seekers.

many asylum-seekers have experienced traumatic events,\textsuperscript{170} needs to be taken into account in determining the justifiability of any restrictions on freedom of movement or liberty based on irregular entry or presence.\textsuperscript{171} The prohibition against detaining asylum-seekers solely on the grounds that they have applied for asylum is also reflected in EU law, most notably in Article 18 of the Asylum Procedures Directive\textsuperscript{172} and Article 26 of the Asylum Procedures Directive 2013 (recast).\textsuperscript{173}

4.3 The prohibition of the expulsion of asylum-seekers, refugees and persons recognized as being in need of international protection

78. UNHCR notes that under Articles 31 to 33 of the 1951 Convention, an asylum-seeker cannot be deported or otherwise removed until his/her application for refugee status has been definitively determined. This principle was worded in clear terms by the European Court of Human Rights in the case of \textit{R.U. v. Greece}:

\textit{"\[I\]t emerges from international and national law, notably Articles 31-33 of the Geneva Convention Relating to the Status of Refugees […] that the expulsion of a person who has submitted an application for asylum is not permitted until a final determination on the asylum application.\"}\textsuperscript{174}

79. This prohibition against the deportation or expulsion of an individual who has sought asylum, and whose claim has not yet been definitively determined, stems from States’ \textit{non-refoulement} obligations. The obligation of states not to expel or return (\textit{refouler}) a person to territories where his/her life or freedom would be threatened is a cardinal protection principle, most prominently expressed in Article 33(1) of the 1951 Convention. The prohibition of \textit{refoulement} applies to all refugees, including those who have not been formally recognized as such, to persons recognized as being in need of international protection, and to asylum-seekers

\textsuperscript{170}As recognized by the European Court of Human Rights in its Grand Chamber judgment of M.S.S. v. Belgium and Greece, ECHR (Grand Chamber), App. No 30696/09, 21 January 2011, at para. 232-233, available at: \url{http://www.unhcr.org/refworld/docid/4d339bc7f2.html}

\textsuperscript{171}UNHCR Detention Guidelines 2012, op. cit. Guideline 1.

\textsuperscript{172}European Union: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2 January 2006, OJ L 326, 13 December 2005, pp. 13-34 available at: \url{http://www.refworld.org/docid/4394203c4.html}. Article 18 provides: “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.” Further, Article 31(2) also provides that: “Contracting States shall not apply to the movements of such refugees (including asylum-seekers) restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.”

\textsuperscript{173}European Union, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, L 180/60, available at: \url{http://www.refworld.org/docid/51d29b224.html}. Article 26 provides: “1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU. 2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU.”

\textsuperscript{174}\textit{R.U. v. Greece}, ECHR, App. No. 2237/08, 7 June 2011, at para. 94, available at: \url{http://www.unhcr.org/refworld/docid/4f2aafc42.html}. [UNHCR translation of \"\[L\]l ressort du droit international et national, il savo\[u\] les articles 31-33 de la Convention de Genève relative au statut des réfugiés […] que l’expulsion d’une personne ayant soumis une demande d’asile n’est pas permise jusqu’au traitement définitif de ladite demande. \" The Court made a similar finding in S.D. v. Greece, ECHR, App. No. 53541/07, 11 June 2009, at para. 62, available at: \url{http://www.unhcr.org/refworld/docid/4a37735f2.html}, without making specific reference to the provisions of the 1951 Convention. See also the Maltese Court’s judgement in \textit{Abdul Hakim Hassan Abdulle vs. Minister of Justice and Home Affairs and the Commissioner of Police as Principal Immigration Officer, Civil Court First Hall (Constitutional Jurisdiction), 29 November 2011, Application No. 56/2007}.\textsuperscript{175}
whose status has not yet been determined. The non-refoulement principle has been recognized as a principle of customary international law, and is also contained in Article 19(2) of the EU Charter. Furthermore, a non-refoulement obligation may also arise as a result of the risk of a breach of certain rights contained in the ECHR.

80. The protections against refoulement and expulsion of refugees lawfully in the territory of a host State (contained in Articles 33 and 32 of the 1951 Convention respectively) and the prohibition of penalization of refugees and asylum-seekers for illegal entry and presence (contained in Article 31 of the 1951 Convention) are central tenets of the 1951 Convention and the right to asylum. In addition, the right to asylum requires States to (i) advise individuals of their right to apply for refugee status and other forms of international protection and (ii) provide for fair and effective status determination procedures. States must regulate and apply their immigration policies with due regard to their obligations under the 1951 Convention. This means that States cannot return such persons to their country of origin or another territory until such time as it has been definitively determined that they do not have international protection needs. The principle of non-refoulement is also found in Article 21 the EU Qualification Directive 2011 (recast), which Directive also states that “the Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.”

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176 Compliance with due process is expressly required by Article 32(2) of the 1951 Convention in respect of expulsion of refugees. To the extent that refoulement would pose a potentially greater threat to a refugee or asylum-seeker than expulsion, it is UNHCR’s position that, at the very least, the due process safeguards applicable to expulsion must be read into the application of the exceptions to refoulement. There are no exceptions to the non-refoulement obligation under the EUHCR or in the jurisprudence of the European Court of Human Rights, and as such, the protection afforded by the ECHR is wider than that provided by Articles 32 and 33 of the 1951 Convention. Saadi v. Italy, ECtHR, App. No. 37201/06, 28 February 2008.

177 See ExCom Conclusion No. 85(XLIX), 1988, at para. (dd).

178 Hirsi Jamaa and Others v. Italy, see footnote 174, at para. 179.

180 See, for example ExCom Conclusion No. 22 (XXXII), 1981, Section 2 (Admission and Non-Refoulement); ExCom Conclusion No. 81 (XLVII), 1997, at para. (h) (no rejection at frontiers without the application of these procedures); ExCom Conclusion No. 82 (XLVIII), 1997, at para. (d) (admission of asylum applicants to state territory); ExCom Conclusion No. 85 (XLIX), 1998, at para. (q); ExCom Conclusion No. 99 (LV), 2004, at para. (l); ExCom Conclusion No. 108 (LIX), 2008. Under EU law, there are clear legal obligations on the part of the responsible State (pursuant to the provisions of the Dublin III Regulation and the Asylum Procedures Directive 2013 recast) to complete the examination of the application for asylum and to allow asylum-seekers to remain on their territory pending the examination of their application. See, in particular, Article 3 of the Dublin III Regulation; Article 9 of the Asylum Procedures Directive 2013 recast; Article 6 of the Reception Conditions Directive 2013 recast.

181 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), see footnote 21.

182 Preambulary para. 4 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), see footnote 21.
4.4 The prohibition of detention of asylum-seekers, refugees and persons recognized as being in need of international protection for the purpose of expulsion

81. In light of the principles highlighted above in Parts 4.1, 4.2 and 4.3, it can be concluded that there exists a prohibition in international human rights and refugee law, under which asylum-seekers and persons recognized as being in need of international protection cannot lawfully be detained for the purpose of expulsion or removal.184

4.5 The right to liberty and security under Article 5(1) ECHR in light of the relevant international human rights and refugee law standards

82. The guarantee of the right to liberty and security in Article 5 ECHR applies to “everyone” within a State’s jurisdiction, irrespective of nationality or immigration status. Article 5 also explicitly states that “no one” shall be deprived of the right to liberty save in prescribed cases. Sub-paragraphs (a) to (f) of Article 5(1) contain an exhaustive list of grounds upon which persons may be deprived of their liberty.185 Article 5(1)(f) only permits the State to restrict the liberty of third-country nationals in an immigration context, either (i) to prevent an individual from effecting an unauthorized entry or (ii) with a view to deportation or extradition.

83. Compliance with the international obligations of States should form an integral part of their compliance with their obligations under the ECHR. The European Court of Human Rights has already taken into consideration a State’s international obligations, including under international refugee law, when assessing its compliance with the ECHR in a number of cases. As noted above, in R.U. v. Greece, the Court considered Greece’s obligations under Articles 31 to 33 of the 1951 Convention in assessing whether there had been a violation of Article 5(1)(f) ECHR.186 In Hirsi Jamaa and Others v. Italy, the Court took into account a State’s non-refoulement obligations under international law in the context of its finding that there had been a violation of Article 3 ECHR.187 In Kuric and Others v. Slovenia the Court took into account the international standards on preventing statelessness to conclude that there had been a violation of Art. 8 ECHR,188 while in Rahimi v. Greece, the Court took into account, inter alia, the Convention on the Rights of the Child to conclude to a violation of Art. 5 ECHR.189

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184 R.U. v. Greece, see footnote 70, at para. 94; S.D. v. Greece, see footnote 70, at para. 62.
185 See, e.g., Saadi v. the United Kingdom, see footnote 151, para. 43; Witold Litwa v. Poland, ECtHR, App. No. 26629/95, at para. 49.
186 R.U. v. Greece, see footnote 70.
187 Hirsi Jamaa and Others v. Italy, see footnote 174, at para. 134.
As with the right to liberty and security of the person in international human rights law, as summarized in Section 4.1 above, any deprivation of liberty must (i) be lawful and (ii) not be arbitrary under Article 5(1)(f) of the ECHR.

The European Court of Human Rights has held that where the lawfulness of detention is in issue, including the question of whether a “procedure prescribed by law” has been followed, the ECHR refers essentially to national law, although the State party also needs to ensure that any deprivation of liberty is in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness. As mentioned in Section 4.1 above, the Court has also held that there must be a degree of legal certainty.

In relation to detention for the purposes of expulsion, the Court has held that any deprivation of liberty under the second limb of Article 5(1)(f) will be justified only so long as deportation or extradition proceedings are in progress. As stated in Chahal v. the United Kingdom, and in subsequent cases such as Louled Massoud v. Malta, Suso Musa v. Malta and Aden Ahmed v. Malta, if deportation proceedings are “not prosecuted with due diligence, the detention will no longer be permissible under Article 5(1)(f).”

UNHCR notes that in Malta, the detention of asylum-seekers is generally based upon Article 5, 14 and 16 of the Immigration Act, related to illegal entry and removal. As noted in Section 3.1 above, Maltese law permits detention with a view to removal. Under Maltese law, persons to whom the non-refoulement principle has been found to be applicable cannot be returned or expelled. Moreover, under Maltese law, asylum-seekers cannot be removed from Malta before their application is finally determined and such applicants shall be allowed to enter or remain in Malta pending a final decision of their application.

Further to Sections 4.2 to 4.4 above, UNHCR notes that detention, for the purposes of expulsion or removal of (i) an asylum-seeker whose application for international protection has not been definitively rejected and/or (ii) a person recognized as being in need of international protection, is at variance with international human rights and refugee law. Furthermore, in keeping with the European Court of Human Rights’ jurisprudence cited above, Malta’s failure to comply with relevant obligations under international refugee law should form an integral part of any assessment of its compliance with Article 5(1)(f) of the ECHR.

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191 Bozano v. France, see footnote 34, at para. 54; H.L. v. the United Kingdom, at para. 114; Dougoz v. Greece, see footnote 35; Kawka v. Poland, at paras. 48-49.
193 Article 14(1) and (2) of the Immigration Act, Chapter 217 of the Laws of Malta.
194 Article 14(1) of the Refugees Act, Chapter 420 of the Laws of Malta.
5. Conclusion

89. While it is acknowledged that some improvements have been made in the infrastructure and conditions of detention in Malta, UNHCR considers that the current reception system, based on the systematic administrative detention of asylum-seekers is not in conformity with international law standards. The fact that Malta continues to receive relatively high numbers of asylum-seekers does not absolve the fundamental state responsibilities in this regard.

90. Under international human rights and refugee law, as well as Maltese refugee law, asylum-seekers cannot be deported or expelled, until such time as there has been a final decision on their claims, determining that they are not in need of international protection. The majority of asylum-seekers in Malta are subject to prolonged periods in detention without access to adequate avenues to challenge effectively the decision to detain. There is also no general mechanism in place to consider less coercive and alternative measures in individual cases at the time of the decision to detain. The bail system, the only statutory alternative available, is neither effective nor generally accessible to asylum-seekers arriving in an irregular manner. In these circumstances, it is UNHCR’s position that the mandatory and automatic detention of all asylum-seekers who arrive in an irregular manner, for the purposes of removal, is unlawful and arbitrary.

91. It is UNHCR’s experience that the introduction of alternatives to detention is an effective means of balancing the rights of asylum-seekers with the efficient management of the reception system. UNHCR stands ready to contribute to any form of review of the current system and provide support in exploring potential adjustments which can lead to a better response towards the arrival of asylum-seekers, in line with international and European law standards.

92. To this end, UNHCR will present a separate document outlining a comprehensive proposal for changes to the national asylum system that could address many of the issues and concerns raised in this position paper. UNHCR appreciates in this context that the organization has full access to all detention centres in Malta, thus facilitating the execution of its mandate functions and supervisory role, including through effective cooperation with relevant national authorities.
THE RIGHTS TO LIBERTY AND SECURITY OF PERSON AND TO FREEDOM OF MOVEMENT APPLY TO ASYLUM-SEEKERS

DETENTION MUST BE IN ACCORDANCE WITH AND AUTHORISED BY LAW

INDEFINITE DETENTION IS ARBITRARY AND MAXIMUM LIMITS ON DETENTION SHOULD BE ESTABLISHED IN LAW

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO MINIMUM PROCEDURAL SAFEGUARDS

THE SPECIAL CIRCUMSTANCES AND NEEDS OF PARTICULAR ASYLUM-SEEKERS MUST BE TAKEN INTO ACCOUNT

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO MINIMUM PROCEDURAL SAFEGUARDS

THE SPECIAL CIRCUMSTANCES AND NEEDS OF PARTICULAR ASYLUM-SEEKERS MUST BE TAKEN INTO ACCOUNT

CONDITIONS OF DETENTION MUST BE HUMANE AND DIGNIFIED

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO MINIMUM PROCEDURAL SAFEGUARDS

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO INDEPENDENT MONITORING AND INSPECTION

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST BE SUBJECT TO INDEPENDENT MONITORING AND INSPECTION

Detention Guidelines

Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST NOT BE DISCRIMINATORY

DESERVICES TO DETAIN OR TO EXTEND DETENTION MUST NOT BE ARBITRARY, AND ANY DECISION TO DETAIN MUST BE BASED ON AN ASSESSMENT OF THE INDIVIDUAL’S PARTICULAR CIRCUMSTANCES

THE RIGHT TO SEEK ASYLUM MUST BE RESPECTED

These Guidelines are intended to provide guidance to governments, parliamentarians, legal practitioners, decision-makers, including the judiciary, as well as other international and national bodies working on detention and asylum matters, including non-governmental organisations, national human rights institutions and UNHCR staff.

The Guidelines are available online at: [http://www.unhcr.org/refworld/docid/503489533b8.html](http://www.unhcr.org/refworld/docid/503489533b8.html)

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Introduction

1. The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement. While acknowledging the array of contemporary challenges to national asylum systems caused by irregular migration as well as the right of States to control the entry and stay of non-nationals on their territory, subject to refugee and human rights standards,

these Guidelines reflect the current state of international law relating to the detention of asylum-seekers and are intended to guide:

(a) governments in their elaboration and implementation of asylum and migration policies which involve an element of detention; and

(b) decision-makers, including judges, in making assessments about the necessity of detention in individual cases.

2. In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers, including safe, dignified and human rights-compatible treatment.
3. There are various ways for governments to address irregular migration – other than through detention – that take due account of the concerns of governments as well as the particular circumstances of the individual concerned. In fact, there is no evidence that detention has any deterrent effect on irregular migration. Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain. Apart from ensuring compliance with human rights standards, governments are encouraged to review their detention policies and practices in light of the latest research in relation to alternatives to detention (some of which is documented in these Guidelines). UNHCR stands ready to assist governments in devising alternative to detention programmes.
Scope

4. These Guidelines reflect the state of international law relating to detention – on immigration-related grounds – of asylum-seekers and other persons seeking international protection. They equally apply to refugees and other persons found to be in need of international protection should they exceptionally be detained for immigration-related reasons. They also apply to stateless persons who are seeking asylum, although they do not specifically cover the situation of non-asylum-seeking stateless persons, persons found not to be in need of international protection or other migrants, although many of the standards detailed herein may apply to them mutatis mutandis. This is particularly true with regard to non-refugee stateless persons in the migratory context who face a heightened risk of arbitrary detention. The Guidelines do not cover asylum-seekers or refugees imprisoned on the basis of criminal offences.
For the purposes of these Guidelines, “detention” refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.

The place of detention may be administered either by public authorities or private contractors; the confinement may be authorised by an administrative or judicial procedure, or the person may have been confined with or without “lawful” authority. Detention or full confinement is at the extreme end of a spectrum of deprivations of liberty (see Figure 1). Other restrictions on freedom of movement in the immigration context are likewise subject to international standards. Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of “degree or intensity and not one of nature or substance”. While these Guidelines focus more closely on detention (or total confinement), they also address in part measures short of full confinement.

Detention can take place in a range of locations, including at land and sea borders, in the “international zones” at airports, on islands, on boats, as well as in closed refugee camps, in one’s own home (house arrest) and even extraterritorially. Regardless of the name given to a particular place of detention, the important questions are whether an asylum-seeker is being deprived of his or her liberty de facto and whether this deprivation is lawful according to international law.

Figure 1

[Diagram: Liberty → Restrictions on Liberty → Detention]
Alternatives to Detention

8. “Alternatives to detention” is not a legal term but is used in these Guidelines as short-hand to refer to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. As some alternatives to detention also involve various restrictions on movement or liberty (and some can be classified as forms of detention), they are also subject to human rights standards (see Figure 2).

Asylum-Seeker

9. The term “asylum-seeker” in these Guidelines refers to persons applying for refugee status pursuant to the definition of a “refugee” in the 1951 Convention and 1967 Protocol relating to the Status of Refugees (“1951 Convention”) or any regional refugee instrument, as well as other persons seeking complementary, subsidiary or temporary forms of protection. The Guidelines cover those whose claims are being considered within status determination procedures, as well as admissibility, pre-screening or other similar procedures. They also apply to those exercising their right to seek judicial review of their request for international protection.

Stateless Person

10. A “stateless person” is defined under international law as a person “who is not considered as a national by any State under the operation of its law.” An asylum-seeking stateless person refers to a stateless person who seeks to obtain refugee status under the 1951 Convention, or another form of international protection.
UNHCR Detention Guidelines

**Guideline 1.** The right to seek asylum must be respected

**Guideline 2.** The rights to liberty and security of person and to freedom of movement apply to asylum-seekers

**Guideline 3.** Detention must be in accordance with and authorised by law

**Guideline 4.** Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual’s particular circumstances, according to the following:

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**Guideline 5.** Detention must not be discriminatory

**Guideline 6.** Indefinite detention is arbitrary and maximum limits on detention should be established in law

**Guideline 7.** Decisions to detain or to extend detention must be subject to minimum procedural safeguards

**Guideline 8.** Conditions of detention must be humane and dignified

**Guideline 9.** The special circumstances and needs of particular asylum-seekers must be taken into account

**Guideline 10.** Detention should be subject to independent monitoring and inspection
Guideline 1:

The right to seek asylum must be respected

11. Every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore, an unlawful act. Furthermore, the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence. In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.
GUIDELINE 2:

The rights to liberty and security of person and to freedom of movement apply to asylum-seekers

12. The fundamental rights to liberty and security of person and freedom of movement are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law. The Executive Committee of the High Commissioner’s Programme (ExCom) has addressed on a number of occasions the detention of asylum-seekers. These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.

13. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country. Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory. Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.

14. These rights taken together – the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.
GUIDELINE 3:

Detention must be in accordance with and authorised by law

15. Any detention or deprivation of liberty must be in accordance with and authorised by national law. Any deprivation of liberty that is not in conformity with national law would be unlawful, both as a matter of national as well as international law. At the same time, although national legislation is the primary consideration for determining the lawfulness of detention, it is “not always the decisive element in assessing the justification of deprivation of liberty.” In particular, a specific factor that needs to be considered is the underlying purpose of preventing persons being deprived of their liberty arbitrarily.

16. Detention laws must conform to the principle of legal certainty. This requires, inter alia, that the law and its legal consequences be foreseeable and predictable. The law permitting detention must not, for example, have retroactive effect. Explicitly identifying the grounds for detention in national legislation would meet the requirement of legal certainty.

17. Insufficient guarantees in law to protect against arbitrary detention, such as no limits on the maximum period of detention or no access to an effective remedy to contest it, could also call into question the legal validity of any detention.
**Guideline 4:**

Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual’s particular circumstances.

18. Detention in the migration context is neither prohibited under international law *per se*, nor is the right to liberty of person absolute. However, international law provides substantive safeguards against *unlawful* (see Guideline 3) as well as *arbitrary* detention. “Arbitrariness” is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose (see Guidelines 4.1 and 4.2). Further, failure to consider less coercive or intrusive means could also render detention arbitrary (Guideline 4.3).

19. As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening or assessment tools can guide decision-makers in this regard, and should take into account the special circumstances or needs of particular categories of asylum-seekers (see Guideline 9). Factors to guide such decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behaviour of compliance and character, and risk of absconding or articulation of a willingness and understanding of the need to comply.

20. In relation to alternatives to detention (Guideline 4.3 and Annex A), the level and appropriateness of placement in the community need to balance the circumstances of the individual with any risks to the community. Matching an individual and/or his/her family to the appropriate community should also be part of any assessment, including the level of support services needed and available.
Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case.\textsuperscript{38}

**Guideline 4.1:**

Detention is an exceptional measure and can only be justified for a legitimate purpose.

21. Detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if entry was illegal.\textsuperscript{39} The purposes of detention ought to be clearly defined in legislation and/or regulations (see Guideline 3).\textsuperscript{40} In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely **public order, public health or national security.**

4.1.1 To protect public order

**To prevent absconding and/or in cases of likelihood of non-cooperation**

22. Where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention may be necessary in an individual case.\textsuperscript{41} Factors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive.\textsuperscript{42} Appropriate screening and assessment methods need to be in place in order to ensure that persons who are *bona fide* asylum-seekers are not wrongly detained in this way.\textsuperscript{43}
In connection with accelerated procedures for manifestly unfounded or clearly abusive claims

23. Detention associated with accelerated procedures for manifestly unfounded or clearly abusive cases must be regulated by law and, as required by proportionality considerations, must weigh the various interests at play. Any detention in connection with accelerated procedures should only be applied to cases that are determined to be “manifestly unfounded” or “clearly abusive” and those detained are entitled to the protections outlined in these Guidelines.

For initial identity and/or security verification

24. Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks. At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law (see below).

25. Mindful that asylum-seekers often have justifiable reasons for illegal entry or irregular movement, including travelling without identity documentation, it is important to ensure that their immigration provisions do not impose unrealistic demands regarding the quantity and quality of identification documents asylum-seekers can reasonably be expected to produce. Also in the absence of documentation, identity can be established through other information as well. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate, or lead to an adverse security assessment. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. Rather, what needs to be assessed is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process.
26. Strict time limits need to be imposed on detention for the purposes of identity verification, as lack of documentation can lead to, and is one of the main causes of, indefinite or prolonged detention.

27. While nationality is usually part of someone’s identity, it is a complicated assessment and as far as it relates to stateless asylum-seekers, it should be undertaken in a proper procedure.\textsuperscript{48}

\textbf{In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention}

28. It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection.\textsuperscript{49} However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

4.1.2 To protect public health

29. Carrying out health checks on individual asylum-seekers may be a legitimate basis for a period of confinement, provided it is justified in the individual case or, alternatively, as a preventive measure in the event of specific communicable diseases or epidemics. In the immigration context, such health checks may be carried out upon entry to the country or as soon as possible thereafter. Any extension of their confinement or restriction on movement on this basis should only occur if it can be justified for the purposes of treatment, authorised by qualified medical personnel, and in such circumstances, only until the treatment has been completed. Such confinement needs to be carried out in suitable facilities, such as health clinics, hospitals, or in specially designated medical centres in airports/borders. Only qualified medical personnel, subject to judicial oversight, can order the further confinement on health grounds beyond an initial medical check.
4.1.3 To protect national security

30. Governments may need to detain a particular individual who presents a threat to national security.\textsuperscript{50} Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in these Guidelines, in particular that the detention is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.\textsuperscript{51}

4.1.4 Purposes not justifying detention

31. Detention that is not pursued for a legitimate purpose would be arbitrary.\textsuperscript{52} Some examples are outlined below.

\textbf{Detention as a penalty for illegal entry and/or as a deterrent to seeking asylum}

32. As noted in Guidelines 1 and 2, detention for the sole reason that the person is seeking asylum is not lawful under international law.\textsuperscript{53} Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country.\textsuperscript{54} Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.\textsuperscript{55}
Detention of asylum-seekers on grounds of expulsion

33. As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on **grounds of expulsion** as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected. However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed.
GUIDELINE 4.2:

Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose

34. The necessity, reasonableness and proportionality of detention are to be judged in each individual case, initially as well as over time (see Guideline 6). The need to detain the individual is to be assessed in light of the purpose of the detention (see Guideline 4.1), as well as the overall reasonableness of that detention in all the circumstances, the latter requiring an assessment of any special needs or considerations in the individual’s case (see Guideline 9). The general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights. The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case (see Guidelines 4.3 and Annex A).
Guideline 4.3:

Alternatives to detention need to be considered

35. The consideration of alternatives to detention – from reporting requirements to structured community supervision and/or case management programmes (see Annex A) – is part of an overall assessment of the necessity, reasonableness and proportionality of detention (see Guideline 4.2). Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker’s particular circumstances, there were not less invasive or coercive means of achieving the same ends. Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken.

36. Like detention, alternatives to detention equally need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement. The principle of legal certainty calls for proper regulation of these alternatives (see Guideline 3). Legal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.

37. Alternatives to detention that restrict the liberty of asylum-seekers may impact on their human rights and are subject to human rights standards, including periodic review in individual cases by an independent body. Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable. Alternatives to detention need to be available not only on paper, but they need to be accessible in practice.
38. Notably, alternatives to detention **should not be used as alternative forms of detention**; nor should alternatives to detention become alternatives to release. Furthermore, they should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers.64

39. In designing alternatives to detention, it is important that States observe the principle of **minimum intervention** and pay close attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma (see Guideline 9).65

![Figure 2](image.png)
40. Alternatives to detention may take various forms, depending on the particular circumstances of the individual, including registration and/or deposit/surrender of documents, bond/bail/sureties, reporting conditions, community release and supervision, designated residence, electronic monitoring, or home curfew (for explanations of some of these alternatives, see Annex A). They may involve more or less restrictions on freedom of movement or liberty, and are not equal in this regard (see Figure 2). While phone reporting and the use of other modern technologies can be seen as good practice, especially for individuals with mobility difficulties, other forms of electronic monitoring – such as wrist or ankle bracelets – are considered harsh, not least because of the criminal stigma attached to their use; and should as far as possible be avoided.

41. Best practice indicates that alternatives are most effective when asylum-seekers are:

- treated with dignity, humanity and respect throughout the asylum procedure;
- informed clearly and concisely at an early stage about their rights and duties associated with the alternative to detention as well as the consequences of non-compliance;
- given access to legal advice throughout the asylum procedure;
- provided with adequate material support, accommodation and other reception conditions, or access to means of self-sufficiency (including the right to work); and
- able to benefit from individualised case management services in relation to their asylum claim (explained further in Annex A).

42. Documentation is a necessary feature of alternative to detention programmes in order to ensure that asylum-seekers (and all members of their families) possess evidence of their right to reside in the community. Documents also serve as a safeguard against (re-)detention; and can facilitate their ability to rent accommodation, and to access employment, health care, education and/or other services, as applicable. Additional information about various types of alternative to detention and other complementary measures can be found at Annex A.
GUIDELINE 5:

Detention must not be discriminatory

43. International law prohibits detention or restrictions on the movement of a person on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status. This applies even when derogations in states of emergency are in place. States may also be liable to charges of racial discrimination if they impose detention on persons of a “particular nationality”. At a minimum, an individual has the right to challenge his or her detention on such grounds; and the State will need to show that there was an objective and reasonable basis for distinguishing between nationals and non-nationals, or between non-nationals, in this regard.
GUIDELINE 6:

Indefinite detention is arbitrary and maximum limits on detention should be established in law

44. As indicated in Guideline 4.2, the test of proportionality applies in relation to both the initial order of detention as well as any extensions. The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.75

45. Asylum-seekers should not be held in detention for any longer than necessary; and where the justification is no longer valid, the asylum-seeker should be released immediately (Guideline 4.1).76

46. To guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite, including particularly for stateless asylum-seekers.77 Maximum periods in detention cannot be circumvented by ordering the release of an asylum-seeker only to re-detain them on the same grounds shortly afterwards.
GUIDELINE 7:

Decisions to detain or to extend detention must be subject to minimum procedural safeguards

47. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees:

(i) to be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in terms which they understand.

(ii) to be informed of the right to legal counsel. Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights. Communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting.

(iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release.

(iv) following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates
that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.

(v) irrespective of the reviews in (iii) and (iv), either personally or through a representative, the right to challenge the lawfulness of detention before a court of law at any time needs to be respected. The burden of proof to establish the lawfulness of the detention rests on the authorities in question. As highlighted in Guideline 4, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case.

(vi) persons in detention must be given access to asylum procedures, and detention should not constitute an obstacle to an asylum-seeker's possibilities to pursue their asylum application. Access to asylum procedures must be realistic and effective, including that timeframes for lodging supporting materials are appropriate for someone in detention, and access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.

(vii) to contact and be contacted by UNHCR. Access to other bodies, such as an available national refugee body or other agencies, including ombudsman offices, human rights commissions or NGOs, should be available as appropriate. The right to communicate with these representatives in private, and the means to make such contact, should be made available.

(viii) general data protection and confidentiality principles must be respected in relation to information about the asylum-seeker, including health matters.

(ix) illiteracy should be identified as early as possible and a mechanism that allows illiterate asylum-seekers to make “submissions” should be in place, such as requests to meet with a lawyer, doctor, visitor, or to make complaints.
GUIDELINE 8:

Conditions of detention must be humane and dignified

48. If detained, asylum-seekers are entitled to the following minimum conditions of detention:

(i) Detention can only lawfully be in places officially recognised as places of detention. Detention in police cells is not appropriate.87

(ii) Asylum-seekers should be treated with dignity and in accordance with international standards.88

(iii) Detention of asylum-seekers for immigration-related reasons should not be punitive in nature.89 The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population.90 Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.

(iv) Detainees’ names and the location of their detention, as well as the names of persons responsible for their detention, need to be kept in registers readily available and accessible to those concerned, including relatives and legal counsel. Access to this information, however, needs to be balanced with issues of confidentiality.

(v) In co-sex facilities, men and women should be segregated unless they are within the same family unit. Children should also be separated from adults unless these are relatives.91 Where possible, accommodation for families ought to be provided. Family accommodation can also prevent some families (particularly fathers travelling alone with their children) from being put in solitary confinement in the absence of any alternative.
(vi) **Appropriate medical treatment must be provided where needed**, including psychological counselling. Detainees needing medical attention should be transferred to appropriate facilities or treated on site where such facilities exist. A medical and mental health examination should be offered to detainees as promptly as possible after arrival, and conducted by competent medical professionals. While in detention, detainees should receive periodic assessments of their physical and mental well-being. Many detainees suffer psychological and physical effects as a result of their detention, and thus periodic assessments should also be undertaken even where they presented no such symptoms upon arrival. Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release.

(vii) Asylum-seekers in detention should be able to make **regular contact** (including through telephone or internet, where possible) and receive visits from **relatives, friends, as well as religious, international and/or non-governmental organisations**, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.

(viii) The opportunity to conduct some form of **physical exercise** through daily indoor and outdoor recreational activities needs to be available; as well as access to suitable outside space, including fresh air and natural light. Activities tailored to women and children, and which take account of cultural factors, are also needed.

(ix) The right to **practice one's religion** needs to be observed.

(x) **Basic necessities** such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, are to be provided to asylum-seekers in detention. They should have the right to wear their own clothes, and to enjoy privacy in showers and toilets, consistent with safe management of the facility.
(xi) **Food of nutritional value** suitable to age, health, and cultural/religious background, is to be provided. Special diets for pregnant or breastfeeding women should be available. Facilities in which the food is prepared and eaten need to respect basic rules on sanitation and cleanliness.

(xii) Asylum-seekers should have **access to reading materials and timely information** where possible (for example through newspapers, the internet, and television).

(xiii) Asylum-seekers should have access to **education and/or vocational training**, as **appropriate to the length of their stay**. Children, regardless of their status or length of stay, have a right to access at least primary education. Preferably children should be educated off-site in local schools.

(xiv) The frequent transfer of asylum-seekers from one detention facility to another should be avoided, not least because they can hinder access to and contact with legal representatives.

(xv) Non-discriminatory **complaints mechanism** (or grievance procedure) needs to be in place, where complaints may be submitted either directly or confidentially to the detaining authority, as well as to an independent or oversight authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

(xvi) All staff working with detainees should receive **proper training**, including in relation to asylum, sexual and gender-based violence, the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention. Staff-detainee ratios need to meet international standards; and codes of conduct should be signed and respected.

(xvii) With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international refugee or
human rights law and remain accountable as a matter of international law. Accordingly, States need to ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms, including termination of contracts or other work agreements where duty of care is not fulfilled.98

(xviii) Children born in detention need to be registered immediately after birth in line with international standards and issued with birth certificates.99
GUIDELINE 9:

The special circumstances and needs of particular asylum-seekers must be taken into account

GUIDELINE 9.1

Victims of trauma or torture

49. Because of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain (see Guideline 4). Victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.

50. Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms. This can be the case even if individuals present no symptoms at the time of detention. Because of the serious consequences of detention, initial and periodic assessments of detainees’ physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment needs to be provided to such persons, and medical reports presented at periodic reviews of their detention.
Guideline 9.2

Children

51. General principles relating to detention outlined in these Guidelines apply a fortiori to children, who should in principle not be detained at all. The United Nations Convention on the Rights of the Child (CRC) provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children:

- The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22, CRC).

- There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members (Article 2, CRC).

- Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6, CRC).

- Children should be assured the right to express their views freely and their views should be given “due weight” in accordance with the child’s age and level of maturity (Article 12, CRC).103

- Children have the right to family unity (inter alia, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
• Article 20(2) and (3) of the CRC require that States Parties shall, in accordance with their national laws, ensure **alternative care for such a child**. Such care could include, *inter alia*, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.

• Article 22 of the CRC requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive **appropriate protection and assistance**.

• Article 37 of the CRC requires States Parties to ensure that the **detention of children be used only as a measure of last resort** and for the **shortest appropriate period of time**.

• Where separation of a child or children from their parents is unavoidable in the context of detention, both parents and child are entitled to essential information from the State on the whereabouts of the other unless such information would be detrimental to the child (Article 9(4), CRC).

52. Overall an **ethic of care** – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien”.\(^{104}\) States should “utilize, within the framework of the respective child protection systems, **appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”\(^{105}\)

53. All appropriate alternative care arrangements should be considered in the case of **children accompanying their parents**, not least because of the well-documented deleterious effects of detention on children’s well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right
to family and private life of the family as a whole, the appropriateness of the detention facilities for children,\textsuperscript{106} and the best interests of the child.

54. As a general rule, \textbf{unaccompanied or separated children} should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.\textsuperscript{107} Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child’s proper development (both physical and mental) while longer term solutions are being considered.\textsuperscript{108} A primary objective must be the best interests of the child.

55. Ensuring accurate age assessments of asylum-seeking children is a specific challenge in many circumstances, which requires the use of appropriate assessment methods that respect human rights standards.\textsuperscript{109} Inadequate age assessments can lead to the arbitrary detention of children.\textsuperscript{110} It can also lead to the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.

56. Children who are detained benefit from the same \textbf{minimum procedural guarantees} as adults, but these should be tailored to their particular needs (see Guideline 9). An independent and qualified \textbf{guardian as well as a legal adviser} should be appointed for unaccompanied or separated children.\textsuperscript{111} During detention, children have a \textbf{right to education} which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their \textbf{recreation and play, including with other children}, which is essential to a child’s mental development and will alleviate stress and trauma (see also Guideline 8).

57. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.\textsuperscript{112}
Guideline 9.3

Women

58. As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.

59. Where detention is unavoidable for women asylum-seekers, facilities and materials are required to meet women’s specific hygiene needs. The use of female guards and warders should be promoted. All staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.

60. Women asylum-seekers in detention who report abuse are to be provided immediate protection, support and counselling, and their claims must be investigated by competent and independent authorities, with full respect for the principle of confidentiality, including where women are detained together with their husbands/partners/other relatives. Protection measures should take into account specifically the risks of retaliation.

61. Women asylum-seekers in detention who have been subjected to sexual abuse need to receive appropriate medical advice and counselling, including where pregnancy results, and are to be provided with the requisite physical and mental health care, support and legal aid.
Guideline 9.4

Victims or potential victims of trafficking

62. The prevention of trafficking or re-trafficking cannot be used as a blanket ground for detention, unless it can be justified in the individual case (see Guideline 4.1). Alternatives to detention, including safe houses and other care arrangements, are sometimes necessary for such victims or potential victims, including in particular children.120

Guideline 9.5

Asylum-seekers with disabilities

63. Asylum-seekers with disabilities must enjoy the rights included in these Guidelines without discrimination. This may require States to make “reasonable accommodations” or changes to detention policy and practices to match their specific requirements and needs.121 A swift and systematic identification and registration of such persons is needed to avoid arbitrary detention;122 and any alternative arrangements may need to be tailored to their specific needs, such as telephone reporting for persons with physical constraints. As a general rule, asylum-seekers with long-term physical, mental, intellectual and sensory impairments123 should not be detained. In addition, immigration proceedings need to be accessible to persons with disabilities, including where this is needed to facilitate their rights to freedom of movement.124
**Guideline 9.6**

**Older asylum-seekers**

64. Older asylum-seekers may require special care and assistance owing to their age, vulnerability, lessened mobility, psychological or physical health, or other conditions. Without such care and assistance, their detention may become unlawful. Alternative arrangements would need to take into account their particular circumstances, including physical and mental well-being.\(^\text{125}\)

**Guideline 9.7**

**Lesbian, gay, bisexual, transgender or intersex asylum-seekers**

65. Measures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation or gender identity.\(^\text{126}\) Where their security cannot be assured in detention, release or referral to alternatives to detention would need to be considered. In this regard, solitary confinement is not an appropriate way to manage or ensure the protection of such individuals.
**GUIDELINE 10:**

Detention should be subject to independent monitoring and inspection

66. To ensure systems of immigration detention comply with international legal principles, it is important that immigration detention centres are open to scrutiny and monitoring by independent national and international institutions and bodies.\(^{127}\) This could include regular visits to detainees, respecting principles of confidentiality and privacy, or unannounced inspection visits. In line with treaty obligations, and relevant international protection standards, access by UNHCR\(^{128}\) and other relevant international and regional bodies with mandates related to detention or humane treatment\(^{129}\) needs to be made possible. Access to civil society actors and NGOs for monitoring purposes should also be facilitated, as appropriate. Independent and transparent evaluation and monitoring are likewise important facets of any alternative programme.\(^{130}\)

67. In respect of monitoring the conditions of detention and treatment of women detainees, any monitoring body would need to include women members.\(^{131}\)
Alternatives to Detention

There are a range of alternatives to detention, which are outlined below. Some are used in combination, and as indicated in the main text, some impose greater restrictions on liberty or freedom of movement than others. The list is non-exhaustive.

(i) **Deposit or surrender of documentation:** Asylum-seekers may be required to deposit or surrender identity and/or travel documentation (such as passports). In such cases, individuals need to be issued with substitute documentation that authorises their stay in the territory and/or release into the community.\textsuperscript{132}

(ii) **Reporting conditions:** Periodic reporting to immigration or other authorities (for example, the police) may be a condition imposed on particular asylum-seekers during the status determination procedure. Such reporting could be periodic, or scheduled around asylum hearings and/or other official appointments. Reporting could also be to an NGO or private contractor within community supervision arrangements (see vii).

**However, overly onerous reporting conditions** can lead to non-cooperation, and can set up individuals willing to comply to instead fail. Reporting, for example, that requires an individual and/or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfil the conditions, and can unfairly discriminate on the basis of economic position.\textsuperscript{133}
The frequency of reporting obligations would be reduced over time – either automatically or upon request – so as to ensure that any conditions imposed continue to meet the necessity, reasonableness and proportionality tests. Any increase in reporting conditions or other additional restrictions would need to be proportionate to the objective pursued, and be based on an objective and individual assessment of a heightened risk of absconding, for example.

(iii) Directed residence: Asylum-seekers may be released on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum-seekers may also be required to obtain prior approval if they wish to move out of the designated administrative region; or to inform the authorities if they change address within the same administrative region. Efforts should be made to approve residency that facilitates family reunification or closeness to relatives, and/or other support networks. Residency conditions might also involve residence at a designated open reception or asylum facility, subject to the rules of those centres (see iv).

(iv) Residence at open or semi-open reception or asylum centres: Release to open or semi-open reception or asylum centres with the condition to reside at that address is another form of directed residence (see above iii). Semi-open centres may impose some rules and regulations for the good administration of the centre, such as curfews and/or signing in or out of the centre. General freedom of movement within and outside the centre should, however, be observed to ensure that it does not become a form of detention.

(v) Provision of a guarantor/surety: Another alternative arrangement is for asylum-seekers to provide a guarantor/surety who would be responsible for ensuring their attendance at official appointments and hearings, or to otherwise report as specified in any conditions of release. Failure to appear could lead to a penalty – most likely the forfeiture of a sum of money – being levied against the guarantor/surety. A guarantor, for example, could be a family member, NGO or community group.
(vi) **Release on bail/bond:** This alternative allows for asylum-seekers already in detention to apply for release on bail. Any of the above-mentioned conditions (ii)-(v) may be imposed. For bail to be genuinely available to asylum-seekers, bail hearings would preferably be automatic. Alternatively, asylum-seekers must be informed of their availability and they need to be accessible and effective. Access to legal counsel is an important component in making bail accessible. The bond amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail systems merely theoretical.

Bail/bond and guarantor/surety systems tend to discriminate against persons with limited funds, or those who do not have previous connections in the community. As a consequence, where bail/bond and guarantor/surety systems exist, governments are encouraged to explore options that do not require asylum-seekers to hand over any funds. They could, for example, be “bailed” to an NGO – either upon the NGO acting as guarantor (see v above) – or under agreement with the government. Safeguards against abuse and/or exploitation, such as inspection and oversight, also need to be in place in these systems involving NGOs and others. In all cases, what needs to be assessed is whether payment of a bond or the designation of a guarantor/surety is necessary to ensure compliance in the individual case. Systematically requiring asylum-seekers to pay a bond and/or to designate a guarantor/surety, with any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary and not tailored to individual circumstances.

(vii) **Community supervision arrangements:** Community supervision arrangements refer to a wide range of practices in which individuals and families are released into the community, with a degree of support and guidance (that is, “supervision”). Support arrangements can include support in finding local accommodation, schools, or work; or, in other cases, the direct provision of goods, social security payments, or other services. The “supervision” aspect may take place within open or semi-open reception or asylum facilities, or at the offices of the relevant service provider while the individual lives freely in the community. Supervision may be a condition of the asylum-seeker's release and may
thus involve direct reporting to the service provider, or alternatively, to the immigration or other relevant authorities separately (see ii).

Supervision may also be optional, such that individuals are informed about the services available to them without any obligation to participate in them. Community supervision may also involve case management (see next).

Complementary measures and other considerations

Case management

Case management has been identified as an important component in several successful alternative to detention policies and programmes, and also as an aspect of good asylum systems. Case management is a strategy for supporting and managing individuals and their asylum claims whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.\textsuperscript{136} Such policies have led to constructive engagement with the asylum process, and improvements in compliance/cooperation rates.

Case management is part of an integrated process, starting at an early stage in the asylum process and continuing until refugee status or other legal stay is granted, or deportation is carried out. The concept is that each asylum-seeker is assigned a “case manager” who is responsible for their entire case, including providing clear and consistent information and advice about the asylum process (as well as other migration and/or return processes, as applicable), as well as about any conditions on their release and the consequences of non-cooperation. It is a stand-alone process, but it has been identified as an element of successful alternative to detention programmes. Transparency, active information-sharing and good cooperation between all actors involved have also been shown to develop trust among the individuals concerned and to improve compliance rates.\textsuperscript{137}
Skill sets and personalities of staff

Skill sets and personalities of staff can contribute to the success or failure of alternatives. Recruitment and training of staff need to be well managed, including through tailored training, courses and/or certification. Codes of conduct or other regulations relating to staff behaviour can be important aspects of detention measures and alternatives to detention.

Alternatives operated by NGOs or private contractors

Where alternatives are operated by non-governmental or private organisations, a legally binding agreement would need to be entered into with the relevant governmental authority, and be subject to regular compliance monitoring by the government, independent national inspectorates and/or international organisations or bodies (such as UNHCR). The agreement would set out the roles and responsibilities of each body as well as complaints and inspection arrangements, and provide for termination of the agreement if terms are not met. It is important that agreements do not provide incentives to use more restrictive measures than are strictly necessary. Despite the role of non-governmental or private organisations in the management and/or implementation of alternatives, and while good practice might impose a statutory duty on such entities to take account of the welfare of detainees, the State remains responsible as a matter of international law for ensuring human rights and refugee law standards are met. It is important to keep in mind that the decision to impose restrictions on liberty or freedom of movement can never be taken by a non-State body.

The role of non-governmental or private organisations in the process of enforcement of non-compliance orders (such as by reporting on absences or absconding to the authorities for their follow-up) varies. It is, however, not necessary that these organisations participate in the enforcement process.
Endnotes


A clear distinction is required between stateless persons who are seeking asylum in other countries and stateless persons who are residing in their “own” country in the sense envisaged by Article 12(4) of the International Covenant on Civil and Political Rights, 1966 (ICCPR). The latter include individuals who are long-term, habitual residents of a State which is often their country of birth. Being in their “own country” they have a right to enter and remain there with significant implications for their status under national law. Rules governing the acceptable grounds for detention will vary between these two groups (Guideline 4.1). In relation to the former, the grounds outlined in these Guidelines apply; however, such justifications for the detention of stateless persons residing in their “own” country will in many instances lead to arbitrary and unlawful (including indefinite) detention. For more on detention and stateless persons, see UNHCR, Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, 5 April 2012, HCR/GS/12/02, paras. 59-62, available at: http://www.unhcr.org/refworld/docid/4f7dafb52.html.

The term “persons found not to be in need of international protection’ is understood to mean persons who have sought international protection and who after due consideration of their claims in fair procedures, are found neither to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection in accordance with other international obligations or national law”, see UNHCR, ExCom, Conclusion on the Return of Persons Found Not to be in Need of International Protection, No. 96 (LIV) – 2003, preambular para. 6, available at: http://www.unhcr.org/3f93b1ca4.html.

See, below note 22.


See, for example, Guzzardi v. Italy, above note 8.


“Extraterritorial” detention refers to, inter alia, the transfer and detention of asylum-seekers in another country’s territory, including under agreement with that State. The responsibility of the sending State for the human rights standards in that place of detention will depend on a range of factors, see, for example, UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at: http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf.
13 Edwards, *Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention”*, above note 4, Figure 1.


20 Article 31, 1951 Convention.

21 See, for example, Articles 3 and 9, UDHR; Article 9, ICCPR; Articles 1 and 25, ADRDM; Article 6, ACHPR; Article 7 ACHR; Article 5, ECHR; Article 6, CFREU.
See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one’s own. See, also, Article 12, African Charter on Human and Peoples’ Rights, 1981 (ACHPR); Article 22, American Convention on Human Rights, 1969 (ACHR); Article 2, Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), 1950 (ECHR); Article 2, Protocol No. 4 to the ECHR, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto, 1963; Article 45, CFREU.

See, UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) –1986, para. (b), available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) –1998, paras. (cc), (dd) and (ee); and 89 (LI) –2000, third paragraph, all available at: http://www.unhcr.org/3d4ab3ff2.html.


Article 31(2) of the 1951 Convention provides: “The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”. See UNHCR, Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention – Revised, Geneva Expert Roundtable, 8-9 November 2001 (UNHCR Global Consultations Summary Conclusions: Article 31 of the 1951 Convention), para. 3, available at: http://www.unhcr.org/419c783f4.pdf. See, also, UNHCR, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17 (UNHCR Global Consultations: Reception of Asylum-Seekers), available at: http://www.unhcr.org/refworld/docid/3bfa81864.html.

Article 26 of the 1951 Convention provides: “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.” Article 26 of the 1954 Convention relating to the Status of Stateless Persons provides an identical provision.

28  For example, Article 9(1) of the ICCPR provides explicitly that: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”


30  Ibid. The ECtHR stated: “It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of the relevant provision, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.”


32  The general principle that laws ought not to have retroactive effect is well-established in most legal jurisdictions, especially as regards criminal prosecution, arrest or detention: see, for example, Article 25 of the ADRDM, which provides in part that “[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.” See, also, Amuur v. France, above note 9, para. 53.


Article 9 of the ICCPR may be derogated from in a public emergency subject to being “strictly required by the exigencies of the situation” and “provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination …” (Article 4, ICCPR). Also, A v. Australia, HRC, Comm. No. 560/1993, 3 April 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b71a0.html, which found no basis to suggest that detention of asylum-seekers was prohibited as a matter of customary international law (para. 9.3).


Ibid. and A v. Australia, above note 35, paras. 9.2-9.4 (on proportionality).


A v. Australia, above note 35, para. 9.

WGAD, Report to the Tenth Session of the Human Rights Council, 16 February 2009, A/HRC/10/21, para. 67, available at: http://www.unhcr.org/refworld/docid/502e0de72.html. Some regional instruments explicitly limit the grounds of immigration detention: for example, Article 5(f) of the ECHR: “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

A v. Australia, above note 35, para. 9.4.

UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, above note 23, para. (b).


R (on the application of Suckrajh) v. (1) Asylum and Immigration Tribunal and (2) The Secretary of State for the Home Department, EWCA Civ 938, United Kingdom: Court of Appeal (England and Wales), 29 July 2011, available at: http://www.unhcr.org/refworld/docid/4e38024f2.html.

UNHCR ExCom, Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 20 October 1983, No. 30 (XXXIV) -1983, para. (d), available at: http://www.unhcr.org/refworld/docid/3ae68c6118.html.
UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b).


UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, above note 23, para. (b)


WGAD Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, para. 53: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.” Available at: [http://www.unhcr.org/refworld/docid/502e0eb02.html](http://www.unhcr.org/refworld/docid/502e0eb02.html).
Article 5 (3), ACHR; Article 7(2) ACHPR; Article 5(3) CFREU.


C v. Australia, above note 38, para. 8.2.


Global Roundtable Summary Conclusions, above note 48, para 2.

Global Roundtable Summary Conclusions, above note 48, para 20.
These other rights could include: the right to privacy (Article 12, UDHR; Article 17(1), ICCPR; Article 16(1), CRC; Article 11 ACHR; Article 5 ADRDM; Article 8 ECHR; Article 7 CFREU), the right to family life (Articles 12 and 16(3), UDHR; Article 23(1), ICCPR; Article 10(1) ICESCR; Article 12(2), 1951 Convention and Recommendation B of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.unhcr.org/refworld/docid/40a8a7394.html; Article 18, ACHPR; Article 17(1), ACHR; Article 6, ADPDM; Article 2 and 8 ECHR; Article 9, CFREU), the prohibition on inhuman or degrading treatment (Article 7, ICCPR; Article 1, CAT; Article 3, ECHR; Article 25 ADRDM; Article 4 CFREU; Article 5 ACHR; Article 5 ACHPR).

Global Roundtable Summary Conclusions, above note 48, para 31.

Global Roundtable Summary Conclusions, above note 48, para. 19.

Global Roundtable Summary Conclusions, above note 48, para. 21.


Global Roundtable Summary Conclusions, above note 48, para. 21.

Global Roundtable Summary Conclusions, above note 48, para. 21.


Global Roundtable Summary Conclusions, above note 48, para. 24.

Article 3, 1951 Refugee Convention; Article 2, UDHR; Article 2, ICCPR; Article 2(2), ICESCR; Article 2, CRC; Article 7, CMW and Article 5, CRPD as well as in regional instruments such as Article 2, ADRDM; Article 24, ACHR; Art. 14 ECHR; Article 21, CFREU and Articles 2 and 3, ACHPR.

No derogations may be based on discriminatory grounds: Article 4, ICCPR. A like provision is found in Article 15, ECHR and in Article 27, ACHR. See, also, Article 8, 1951 Convention.
CERD, General Recommendation No. 30: *Discrimination against Non-Citizens*, UN Doc. A/59/18, 10 January 2004, para. 19: The CERD Committee has called in particular for States to respect the security of non-citizens, in particular in the context of arbitrary detention, and to ensure that conditions in centres for refugees and asylum-seekers meet international standards, available at: http://www.unhchr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d.

For example, in deportation proceedings there may be a justified distinction drawn between nationals and non-nationals, in the sense that the national has a right of abode in their own country and cannot be expelled from it: *Moustaquim v Belgium* (1991) 13 EHRR 802, available at: http://www.unhchr.org/refworld/docid/3ae6b7018.html. See, also, *Agee v. UK* (1976) 7 DR 164 (European Commission on Human Rights decision), available at: http://www.unhchr.org/refworld/docid/4721af792.html.


Article 9 (2), ICCPR; Article 7 (4), ACHR; Article 5 (2) ECHR and Article 6, ACHPR.


Article 16(2), 1951 Convention.


Article 9(4), ICCPR; Article 7(6), ACHR; Article 5(4), ECHR; Article 25, paragraph 3, ADRDM; Article 7(6), ACHR; Article 6 read in conjunction with Article 7, ACHPR; Article 5, ECHR. See, for example, Article 2(3), ICCPR; Article 25, ACHR; Article 13, ECHR.


*Abdolkhani and Karimnia v. Turkey* (No.2), (2010), ECtHR App. No.50213/08, available at: http://www.unhcr.org/refworld/docid/4c5149cf2.html, which found a violation of Article 3 of the ECHR on account of the detention of refugees for three months in the basement of police headquarters.

A number of human rights provisions are specifically relevant to conditions in detention, such as Articles 7 (prohibition against torture and cruel, inhuman or degrading treatment), 10 (right to humane conditions in detention) and 17 (right to family life and privacy) of the ICCPR. See, also, UN *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, General Assembly resolution 43/173 of 9 December 1988, available at: http://www.unhcr.org/refworld/docid/3b00f219c.html; UN *Standard Minimum Rules for the Treatment of Prisoners*, 1955, available at: http://www.unhcr.org/refworld/docid/3ae6b36e8.html; UN *Rules for the Protection of Juveniles Deprived of their Liberty*, 1990, A/RES/45/113, 14 December 1990, available at: http://www.unhcr.org/refworld/docid/3b00f18628.html.


Muskhadzhiyeva and others v. Belgium, (2010), ECtHR, App. No. 41442/07, available at: http://www.unhcr.org/refworld/docid/4bd55f202.html, in which it was held inter alia that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.


Rule 48, Bangkok Rules, ibid.

Article 22, 1951 Convention; Art. 26, UDHR; Art. 13 and 14, ICESCR; Art. 28, CRC; Art.10, CEDAW.


Global Roundtable Summary Conclusions, above note 48, para. 10.

For the purposes of these Guidelines, a child is defined as “a human being below the age of 18 years”, Article 1, United Nations Convention on the Rights of the Child (CRC), 1990. See also UN Rules for the Protection of Juveniles Deprived of their Liberty, above note 88.


Muskhadzhiyeva and others v. Belgium, above note 91.


Ibid.

On reception conditions for children, see UNHCR, Refugee Children: Guidelines on Protection and Care, 1994, para. 92, available at: http://www.unhcr.org/refworld/docid/3ae6b3470.html. WGAD Report to the Thirteenth Session of the Human Rights Council, above note 59, para. 60: “Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of unaccompanied minors would comply with the requirements of article 37(b), clause 2, of the [CRC], according to which detention can only be used as a last resort.” Mitunga v. Belgium, (2006), ECtHR, App. No.13178/03, para. 103, available at: http://www.unhcr.org/refworld/docid/45d5cef72.html.


An adult who is familiar with the child’s language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.

See CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, above note 103, para. 61.

See, also, the Bangkok Rules, above note 92.

Special measures, for example, would need to be in place to protect the right to live in dignity of women who have been trafficked into the country.

Rule 5, Bangkok Rules, above note 92.

Rule 19, Bangkok Rules, above note 92.

Rule 33(1), Bangkok Rules, above note 92.

Rule 25(1), Bangkok Rules, above note 92.

Rule 25(2), Bangkok Rules, above note 92.


UNHCR ExCom, Conclusion on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR, No. 110 (LXI) –2010, paras. (c), (f), (h), (j), available at: http://www.unhcr.org/refworld/docid/4cbeaf8c2.html.

Language taken from ExCom Conclusion, ibid., preambular para. 3.

Article 18(1)(b), ICRPD.


A range of international, regional and national bodies exist which have a monitoring or inspection function, such as the Sub-Committee on the Prevention of Torture and national preventive mechanisms set up pursuant to the Optional Protocol to the Convention Against Torture, 2002 (OPCAT). National mechanisms would include National Preventive Mechanisms, National Human Rights Institutions, Ombudsmans, and/or NGOs.

Global Roundtable Summary Conclusions, above note 48, para. 25.

Rule 25(3), Bangkok Rules, above note 92.


Global Roundtable Summary Conclusions, above note 48, para. 22.

On the right to family and personal life, see above note 62.


Global Roundtable Summary Conclusions, above note 48, para. 29.
137 Global Roundtable Summary Conclusions, above note 48, para. 30.
138 Global Roundtable Summary Conclusions, above note 48, para. 31.
Useful links

The Guidelines are available online at:
http://www.unhcr.org/refworld/docid/503489533b8.html

Refworld special features page on Detention:
http://www.unhcr.org/refworld/detention.html

A Compilation of Summary Conclusions from UNHCR’s Expert Meetings: Commemorating the Refugee and Statelessness Conventions, 2010-2011:
http://www.unhcr.org/4fe31c7a9.html

UNHCR Website:
http://www.unhcr.org
Elements for a National Integration Policy Framework in Malta

I. Overall goals

A settlement and integration policy framework in Malta may be useful for several purposes:

- Provide a **longer term vision** as to where the country aims to be in the coming years as regards the framework to facilitate settlement of beneficiaries of protection;
- Contribute to implementation of **international law obligations** towards refugees and migrants in general in Malta;
- Form part of a framework to facilitate **well coordinated operational structures** involving various relevant Government entities in Malta, maximizing the impact of the available financial, material and human resources;
- Contribute to better management of **mixed migration** movements, to the benefit of people affected as well as the country as a whole;
- Foster development of **skills potential** among beneficiaries of protection and address labour needs in the national economy;
- Provide a tool to pursue **economic, cultural and social development** for individuals and communities in Malta;
- Facilitate steps towards greater acceptance and understanding of a **multicultural** environment in Malta.

In the below outline these objectives are incorporated under two main headings. The first part addresses the definition of relevant Government entities’ responsibilities, and development of their capacities and collaboration arrangements. The second part provides an overview of integration issues from the perspective of rights and obligations of migrants, refugees and other beneficiaries of protection.

A national integration policy framework may follow a similar structure.

II. Government entities’ responsibilities, capacities and objectives

An integration policy framework can help to ensure that relevant government entities are provided with clear direction as regards their involvement with migration and refugee issues. This may include elaboration of specific guidance towards the following targets:

**Clarity as regards responsibilities**

- It is important to ensure that the relevant **roles, functions, responsibilities and capacities** under each Ministry and Department engaged with migration issues are identified and described, avoiding potential overlap and confusion of roles.

**Effective coordination and collaboration**

- It should be a central objective to ensure **effective coordination** among Ministries and service providers under their respective remits.
- Such coordination will require a mechanism to facilitate sharing of information, joint policy development and sharing of implementation responsibilities. This may
be lead by an existing Governmental entity (Ministry) designated as responsible for coordinating settlement and integration issues, including through establishing links with focal points in other government entities. Alternatively, an inter-Ministerial working group can be established, potentially under the leadership of a designated Integration Commissioner or under the remit of a new governmental migration entity.

**Defining the role of mainstream services**

- In order to **facilitate access to services** available to various categories of migrants and beneficiaries of protection (health, social security and assistance, education, employment, housing etc), it is essential that mainstream providers in Malta have clear guidance as regards their responsibilities towards these groups.
- This may require further measures as regards development of additional capacity, and provision of information and tailored training activities for relevant staff.

**Legislation, policy development and review**

- An integration policy should indicate a process for review of current integration related legislation and policies, in accordance with the longer term vision of the Government and as measured against the new recast EU Directives. A review process should link also with the development of asylum and reception related policies with the aim to create conducive environment for future integration in Malta.
- Particular attention may be required to ensuring effective legislation and policies to curb abuse and exploitation in the labour and housing market etc.

**Links with EU institutions, international organizations and civil society**

- The national on settlement and integration should take into account regulations and capacities available within the EU system, including relevant parts of the recast EU directives and various support and funding mechanisms.
- International organizations and civil society can also contribute to a national integration framework as required.

**Data collection and analysis**

- In order to facilitate planning and effective responses it is essential to monitor developments through **data collection and analysis**, including through maintaining comprehensive statistics on integration indicators. Such information should be made available to relevant Government entities as well as to the general public.
- This may require further involvement by existing data collecting entities (NSO, ETC, Education Ministry) as well as development of a central capacity to collect and coordinate management and presentation of integration related information.

**III. Rights and responsibilities of migrants and beneficiaries of protection**

A comprehensive national integration policy should describe the implications of key rights and obligations of migrants and refugees, and indicate the role of stakeholders, relevant tools and measures to ensure their implementation. This may include the following elements:

- A system to disseminate **information** to migrants and beneficiaries of protection (rights/ duties/ services). One important element in this regard could be to develop
an online portal to serve information needs of various categories of third country nationals, including migrants and beneficiaries of protection.

- While access to mainstream services is essential, it will also be necessary to maintain a level of **targeted integration support**. This may include training activities (voluntary and/or mandatory) to promote language skills, cultural orientation and learning programmes. This approach should be developed with a view to ensure sensitivity to age, gender and diversity variations among beneficiaries of protection.

- A national framework should ensure that formal legal status is reflected through **appropriate registration and provision of identity documents**. This means establishing secure legal status, facilitating the issuing of residency documents, enable family reunification as appropriate and as far as possible establishing a pathway to facilitated naturalization for people who remain in Malta in the longer term.

- Ensure that **mainstream services** are able to meet specific refugee needs and promote their social inclusion. Civil society may also contribute with setting up training and mentoring programmes etc. There is also further potential to engage local councils, parishes in the local settlement process. ‘Access’ centres and other relevant organizations e.g. scouts, youth centres, Agenzija Zghazagh (Youth Agency), Kunsill Malti ghall-Isport (Malta Sports Council) may be assisted to contribute more to integrate migrants in the locality.

- There is a need to target **support for families to settle and integrate in Malta**. This may require additional resources towards child care centres and schools (introduction programmes, peripatetic teachers etc). A system for transitional housing support may also be considered (eg as in Italy’s SPRAR system).

- Further targeted support may be provided to **specific groups** (such as unaccompanied children, older persons, persons with a disability, women, single women with children, LGBTI refugees, victims of torture/trauma etc) by adapting the access to and support of existent service providers to cater for specific needs within the migrant population.

- Permanent schemes should be launched to **promote skills development and improved access to the regular labour market**. Incentives should be established to counter informal work arrangements. Specific support may also include mechanisms to ensure recognition of degrees and qualifications from countries of origin.

- A national policy framework should also foster tolerance and a multi-cultural environment through **public campaigns** and information initiatives (TV, radio, billboards, school outreach, art exhibitions etc). The NCPE may play a central role in this regard.

- An integration policy framework should include mechanisms to ensure **refugees’ participation** in gap analysis and the policy development process. This may be
done through establishment of consultative fora, possibly with involvement also by UNHCR, IOM and civil society.

- It is essential to define **clearly various obligations of migrants and refugees**, and establish mechanisms and tools to facilitate raising awareness about all requirements and expectations relevant to the settlement and integration process in Malta.

*Some documents that can provide further guidance in the development of a national integration policy framework:*


- UNHCR Executive Committee Conclusion on Local Integration [http://www.refworld.org/docid/4357a91b2.html](http://www.refworld.org/docid/4357a91b2.html)

- UNHCR Note on the Integration of Refugees in the European Union [http://www.refworld.org/docid/463b24d52.html](http://www.refworld.org/docid/463b24d52.html)