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LAW

Immigration Detention and the Rule of Law: Safeguarding Principles

2nd edition



**British Institute of
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Comparative Law**

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List of Abbreviations

APC	Association for the Prevention of Torture
CAT	Committee against Torture
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CPT	European Committee for the Prevention of Torture
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
EU	European Union
GC	Grand Chamber of the European Court of Human Rights
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDC	International Detention Coalition
IRC	Immigration Removal Centre
NGO	Non-governmental organisation
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
SPT	Subcommittee on Prevention of Torture
SSFCA	Secretary of State for Foreign and Commonwealth Affairs
SSHHD	Secretary of State for the Home Department
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UN	United Nations

UNCAT	United Nations Convention against Torture
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNWGAD	United Nations Working Group on Arbitrary Detention

Immigration Detention and the Rule of Law: Safeguarding Principles

I. Overarching Safeguarding Principles

SP1: LIBERTY. Everyone, whatever their immigration status, has a basic right to liberty.

SP2: EQUALITY. The right to liberty must be enjoyed without discrimination of any kind, including on the basis of immigration status.

II. Legality

SP3: PRESCRIPTION. To be justified as a derogation from the principle of liberty, detention must be based on clear and accessible legal rules setting out the relevant grounds and procedure.

SP4: AUTHORITY. Detention can only be imposed by decision of prescribed public authorities.

SP5: ADHERENCE. Detention must always be compliant with the prescribed rules.

III. Non-arbitrariness

SP6: INDIVIDUALISATION. Detention must be based on due appraisal of the individual's circumstances.

SP7: LEGITIMATE AIM. Detention can only be imposed for the purposes of facilitating examination on entry or with a view to enforcing removal.

SP8: NECESSITY. Detention must be a last resort and sufficiently closely connected to the legitimate aim as to be necessary to achieve it.

SP9: ALTERNATIVES. Alternatives to detention must be sought and applied on the basis of minimum intervention.

SP10: ACHIEVABILITY. The legitimate aim must be realistic and be achievable within a reasonable timeframe.

SP11: DILIGENCE. Detention must be for the shortest time that is reasonably practicable. This requires the legitimate aim to be pursued diligently and expeditiously.

SP12: MAXIMUM. The period of detention cannot exceed what is reasonably necessary to achieve the immigration control aim and should be subject to a statutory maximum time limit resulting in immediate release.

IV. Treatment in Detention

SP13: ENVIRONMENT. Detention must take place in a suitable, non-carceral setting, while also ensuring appropriate separation based on the age, gender and sexual orientation of detained persons.

SP14: CONDITIONS. Detention conditions must be humane and dignified.

SP15: HEALTHCARE. Detained persons must be medically assessed and must receive timely and appropriate treatment.

SP16: CONTACT. Detained persons must not be held incommunicado and must be provided with the means to maintain contact with the outside world.

SP17: PRIVATISATION. (a) Where detention management is outsourced to a private actor, the State must ensure that human rights standards are upheld and protect detained persons against any violations. (b) A private actor managing any aspect of detention must respect human rights standards.

SP18: MONITORING. Independent monitoring of immigration detention facilities must be ensured, together with access to mechanisms for detained persons to complain about treatment in detention.

V. Judicial Oversight & Remedies

SP19: REASONS. Detained persons must be promptly and clearly informed of the grounds of their detention and of their rights in a language they understand.

SP20: LEGAL REPRESENTATION. Every detained person is entitled to prompt legal assistance, together with guarantees of access to their legal representatives. Such legal assistance must be funded by the State.

SP21: JUDICIAL REVIEW. Detained persons must be guaranteed the right to have the lawfulness of their detention reviewed without delay by a court empowered to order release.

SP22: AUTOMATIC COURT CONTROL. Detained persons must be brought promptly before a court to review the lawfulness of their detention. Such reviews must be conducted periodically by a judicial body until detention ceases.

SP23: COMPENSATION. Everyone unlawfully detained is entitled to adequate compensation reflecting the violation of their rights.

Introduction

Immigration detention remains a controversial and much-debated practice—just as it was when the first edition of these Safeguarding Principles was published in 2013. While the human and financial costs involved in immigration detention are well documented, the reality is that migrants continue to be detained in large numbers across the globe, with States reluctant to abandon what they consider to be a critical tool in their efforts to manage unauthorised migration. The permissibility of such practices also receives broad support under international law, where it has been accepted that the State's authority to detain for immigration purposes is a 'necessary adjunct' to the sovereign right to regulate matters of entry into and residence within the territory (*Saadi v United Kingdom*, ECtHR GC [App No 13229/03 \(2008\) § 64](#)).

This authority is not unfettered, however. Drawing on core set of international standards, the aim of this Handbook is to articulate Safeguarding Principles that set *clear limits* on the exercise of powers of immigration detention, while also seeking to ensure the dignity of persons detained under these powers. It proceeds from the understanding that *any* form of detention without such clear limits is a very troubling problem, posing serious challenges to human rights and the rule of law. This problem is particularly acute in the context of immigration detention, which 'remains far less regulated and monitored than criminal detention, leaving migrants at risk of, inter alia, prolonged detention, inadequate conditions and mistreatment' (*Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24 (2012) §48*). A key contention of this Handbook is that the liberty of foreign nationals (irrespective of their immigration status) is no less worthy of protection under the rule of law than those who are detained on other grounds—including those detained because they are suspected of, or have been convicted for, the commission of criminal offences.

What should immigration detention under the rule of law look like? A principled system of protection, as articulated in this Handbook, can be outlined as follows. It starts with an acknowledgement of every individual's basic right to liberty (SP1: Liberty), which must be secured without unjustified distinctions—including based on nationality and immigration status (SP2: Equality) ([Section I: Overarching Safeguarding Principles](#)). The next step requires ascertaining whether the decision to detain is 'lawful'. This means that the decision must have a clear and accessible basis in domestic law (SP3: Prescription), must be based on an order by a duly authorised public official (SP4: Authority), and must be in line with the grounds and procedures set out in domestic law and policy (SP5: Adherence) ([Section II: Legality](#)).

In addition to being 'lawful', immigration detention must also satisfy certain requirements to avoid being characterised as arbitrary ([Section III: Non-Arbitrariness](#)). First and foremost, any decision to detain must be made on an individualised basis, including by taking into account any vulnerabilities that would render such a measure disproportionate (SP6: Individualisation). Detention must also pursue a legitimate immigration control aim (SP7: Legitimate Aim) and be imposed only exceptionally as a last resort (SP8: Necessity)—that is, when alternative measures have been sought out and found to be ineffective in achieving that aim (SP9: Alternatives). Immigration detention may also be arbitrary owing to its excessive duration. To this end, the authorities must ensure that the overall period of detention does not exceed what is reasonably necessary to achieve the legitimate immigration control aim (SP12: Maximum), while also ensuring that detained persons are released as soon as it becomes apparent that this aim cannot be achieved within a reasonable timeframe (SP10: Achievability). Moreover, every effort

must be made to ensure that individuals are detained for the shortest time that is reasonably practicable. This requires the legitimate immigration control aim to be pursued diligently and expeditiously (SP11: Diligence).

The Safeguarding Principles articulated in this Handbook extend beyond the decision to impose or maintain detention, also addressing treatment *during* detention ([Section IV: Treatment in Detention](#)). These principles stipulate that immigration detention must take place outside of penal establishments (SP13: Environment) and guarantee conditions that are humane and dignified (SP14: Conditions). Moreover, anyone detained under immigration powers must be medically assessed and receive timely and appropriate treatment (SP15: Healthcare), while also being provided with the means to maintain contact with the outside world (SP16: Contact). Importantly, responsibility for upholding these standards ultimately falls on the State, even when it contracts the management of detention facilities out to private organisations (SP17: Privatisation). The State must also implement monitoring and complaints procedures aimed at preventing ill-treatment in detention, while guaranteeing unrestricted access to detention facilities to allow independent reporting by non-governmental organisations (NGOs) and international organisations (SP18: Monitoring).

The final set of Safeguarding Principles address judicial oversight of immigration detention and access to compensation for persons detained unlawfully ([Section V: Judicial Oversight & Remedies](#)). States must guarantee the right for detained persons to have the lawfulness of their detention reviewed without delay by a court empowered to order release (SP21: Judicial Review), which should be supplemented by a system of automatic court reviews conducted at regular intervals (SP22: Automatic Court Control). Moreover, to enable effective judicial oversight, persons detained under immigration powers must be promptly and clearly informed of the grounds of their detention (SP19: Reasons) and granted access to publicly funded legal assistance (SP20: Legal Representation). Finally, States must guarantee the right to pursue and receive adequate compensation for individuals who have been detained unlawfully or suffered other violations of their rights within detention (SP23: Compensation).

Background

This Handbook provides a comprehensive update of a series of Safeguarding Principles originally published in 2013 by the Bingham Centre for the Rule of Law (Bingham Centre) (British Institute of International and Comparative Law). Those principles have proven highly influential, informing legislative debates and judicial proceedings in the United Kingdom (UK) and beyond. While those principles continue to have an important impact, there have been a host of significant developments in the intervening period—both in terms of immigration detention practices on the ground, and in terms of the applicable international standards. This updated edition duly aims to ensure that the principles remain a relevant and practical resource for policymakers, legal practitioners and civil society actors working in this area. This is reflected, among other ways, in a renewed emphasis on the current realities of immigration detention—from the mainstreaming of the private management of detention facilities (SP17: Privatisation) to the growing reliance on artificial intelligence in detention decision-making (SP4: Authority; SP6: Individualisation; SP19: Reasons).

Another important change from the previous edition has been the decision to adapt the principles more closely to the factual and legal context of immigration detention in the UK. The first of a series of parliamentary inquiries into the use of immigration detention in the UK concluded in 2015 that this

measure is used ‘disproportionately and inappropriately’, with the UK authorities detaining migrants ‘more than most other European countries and for longer’ (*All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration, ‘Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’ (2015) 19*). Since the publication of these findings, there has been a decline in the overall numbers of individuals entering immigration detention in the UK. However, these numbers remain far from negligible, with 22,661 individuals reported to have entered the immigration detention estate in the year ending September 2025—an increase of 17% from the previous year (*Home Office, ‘Immigration system statistics, year ending September 2025’*). Other figures contribute further to a troubling picture. Of the individuals released from immigration detention in the year ending September 2025, approximately one third were held for one month or longer, with a worrying number detained for a period of over six months (2.1%, or 570 persons). Similarly concerning is the fact that less than half of the individuals released from immigration detention in the year ending September 2025 were returned to another country (43% of all leavers), with most continuing to be released on bail (*Home Office, ‘Immigration system statistics, year ending September 2025’*). This supports long-standing concerns around the excessive (and ultimately unwarranted) use of immigration detention in the UK (*Joint Committee on Human Rights, ‘Immigration detention—Sixteenth report of Session 2017–19’ (2019) §§ 26–27*).

As always, statistics do not tell the full story. While the overall numbers of persons held in immigration detention in the UK has fallen over the past decade, many of the concerns around the use of this practice have persisted—for instance, in relation to the absence of a maximum time limit on immigration detention (SP12: Maximum), or the lack of appropriate safeguards for avoiding the detention of vulnerable individuals (SP6: Individualisation), both of which have been cited as having severe impacts on the physical and psychological wellbeing of detained migrants (*Home Affairs Committee, ‘Immigration detention—Fourteenth Report of Session 2017-19’ (2019)*). Also omitted from these statistics are concerning reports of widespread ill-treatment of individuals detained under immigration powers, as uncovered most notably by the Brook House public inquiry (*Brook House Inquiry Report (2023)*). These findings have had an important impact on the development of these principles and the safeguards which they promote, including the introduction of an additional set of Safeguarding Principles that address treatment during detention ([Section IV: Treatment in Detention](#)).

Within the UK, a particularly salient issue in recent years has been the introduction of legislative changes aimed at limiting the powers of the judiciary to rule on the lawfulness of immigration detention. Key amongst these changes has been the passing of section 12 of the Illegal Migration Act 2023, which seeks to strip courts of the ability to conduct independent scrutiny of the lawfulness of the length of detention. This represents a serious challenge to the rule of law and the protections afforded to individuals detained for immigration purposes. Rule of law concerns have been raised regarding certain provisions of the newly passed Border Security, Asylum and Immigration Act 2025. Foremost among these is a provision (section 44) which expands the scope of detention powers with retrospective effect, potentially rendering lawful detention decisions which had no legal basis at the material time.*

This brief account highlights that the need for the articulation of clear protective standards on immigration detention is just as great now—if not greater—than it was when the Bingham Centre first

* See on this: ‘Safeguarding Principles on Immigration Detention and the Rule of Law: Applications in the UK Legal and Policy Context’ (BIICL 2025) available [here](#)

published its Safeguarding Principles over 10 years ago. This need is reflected in the growing body of international materials on immigration detention that has emerged over the past decade, and which has resulted in the development and further refinement of the international standards which form the basis of the Safeguarding Principles articulated in this Handbook. These developments include, among other things: decisions on immigration detention delivered by judicial (such as the European Court of Human Rights) and quasi-judicial bodies (such as the Human Rights Committee); guidelines developed by regional monitoring bodies, such as the European Committee on the Prevention of Torture (CPT); international commitments made through the adoption of the Global Compact on Migration (2018); the update of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners (2015) (Nelson Mandela Rules); pronouncements by the UN Working Group on Arbitrary Detention (UNWGAD); and a series of General Comments and Opinions on immigration detention delivered by UN treaty bodies. Understandings of the rule of law have also continued to develop. The last decade has seen the adoption, for example, of the European Commission for Democracy through Law's (Venice Commission) [Rule of Law Checklist](#) (2016), which has also played an important role in the process of updating these principles.

Aims

This Handbook is intended to inform the work of a wide audience, including policymakers, legal practitioners, judges and civil society actors working in this area. It draws its inspiration from a core set of standards developed within international human rights law, distilling these into discrete and easily digestible principles designed to inform litigation, policy design and broader engagement with parliamentary processes. Like the previous edition that it seeks to update, the Safeguarding Principles expounded in this Handbook are unapologetically protective in their orientation, seeking to draw international standards together at their highest point to maximise the substantive and procedural protections afforded to persons detained in the immigration context. To this end, where divergences are present in the international rules and/or their interpretation, the principles promote the most protective position supported by authority. Further inspiration for these principles is drawn from an extensive body of jurisprudence delivered by domestic UK courts on implied limits to the exercise of statutory powers of immigration detention.

Together with elaborating the relevant domestic and international human rights standards, a unique feature of the Safeguarding Principles lies in the emphasis they place on promoting compliance with the rule of law. These objectives share a considerable degree of overlap. Lord Bingham recognises compliance with international human rights standards as a core component of the rule of law (**Tom Bingham, *The Rule of Law* (Penguin Books 2010)**). By the same token, rule of law concepts enjoy a prominent position within the realm of human rights law—not least in the context of the right to liberty, where any interference by the State is permitted only in so far as it is 'lawful' and 'follows a procedure prescribed by law' (see the Commentary for SP3: Prescription). Nonetheless, adopting an explicit rule of law perspective serves an important function in the present Handbook. Immigration detention is executive detention, imposed by State authorities against a frequently disempowered and marginalised group. A rule of law perspective is thus essential to ensure that immigration detention does not operate 'outside of the law'—that is, in the absence of the types of legal safeguards that are broadly accepted as indispensable in other contexts, such as criminal detention.

Scope

The 23 Safeguarding Principles outlined in this Handbook have been developed to address *all* forms of immigration detention—that is, ‘any situation in which a person is deprived of liberty on grounds related to that person’s migration status, regardless of the name or reason given for carrying out the deprivation of liberty, or the name of the facility or place where the person is being held while deprived of liberty’ (***Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and their Connection with Other Human Rights*** [CMW/C/GC/5, §14](#)). This covers all scenarios where individuals are detained for reasons owing to their immigration or residence status—for instance, pending an assessment of whether they have leave to enter the country (including in the context of claims for asylum) or to facilitate removal or deportation. While examples are drawn at certain points from relevant jurisprudence dealing with extradition, this is primarily an issue dealt with under criminal law. Accordingly, the focus of these principles remains on immigration detention proper.

These Safeguarding Principles apply to all individuals who have been, or are liable to be, detained for immigration purposes. The Safeguarding Principles emphasise at various points the heightened standards of protection that apply to migrants with special needs—particularly in the context of individualised decision-making on detention (SP6: Individualisation) and alternatives to detention (SP9: Alternatives). It is nonetheless important to emphasise that the 23 Safeguarding Principles set out in this Handbook do not apply *exclusively* to cases where such vulnerabilities have been identified. Rather, they apply to all persons, based on the universality of human rights and rule of law standards.

How to Use the Safeguarding Principles

The first point to emphasise is that the 23 Safeguarding Principles apply simultaneously. Using immigration detention in a way that respects human rights and upholds the rule of law means guaranteeing each and every one of these principles as they pertain to the decision to impose or maintain detention (Sections I–III), the treatment of detained persons (Section IV) and guarantees of appropriate judicial oversight and access to remedies (Section V). States cannot ‘pick and choose’ between the principles, and no one principle should be considered subordinate to another.

In terms of the organisational logic of the Handbook, the Safeguarding Principles have been grouped into five broader themes: Overarching Principles (Section I); Legality (Section II); Non-arbitrariness (Section III); Treatment in Detention (Section IV); and Judicial Oversight & Remedies (Section V). This categorisation aims to enhance the accessibility and usability of this Handbook by illustrating how different Safeguarding Principles interact under these broader headings—a point emphasised by the introductory commentary provided at the beginning of each section. Importantly, these sections do not need to be read sequentially. Depending on the needs of the user, specific principles and/or sections can be read in isolation.

Regarding the internal structure of the Safeguarding Principles, each one follows the same sequence. The principles begin by setting out the relevant international standards, distinguishing between provisions of international treaty law (set out in the shaded box) and pronouncements by authoritative

international bodies such as the UN Human Rights Committee (HRC), the Committee against Torture (CAT), UN special mechanisms, the UNWGAD, and regional bodies (such as the Council of Europe Committee of Ministers and the CPT). Domestic standards in the UK are also cited where these are relevant to the principle in question. Given that the principles are designed primarily to facilitate engagement in the UK context, this Handbook largely excludes European Union (EU) law from its scope (apart from illustrative examples, where relevant).

The list of relevant standards is accompanied in each case by a commentary on the safeguarding principle in question. These commentaries elaborate on the requirements identified by the principles, specifying their different elements in greater detail. The commentaries also draw together jurisprudence from international and domestic judicial and quasi-judicial bodies to highlight the positive recognition of these principles and to exemplify their application in real-world cases.

I. Overarching Safeguarding Principles

I. OVERARCHING SAFEGUARDING PRINCIPLES

There are two overarching Safeguarding Principles that provide the sound starting point for examining all questions related to immigration detention: liberty (SP1) and equality (SP2). The former underlines that the individual's basic right to liberty must be the default position under the rule of law. While not absolute, the presumption of liberty means that any derogation from this right requires cogent justification in each individual case, with the burden of proof falling on the State. The principle of equality, meanwhile, demands that any differential treatment in the enjoyment of the right to liberty must be objectively and reasonably justified, including where this is based on immigration status. Detaining migrants based on their immigration status alone, where this is not strictly connected to an immigration control aim, may thus amount to unlawful discrimination. The same holds true for unjustified distinctions between different groups of migrants when it comes to imposing or maintaining detention, or the rights that they enjoy while in detention.

The principles of liberty (SP1: Liberty) and equality (SP2: Equality) provide the overarching framework for ensuring that immigration detention complies with rule of law safeguards. The former principle holds that all individuals enjoy a basic right to liberty, and that any decision to detain—regardless of the reasons supplied—is necessarily a derogation from this right (SP1: Liberty). While such derogations may be permissible, the onus for justifying detention must *always* fall on the State, bearing in mind the specific situation of the individual in question (SP6: Individualisation). Depriving an individual of their liberty is an interference with a basic human right, and as such can never be applied as a routine measure based on an assumption of the State's right to detain. This is no different when detention is employed with a view to enforcing immigration controls.

Further to this, the right to liberty (SP1: Liberty) requires rigorous scrutiny in terms of characterising situations as detention, based on an objective set of criteria. In the context of immigration control, concerns have frequently been raised around the practice of detaining migrants *de facto*—that is to say, in the absence of a formal detention order. This poses a major challenge to the rule of law, effectively depriving the individual concerned of access to appropriate avenues of judicial oversight and other key procedural safeguards (V. Judicial Oversight & Remedies). Strict standards must therefore be applied when it comes to determining whether an individual has been deprived of their liberty, regardless of the terminology used by the State to describe their situation of confinement.

The principle of equality (SP2: Equality), meanwhile, demands objective and reasonable justification for any distinctions in the enjoyment of the right to liberty based on certain identifiable characteristics, including immigration status. Foreign nationals are in a fundamentally different situation from a State's own nationals in that they require permission to enter and reside within the territory. Nonetheless, the principle of equality requires that detaining an individual based on their immigration status alone must be strictly connected to an immigration control purpose (SP7: Legitimate Aim), in the absence of which such a measure is likely to be discriminatory. Detention laws and policies must also not differentiate unjustifiably between different categories of foreign nationals based on protected characteristics (such as their gender, race, age or nationality). This principle extends beyond the decision to impose or maintain detention, prohibiting unjustified distinctions in providing access to mechanisms to challenge detention and receive appropriate compensation (V. Judicial Oversight & Remedies), or in the treatment of detained persons (IV. Treatment in Detention).

SP1: LIBERTY.

Everyone, regardless of their immigration status, has a basic right to liberty.

The individual's basic right to liberty is the default position under the rule of law. While the right to liberty is not absolute, any derogation duly requires cogent justification from the State and must be compliant with national and international legal standards. In the case of children, the right to liberty in the context of immigration proceedings is absolute, meaning that detention under any circumstances will be arbitrary.

A rigorous approach is called for when determining whether restrictions imposed on an individual's freedom of movement amount, in practice, to a deprivation of liberty. This should be based on an objective assessment, regardless of how the measure is characterised in domestic law. Moreover, the duty to guarantee the right to liberty extends to all individuals under the jurisdiction of the State, including where it exercises effective control over an individual located on another country's territory.

Right to Liberty

Universal Declaration of Human Rights (1948) Article 3: 'Everyone has the right to [...] liberty [...] of person.'

International Covenant on Civil and Political Rights (ICCPR) (1966) Article 9(1): 'Everyone has the right to liberty [...] of person. No one shall be subjected to arbitrary arrest or detention.'

European Convention on Human Rights (1950) Article 5(1): 'Everyone has the right to liberty [...] of person.'

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) Article 16(1): 'Migrant workers and members of their families shall have the right to liberty [...] of person.'

HRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 13 (2004) § 10: '[...] the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) §§ 2–3: 'Article 9 recognizes and protects both liberty of person and security of person [...] Article 9 guarantees those rights to everyone. "Everyone" includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 7: 'The right to personal liberty is fundamental and extends to all persons at all times and circumstances, including migrants and asylum seekers, irrespective of their citizenship, nationality or

migratory status.’ **§ 8:** ‘The prohibition of arbitrary detention is absolute, meaning that it is a non-derogable norm of customary international law, or *jus cogens*. Arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers. This extends both to the territorial jurisdiction and effective control of a State.’

UN High Commissioner for Refugees ([UNHCR Detention Guidelines](#) (2012) *Guideline 2* (§ 12): ‘The fundamental right[] [...] to liberty [...] of person [is] expressed in all the major international and regional human rights instruments, and [is an] essential component [...] of legal systems built on the rule of law.’

Immigration Detention of Children

[UN Convention on the Rights of the Child](#) (1989) *Article 3(1)*: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ ***Article 37(b)*:** ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.’

Joint General Comment No 4 (2017) of the CMW and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return [CMW/C/GC/4-CRC/C/GC/23](#), **§ 5:** ‘Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.’

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45](#) (2018) **§ 40:** ‘Detaining children because of their parents’ migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child. Children must not be separated from their parents and/or legal guardians. The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit, and alternatives to detention must be applied to the entire family instead.’

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37](#) (2015) **Principle 21, § 46:** ‘The deprivation of liberty of an unaccompanied or separated migrant or of an asylum-seeking, refugee or stateless child is prohibited. Detaining children because of their parents’ migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.’ ***Guideline 21, § 114:*** ‘[...] Children who are non-nationals should not

be placed in detention centres or shelters for migrants, but in non-custodial community-based alternatives to detention, where they may receive all services necessary for their protection, such as adequate nutrition, access to quality education and leisure, care, physical and psychological medical care and security. Special attention should be given to family reunification.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and their Connection with Other Human Rights [CMW/C/GC/5](#), § 44: 'In order to ensure that migrant or asylum-seeking children are not placed in immigration detention or in closed alternative care facilities for children, child protection and welfare actors should take primary responsibility for children in the context of international migration. When a migrant child is first detected by immigration authorities, child protection or welfare officials should immediately be informed and be responsible for screening the child for protection, shelter and other needs.'

Parliamentary Assembly of the Council of Europe, [Resolution 2020 \(2014\) on Alternatives to Immigration Detention of Children](#), § 9: '[Calling on Member States to] § 9.1. acknowledge that it is never in the best interests of a child to be detained on the basis of their or their parents' immigration status; § 9.2. introduce legislation prohibiting the detention of children for immigration reasons [...] and ensure its full implementation in practice; § 9.7. adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved.'

UN General Assembly, [Global Compact for Safe, Orderly and Regular Migration A/RES/73/195 \(2019\) Objective 13 § 29\(h\)](#): [Committing to] 'Protect and respect the rights and best interests of the child at all times, regardless of migration status, by ensuring availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements, that ensure access to education and health care, and respect the right to family life and family unity, and by working to end the practice of child detention in the context of international migration.'

UN General Assembly, [Resolution 70/147 on Protection of Migrants \(2016\) § 3\(b\)](#): 'Encourages States to put in place, if they have not yet done so, appropriate systems and procedures in order to ensure that the best interests of the child are a primary consideration in all actions or decisions concerning migrant children, regardless of their migration status, and to use, when applicable, alternatives to the detention of migrant children.'

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez, [A/HRC/28/68 \(2015\) § 80](#): 'Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.'

Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, [A/65/222 \(2010\) § 93](#): 'States should provide alternatives to detention for family groups when parents are detained on the sole basis of migratory status, keeping in mind the necessary balance between the need to protect family unity and the best interests of the child. In all decisions concerning children, the best

interests of the child should be the primary consideration [...] Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations.'

UNHCR, [Guidelines on International Protection No 14: Non-penalization of Refugees on Account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\)](#) § 38: 'Child refugees, including those who are irregularly present, should not be detained for immigration-related purposes, including when accompanied by parents or legal guardians who have entered or are present irregularly. Detention, when solely or exclusively based on the irregular entry or presence of the child and/or their parents or legal guardians, or to ensure attendance at asylum proceedings, would exceed the requirement of necessity and is not in the child's best interests. The detention of pregnant women and nursing mothers should also be avoided. In such cases, when restrictions on freedom of movement are necessary, other restrictions should be applied in lieu of detention including, for example, appropriate care arrangements and community-based programmes to ensure adequate reception and treatment of irregular child and pregnant and nursing refugees and their families.'

Characterising Detention

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#) § 13: '[...] Irrespective of how that measure is defined in the national policy, law or practice, or the reasons giving rise to it, if the measure results in a deprivation of liberty in which migrants or members of their families are unable to leave the place of detention at will, the Committee understands the measure to be a form of detention to which articles 16 and 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families apply.' **§ 14:** 'In addition, the Committee considers that detention for "reasons related to migration status" or "immigration detention" refers to any situation in which a person is deprived of liberty on grounds related to that person's migration status, regardless of the name or reason given for carrying out the deprivation of liberty, or the name of the facility or place where the person is being held while deprived of liberty. Accordingly, immigration detention includes the detention of migrants in prisons, police stations, immigration detention centres, closed reception facilities, health-care facilities and any other enclosed spaces, such as international or transit areas at air, land and maritime ports. "Reasons related to migration status" is understood by the Committee to be a person's migratory or residence status, or lack thereof, relating to irregular entry, stay or exit.'

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, [A/HRC/37/50](#) (2018) § 171: 'In general terms, "deprivation of liberty" or "detention" includes any placement of persons in public or private custodial settings that they are not permitted to leave at will. In practice, such settings may include prisons or purpose-built detention facilities, closed reception or holding centres, shelters, guesthouses or camps, but also temporary facilities, vessels and private residences. Regardless of the name given to a particular placement or accommodation and its categorization in national law, the decisive question for its qualification as "deprivation of liberty" is whether or not migrants are free to leave. In practice, the possibility of leaving must not be a merely theoretical option to be exercised at some point in the future, but also practicable

and available at any time. For example, holding migrants at an international border, in an offshore facility or in an airport transit zone and refusing them immigration while granting them the theoretical right to leave to any other country or territory of their choice still amounts to deprivation of liberty for such time as they are being held, and entitles all affected migrants to the full protection afforded to persons deprived of their liberty under international law.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45](#) (2018) § 45: 'Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled "shelters", "guest houses", "transit centres" "migrant stations" or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.'

Report of UNWGAD [A/HRC/36/37](#) (2017) § 52: 'While prisons and police stations remain the most common places where an individual may be deprived of his or her liberty, there are a number of different places which an individual is not free to leave at will and which raise a question of de facto deprivation of liberty. It is paramount that, irrespective of what such places are called, the circumstances in which an individual is detained are examined so as to determine whether he or she is in fact at liberty to leave such a place at will. If not, it is paramount that all the safeguards applicable to situations of deprivation of liberty are in place so as to guard against any arbitrariness.'

Joint General Comment No 4 (2017) of the CMW and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return [CMW/C/GC4-CRC/C/GC/23](#) § 6: 'Immigration detention is understood by the Committees as any setting in which a child is deprived of his/her liberty for reasons related to his/her, or his/her parents', migration status, regardless of the name and reason given to the action of depriving a child of his or her liberty, or the name of the facility or location where the child is deprived of liberty. "Reasons related to migration status" is understood by the Committees to be a person's migratory or residence status, or the lack thereof, whether relating to irregular entry or stay or not, consistent with the Committees' previous guidance.'

SP1. Liberty: Commentary.

Right to Liberty

The right to liberty of the person is a core human right and an 'essential component [...] of legal systems built on the rule of law' ([UNHCR Detention Guidelines](#) (2012) **Guideline 2, § 12**). Its fundamental importance is reflected in its inclusion in all the key international human rights treaties, which stipulate in clear terms that the right to liberty applies to 'everyone' ([ICCPR, Article 9\(1\)](#); [ECHR, Article 5\(1\)](#)). The right to liberty is therefore universal in scope: it cannot be a privilege reserved for a State's own nationals, nor can it be restricted to foreign nationals expressly permitted to reside in the territory. Rather, this core protection 'extends to all persons at all times and circumstances, including migrants and asylum seekers, irrespective of their citizenship, nationality or migratory status' ([UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants \[A/HRC/39/45\]\(#\) \(2018\) § 7](#)).

While universal, the right to liberty is not absolute. International standards recognise a variety of situations in which States may deprive someone of their liberty—for instance, following a criminal conviction by a court, or to prevent the spread of infectious diseases ([ECHR, Article 5\(1\)](#)). By the same token, it is widely accepted that States may detain foreign nationals for the specific purpose of enforcing immigration controls, whether to prevent an individual from entering the territory without permission, or to secure the removal of an individual from the territory where they are not (or are no longer) authorised to reside there (SP7: Legitimate Aim). This is not to say, however, that detention is always permitted if imposed for a legitimate purpose. In addition to pursuing a legitimate aim, international law is clear that ‘deprivation of liberty must not be arbitrary [...] and must be carried out with respect for the rule of law’ ([HRC, General Comment No 35: Article 9 \(Liberty and Security of Person\) CCPR/C/GC/35 \(2014\) § 10](#)).

Accordingly, interference with the right to liberty is only permissible to the extent that it is both ‘non-arbitrary’ and ‘lawful’, regardless of the context in which it occurs and/or the purpose it pursues. To be lawful, any deprivation of liberty must be authorised by domestic legal provisions that satisfy the requirements of legal certainty, accessibility and predictability (Section II Legality). Arbitrariness, meanwhile, is a broader concept that includes ‘not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability’, requiring ‘any detention [...] to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose’ ([UNHCR Detention Guidelines \(2012\) Guideline 4, § 18](#)) (Section III. Non-Arbitrariness). The right to freedom from arbitrary detention is considered a ‘fundamental human right’ ([Saadi v United Kingdom, ECtHR GC App No 13229/03 \(2008\) § 67](#)) that is ‘of the highest importance in a democratic society’ ([Medvedyev v France, ECtHR GC App No 3394/03 \(2010\) § 76](#)). It has also been held to be a non-derogable norm of international law, meaning that it cannot be derogated from under any circumstances ([UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 \(2018\) § 8](#)).

Effective protection of the right to liberty calls for detention to be the exception—a last resort (SP8: Necessity)—and for every power of detention, every purpose, every exception, to be interpreted restrictively. While not absolute, the right to liberty must be considered the default position under the rule of law, with any detention measure amounting to a derogation from this right. Accordingly, it has been held that ‘the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances’ ([Lam and Others v. Superintendent of Tai A Chau Detention Centre and Others \(Hong Kong\) \[1996\] UKPC 5, § 22 \(Lord Browne-Wilkinson\)](#)). As ‘the detention of a person constitutes a major interference with individual freedom’, it follows that this ‘must always be subject to rigorous scrutiny’ ([Khlaifia v Italy, ECtHR GC App No 16483/12 \(2016\) § 161](#)). This is no different when it comes to detention for immigration purposes.

Moreover, ‘[i]n every instance of detention, the burden of establishing the legal basis and the reasonableness, necessity and proportionality of the detention lies with the authorities responsible for the detention’ ([UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court](#)

[A/HRC/30/37 \(2015\) Principle 21, § 21](#)). This extends to any legal proceedings challenging detention. Thus, once a claimant has proven that they have been imprisoned at common law, ‘the burden shifts to the defendant [i.e., the State] to show that there was lawful justification for doing so’ (*Lumba (WL) v SSHD [2011] UKSC 12, § 65 (Lord Dyson)*). It should not suffice for the State to point to a detention power and require the individual to prove that it has been exercised unlawfully. Rather, the rule of law must be ‘alert to see that any coercive action is justified in law’, based on the fundamental understanding that ‘every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act’ (*Liversidge v Anderson [1942] AC 206, 244, 245 (Lord Atkin)*).

Immigration Detention of Children

International law does not expressly prohibit depriving children of their liberty, provided that ‘detention [...] [is] in conformity with the law and [...] used only as a measure of last resort and for the shortest appropriate period of time’ (*UNCRC, Article 37(b)*). Nonetheless, there is a growing international consensus that ‘depriving children of their liberty on the basis of their migration status – or that of their parents – is generally disproportionate and therefore arbitrary [...]’ (*E.B. v Belgium, CRC/C/89/D/55/2018 (2022) § 13.12*). In this respect, the Committee on Migrant Workers (CMW) and Committee on the Rights of the Child (CRC) have recognised that ‘[e]very child, at all times, has a fundamental right to liberty and freedom from immigration detention’, elaborating that ‘[a]ny kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice’ (*CMW and CRC, Joint General Comment on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return CMW/C/GC/4-CRC/C/GC/23 (2017) § 5*). States themselves have also increasingly recognised the need to abolish the immigration detention of children, with signatories to the Global Compact for Safe, Orderly and Regular Migration committing to ‘working to end the practice of child detention in the context of international migration’ (*UNGA, Global Compact for Safe, Orderly and Regular Migration A/RES/73/195 (2019) Objective 13, § 29(h)*).

Support for this position stems from the recognition of ‘the negative impact that immigration detention can have on children’s physical and mental health and on their development, even when they are detained for a short period of time or with their families’ (*CMW and CRC, Joint General Comment on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return CMW/C/GC/4-CRC/C/GC/23 (2017) § 9*). Immigration detention infringes a range of internationally enshrined children’s rights—including the right to development (*UNCRC, Article 6*), the right to health (*UNCRC, Article 24*) and the right to an adequate standard of living (*UNCRC, Article 27*)—and can therefore never be considered in the best interests of the child (*UNCRC, Article 3*). Moreover, children are at a heightened risk of experiencing inhuman or degrading treatment in detention (*Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez, A/HRC/28/68 (2015) § 80*) (SP14: Conditions). As a result, there is a strong legal basis to argue that the effects of detention on the rights of children are necessarily disproportionate to any legitimate immigration aim, rendering any such measure inherently arbitrary (*Ciara Smyth, ‘Towards a Complete Prohibition on the Immigration Detention of Children’ (2019) 19 Human Rights Law Review 1*) (SP6: Individualisation).

This position is further reflected in international jurisprudence. The Inter-American Court of Human Rights (IACtHR), for instance, has acknowledged that depriving children of their liberty in the context of juvenile criminal justice may be legitimate if imposed as a matter of last resort for the shortest appropriate period of time. However, it has held that such considerations do not apply to immigration detention, where deprivation of liberty exceeds the principle of necessity and where the best interests of the child outweigh immigration considerations (*IACtHR, [Advisory Opinion OC-21/14 on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection \(2021\) Series A No 21, § 154](#)*). While stopping short of outrightly prohibiting the immigration detention of children, the ECtHR has also increasingly recognised the relevance of children’s rights in its jurisprudence under Article 5(1)(f), asserting that ‘the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant’ (*A.B. v France, ECtHR [App No 11593/12 \(2016\) § 110](#)*). Accordingly, ‘as a matter of principle, the confinement of migrant children in a detention facility should be avoided’, and is permissible only when imposed ‘for a short period in appropriate conditions’ and provided that ‘the national authorities can establish that they resorted to such a measure only after having verified that no other measure involving a lesser restriction of freedom could be implemented’ (*M.H. and S.B. v Hungary, ECtHR [App Nos 10940/17 and 15977/17 \(2024\) § 72](#)*) (SP8: Necessity).

Importantly, the immigration detention of children should be avoided regardless of whether they are accompanied by their family members. Indeed, ‘[d]etaining children because of their parents’ migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child’ (*UNWGAD, [Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 \(2018\) § 40](#)*). Accordingly, preserving family unity cannot be invoked to justify the immigration detention of children (*Nikoghosyan v Poland, ECtHR [App No 14743/17 \(2022\) § 84](#)*), nor can States circumvent their legal obligations by ‘housing’ children as the ‘guests’ of their parents and/or guardians in immigration detention facilities (*UNWGAD, [Opinion No 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong \(Australia\) A/HRC/WGAD/2019/2 \(2019\) §§ 105–106](#)*). Rather, ‘[w]hen the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family’ (*CMW and CRC, [Joint General Comment on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return CMW/C/GC/4-CRC/C/GC/23 \(2017\) § 11](#)*). As underlined by the Parliamentary Assembly of the Council of Europe (PACE), States must duly ‘adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved’ (*PACE, [Resolution 2020 \(2014\) on the alternatives to immigration detention of children, § 9.9](#)*) (SP9: Alternatives). In this respect, States must be attentive to ensure that ‘the places intended for the care and protection of [...] children do not in reality result in material deprivation of liberty’ (*CMW, [General Comment No 5 \(2021\) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with other Human Rights CMW/C/GC/5, § 43](#)*).

Characterising Deprivation of Liberty

Failure to acknowledge that an individual has been detained has serious consequences for the legal safeguards that apply to their situation. A rigorous approach is therefore required when determining whether restrictions imposed on an individual's freedom of movement amount in practice to a deprivation of liberty, based on the specific facts of the case. This is particularly relevant in the context of immigration detention, where efforts to circumvent the protections owed to individuals deprived of their liberty must be staunchly resisted. Indeed, it has been noted that 'an increasing number of countries [...] hold irregular migrants in various temporary or permanent settings, such as holding rooms, reception centres and shelters. While not officially called "detention centres", those places are in fact closed institutions and individuals kept in them are not at liberty to leave, which makes such places *de facto* detention places.' Accordingly, 'all the safeguards that are in place, or should be in place, to guard against arbitrary deprivation of liberty must be respected in relation to every person held in such a setting' (**Report of UNWGAD A/HRC/36/37 (2017) § 53**).

Deprivation of liberty has been defined as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority' (**Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002) Article 4(2)**). Whether this definition is satisfied requires a factual and objective assessment of the relevant circumstances, '[i]rrespective of how that measure is defined in the national policy, law or practice, or the reasons giving rise to it' (**CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 13**). The same factual assessment must also be applied regardless of the name given to the facility or location where the individual is being held. For instance, in a communication submitted against Belgium before the CRC, the Committee rejected the Government's claim that the minors in question had not been subjected to a detention measure, holding that 'although the place of detention was called a family home, it was still in a closed detention centre' (**E.B. v Belgium, CRC/C/89/D/55/2018 (2022) § 13.12**). This reinforces the understanding that 'the deciding factor for the qualification of any place, facility or setting as a place of deprivation of liberty is not the name or title given to it or its categorization in national legislation but whether individuals are free to leave it at will' (**Subcommittee on Prevention of Torture, General Comment No 1 (2024) on Article 4 of the Optional Protocol CAT/OP/GC/1, § 42**).

Put simply: 'deprivation of liberty is not only a question of legal definition, but also of fact' (**Report of UNWGAD A/HRC/36/37 (2017) § 56**). When it comes to determining whether an individual has indeed been deprived of their liberty, the ECtHR has emphasised that 'the starting point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question' (**A.D. v Malta, ECtHR App No 12427/22 (2023) § 141**). The right to liberty was duly engaged where, to prevent unauthorised entry into the territory, the applicants were held in reception facilities and on docked ships under constant surveillance and prevented from leaving for a 'not insignificant' period—a conclusion not affected by the argument that such measures were necessary to ensure the applicants' safety (**Khlaifia v Italy, ECtHR GC App No 16483/12 (2016) §§ 65–72**). The Court has also found instances of *de facto* deprivation of liberty where asylum seekers were held in 'transit zones' at airports (**Amuur v France,**

ECtHR App No 19776/92 (1996); *Z.A. v Russia, ECtHR GC App Nos 61411/15 et al. [2019]*) and at land borders (*R.R. v Hungary, ECtHR App No 36037/17 (2021)*) pending formal authorisation to enter the territory. The Court acknowledged in these cases that States have a 'right, subject to their international obligations, to control their borders and to take measures against foreigners circumventing restrictions on immigration' (*Z.A. v Russia, § 135*), and that restrictions imposed to prevent unlawful entry are not wholly comparable to cases where migrants are placed in detention centres pending removal (*Amuur v France, § 43*). Nonetheless, such restrictions may still amount to *de facto* detention in light of factors such as the duration of confinement, the lack of domestic provisions fixing a maximum time limit for the period of stay, the characteristics of the area in which the individuals are held, and the level of control exerted over them (*Z.A. v Russia, § 156*).

An often-critical question in determining whether restrictions amount to a deprivation of liberty is whether the migrant is free to leave the place of confinement by departing from the territory voluntarily. On this issue, there is broad consensus that 'whether a particular fact or circumstance may be taken to be a deprivation of liberty depends not only on whether the person in question has a *de jure* right to leave, but also on whether the person is able to exercise that right *de facto* [...]' (*Subcommittee on Prevention of Torture, General Comment No 1 (2024) on Article 4 of the Optional Protocol, CAT/OP/GC/1 (2024) § 45*). Departure from an airport transit zone was not held to be practically feasible for the applicants as this 'would have required planning, contacting aviation companies, purchasing tickets and possibly applying for a visa' (*Z.A. v Russia, ECtHR GC App Nos 61411/15 et al. (2019) § 154*). Asylum seekers held in the Hungarian transit zone were likewise considered not to have an 'effective possibility of leaving' as they were only able to exit in the direction of Serbia where they 'would be considered illegal [...] and [...] exposed to penalties' on that basis (*CJEU, Joined Cases C-924/19 and C-925/19 (2020) § 229*).

Beyond being factually and/or legally capable of leaving their situation of confinement, a migrant must be 'able to do so without being exposed to serious human rights violations' (*Subcommittee on Prevention of Torture, General Comment No 1 (2024) on Article 4 of the Optional Protocol, CAT/OP/GC/1 (2024) § 45*). Indeed, 'a person should not have to choose between their freedom and being sent back to a place where they may face torture and persecution' (*R (VT & Ors) v Commissioner for the British Indian Ocean Territory [2024] BIOT CA (Civ) 1, § 69*). Accordingly, '[t]he mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty' (*Amuur v France, ECtHR App No 19776/92 (1996) § 48*). The UNWGAD duly rejected the argument that 'an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones' (*UNWGAD, Opinion No 22/2020 concerning Saman Ahmed Hamad (Hungary) A/HRC/WGAD/2020/22 (2020) § 69*). The HRC, meanwhile, did not accept that the complainant 'chose to remain in immigration detention' by rejecting the option of leaving Australia voluntarily, given that this would amount to forfeiting his right to remain in his own country under Article 12(4) of the ICCPR (*Falzon v Australia CCPR/C/140/D/3646/2019 (2024) § 7.9*).

Jurisdiction

The duty to respect the right to liberty applies to all individuals within the jurisdiction of a State, regardless of their immigration status. Importantly, States cannot circumvent these obligations by designating areas as ‘transit zones’ or otherwise not a real part of its territory. An individual detained in an airport ‘transit hall’, who had not crossed the border and was not under any formal detention procedure, was nonetheless ‘effectively under Russian authority and responsibility’ when it came to guaranteeing his right to liberty under Article 5 of the ECHR (*Nolan and K. v Russia*, [ECtHR App No 2512/04 \(2009\) §§ 95–96](#)). As a general principle, ‘an airport, including an international airport, located on the territory of a State is legally part of the territory of that State’ (*Z.A. v Russia*, [ECtHR GC App Nos 61411/15 et al. \(2019\) § 130](#)), meaning that any deprivation of liberty in such a setting will necessarily engage that State’s obligations under the ECHR (*Shamsa v. Poland*, [ECtHR App Nos 45355/99 and 45357/99 \(2004\) § 45](#)).

Moreover, the duty to respect the right to liberty ‘extends both to the territorial jurisdiction and effective control of a State’ (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 8*). Accordingly, responsibility for securing the right to liberty may extend to individuals located in another State’s territory where the threshold of ‘effective control’ is met. This was the conclusion of the HRC, which held in a set of decisions that Australia continued to exercise jurisdiction over the complainants after they had been transferred to and subsequently detained in Nauru pending the assessment of their asylum claims. Relevant to this finding was the fact that Australia ‘funded the detention operations, was authorized to jointly manage them, participated in monitoring them, selected companies which would be responsible (directly or through subcontractors) for construction, security, garrison, health and other services at the detention centre, and provided police services to Nauru to help manage the detention operations’ (*M.I. v. Australia CCPR/C/142/D/2749/2016 (2025) § 9.9; Nabhari v Australia CCPR/C/142/D/3663/2019 (2025) § 7.15*). As a result of this level of control, the physical transfer of the complainants to Nauru did not relieve Australia of the responsibility to guarantee their right to liberty under Article 9 of the ICCPR.

SP2: EQUALITY.

The right to liberty must be enjoyed without discrimination of any kind, including on the basis of immigration status.

The principle of equality prohibits unjustified distinctions between individuals owing to a specific set of characteristics. To ensure compliance with this principle, any interference with the right to liberty (SP1: Liberty) based exclusively on the immigration status of an individual must be strictly limited to the exercise of immigration control functions. States must also refrain from unjustified distinctions between different categories of non-nationals when it comes to imposing detention measures and ensuring appropriate treatment during detention.

Universal Declaration of Human Rights (1948) Article 1: 'All human beings are born free and equal in dignity and rights [...].'
Article 2: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration [including liberty of person], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'
Article 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.'

International Covenant on Civil and Political Rights (1966) Article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [including liberty of person], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
Article 26: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

European Convention on Human Rights (1950) Article 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) Article 7: 'States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention [including liberty of person] without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.'

Convention on the Rights of Persons with Disabilities (2006) Article 14(1): 'States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and

security of person; **(b)** Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.’ **Article 14(2)**: ‘States parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.’

Committee on the Elimination of Racial Discrimination, General Recommendation No 30 on the Discrimination of Non-citizens [CERD/C/64/Misc.11/rev.3 \(2004\) § 18](#): [calling on States to] ‘Ensure that non-citizens enjoy equal protection and recognition before the law.’

HRC, [General Comment No 18: Non-discrimination \(1989\) § 1](#): ‘Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.’

HRC, [General comment No 15 \(1986\) on the position of aliens under the Covenant, § 1](#): ‘[...] the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.’

Venice Commission, [Rule of Law Checklist \(2016\) § 69](#): ‘The principle of non-discrimination requires the prohibition of any unjustified unequal treatment under the law and/or by law, and that all persons have guaranteed equal and effective protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ **§ 70**: ‘Legislation must respect the principle of equality: it must treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination.’ **§ 73**: ‘The Rule of Law requires the universal subjection of all to the law. It implies that law should be equally applied, and consistently implemented. Equality is however not merely a formal criterion, but should result in substantively equal treatment. To reach that end, differentiations may have to be tolerated and may even be required. For example, affirmative action may be a way to ensure substantive equality in limited circumstances so as to redress past disadvantage or exclusion.’

UN Office of the High Commissioner for Human Rights (OHCHR), Report of the Office of the United Nations High Commissioner for Human Rights on the Situation of Migrants in Transit [A/HRC/31/35 \(2016\) § 42](#): ‘The right to liberty and security of person is a fundamental human right to be enjoyed by everyone, regardless of legal status.’

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\) Principle 5\(1\)](#): ‘These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or status.’

CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 9](#): ‘The right to liberty

applies to all forms of detention and must be guaranteed to all persons, without discrimination, including all migrant workers, regardless of their migration status.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants (2018) [A/HRC/39/45](#), § 21: 'Migration detention policies and procedures must not be discriminatory or make distinctions based on the legal conditions of the person. Detaining someone solely on the basis of a distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, economic position, birth, nationality or any other status will always be arbitrary.' **§ 32:** 'Those detained in the course of migration proceedings must be treated without discrimination based on race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion, sexual orientation or gender identity, disability, nationality or any other status, or on any ground that aims at or may result in undermining the enjoyment of human rights on the basis of equality.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\) Principle 5:](#) The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies may be exercised by anyone regardless of race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion, sexual orientation or gender identity, asylum seeking or migration status, or disability or any other status.'

SP2. Equality: Commentary.

Equality (SP2) accompanies liberty (SP1) in forming the principled starting point for all protective standards in the field of immigration detention. It has been emphasised that '[t]he right to equality is a universal right, to which everyone is entitled, regardless of their nationality or lack thereof' (***Equal Rights Trust, Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless People (2010) 34***). This extends to the enjoyment of the right to freedom from arbitrary detention, which applies to every person within the State's jurisdiction, 'citizen or not' (***R (Abbasi) v SSFCA [2002] EWCA Civ 1598, § 60 (Lord Phillips); Lumba (WL) v SSHD [2011] UKSC 12, §§ 42, 44, 65 Lord Dyson***) (SP1: Liberty).

Not all distinctions in treatment amount to unlawful discrimination, including in the context of detention. By its very nature, immigration detention relies on distinctions between a State's own citizens and foreign nationals, as well as between different categories of foreign nationals based on their immigration status. It does not follow, however, that the State may constrain the freedoms of those who are subject to immigration control on that basis alone. Rather, it is necessary to demonstrate that any differential treatment on this basis is sufficiently justified. This will be straightforward where the detention measure is imposed with a view to enforcing immigration controls, as expressly permitted by international law (SP7: Legitimate Aim). However, where the purpose is unrelated to an immigration control aim, it will be much more difficult to contest a claim of unlawful discrimination. As Lord Bingham has put it: 'The position of a non-national with no right of abode [...] differs from that of a national with a right of abode in the obvious and important respect that the one is subject to removal and the other is not. That is the crucial distinction, and differentiation relevant to it is unobjectionable and indeed

inevitable. But it does not warrant differentiation irrelevant to that distinction' (**Lord Bingham, 'The Rule of Law' (2006) 66 Cambridge Law Journal 67**).

An example of such unlawful discrimination is the use of immigration detention to prevent harm, where similar constraints are not imposed on the State's own nationals posing comparable threats. That was the conclusion of the UNWGAD, applying ICCPR Article 26 (**UNWGAD, Opinion No 45/2006 concerning Mustafa Abdi (UK) A/HRC/7/4/Add.1 (2007) §§ 28–29**). It was also the conclusion of the UK House of Lords, which held that employing immigration detention as a security measure treated people differently 'because of their nationality or immigration status', whereas 'the threat presented [...] did not depend on [...] nationality or immigration status' (**A & Ors v SSHD [2004] UKHL 56, §§ 53–54 (Lord Bingham)**). Preventive immigration detention is objectionable precisely because it amounts to differential treatment of foreigners for reasons unrelated to their immigration status, making 'liberty [...] the preserve of the popular, [and] denying the rights that would be accorded to [a State's own] nationals in similar situations' (**Connor Johnston, 'Indefinite Immigration Detention: Can It Be Justified?' (2009) 23 Journal of Immigration, Asylum and Nationality Law 351, 361, 364**).

The force and relevance of the principle of equality extends beyond the question of preventive detention and the decision to deprive individuals of their liberty more generally. It also prohibits unjustified distinctions on protected grounds when it comes to treatment *within* detention (**UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) A/RES/70/175 (2016) Rule 2; UN General Assembly, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principle 5**) (Section IV. Treatment in Detention). This includes unjustified distinctions in the treatment of nationals and foreigners in terms of the ability to challenge the lawfulness of one's detention before a judicial body (**Stefanie Grant, 'Immigration Detention: Some Issues of Inequality' (2011) 7 The Equal Rights Review 69, 73**) (SP21: Judicial Review). For instance, the UNWGAD has consistently found that the absence of an effective remedy to challenge the lawfulness of detention under Australian immigration rules not only raises issues under Article 9(4) ICCPR, but also amounts to discrimination within the meaning of Articles 16 and 26 (**UNWGAD, Opinion No 28/2017 concerning Abdalrahman Hussein (Australia) A/HRC/WGAD/2017/28 (2017) §§ 28–29**). States are also required to take positive action to ensure *substantive equality* in the rights enjoyed by detained persons. This includes a requirement to ensure the availability of translation and interpretation services so that individuals detained for the purpose of immigration control can exercise their rights on equal footing, including the right to challenge their detention before a judicial body (**UNWGAD, Opinion No 72/2017 concerning Marcos Antonio Aguilar-Rodríguez (United States of America) A/HRC/WGAD/2017/72 (2017) § 63**).

The principle of equality is also relevant to addressing discrimination *among* different categories of individuals detained under immigration powers. In the UK, for instance, concerns have been raised around the potentially discriminatory treatment of foreign nationals who, having completed a custodial sentence, continue to be held in prisons while detained under immigration powers, particularly in terms of access to legal advice (SP20: Legal Representation) and contact with the outside world (SP16: Contact) (**CPT, Report on Visit to United Kingdom CPT/Inf (2024) 08 §§ 105–107**). On the former issue, the High Court found that the Secretary of State had failed to justify the absence of arrangements to access legal advice in prisons which were comparable to those available in Immigration Removal Centres (IRCs), resulting in a breach of the duty of non-discrimination enshrined in Article 14 of the ECHR (**R (SM) v Lord Chancellor [2021] EWHC 418 (Admin)**). The Court of Appeal, meanwhile, has held that a failure

to ensure that detained persons with mental illnesses can make representations against decisions to maintain detention amounted to a breach of the Equality Act 2010 (*R (VC) v SSHD (Rev 1)* [2018] EWCA Civ 57), reinforcing the need to ensure substantive equality in the procedure for imposing and reviewing detention orders. The UNWGAD has made similar findings regarding the need to make reasonable accommodations to facilitate the right to challenge the lawfulness of one's detention, drawing on Articles 4 and 14 of the [Convention on the Rights of Persons with Disabilities \(2016\)](#) (*Opinion No. 1/2019 concerning Premakumar Subramaniam (Australia)* [A/HRC/WGAD/2019/1 \(2019\) § 81](#)).

The principle of equality can therefore operate as a powerful protective safeguard in the context of immigration detention. It can address discrimination within the immigrant community: where one group of migrants is treated differently from another, without justification. And it can protect all migrants by insisting that immigration detention, imposed by reason of immigration status, must be cogently justified.

II. Legality

II. LEGALITY

The following set of Safeguarding Principles form the basis of a rule of law-compliant approach to immigration detention. In focusing on different aspects of 'legality', these principles establish formal protections against arbitrary detention, requiring that any interference with the right to liberty has a sufficiently clear and accessible legal basis (SP3: Prescription), follows the adoption of a detention order by a duly authorised official (SP4: Authority) and complies with the criteria and procedures for detention foreseen by national law and policy (SP5: Adherence). These core rule of law safeguards apply to any form of detention, including administrative detention imposed for immigration control purposes.

As already established in this Handbook, the right to liberty is not absolute (SP1: Liberty). However, a decision to detain can *never* be based on the unrestricted exercise of executive powers, regardless of the substantive justification provided. Rather, any interference with the right to liberty must be 'lawful'. In other words, it must be based on, and compliant with, specific grounds and procedures enshrined in national law. This plays an important role in protecting against arbitrary detention, while reflecting the requirement that any deprivation of liberty must be 'carried out with respect for the rule of law' (**HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\) § 10](#)**).

At the most basic level, the principle of prescription (SP3) requires any derogation from the right to liberty to have a basis in domestic law. This means that powers of detention can only be exercised within pre-defined legal limits, reducing the scope for arbitrary decision-making. The principle of prescription also imposes demands on the *quality* of these laws, requiring them to be clearly defined and accessible. This reflects the understanding that laws authorising deprivation of liberty should be sufficiently transparent and predictable, allowing potentially affected individuals to be aware of the consequences of their actions. Clarity and accessibility in the law are also relevant to questions of procedural fairness, ensuring that individuals can understand why they have been detained and make representations to challenge these decisions (Section V. Judicial Oversight & Remedies).

Prescription (SP3) is supplemented by the principles of authority (SP4) and adherence (SP5). The former of these dictates that detention is lawful only when imposed by decision of duly authorised public officials. As a result, the law must clearly indicate which public authorities are invested with powers to detain. Finally, the principle of adherence (SP5) necessitates compliance with the grounds and procedures for detention foreseen at the domestic level. Detention will fall short of the requirements of legality where, for instance, the authorities have failed to adhere to a legally prescribed procedure. Importantly, this principle also extends to compliance with any stated policies governing the procedure for imposing or maintaining detention.

SP3. PRESCRIPTION

To be justified as a derogation from the principle of liberty, detention must be based on clear and accessible legal rules setting out the relevant grounds and procedure.

The principle of prescription comprises two core elements. The first element demands that any interference with the right to liberty is provided for by national law. This means that detention without a legal basis is prohibited in all its forms, without exception. The second element relates to the quality of the legal rules authorising detention. These rules must be clearly defined and accessible to the individuals affected to ensure sufficient protection against arbitrariness.

[International Covenant on Civil and Political Rights \(1966\) Article 9\(1\)](#): ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’

[European Convention on Human Rights \(1950\) Article 5\(1\)](#): ‘No one shall be deprived of his liberty save [...] in accordance with a procedure prescribed by law [...].’

[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families \(1990\) Article 16\(4\)](#): ‘Migrant workers and members of their families shall not be [...] deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.’

[UN Convention on the Rights of the Child \(1989\) Article 37\(b\)](#): ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law [...].’

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\) Guideline 2](#): ‘Any restriction on liberty must be authorized in national legislation.’

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants (2018) [A/HRC/39/45, § 20](#): ‘Detention in the course of migration proceedings must be prescribed by law.’

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 6\(1\)](#): ‘A person may only be deprived of his/her liberty [...] if this is in accordance with a procedure prescribed by law.’

UN General Assembly, [Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live \(1985\) Article 5\(1\)\(a\)](#): ‘no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.’

Council of Europe Committee of Ministers, [Guidelines on Human Rights Protection in the context of Accelerated Asylum Procedures \(2009\) Guideline XI\(4\)](#): ‘Asylum seekers may only be deprived of their liberty if this is in accordance with a procedure prescribed by law [...].’

UNHCR, [ExCom Conclusion No 44 \(XXXVII\) 1986, §\(b\)](#): ‘[...] detention may be resorted to only on grounds prescribed by law [...].’

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\) § 15](#): '[...] regimes involving deprivation of liberty must [...] be established by law and must be accompanied by procedures that prevent arbitrary detention. The grounds and procedures prescribed by law must not be destructive of the right to liberty of person.' **§ 22:** 'Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Deprivation of liberty without such legal authorization is unlawful.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 22](#): 'Immigration detention can be legal only when it is previously authorized, and clearly and exhaustively provided for, by law and is in line with the procedures established by law. It is prohibited for the law to leave ample discretion to the authorities in the decision and enforcement of immigration detention.'

UNHCR, [Detention Guidelines \(2012\) Guideline 3, § 15](#): 'Any detention or deprivation of liberty must be in accordance with and authorised by national law.' **§ 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.'

PACE, Report on the Detention of Asylum Seekers and Irregular Migrants in Europe, [Doc No 12105 \(2010\) Appendix 1, Principle III \(§ 2\)](#): 'Where there is a deprivation of liberty it is particularly important to satisfy the general principle of legal certainty. If the law is clearly and precisely defined, the citizen will be able to foresee to a degree that is reasonable in the circumstances [...] the consequences of a given act. The law must also be accessible which implies they are made public.'

Venice Commission, [Rule of Law Checklist \(2016\) § 58](#): 'Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.' **§ 65:** 'It is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness.'

Lumba (WL) v SSHD [\[2011\] UKSC 12, §§ 34–36 \(Lord Dyson\)](#): '[t]he rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria [for imposing immigration detention] will be exercised [...] so that the individual knows the criteria that are being applied and is able to challenge an adverse decision.'

SP3. Prescription: Commentary.

Any decision to deprive an individual of their liberty must be authorised by domestic law, including in the context of immigration detention. This a key rule of law safeguard, ensuring that any interference with the right to liberty 'is not random and arbitrary, but governed by clear pre-existing rules' (**R (SK Zimbabwe) v SSHD [\[2008\] EWCA Civ 1204, § 33 \(Lord Laws\)](#)**). By defining the conditions under which individuals may be detained, the law imposes necessary limits on the exercise of discretion by decision-

makers. As Lord Bingham has noted, this ‘does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered’ (**Tom Bingham, *The Rule of Law* (Penguin Books 2010) 54**).

This principle is foregrounded in the applicable human rights standards, which stipulate that any deprivation of liberty can only be imposed in accordance with a procedure prescribed by law (**[ECHR, Article 5\(1\)](#)**; **[ICCPR, Article 9\(1\)](#)**) (see also SP5: Adherence). At its most basic level, this requires the decision to detain to have an identifiable basis in domestic law, meaning that ‘the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation’ (***McLawrence v Jamaica* [CCPR/C/60/D/702/1996 \(2017\) § 5.5](#)**). The ECtHR duly found immigration detention to be unlawful where it could find ‘no trace of any provision of Russian law capable of serving as grounds for justifying the applicants’ deprivation of liberty’ (***Z.A. v Russia, ECtHR GC App Nos 61411/15 et al. (2019) § 164***), and where ‘there was no strictly defined statutory basis for the applicants’ detention’ in the Hungarian transit zone (***R.R. v Hungary, ECtHR App No 36037/17 (2021) § 89***).

Detention will also lack a legal basis where the underlying deportation or removal decision is *itself* unlawful. The HRC duly found that the right to liberty was violated when the underlying decision to revoke the author’s visa and remove him from the territory was in violation of Article 12(4) of the ICCPR (***Falzon v Australia* [CCPR/C/140/D/3646/2019 \(2024\) § 7.9](#)**). Similar conclusions were reached by the UK Supreme Court, which found that the lawfulness of a detention order cannot be separated from flaws in the underlying deportation decision. As held in that case: ‘[t]he detention depends for its legality on the lawfulness of the deportation itself’. Accordingly, ‘[a]bsent a lawful basis for the making of a deportation order, it is not possible to breathe legal life into the decision to detain’ (***R (DN (Rwanda)) v SSHD [2020] UKSC 7, § 25 (Lord Kerr)***).

Importantly, the principle of prescription also addresses the *quality* of the laws which authorise detention, requiring these to be compatible with basic rule of law safeguards to ensure sufficient protection against arbitrariness. A central tenet of the rule of law is that ‘[t]he law must be accessible and so far as possible intelligible, clear and predictable’ (**Tom Bingham, *The Rule of Law* (Penguin Books 2010) 37**). In line with this position, the ECtHR has stressed that the words ‘in accordance with a procedure prescribed by law’ not only require detention to be authorised by domestic legal provisions, but also require the laws in place to ‘be sufficiently accessible and precise’ (***Amuur v France, ECtHR App No 19776/92 (1996) § 50***). The Court has further emphasised that, in line with the principle of legal certainty, ‘it is [...] essential that the conditions for deprivation of liberty [...] be clearly defined and that the law itself be foreseeable in its application’ (***Medvedyev v France, ECtHR GC App No 3394/03 (2010) § 80***). The same principles apply under the ICCPR, with the HRC emphasising that unlawfulness may stem not only from the absence of legal rules governing detention, but also from a ‘lack of predictability’ regarding their application (***Van Alphen v Netherlands* [CCPR/C/39/D/305/1988 \(1990\) § 5.8](#)**).

Rules which are articulated in unclear or ambiguous terms thus fail to provide a sufficient legal basis for detention (***Rashed v Czech Republic, ECtHR App No 298/07 (2008) § 76***). The quality of law requirement was not satisfied, for instance, where the laws in place did not ‘provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention’ (***Abdolkhani and Karminia v Turkey, ECtHR App No 30471/08 (2009) § 133***). The

principle of legal certainty was also found to be compromised where 'policies regulating detention [...] were subject to change by Government at their discretion' (*Louled Massoud v Malta*, ECtHR App No [24340/08](#) (2010) § 53), as well as by laws which permitted immigration detention for the purpose of removal without the need to specify the destination country (*Auad v Bulgaria*, ECtHR App No [46390/10](#) (2011) § 133). As the Court stressed in the latter case: 'Where deprivation of liberty is concerned, legal certainty must be strictly complied with in respect of each and every element relevant to the justification of the detention under domestic and Convention law. In cases of aliens detained with a view to deportation, lack of clarity as to the destination country could hamper effective control of the authorities' diligence in handling the deportation' (§ 133) (SP11: Diligence).

The requirement for an appropriate legal basis for detention continues to apply in holding areas at the State's external borders, including in the context of 'massive arrivals of asylum seekers'. While 'fully conscious' of the challenges faced by States in such contexts, the ECtHR has held that there must nonetheless be a domestic legal regime in place 'that provides, for example, for [...] the name of the authority competent to order deprivation of liberty [...] the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal' (*Z.A. v Russia*, ECtHR GC App Nos [61411/15 et al.](#) (2019) § 162). This further suggests that, in addition to specifying the substantive conditions under which detention may be authorised, prescribed rules must also stipulate which public authorities are competent to impose detention (SP4: Authority), the maximum duration of detention (SP12: Maximum) and avenues for judicial review (SP21: Judicial Review).

Beyond the requirements of precision and clarity, Article 5(1) of the ECHR requires rules authorising detention to be publicly accessible. This is consistent with the understanding that the laws in place must allow any potentially affected person 'to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail' (*Khlaifia v Italy*, ECtHR GC App No [16483/12](#) (2016) § 92). Russia's Border Crossing Guidelines violated this requirement because they had 'never been published or accessible to the public' *Nolan and K. v Russia*, ECtHR App No [2512/04](#) (2009) § 99). A bilateral agreement between Italy and Tunisia also failed to provide a sufficient legal basis for detention. The fact that the text had not been made public meant that '[i]t was therefore not accessible to the applicants, who accordingly could not have foreseen the consequences of its application' (*Khlaifia v Italy*, § 102).

In the UK, courts have found that rule of law considerations extend to the policies which guide the exercise of statutory detention powers. In the *Lumba* judgment, the Supreme Court held that the Secretary of State had been obliged to publish the policy relied on to detain the appellants, with Lord Dyson emphasising that '[t]he rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria [for imposing immigration detention] will be exercised [...] so that the individual knows the criteria that are being applied and is able to challenge an adverse decision' (*Lumba (WL) v SSHD* [2011] UKSC 12, §§ 34–36 (Lord Dyson); see also *R (Hemmati & Ors) v SSHD* [2019] UKSC 56, § 49 (Lord Kitchin)). Failure to make this policy public meant that the decision to detain was 'tainted by public law error', rendering the detention itself unlawful as a result (*Lumba (WL) v SSHD*, § 88 (Lord Dyson)) (SP5: Adherence; SP23: Compensation). A later judgment found that the unclear formulation of the Secretary of State's policy on the Detained Fast Track procedure meant that, while published, it nonetheless failed to meet the *Lumba* requirements of 'clarity and transparency' and was therefore unlawful, as was the decision to detain on this basis (*R (Detention Action) v SSHD* [2014] EWCA Civ 1634, § 70 (Beatson LJ)).

The principle of prescription thus establishes a standard under which national arrangements can be scrutinised for compatibility with the rule of law. It emphasises that the existence of a sufficiently clear, precise, and accessible legal framework is a necessary precondition for *any* deprivation of liberty to be lawful, based on the notion that individuals should be able to anticipate the application of the law and to make representations against adverse decisions.

SP4. AUTHORITY.

Detention can only be imposed by decision of prescribed public authorities.

Powers to detain can only be exercised by a duly authorised State body through the issuance of individual orders. The prescribed rules (SP3) must clearly identify which bodies have the power to impose and maintain detention, while the duty of adherence (SP5) requires compliance with those rules.

Venice Commission, [Rule of Law Checklist \(2016\)](#) § 45: ‘A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law.’

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\)](#) Principle 4: ‘Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.’

Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/HRC/20/24 \(2012\)](#) § 72: ‘A decision to detain should only be taken under clear legal authority.’

UNWGAD, [Revised Deliberation No 5 on Deprivation of Liberty of Migrants \(2018\)](#) [A/HRC/39/45](#), § 13: ‘Any form of detention, including detention in the course of migration proceedings, must be ordered and approved by a judge or other judicial authority.’

PACE, [Report on the Detention of Asylum Seekers and Irregular Migrants in Europe, Doc No 12105 \(2010\)](#) Appendix 1, § 12: ‘the decision to detain [should] be made by a judicial authority.’

CMW, [General Comment No 5 \(2021\) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights](#) [CMW/C/GC/5](#), § 62: ‘In the light of the effects that the deprivation of liberty have on the human rights of migrants, the Committee considers that, as a general rule, the procedure and the decision ordering the detention of a migrant must be carried out and dictated by a judge or court.’

SP4. Authority: Commentary

The principle of authority requires that any deprivation of liberty be ordered by an authority invested with the appropriate powers under national law. Officials authorised to impose and maintain detention must therefore be prescribed by national law (SP3: Prescription), while the principle of adherence requires that powers of detention are exercised by those officials alone (SP5: Adherence). A straightforward example of this principle in action is the case of **A.D. v Malta, ECtHR [App No 12427/22 \(2023\)](#)**, where the ECtHR held that the applicant’s detention could not be justified on public health grounds as it was not based on a judicial order, as required by Maltese law (§§165–166). Similar considerations may also apply to other aspects of the procedure governing the exercise of detention powers. For instance, in the earlier case of **Dougoz v Greece, ECtHR [App No 40907/98 \(2001\)](#)**, the Court highlighted that the relevant provision of Greek law only allowed for detention for the purpose

of executing an expulsion order issued by the Minister of Public Order. As such, it was unlawful for the applicant to be detained based on an expulsion order issued by a judicial body (§ 56).

Additionally, this principle requires a specific, concrete decision to detain the individual: detention must not follow automatically from the operation of legal provisions, from a decision to refuse permission to enter, or from a decision to remove or deport (SP6: Individualisation). In *Shamsa v Poland*, [ECtHR App Nos 45355/99 and 45357/99 \(2004\)](#), the ECtHR rejected the argument that the applicants' detention could be justified exclusively by an expulsion order, noting that 'no domestic decision was issued specifying the basis on which the persons concerned were to be detained in the transit zone and defining the duration and modalities of that detention' (§ 55). Article 5(1) of the ECHR was also violated when the applicants' detention pending assessment of their asylum applications was prolonged by the 'non-action' of the authorities, rather than 'by a decision, accompanied by a reasoning or susceptible to a remedy' (*Lopko and Touré v Hungary*, [ECtHR App No 10816/10 \(2011\) § 23](#)) (SP19: Reasons; SP21: Judicial Review). As the Court emphasised elsewhere, imposing detention in the absence of an administrative or judicial decision meant that 'the applicants were not only deprived of their liberty without a clear and accessible legal basis, [but] [...] were also unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down, for example, in Article 13 of the Italian Constitution' (*Khlaifia v Italy*, [ECtHR GC App No 16483/12 \(2016\) § 105](#)) (SP21: Judicial Review). A legal basis was also lacking when children were considered by the authorities to have 'accompanied' their mother in immigration detention, despite themselves not being subject to a detention order (*Minasian v Republic of Moldova*, [ECtHR App No 26879/17 \(2023\) § 41](#)).

Similar positions have been adopted by other international human rights bodies. For instance, the UNWGAD held that detention lacked a legal basis when 'no orders were issued nor were the detainees shown any orders emanating from a legal proceeding that would have justified depriving them of their liberty' (*UNWGAD, Opinion No 72/2018 concerning 59 Colombian Citizens (Bolivarian Republic of Venezuela)* [A/HRC/WGAD/2018/72 \(2018\) § 37](#)). Detention was also unlawful where a child was detained based solely on a written request by her mother to be reunited, 'given that such a request cannot be deemed to be an appropriate legal basis for deprivation of liberty' (*UNWGAD, Opinion No 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia)* [A/HRC/WGAD/2019/2 \(2019\) § 107](#)). EU law, meanwhile, expressly requires detention imposed during asylum or return procedures to be ordered in writing by judicial or administrative authorities, stating the reasons in fact and in law on which it is based (see [EU Reception Conditions Directive \(2024\), Article 11\(2\)](#); [EU Returns Directive \(2008\), Article 15\(2\)](#)).

Certain international bodies suggest that the power to detain should be restricted to courts or other authorities exercising judicial functions—a position which reflects the need for strict adherence to the rule of law when it comes to any interference with the right to liberty (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants (2018)* [A/HRC/39/45, § 13](#)). When it comes to detention for immigration purposes, however, powers of detention are often invested in administrative officials (such as immigration officers). Thus, to ensure compliance with basic rule of law safeguards, it is critical that any decision to detain rendered by administrative authorities is subject to automatic court control (SP22: Automatic Court Control). This principle—which is widely recognised for individuals arrested and detained under criminal powers—means that a court is required to approve continued detention. While the ECtHR accepts that various State actors may be authorised to detain for immigration purposes under national law, where such a decision is not subject to automatic court-control, any judicial review proceedings instigated by the detained person regarding the legality of their detention must be

concluded 'with greater speed than might otherwise be found appropriate for review of a detention order by a court' (**G.B. v Turkey, ECtHR App No 4633/15 (2019) § 185**) (SP21: Judicial Review).

Artificial Intelligence

The increasing use of artificial intelligence and other automated decision-making tools in making recommendations and decisions on immigration detention, including which migrants to detain and for how long, raises additional safeguarding concerns. In the UK, for example, the Identify and Prioritise Immigration Cases (IPIIC) system has been utilised by the Home Office in recent years to automatically identify and recommend migrants for immigration decisions or enforcement action, including detention (**Privacy International, 'Automating the Hostile Environment: Uncovering a Secretive Home Office Algorithm at the Heart of Immigration Decision-making' (2024)**). The use of automated decision-making tools may give rise to concerns as to the misuse of personal data, and can encode biases and discrimination, compromising the right to equality (SP2: Equality). Further, the opacity of such tools often leaves migrants in the dark as to the basis upon which decisions are made about their fates, contrary to the requirement that detention decision-making be individualised (SP6: Individualisation) and that clear reasons be given for any decision to detain (SP19: Reasons). Where such tools are used, transparency about their design and function is essential (not least to allow effective judicial review (SP21: Judicial Review)), and their decisions must be subject to a rigorous process of human review. Any processing of migrants' personal data by such tools must be done lawfully, transparently and fairly, in accordance with the **Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) ETS 108**.

SP5. ADHERENCE.

Detention must always be compliant with the prescribed rules.

Any deprivation of liberty must be in accordance with national law and policy. The duty of adherence applies both to the grounds for detention and any procedures relevant for ordering and maintaining detention.

[International Covenant on Civil and Political Rights \(1966\) Article 9\(1\)](#): ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’

[European Convention on Human Rights \(1950\) Article 5\(1\)](#): ‘No one shall be deprived of his liberty save [...] in accordance with a procedure prescribed by law [...].’

[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families \(1990\) Article 16\(4\)](#): ‘Migrant workers and members of their families shall not be [...] deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.’

Venice Commission, [Rule of Law Checklist \(2016\) § 44](#): ‘State action must be in accordance with and authorised by the law.’ **53**: ‘[...] a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced.’

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\) § 23](#): ‘Article 9 requires that procedures for carrying out legally authorized deprivation of liberty should also be established by law and States parties should ensure compliance with their legally prescribed procedures [...] It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer, where individuals may be detained, when the detained person must be brought to court and legal limits on the duration of detention.’

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\) Principle 2](#): ‘[...] detention [...] shall only be carried out in accordance with the provisions of the law [...].’

CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 22](#): ‘Immigration detention can be legal only when it is previously authorized, and clearly and exhaustively provided for, by law and is in line with the procedures established by law.’

[UNHCR Detention Guidelines \(2012\) Guideline 3, § 15](#): ‘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.’

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5 on Measures of Detention of Asylum Seekers, § 4](#): ‘Measures of detention of asylum seekers [...] are to be implemented as prescribed by law [...].’

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 6\(1\)](#): ‘A person may only be deprived of his/her liberty [...] if this is in accordance with a procedure prescribed by law [...].’

Council of Europe Committee of Ministers, [Guidelines on Human Rights Protection in the context of Accelerated Asylum Procedures \(2009\) Guideline XI\(4\)](#): ‘Asylum seekers may only be deprived of their liberty if this is in accordance with a procedure prescribed by law [...].’

***SK (Zimbabwe) v SSHD [2011] UKSC 23, § 42 (Lord Hope)*: ‘a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful.’**

SP5. Adherence: Commentary.

Any interference with the right to liberty must be ‘in accordance with a procedure prescribed by law’. In addition to requiring clear and accessible rules on the grounds and procedures for authorising detention (SP3: Prescription), this imposes a duty on authorised officials (SP4: Authority) to comply with those laws. Indeed, a requirement for detention to be prescribed by law would be meaningless were those laws not to be adhered to in practice.

The duty of adherence is not only relevant to assessing whether there has been a violation of national law. Rather, this also bears on the lawfulness of detention at the international level ([UNHCR Detention Guidelines \(2012\) Guideline 3, § 15](#)). The ECtHR has held that, ‘[w]here the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law’ (*Saadi v UK, ECtHR GC App No 13229/03 (2008) § 67*). The Court has duly found breaches of Article 5 of the ECHR where the national authorities failed to comply with substantive limits on detention set out in domestic law—for instance, where it was not demonstrated that detention was strictly necessary to secure the applicant’s removal from the territory (*Jusic v Switzerland, ECtHR App No 4691/06 (2010) §§ 76–82; G.H. v Hungary, ECtHR App No 75727/17 (2024) §§ 27–32*), or where the period of detention exceeded the time limits set out in national legislation (*Komissarov v Czech Republic, ECtHR App No 20611/17 (2022) §§ 50–53*). Significantly, Article 5(1)(f) of the ECHR does not require detention to be necessary for the purpose of enforcing immigration controls (SP8: Necessity), nor does it strictly require the authorities to put in place a statutory time limit on detention (SP12: Maximum). However, in failing to comply with their *own* obligations under domestic law, the national authorities were held in these judgments to have violated the duty of adherence incorporated into the concept of ‘lawfulness’ under Article 5(1) of the ECHR (*Rusu v Austria, ECtHR App No 34082/02 [2008] § 54; Komissarov v Czech Republic, § 50*).

Detention may also be unlawful due to a failure of the national authorities to adhere to the procedural requirements foreseen by national law. Thus, the Dutch authorities were found to have breached Article 5 of the ECHR when they failed to provide written notification of the detention order to the applicant within 24 hours, as required by the domestic Code of Criminal Procedure (*Voskuil v Netherlands, ECtHR App No 64752/01 (2007) § 83*). Breaches of the ECHR have also been found in other cases where the national procedure was disregarded—for instance, where the ‘decisions of the courts [...] failed to refer to the relevant national legislation governing the detention’ (*Kolesnik v Russia, ECtHR App No 26876/08 (2010) § 86–87*); where the detention order omitted the names of certain family

members it applied to (*G.B. v Turkey*, [ECtHR App No 4633/15 \(2019\) § 86–87](#)); and where the detention order had not been approved by a judicial authority (*Akkad v Turkey*, [ECtHR App No 1557/19 \(2022\) § 103](#)) (SP4: Authority). The Court has further stipulated that the duty to adhere to a procedure prescribed by law may also extend, 'where appropriate, to other applicable legal standards, including those which have their source in international law' (*Medvedyev v France*, [ECtHR GC App No 3394/03 \(2010\) § 79](#)).

In the UK, beyond complying with statutory provisions, it has been established that 'a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful' (*SK (Zimbabwe) v SSHD* [\[2011\] UKSC 23, § 42 \(Lord Hope\)](#)). This will depend on the existence of 'an adequate connection between compliance with the duty and the lawfulness of the detention' (*SK (Zimbabwe)*, [§ 80 \(Lord Hope\)](#)), such that 'the breach of public law must bear on and be relevant to the decision to detain' (*Lumba (WL) v SSHD* [\[2011\] UKSC 12, § 68 \(Lord Dyson\)](#)). Immigration detention was duly held to be unlawful where the Secretary of State relied on criteria contained within an unpublished policy 'which was, on the face of it, at odds with his policy, as made public' (*Nadarajah v SSHD* [\[2003\] EWCA Civ 1768, § 68 \(Lord Phillips\)](#)).

Detention may also be unlawful when the authorities fail to adhere to procedural requirements laid down in policy, provided that 'the published policy is sufficiently closely related to the authority to detain' (*SK (Zimbabwe)*, [§ 51 \(Lord Hope\)](#)). For instance, failure to comply with a published policy that required regular reviews of the continued justification for immigration detention was held to amount to false imprisonment, based on the understanding that this policy imposed conditions for the continued exercise of the statutory power to detain (*SK (Zimbabwe)*, [§§ 42, 50–52 \(Lord Hope\)](#); see also *Abdi v United Kingdom*, [ECtHR App No 27770/08 \(2013\) § 69](#)). Detention was also held to be unlawful where the appellants were not examined within 24 hours of their arrival at an immigration detention centre, as required by Rule 34 of the Detention Centre Rules 2001 (*R (EO) v SSHD* [\[2013\] EWHC 1236 \(Admin\)](#)). Justice Burnett acknowledged in this judgment that '[t]he 2001 Rules are concerned with the regulation of the management of detention centres', and therefore 'have no direct bearing on the power of the Secretary of State to detain' ([§ 50 \(Justice Burnett\)](#)). Nonetheless, the purpose of this examination—including the identification of any indicators of torture—was directly relevant to the Secretary of State's policy on the conditions under which it would normally be inappropriate to keep an individual in immigration detention. As a result, there was an 'adequate connection between compliance and the lawfulness of detention', with the High Court holding that 'a failure to carry out or to arrange such an examination would amount to a public law failing which bore upon and was relevant to the decision to detain' ([§ 51 \(Justice Burnett\)](#)).

III. Non-Arbitrariness

III. NON-ARBITRARINESS

International law recognises an additional set of factors that may render immigration detention arbitrary—and therefore unlawful—despite compliance with prescribed rules at the national level. These factors are reflected in the Safeguarding Principles of individualisation (SP6), legitimate aim (SP7), necessity (SP8), alternatives (SP9), achievability (SP10), diligence (SP11) and maximum (SP12).

The principles outlined in the previous section (Section II Legality) comprise basic rule of law protections against arbitrary detention (SP1: Liberty). However, detention which complies with the grounds and procedures laid down in domestic law may nonetheless be arbitrary. As held repeatedly by the HRC, '[t]he notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality' (**HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\) § 12](#)**). This is consistent with the formulation of Article 9 of the ICCPR, which distinguishes the requirement of legality ('on such grounds and in accordance with such procedure as are established by law') from a right to be free from 'arbitrary arrest or detention' (**HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\) § 11](#)**). Through this additional reference, 'the principle of legality is complemented with an autonomous international safeguard against those detentions that are authorised by unjust domestic laws' (**Galina Cornelisse, Immigration Detention and Human Rights (Brill 2010) 252**).

As such, 'the mere fact that detention is authorized by national law does not exclude its arbitrariness under international law' (**Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, [A/HRC/37/50 \(2018\) § 24](#)**), while '[t]he fact that a State is following its own domestic legislation does not in itself prove that the legislation conforms with the obligations that the State has undertaken' (**UNWGAD, Opinion No 68/2021 concerning Said Said (Australia and Nauru) [A/HRC/WGAD/2021/68 \(2022\) § 96](#)**). A similar approach is reflected at the regional level in the case law of the ECtHR under Article 5 of the ECHR. While that provision does not contain an explicit reference to arbitrary detention, the Court has consistently maintained that 'the purpose of Article 5 § 1 [...] is to prevent persons from being deprived of their liberty in an arbitrary fashion' (**L.M. v Slovenia, ECtHR [App No 32863/05 \(2014\) § 121](#)**) (SP1: Liberty), elaborating that 'the notion of "arbitrariness" in Article 5 § 1 extends beyond a lack of conformity with national law' (**S.K. v Russia, ECtHR [App No 52722/15 \(2017\) § 111](#)**). To avoid being characterised as arbitrary under Article 5 of the ECHR, immigration detention must therefore pursue a legitimate aim in accordance with Article 5(1) of the ECHR, and must also 'be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (**A v UK, ECtHR GC [App No 3455/05 \(2009\) § 164](#)**). A similar set of considerations have been recognised by domestic UK courts in the form of the *Hardial Singh* principles, which require 'the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation' (**Lumba (WL) v SSHD [2011] UKSC 12, § 30 (Lord Dyson)**). These have been held to be 'almost identical' to the test for arbitrariness imposed by the ECtHR (**J.N. v UK, ECtHR [App No 37289/12 \(2016\) § 96](#)**).

Minimum standards for non-arbitrary immigration detention have also been developed by other

international bodies. For instance, the Committee on Migrant Workers stipulates that '[a]ny use of detention in the context of migration must [...] be based on a legitimate State objective, [...] employed always as an exceptional measure of last resort compatible with the criteria of necessity and proportionality, limited in scope and duration, [and] imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes [...]' (**General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights** [CMW/C/GC/5](#), § 12). Under the 'Global Compact for Safe, Order and Regular Migration', meanwhile, signatories have committed to revising 'legislation, policies and practices related to immigration detention to ensure that [...] decisions [...] are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards, and that immigration detention is not promoted as a deterrent or used as a form of cruel, inhumane or degrading treatment of migrants' (**UNGA, Global Compact for Safe, Orderly and Regular Migration Resolution** [A/RES/73/195](#) (2019) **Objective 13 § 29(c)**).

Based on these international standards, the following set of Safeguarding Principles identify a core set of substantive criteria for immigration detention to satisfy the requirements of non-arbitrariness. They underline how, to avoid being characterised as arbitrary, immigration detention requires an individualised assessment in each case, taking into account any vulnerabilities that may render such a measure disproportionate (SP6: Individualisation). Detention must also pursue a legitimate immigration control aim (SP7: Legitimate Aim) and be strictly necessary to secure this aim in each individual case (SP8: Necessity), based on the active consideration of less coercive alternatives (SP9: Alternatives). Finally, immigration detention may be arbitrary based on the duration of the measure. This will be the case where the overall length of detention exceeds what is 'reasonable' for the purpose pursued (SP12: Maximum), or when an individual continues to be detained after it becomes apparent at an earlier stage that their removal is not realistically achievable within a reasonable timeframe (SP10: Achievability). Detention will also be arbitrary where it is prolonged unnecessarily owing to inertia by the authorities in resolving the relevant immigration proceedings (SP11: Diligence)

SP6: INDIVIDUALISATION.

Detention must be based on due appraisal of the individual's circumstances, including any vulnerabilities that would render such a measure disproportionate.

Detention for immigration purposes requires justification in the case of each individual—both initially, and as detention continues over time. This principle applies to all aspects of the decision to impose or maintain detention, requiring an individualised assessment of the necessity of the measure (SP8: Necessity), the achievability of the immigration aim it pursues (SP10: Achievability) and whether the overall period of detention is excessive in light of the circumstances (SP12: Maximum). Mandatory detention regimes based exclusively on an individual's migration status fail to meet this requirement of individual justification and are therefore arbitrary.

In addition, individuals must not be detained where this would expose them to a risk of serious harm to their mental and/or physical health. In line with this, detention will be arbitrary where the decision-maker fails to consider any relevant vulnerabilities on an individualised basis. Procedures must also be put in place to identify these vulnerabilities and ensure that they are communicated to the authorities responsible for imposing and/or maintaining detention.

Individual Justification of Detention

Fardous v SSHD [2015] EWCA Civ 931, § 41 (Lord Thomas CJ): '[e]ach deprivation of liberty pending deportation requires proper scrutiny of all the facts by the Secretary of State in accordance with the *Hardial Singh* principles.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 18: 'Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time [...] The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category.'

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, A/HRC/37/50 (2018) § 21: 'Just as any other form of deprivation of liberty, any detention of migrants must be justified for each individual as lawful, necessary and proportionate in the circumstances and, in case of administrative or preventative detention, must be periodically re-assessed as it extends in time.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants (2018) A/HRC/39/45, § 19: 'The need to detain should be assessed on an individual basis and not based on a formal assessment of the migrant's current migration status. The detention must comply with the principle of proportionality and as such, automatic and/or mandatory detention in the context of migration is arbitrary.'

CPT, Immigration Detention: Factsheet, CPT/Inf(2017)3, 1: 'Deprivation of liberty of irregular migrants shall be neither arbitrary nor the automatic consequence of an (alleged) violation of aliens legislation. In other words, immigration detention should be exceptional, proportionate and, by

consequence, an individual measure necessary in order to prevent unlawful immigration'; **2:** 'Deprivation of liberty under aliens legislation should only be a measure of last resort, after a careful and individual examination of each case.'

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 6\(1\)](#): 'A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed [...] after a careful examination of the necessity of deprivation of liberty in each individual case.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 17: 'The relevant authorities must carry out a context-specific and individualized assessment of the situation, in which relevant factors must be considered on a case-by-case basis, not on the basis of a mandatory rule for a broad category, and ensure that the period of detention is as short as possible. Any compulsory, automatic, systematic or widespread detention of migrant workers and members of their families is arbitrary.' **§ 21:** 'The Committee has noted previously that the mere fact of entering or remaining in an irregular situation in a State is not sufficient reason to mandate the immigration detention of migrant workers and members of their families, because that exceeds the legitimate purpose or interest of States to control and regulate migration.'

CMW, General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families [CMW/C/GC/2 \(2013\) § 36](#): '[...] any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment.' **§ 27:** 'Preventive detention of migrant workers often leads to prolonged detention based on vague criteria. Therefore, such detention should be imposed only following an individual assessment in each case and for the shortest time possible, in compliance with all procedural safeguards provided for in article 16 of the Convention [on the Protection of the Rights of All Migrant Workers and Members of Their Families].'

UNHCR, [Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\) § 37](#): 'Detention is the most far-reaching restriction on a refugee's freedom of movement. It is governed by human rights law standards on deprivation of liberty and must only be used on an individual basis, namely as a measure of last resort when no alternative exists [...] Decisions to detain, including decisions to extend the duration of detention, must be taken on an individual basis and are subject to minimum procedural safeguards [...];' **§ 36:** 'Automatic, routine or collective measures to restrict the freedom of movement of unlawfully present refugees would be in violation of Article 31(2) [of the 1951 Refugee Convention].'

UNHCR Detention Guidelines (2012) Guideline 4: '[...] any decision to detain must be based on an assessment of the individual's particular circumstances.' **Guideline 4, § 20:** 'Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of

Detention of Asylum Seekers, § 4: 'Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case.'

Duty to Consider Special Needs

HRC, General comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\) § 18:](#) 'Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\) Guideline 21, § 111:](#) 'Decisions regarding the detention of non-nationals are to take into account also the effect of the detention on the physical and mental health of the said persons. When physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants (2018) [A/HRC/39/45, § 24:](#) 'The element of proportionality requires that a balance be struck between the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, including the effect of the detention on the physical and mental health of the individual, and the situation concerned [...]'; **§ 41:** 'Detention of migrants in [...] situations of vulnerability or at risk, such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes, must not take place.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 45:](#) 'States should avoid detaining migrants who have specific needs or who are particularly at risk of exploitation, abuse, gender-based violence, including sexual violence, or other human rights violations in the context of detention. That includes pregnant and breastfeeding women, older persons, persons with disabilities, survivors of torture or trauma, persons who are victims of crimes such as trafficking, migrants with special physical or mental health needs, lesbian, gay, bisexual, transgender and intersex persons, refugees, asylum-seekers and stateless persons.'

PACE, [Resolution 1707\(2010\) on 10 Guiding Principles on Detention of Asylum Seekers and Irregular Migrants, § 9.1.9:](#) 'vulnerable people should not, as a rule, be placed in detention [...].'

[UNHCR Detention Guidelines \(2012\) Guideline 9:](#) 'the special circumstances and needs of particular asylum-seekers must be taken into account.' **Guideline 9.1, § 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 [...] Victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.' **Guideline 9.3, § 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'. (**See also: Guideline 9.4, § 62:** (Victims or Potential Victims of Trafficking); **Guideline 9.5, § 63** (Asylum-seekers with Disabilities); **Guideline 9.6, § 64** (Older Asylum-seekers); **Guideline 9.7, § 65** (Lesbian, Gay, Bisexual, Transgender or Intersex Asylum-seekers)).

Committee on the Elimination of Discrimination against Women, General Recommendation No 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women [CEDAW/C/GC/32 \(2014\) § 34](#): 'As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained.'

SP6. Individualisation: Commentary.

Individual Justification of Detention

The principles addressed in Section III of this Handbook are connected by a common theme: to avoid being arbitrary, any interference with the right to liberty must be justified *in the specific case of the individual*. The relevant State authority is duly required to ensure that 'any decision to detain [...] is based on a detailed and individualized assessment, which should include the individual's personal history' (**Amnesty International, [Jailed Without Justice \(2008\) 44](#)**). This assessment must be evidence-based, clearly demonstrating why detention is justified *in the individual's case* as a necessary measure (SP8: Necessity) to achieve a legitimate immigration control aim (SP7: Legitimate Aim).

For instance, determining whether immigration detention is necessary based on a risk of absconding requires 'a very careful assessment [...] in each case, as the magnitude of that risk will vary according to the circumstances' (**Fardous v SSHD [2015] EWCA Civ 931, § 45 (Lord Thomas CJ)**) (SP8: Necessity). Likewise, what is considered a period of detention which is 'reasonably necessary' for the purpose of effecting removal will 'depend upon the circumstances of the particular case' (**R (Singh) v Governor of Durham Prison [1983] EWHC 1 (QB), § 7 (Woolf J)**), and will therefore be 'fact sensitive' (**R (Nouazli) v SSHD [2016] UKSC 16, § 66 (Lord Clarke)**) (SP12: Maximum). The latter example underlines that an individualised assessment applies not only to the initial decision to detain. Rather, as emphasised by the HRC, any subsequent decision to maintain detention must identify 'grounds particular to the [individuals'] cases which would justify their continued detention' (**Shams v Australia CCPR/C/90/D/1255 (2007) § 11**).

The principle of individualisation means that immigration detention imposed on an automatic or mandatory basis will inevitably be arbitrary. As interpreted by the UNWGAD, 'a policy of mandatory immigration detention breaches article 9 of the Covenant [on Civil and Political Rights] as it fails to respect the requirements of reasonableness, necessity and proportionality of detention as no individualized assessment of the need to detain is carried out' (**UNWGAD, Opinion No 42/2017 concerning Mohammad Naim Amiri (Australia) [A/HRC/WGAD/2017/42 \(2017\) § 36](#)**). The IACtHR has similarly held that 'migratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary' (**Vélez Loor v Panama (IACtHR, 23 November 2010) § 171**) (SP8: Necessity). It is also widely recognised that it is unlawful to detain an individual for the sole reason that they are applying for asylum, absent any individualised reasoning (**EU Reception Conditions Directive (2024), Article**

10(1)). In this regard, the UNWGAD has held that detention will be arbitrary where individuals are detained for no other reason than exercising the legitimate right to seek asylum, as guaranteed by Article 14 of the UHDR (*UNWGAD, Opinion No 1/2019 concerning Premakumar Subramaniyam (Australia)* [A/HRC/WGAD/2019/1](#) (2019) § 71).

Accordingly, immigration detention can never be authorised based on ‘a mandatory requirement for which an individual departmental officer cannot exercise any discretion’ (*UNWGAD, Opinion No 21/2018 concerning Ghasem Hamedani (Australia)* [A/HRC/WGAD/2018/21](#) (2018) § 69). The HRC has repeatedly asserted that detention decisions must be based ‘not on a mandatory rule for a broad category but on an assessment [...] of the specific circumstances of [the] case’ (*Ali and Ali v Norway* [CCPR/C/135/D/2926/2017](#) (2022) § 10.5[‡]), while the ECtHR has suggested that mandatory policies raise doubts over whether immigration detention is applied in good faith (*Suso Musa v Malta, ECtHR App No 42337/12* (2013) § 100). The UK Supreme Court, meanwhile, concluded that a ‘blanket policy’ mandating the detention of time served foreign nationals pending their deportation was unlawful—both on general public law grounds, and owing to the fact that the policy did not allow for release based on an individualised application of the *Hardial Singh* principles (*Lumba (WL) v SSHD* [\[2011\] UKSC 12, §§ 20–21 \(Lord Dyson\)](#)). While recognising that a policy which requires certain categories of migrants to be detained as a matter of ‘normal practice’ was not necessarily unlawful, the Supreme Court confirmed that this is conditional on the requirement that ‘each case is considered individually’ (§ 53 (Lord Dyson)). In similar terms, the ECtHR has held that statutory presumptions in favour of detention may only be lawful if the affected individual has an ‘effective opportunity to rebut such presumption’ (*Nikoghosyan v Poland, ECtHR App No 14743/17* (2022) § 75).

A narrow exception to the requirement of individualisation applies in the context of unauthorised arrivals, with States permitted to impose detention ‘for a brief initial period’ for the purpose of documenting entry, verifying identity or discerning the elements of an asylum claim (SP7: Legitimate Aim). However, maintaining detention beyond this brief initial period ‘would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding [...]’ (*HRC, General Comment No 35: Article 9 (Liberty and Security of Person)* [CCPR/C/GC/35](#) (2014) § 18) (SP8: Necessity). Unsurprisingly, it has been held that a period of one year exceeded the ‘brief initial period’ during which immigration detention may be permitted without individualised justification (*UNWGAD, Opinion No 1/2019 concerning Premakumar Subramaniyam (Australia)* [A/HRC/WGAD/2019/1](#) (2019) §§ 69–70), as did a period of 20 months (*UNWGAD, Opinion No 74/2018 concerning Ahmad Shalikhhan (Australia)* [A/HRC/WGAD/2018/74](#) (2018) § 140).

The logic of immigration control therefore does not override the requirement for any interference with the right to liberty to be justified on an individual basis. While immigration control may indeed provide a legitimate justification for interference with the right to liberty (SP7: Legitimate Aim), it does not follow that migrants can be detained for no other reason than their immigration status. As with any other form of detention, any decision to deprive an individual of their liberty for immigration purposes will need to be justified in each individual situation to avoid being characterised as arbitrary (SP1: Liberty). As the HRC has explained: ‘the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation,

‡ The authors are grateful to acting counsel Prof. Mads Andenas for bringing this decision to our attention.

which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal’ (*A v Australia* [CCPR/C/59/D/560/1993 \(1997\) § 9.4](#)).

The requirement that detention be based on an individualised assessment sits in clear tension with the growing use of automated decision-making tools in the context of detention (SP4: Authority). Where the decision about who to detain—and for how long—is left to an algorithm, serious concerns arise as to the ability to undertake a genuine and unbiased assessment of an individual’s case and circumstances. A Chatham House research paper identified several risks associated with the artificial intelligence in migration contexts, including the potential for malicious use; issues with accuracy; discriminatory outcomes; and the perpetuation of systemic biases and marginalisation (*Madeleine Forster, Refugee Protection in the Artificial Intelligence Era: A Test Case for Rights (2022)*). The use of tools that rely on group-based analysis, or profiling, to choose who to detain and who to release will similarly raise issues with respect to the requirement to ensure individualised decision-making.

Duty to Consider Special Needs

An individualised assessment is therefore a mandatory element of *any* decision to impose or maintain immigration detention. Beyond this, the authorities are also required to consider any vulnerabilities or special needs that individuals may have when considering whether to impose or maintain detention. This reflects the understanding that detention must be avoided where it risks causing serious harm to the individual’s physical and/or mental wellbeing. While it has been acknowledged that there is an ‘unavoidable level of suffering’ inherent in any deprivation of liberty (*Z.A. v Russia, ECtHR GC App Nos 61411/15 et al. (2019) § 182*), there comes a point when the level of harm caused can no longer be justified as proportionate to pursuit of immigration control aims (*EU Agency for Asylum, Guidelines on Alternatives to Detention (2024) 37*) (SP7: Legitimate Aim). It is therefore necessary to ensure that ‘the sacrifice inherent in the restriction of the right to liberty is not exaggerated or unreasonable compared to the advantages obtained from this restriction and the achievement of the intended purpose’ (*Vélez Loor v Panama (IACtHR, 23 November 2010) § 166*).

A duty to consider individual vulnerabilities in the context of decision-making on immigration detention is widely recognised. The ECtHR has held that detaining asylum seekers without taking into account any special needs can give rise to violations of Article 5(1)(f) of the ECHR due to a failure to consider factors that may require recourse to less severe alternatives to detention (*Thimothawes v Belgium, ECtHR App No 39061/11 (2017) § 73; K.G. v Belgium, ECtHR App No 52548/15 (2018) § 73*) (SP8: Necessity; SP9: Alternatives). Concerns have duly been raised where, even after the applicant’s mental health issues had come to the attention of the authorities, subsequent detention orders failed to make any reference to this fact (*Thimothawes v Belgium, §§ 75–77*). Article 5(1) was also breached where the domestic courts ‘did not give sufficiently thorough or individualised consideration to the applicants’ situation’ as a family with young minors (*Nikoghosyan v Poland, ECtHR App No 14743/17 (2022) §§ 78–89*). The UNWGAD came to a similar conclusion, holding that neglecting to consider the family situation of the complainant when imposing detention—whose wife was pregnant and gave birth to their child in detention—constituted ‘a failure to respect the basic principles that should govern the detention of migrants’ (*UNWGAD, Opinion No 54/2019 concerning José de la Paz Ferman Cruz and Aren Boyazhyan (Mexico) A/HRC/WGAD/2019/54 (2020) § 150*).

The HRC, meanwhile, has asserted that '[d]ecisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health' (**HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 18**). At the domestic level, detention was unlawful when the review failed to properly refer to available medical reports in concluding that detention could be maintained (**R (O) v SSHD [2016] UKSC 19, § 25 (Lord Wilson)**). Importantly, mere *consideration* of risks of harm in detention is not sufficient to protect against arbitrariness. As highlighted by the UNWGAD, if the outcome of this assessment indicates that 'physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention' (**UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court A/HRC/30/37 (2015) Guideline 21, § 111**). In such cases, States will therefore be limited to imposing restrictions that fall short of a deprivation of liberty (SP9: Alternatives), regardless of whether detention is considered necessary to achieve a legitimate immigration control aim (SP8: Necessity).

Certain categories of migrants are understood to be at greater risk of serious harm in detention, such as 'pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes' (**UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 41**). As a general rule, migrants falling within these categories should not be detained, as the harmful impacts would likely be disproportionate to the immigration aim pursued. It is, nonetheless, important to emphasise that it may be necessary to exempt individuals from detention even where they fall outside of these categories—for instance, if they suffer from mental illnesses (such as severe depression or PTSD) that cannot be treated appropriately in a detention environment, or which would likely be aggravated by the experience of detention itself (SP15: Healthcare).

Importantly, a duty of individualisation applies not only to the decision to detain; it also requires the authorities to *take active steps* to identify whether the person concerned presents with a particular vulnerability that may preclude detention (**N.M. v Belgium, ECtHR App No 43966/19 (2023) § 108**), including if they belong to one of the categories listed above. The ECtHR duly found a breach of Article 5(1) of the ECHR when the State failed to explain why it took 11 months to conclude the applicant's vulnerability assessment while she remained detained, calling into question the good faith of the authorities (**Abdi Mahamud v Malta, ECtHR App No 56796/13 (2016) §§ 130–136**). Also relevant to this finding was the fact that the authorities did not systematically inform individuals of the possibility to apply for this assessment at the outset of detention (SP19: Reasons), nor did they appear to take active measures to detect vulnerable persons within detention (**§133**). In the UK context, meanwhile, immigration detention was held to be unlawful where the Secretary of State failed to take 'reasonable steps to inform herself of the nature of the condition and whether it could be satisfactorily managed in detention' (**R (MD) v SSHD [2014] EWHC 2249 (Admin), § 118 (Lewis QC)**), as required by her own policy (SP6: Adherence).

To ensure appropriate safeguards against arbitrary detention, women claiming to be pregnant should be treated as such in the absence of medical certifications to the contrary. A similar principle applies to children. It is an uncontroversial position that, '[s]hould the age of the migrant be in dispute, the most favourable treatment should be accorded until it is determined whether he/she is a minor [...]' (**Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85 (2002) § 75**). PACE has duly called on States to 'identify and provide alternative

accommodation options for children awaiting or undergoing age assessment, with a view to avoiding the detention of children during disputes about age [...]’ (*PACE, Resolution 2195 (2017) on Child-friendly Age Assessment for Unaccompanied Migrant Children, § 6.9*). The ECtHR, meanwhile, has held that individuals claiming to be minors should be treated as such pending the conclusion of the age assessment, unless that claim can be considered ‘unfounded or unreasonable’ (*A.D. v Malta, ECtHR App No 12427/22 (2023) §§ 74, 190*). Article 5(1) was duly violated when the authorities continued to detain the applicants for several months after they had claimed to be minors. While it was relevant that the applicants had initially provided information suggesting they were adults, the Court concluded that this did not relieve the authorities of the duty to take steps to verify the age, and did not justify placing the burden on the applicants to rebut the presumption that they were adults (*M.H. and S.B. v Hungary, ECtHR App Nos 10940/17 and 15977/17 (2024) §§ 75–80*).

SP7: LEGITIMATE AIM.

Detention can only be imposed for the purpose of facilitating examination on entry or with a view to enforcing removal.

The essence of immigration control involves the State controlling: (a) whether individuals are permitted to enter the country (permission to enter or remain); and (b) whether individuals are required to exit the country (removal or deportation). To comply with rule of law safeguards, immigration detention must be for—and only for—one of these immigration-control purposes: entry or exit. It cannot be employed to serve aims unrelated to the enforcement of immigration controls, such as the prevention of crime. Nor can detention be justified as general tool of immigration control—for instance, to punish or deter breaches of immigration rules.

General Standards

European Convention on Human Rights (1950) Article 5(1): ‘No one shall be deprived of his liberty save in the following cases [...] (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.’

Lumba (WL) v SSHD [2011] UKSC 12, § 22 (Lord Dyson): ‘The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.’ (*Hardial Singh, Principle 1*)

PACE, Resolution 1707 (2010) on Detention of Asylum Seekers and Irregular Migrants in Europe, § 9.1.2.: ‘Detention shall be ordered only for the specific purpose of preventing unauthorised entry into a state’s territory or with a view to deportation or extradition.’

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants, A/HRC/39/45 (2018) § 22.: ‘The element of reasonableness requires that the detention be imposed in pursuance of a legitimate aim in each individual case. This must be prescribed by legislation that clearly defines and exhaustively lists the reasons that are legitimate aims justifying detention. Such reasons that would legitimize the detention include the necessity of identification of the person in an irregular situation or risk of absconding when their presence is necessary for further proceedings.’

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 18.: ‘Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.’

Council of Europe Committee of Ministers, Recommendation Rec(2003)5 on Measures of Detention of Asylum Seekers, § 3.: ‘Measures of detention of asylum seekers may be resorted to only in the following situations: when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; when elements on which the asylum

claim is based have to be determined which, in the absence of detention, could not be obtained; when a decision needs to be taken on their right to enter the territory of the state concerned, or when protection of national security and public order so requires.'

UNHCR, [ExCom Conclusion No 44 \(XXXVII\) \(1986\) § \(b\)](#): '[...] detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.'

Illegitimate Uses of Immigration Detention

[1951 Refugee Convention, Article 31\(1\)](#): 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

CMW, [General Comment No 5 \(2021\) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 21](#): '[...] detention based solely on migration status, as such, can even amount to torture, in particular where it is intentionally imposed or perpetuated for such purposes as deterring, intimidating or punishing migrants in irregular situations, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation or providing information or fingerprints [...].'

UNWGAD, [Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 \(2018\) § 9](#): 'Seeking asylum is a universal human right, the exercise of which must not be criminalized.' **§14**: 'Detention in the course of migration proceedings must [...] not be punitive in nature [...].'

[Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/65/222 \(2010\) § 85](#): 'States that continue to punish irregular migration with imprisonment should revise and reform their immigration laws and decriminalize irregular migration. States should not deprive migrants of their right to liberty because of their migratory status.'

[Vélez Loor v Panama \(IACtHR, 23 November 2010\) § 171](#): '[...] it is clear that detaining people for non-compliance with migration laws should never involve punitive purposes.'

Council of Europe Committee of Ministers, [Recommendation Rec\(2003\)5 on Measures of Detention of Asylum Seekers, § 3](#): 'The aim of detention is not to penalise asylum seekers.'

UNHCR, [Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\) § 37](#): 'It is unlawful to detain an individual for the purpose of deterring other people from seeking asylum, or on a discriminatory basis.'

[UNHCR Detention Guidelines \(2012\) Guideline 4.1.4, § 32](#): '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.’

SP7. Legitimate aim: Commentary.

Interference with the right to liberty is permissible *only when it serves a legitimate aim*. This principle is most clearly reflected in Article 5(1) of the ECHR, which contains an exhaustive list of exceptions to the right to liberty. The ECtHR has confirmed that that ‘no deprivation of liberty will be lawful unless it falls within one of those grounds’, while also stipulating that ‘only a narrow interpretation of those exceptions is consistent with the aim of [Article 5 of the ECHR], namely to ensure that no one is arbitrarily deprived of his or her liberty’ (SP1: Liberty) (*Khlaifia v Italy*, ECtHR GC App No 16483/12 (2016) § 88).

Among the exhaustive list of exceptions contained within Article 5(1) of the ECHR, subparagraph (f) expressly permits ‘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’. Immigration control is therefore recognised as a legitimate ground for depriving an individual of liberty (SP1: Liberty). However, to fall within the scope of Article 5(1)(f), it must be demonstrated that the detention measure is for the *specific purpose* of either: (i) preventing unauthorised entry under the first limb of Article 5(1)(f) (‘entry control’); or (ii) effecting removal from the territory under the second limb (‘exit control’).

With respect to **entry control**, detention is permitted strictly for the purpose of preventing unauthorised entry into the State (including pending a decision on whether to grant such permission). Somewhat controversially, the Grand Chamber of the ECtHR has accepted that this may extend to asylum seekers who have lodged an application at the border and have yet to be formally authorised to enter the country, rejecting the argument that ‘as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f)’ (*Saadi v UK*, ECtHR GC App No 13229/03 (2008) § 65). Accordingly, the Court’s case law suggests that the first limb of Article 5(1)(f) may apply for the full duration of the asylum procedure—a position caveated only in cases where national laws expressly grant a right of entry or stay to asylum seekers pending the assessment of their claim (*Suso Musa v Malta*, ECtHR App No 42337/12 (2013) § 97). The UNHCR, meanwhile, accepts that restrictions on liberty can be imposed on asylum seekers where necessary, among other things, to verify their identity or to determine the elements on which their claim is based (*UNHCR Detention Guidelines (2012) Guideline 4, §§ 24–28*) (SP8: Necessity). However, under Article 31(2) of the *1951 Refugee Convention*, ‘such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.’ According to the UNHCR, an asylum seeker’s status is regularised within the meaning of the Refugee Convention not only on the basis of national law, but also once they have been formally admitted into the national asylum procedure, after which point the grounds for detention derived from Article 31(2) would no longer apply (*UNHCR, Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees (2024) § 39*).

In relation to **exit control**, meanwhile, immigration detention under Article 5(1)(f) can be imposed on the condition that 'action [is] being taken with a view to deportation or extradition' (see also SP10: Achievability; SP11: Diligence). Accordingly, deprivation of liberty 'will be justified only for as long as deportation proceedings are in progress' (**Chahal v UK, ECtHR GC App No 22414/93 (1996) § 113**). Detention duly failed to pursue a legitimate aim where 'the Government did not submit the slightest detail as to whether any return procedures at all were initiated' (**Aden Ahmed v Malta, ECtHR App No 55352/12 (2013) § 144**) and where removal action was suspended while the applicant remained subject to ongoing criminal proceedings (**Suso Musa v Malta, ECtHR App No 42337/12 (2013) § 104**). In the UK, meanwhile, the first of the *Hardial Singh* principles dictates that detention for the purpose of deportation must satisfy two requirements to pursue a legitimate aim: '[t]he Secretary of State must intend to deport the person and can only use the power to detain for that purpose' (**Lumba (WL) v SSHD [2011] UKSC 12, § 22 (Lord Dyson)**). Such an intention was lacking, for instance, where detention 'was being used [...] not to further that option [of deportation] but solely to investigate whether acceptable arrangements could be made [...] whereby the Claimant could be returned into some form of detention in Iraq' (**HXA v The Home Office [2010] EWHC 1177 (QB), § 22 (King J)**).

Illegitimate Purposes (I): Protection of National Security/Public Order

Immigration detention can therefore be justified *only if it pursues a legitimate immigration control aim*. This means that immigration detention will be arbitrary when imposed exclusively for other, unrelated purposes, such as the protection of national security or public order (see also SP2: Equality). This was the conclusion reached by the UNWGAD, having determined that immigration detention was imposed exclusively a security measure to protect the public (in the absence of any realistic prospect of removal) (**UNWGAD, Opinion No 45/2006 concerning Mr Mustafa Abdi (United Kingdom) A/HRC/7/4/Add.1 (2007) §§ 26-28**) (SP10: Achievability). The ECtHR reached the same conclusion in **A v UK, ECtHR GC App No 3455/05 (2009)**, where it refused to accept that the applicants' detention could be justified on national security grounds in the absence of a realistic prospect of deportation that would bring it within the scope of Article 5(1)(f) (see also **M.S. v Belgium, ECtHR App No 50012/08 (2012) §§ 154–156**). In coming to this conclusion, the Court rejected the argument that the ECHR allows more generally for a balance to be struck between the individual's right to liberty and the national security interests of the State, highlighting that:

This argument is inconsistent not only with the Court's jurisprudence under sub-paragraph (f) but also with the principle that sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the sub-paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee (**A v UK, ECtHR GC App No 3455/05 (2009) § 171**).

Elsewhere, detention failed to meet the requirements of Article 5(1)(f) when the applicant was detained on national security grounds in the absence of a deportation order (**Al Husin v Bosnia and Herzegovina, ECtHR App No 3727/08 (2012) §§ 62–66**). In that judgment, the Court expressly rejected the possibility that detention could be justified separately under Article 5(1)(c) of the ECHR, which permits 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority [...] when it is reasonably considered necessary to prevent his committing an offence [...]'. As the Court reiterated, 'sub-paragraph (c) does not permit a policy of general prevention directed against a person or a category of persons who are perceived by the authorities, rightly or

wrongly, as being dangerous or having propensity to unlawful acts', being limited instead to 'preventing offences which are concrete and specific as regards, in particular, the place and time of their commission and their victims' (§ 65).

The ECtHR has drawn similar conclusions about national security and public order justifications when it comes to the detention of asylum seekers under the first limb of Article 5(1)(f). In ***M.B. v Netherlands ECtHR App No 71008/16 (2024)***, the Court held that the absence of any justification for detaining the applicant outside of the threat he was deemed to pose to public order meant that there was not a 'sufficiently close connection' with the aim of preventing his unauthorised entry under the first limb of Article 5(1)(f). While acknowledging the 'legitimate concerns which exist when an asylum applicant is released from detention shortly after having been convicted on terrorism related charges', the Court concluded that this cannot be invoked to justify 'excessive immigration detention' on grounds not permitted by the ECHR (§§ 73–75). This position was reinforced in ***B.A. v Cyprus, ECtHR App No 24607/20 (2024)***, where the Court held once again that 'the applicant's detention on the sole basis of the need to protect national security cannot be considered to have been closely connected with the aim of preventing unauthorised entry', and therefore failed to fall under any of the exceptions recognised in Article 5(1) of the ECHR (§ 63).

These judgments provide an important corrective to standards promulgated by other international and regional bodies, particularly when it comes to legitimate grounds for detaining asylum seekers. The HRC, for instance, accepts that asylum seekers may be detained under Article 9 of the ICCPR where it is established on an individualised basis that they pose a risk to others or to broader national security interests (***HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 18***), while the UNHCR recognises similar grounds for detaining asylum seekers pursuant to Article 31(2) of the Refugee Convention (***UNHCR Detention Guidelines (2012) Guideline 4, § 30***). By contrast, the judgments of the ECtHR highlight that such considerations are irrelevant to establishing the existence of a legitimate immigration control aim under Article 5(1)(f) of the ECHR. They also impose a higher level of protection vis-à-vis other regional asylum standards. In ***M.B. v Netherlands***, the Court explicitly rejected the relevance of the fact that EU law expressly permits the detention of asylum seekers on public order and national security grounds, concluding that this 'has no bearing on the fact that Article 5(1)(f) of the Convention only allows for immigration detention to prevent unauthorised entry or to effect deportation' (§ 72).

Another important question concerns the relevance of a risk to the public when arranging for an individual's release from immigration detention. In the UK, it has been accepted that the Secretary of State may benefit from 'a short period of grace' after detention ceases to comply with the *Hardial Singh* principles order to make appropriate arrangements for release—for instance, by putting in place any monitoring conditions (where removal may still be pursued later), or to guarantee the individual's welfare by securing appropriate accommodation (***FM v SSHD [2011] EWCA Civ 807, § 60 (Pitchford LJ)***). Moreover, it has been held that 'the risk to the public is a highly important factor' in determining the appropriate duration of the grace period, despite the acknowledgement that such a risk cannot be invoked to justify indefinite or preventive detention (***R (AC) Algeria v SSHD [2020] EWCA Civ 36, § 39 (Irwin LJ)***). Nonetheless, there are arguments to suggest that continued detention for *any* reason would no longer pursue a legitimate aim for the purposes of Article 5(1)(f), given that it would no longer be for the purpose of preventing unauthorised entry or effecting removal. In considering such cases of continued detention, the ECtHR has reaffirmed that 'no deprivation of liberty will be lawful unless it falls

within one of the grounds announced in Article 5 § 1' (*Mahamed Jama v Malta*, ECtHR App No [10290/13](#) (2015) §§ 154–155), suggesting that while brief administrative delays in organising release from immigration detention are often inevitable, these cannot be justified for more than a few hours (*G.B. v Turkey*, ECtHR App No [4633/15](#) (2019) § 154). Moreover, 'the national authorities must attempt to keep this to a minimum', while '[i]t is for the Contracting States to organise their systems in such a way that their authorities can meet the obligation to avoid unjustified deprivation of liberty' (*V.M. v UK* (No 2), ECtHR App No [62824/16](#) (2019) § 38). While it has been implied that it may be relevant, for instance, if immediate release would have rendered the applicant homeless or destitute, there is nothing in the Court's case law to suggest that detention can be prolonged to ensure suitable arrangements to protect against risks to the public (*Mahamed Jama v Malta*, § 157).

The use of immigration detention to prevent criminal (re-)offending is therefore impermissible: it lacks a clear immigration control purpose, while it may in certain circumstances also amount to unlawful discrimination (SP2: Equality). Outside of public order and national security considerations, employing immigration detention as a measure to (purportedly) safeguard the individual's wellbeing is also unlawful when unrelated to the enforcement of immigration controls. For instance, 'however laudable', it is 'an improper purpose' to use 'immigration detention [...] to detain a person to prevent [...] [that] person's suicide' (*R (AA) v SSHD [2010] EWHC 2265 (Admin)*, § 40 (*Cranston J*)), while it is similarly impermissible to maintain immigration detention to ensure appropriate treatment 'where [...] the need for treatment arises because the detainee has become ill as a result of being detained' (*R (BA) v SSHD [2011] EWHC 2748 (Admin)*, § 153 (*Elisabeth Laing QC*)). EU law similarly prohibits the use of detention during asylum or return proceedings on the sole ground that the individual cannot provide for their own needs (*CJEU, Joined Cases C-924/19 and C-925/19* (2020) §§ 256, 270).

Illegitimate Purposes (II): Punishing Immigration Infractions

In addition, immigration detention cannot be employed as a routine measure to disincentivise breaches of immigration rules or to punish non-compliance with those rules. It is well established that 'an individual's failure to co-operate [...] in facilitating his removal is not a justification in itself for any immigration detention' (*R (Sino) v SSHD [2011] EWHC 2249 (Admin)*, § 235 (*John Howell QC*)). Moreover, it is 'plain that detention cannot be justified on the basis that it might deter others from seeking to enter by making false claims for asylum' (*R (Saadi) v SSHD [2001] EWHC (Admin) 670*, § 29 (*Collins J*)) or 'to dissuade those who have commenced their claims from pursuing them' (*UNHCR Detention Guidelines* (2012) *Guideline 4.1.4*, § 32). Entering a country without authorisation for the purpose of seeking asylum should not be considered an unlawful act that can be sanctioned with punitive measures (*UNHCR Detention Guidelines* (2012) *Guideline 1*, § 11). Indeed, the *1951 Refugee Convention* explicitly prohibits the imposition of 'penalties' on refugees on account of their unlawful entry or presence, provided the relevant conditions are satisfied (i.e. that they have come directly from a country where they harbour a well-founded fear of persecution, present themselves to the authorities of the receiving State without delay, and demonstrate good cause for their unlawful entry or presence) (*1951 Refugee Convention*, *Article 31(1)*). The UNHCR has further clarified that the term 'penalties' should be interpreted broadly as including all measures 'that are punitive, discriminatory, retributory, or deterrent in character', including restrictions on freedom of movement and deprivation of liberty (*UNHCR, Guidelines on International Protection No. 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their*

Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees (2024) § 28.

Using detention to punish unauthorised entry is not only ineffective as a deterrent ([UNHCR/OHCHR, Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons \(2011\)](#)), but also ‘exceeds the legitimate interests of States in protecting their territory and regulating irregular migration, and should be regarded as arbitrary’ ([Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, A/HRC/37/50 \(2018\) § 24](#)). Indeed, immigration detention can only be said to be pursuing a legitimate aim if it contributes to the enforcement of entry- or exit-controls *in the case of the specific individual* (SP6: Individualisation). This is clearly exceeded by policies of mandatory immigration detention designed to deter unauthorised migration ([UNWGAD, Opinion No 21/2018 concerning Ghasem Hamedani \(Australia\) A/HRC/WGAD/2018/21 \(2018\) § 71](#)). Nor can restrictions on the permissible uses of immigration detention be circumvented by criminalising irregular entry or presence. Put simply, breaches of immigration laws ‘should not be considered criminal offences’ ([Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24 \(2012\) § 70](#)), with such use of criminal law amounting to ‘abusive exercise of the punitive power of the State’ ([Vélez Loor v Panama \(IACtHR, 23 November 2010\) § 170](#)). As asserted elsewhere, ‘[...] offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime’ ([CMW and CRC, Joint General Comment on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return CMW/C/GC/4-CRC/C/GC/23 \(2017\) § 10](#)). To treat immigration infractions as criminal offences would again ‘exceed[] the legitimate interests of States in protecting [their] territories and regulating irregular migration flows’ and would be contrary to the rule of law ([UNWGAD Annual Report 2009 A/HRC/13/30 \(2010\) § 58](#)).

Alternative Grounds for Immigration Detention

Outside of Article 5(1)(f), the ECtHR has accepted that ‘Article 5 § 1 (b) could also potentially provide justification, in some specific circumstances, for the detention of asylum-seekers’ ([M.H. v Croatia, ECtHR App Nos 15670/18 and 43115/18 \(2021\) § 245](#)). This provision allows for ‘the lawful arrest or detention of a person [...] in order to secure the fulfilment of any obligation prescribed by law’—an exception which has been invoked to justify the detention of asylum applicants for the purpose of ensuring their compliance with the asylum procedure. However, the Court has emphasised that Article 5(1)(f) constitutes *lex specialis* in the context of immigration detention, meaning that Article 5(1)(b) can only be invoked where a sufficient connection is lacking between the deprivation of liberty and the exercise of entry or exit controls (for instance, where domestic law authorises entry or stay pending a final decision on an asylum application) ([A.D. v Malta, ECtHR App No 12427/22 \(2023\) § 185](#)). Moreover, Article 5(1)(b) imposes particularly stringent demands of justification. As the Court has clarified, this provision requires the identification of an unfulfilled obligation which is ‘specific and concrete’, while ‘the arrest and detention must be truly necessary for the purpose of ensuring its fulfilment’ and ‘must not be punitive in character’ ([O.M. v Hungary, ECtHR App No 9912/15 \(2016\) § 42](#)). In cases where this provision has been invoked to justify the detention of asylum applicants, the Court has found that the respondent State failed to identify a ‘specific and concrete’ obligation which was unfulfilled by the applicant. As a result, detention could not be justified under Article 5(1)(b), without

it being necessary to engage in a further assessment of whether such a measure was strictly necessary (*O.M. v Hungary*, § 54; *A.D. v Malta*, § 187).

SP8. NECESSITY.

Detention must be a last resort and sufficiently closely connected to the legitimate aim as to be necessary to achieve it.

Respect for the right to liberty (SP1: Liberty) dictates that immigration detention should be resorted to exclusively as a measure of last resort: namely, where it is strictly necessary to achieve the legitimate aim of entry or exit control (SP7: Legitimate Aim). Detention may therefore be justified where it is established that, in the absence of such a measure, it would not be possible to assess an individual's eligibility to enter the territory or to remove an individual from the territory due to a high likelihood of absconding. However, this must be evidenced on an individual basis (SP6: Individualisation), including by demonstrating that the legitimate aim could not be achieved by less coercive means (SP9: Alternatives).

1951 Refugee Convention, Article 31(2): 'The Contracting States shall not apply to the movements of [refugees unlawfully in the country of refuge] 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.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 18: 'Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants (2018) A/HRC/39/45, § 12: 'Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort [...]; § 16: 'Alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure.'

Report of UNWGAD A/HRC/13/30 (2010) § 59: 'If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 24: 'In application of the principle of necessity, immigration detention can be used only where it is strictly essential to achieve the established legitimate end [...] the decision-making authority must start from the fact that deprivation of liberty will always be the most harmful measure for the person concerned. Therefore, it must evaluate and apply all available alternatives to detention, such as non-custodial measures or less coercive measures, that are less harmful to the individual'; § 38: 'detention or any other form of deprivation of liberty on grounds relating to an individual's migration status must be governed by the principle of exceptionality, that is, deprivation of liberty should serve as the last possible measure only, once all the less harmful alternatives have been considered and ruled out.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 17: 'To guarantee the right to liberty, States should establish in their laws a presumption in favour of freedom, which is consistent with the right to liberty, the principle that immigration detention should be an exceptional measure of last resort and the duty of States to assess whether any less coercive measures are available before resorting to detention in immigration procedures involving migrant workers and members of their families.'

Report of Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/HRC/20/24 \(2012\)](#) § 68: 'Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure.'

Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/65/222 \(2010\)](#), § 90: 'States should consider and use alternatives to immigration detention in accordance with international law and human rights standards. Detention should not be considered necessary or proportionate if other less restrictive measures to achieve the same legitimate objective have not been considered and assessed.'

UN General Assembly, Global Compact for Safe, Orderly and Regular Migration [A/RES/73/195 \(2019\)](#) Objective 13: [Recognising a commitment to] '[u]se immigration detention only as a measure of last resort and work towards alternatives.' § 29: (recognising a commitment to) 'prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.'

PACE, [Resolution 1707 \(2010\)](#) on 10 Guiding Principles on Detention of Asylum Seekers and Irregular Migrants, § 8: 'Detention should be used only if less intrusive measures have been tried and found insufficient. Consequently, priority should be given to alternatives to detention for the individuals in question [...].' § 9.1.1.: 'Detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative.' § 9.1.6.: '[D]etention shall only be used when necessary.' § 9.3.1.: [Member States are encouraged to] 'provide for a presumption in favour of liberty under national law.'

UNHCR/OHCHR, [Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons \(2011\)](#) § 3: '[D]etention can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention.'

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\)](#) Guideline 6(1): 'A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if [...], after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5 on Measures of Detention of Asylum Seekers](#), § 4: ‘Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case.’ **§ 6:** ‘Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.’

[UNHCR Detention Guidelines \(2012\) Guideline 4.2:](#) ‘Detention can only be resorted to when it is determined to be necessary, reasonable and proportionate to a legitimate purpose.’ **§ 34:** ‘The need to detain the individual is to be assessed in light of the purpose of the detention [...] 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.’ **Guideline 4.3, § 35:** ‘The consideration of alternatives to detention [...] is part of an overall assessment of the necessity, reasonableness and proportionality of detention. 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 [...]’

Council of Europe Committee of Ministers, [Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures \(2009\) Guideline XI\(4\):](#) ‘Asylum seekers may only be deprived of their liberty [...] if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the state in which the asylum application is lodged have concluded that the presence of the asylum seekers for the purpose of carrying out the accelerated procedure cannot be ensured as effectively by another, less coercive measure.’

[UNHCR, Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\) § 7:](#) ‘In accordance with Article 31(2), refugees who have entered or are present irregularly are protected from restrictions on their freedom of movement, except when such restrictions are necessary and then only until their status in the host country is regularized, or until they obtain admission to another country.’ **§ 36** ‘Restrictions on a refugee’s freedom of movement may include directed residence, reporting requirements, deposit of documents, supervised movement, and, exclusively as a measure of last resort and in line with human rights standards, detention.’

SP8. Necessity: Commentary.

Detention as a Last Resort

To be justified as non-arbitrary, immigration detention must not only serve a legitimate aim (SP7: Legitimate Aim); it must also be *necessary* to achieve this aim. The principle of necessity reinforces the understanding that immigration detention ought to be imposed exclusively as a measure of last resort. As stated by the UNWGAD: ‘the element of necessity requires that the detention be absolutely indispensable for achieving the intended purpose and that no other measure less onerous exists in the individual circumstances of the person who is in an irregular migration situation’ (**UNWGAD, Revised**

Deliberation No 5 on Deprivation of Liberty of Migrants (2018) [A/HRC/39/45, § 23](#) (SP9: Alternatives). Necessity thus constitutes a critical rule of law safeguard, helping to preserve the presumption in favour of liberty (SP1: Liberty) and reflecting the imperative of minimum interference with the enjoyment of fundamental rights (**EU Agency for Asylum, [Guidelines on Alternatives to Detention \(2024\) 37](#)**).

The principle of necessity has been interpreted as a central requirement for the justification of any deprivation of liberty under Article 9 of the ICCPR, including in the context of immigration control. While acknowledging that '[d]etention in the course of proceedings for the control of immigration is not per se arbitrary', the HRC has consistently held that it 'must be justified as reasonable, necessary and proportionate in light of the circumstances' (**HRC, General Comment No 35: Article 9 (Liberty and Security of Person)** [CCPR/C/GC/35 \(2014\) § 18](#)). Accordingly, immigration detention was in breach of the ICCPR where the State failed to demonstrate 'that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting restrictions, sureties or other conditions which would take into account the family's particular circumstances' (**Bakhtiyari v Australia** [CCPR/C/79/D/1069/2002 \(6 November 2003\) § 9.3](#)). Moreover, to satisfy the principle of necessity, the State authorities must actively consider a *range* of potentially viable alternatives prior to imposing detention (SP9: Alternatives). Such a requirement was not met, for instance, where the authorities limited their assessment to whether the complainant could be placed in a designated residence in the community—an option ultimately deemed to be unsuitable owing to his mental health needs and prior criminal record (**Opinion No 74/2018 concerning Ahmad Shalikhani (Australia)** [A/HRC/WGAD/2018/74 \(2018\) § 113](#)). Detention also failed to meet the requirements of necessity where the domestic courts simply verified that the applicants had limited financial means and no address in Poland, concluding as a result that no alternative measure was applicable (**Nikoghosyan v Poland, ECtHR** [App No 14743/17 \(2022\) §§ 87–88](#)).

A requirement of necessity has also been held to apply specifically to the detention of asylum seekers. A test of necessity applies to *any* restrictions on the freedom of movement of asylum seekers under Article 31(2) of the [1951 Refugee Convention](#) (including, but not limited to, deprivation of liberty), with any such restrictions permissible 'only until their status in the host country is regularized, or until they obtain admission to another country' (**UNHCR, [Guidelines on International Protection No 14 \(2024\) § 7](#)**). This is reflected in EU law, which stipulates that detention may only be imposed on asylum applicants '[w]here necessary and on the basis of an individual assessment of each case [...] if other less coercive alternative measures cannot be applied effectively' (**EU Reception Conditions Directive (2024), Article 10(2)**). A similar requirement applies more generally to administrative removal under the EU Returns Directive, which prohibits detention where 'other sufficient but less coercive measures can be applied effectively in a specific case' (**EU Returns Directive (2008), Article 15(1)**).

By contrast, the ECtHR has held that Article 5(1)(f) 'does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example, to prevent his committing an offence or fleeing' (**Chahal v UK, ECtHR GC** [App No 22414/93 \(1996\) § 112](#)). This conclusion has been extended to immigration detention imposed for the purpose of preventing unauthorised entry, with the Court accepting, for instance, that asylum seekers may be detained for the sake of administrative expedience (**Saadi v UK, ECtHR GC** [App No 13229/03 \(2008\) §§ 73, 80](#)). There are, nonetheless, notable exceptions to this approach. When it comes to the

immigration detention of children under Article 5(1)(f), the Court has repeatedly asserted that ‘the deprivation of liberty must be necessary to fulfil the aim pursued’ (*A.B. v France*, [ECtHR App No 11593/12 \(2016\) § 120](#)), meaning that detention must be treated as a matter of last resort for which no alternative was available (*Rahimi v Greece*, [ECtHR App No 8687/08 \(2011\) § 108](#)) (SP1: Liberty). Immigration detention will also be arbitrary where other vulnerabilities have been identified—for instance, in relation to the migrant’s physical or mental health—and the authorities have failed to at least consider the viability of less harmful alternatives (*Yoh-Ekale Mwanje v Belgium*, [ECtHR App No 10486/10 \(2011\) § 124](#) regarding an applicant diagnosed with HIV; *V.M. v UK*, [ECtHR App No 49734/12 \(2016\) §§ 94–95](#) regarding an applicant with severe mental health issues) (SP6: Individualisation).

The question of necessity has also arisen in other areas of the Court’s Article 5(1)(f) jurisprudence. In cases where detention was imposed without an immediate prospect of removal (SP10: Achievability), the Court has been critical of the fact that the authorities ‘had at their disposal measures other than the applicant’s protected detention’ to pursue the relevant immigration control objective (*Louled Massoud v Malta*, [ECtHR App No 24340/08 \(2010\) § 68](#); *Raza v Bulgaria*, [ECtHR App No 31465/08 \(2010\) § 74](#); *Mikolenko v Estonia*, [ECtHR App No 10664/05 \(2009\) § 67](#)). In a case involving protracted detention for 25 months while deportation was prohibited by an interim measure, it was therefore relevant that the domestic courts and authorities had actively considered the need for detention to be maintained based on the risk of absconding or re-offending (SP6: Individualisation), while also considering whether these risks could be managed by alternatives to detention (SP9: Alternatives) (*Ahmed v UK*, [ECtHR App No 59727/13 \(2017\) §§ 54–56](#)). Necessity may also be relevant to determining whether detention genuinely pursues a legitimate aim in the first place (SP7: Legitimate Aim). For instance, in *M.B. v Netherlands* [ECtHR App No 71008/16 \(2024\)](#), the Court emphasised that detaining the applicant for immigration purposes after 10 months in pre-trial criminal detention appeared ‘disproportionate, even unnecessary, as many of the steps required to assess the asylum application could have been taken during the criminal law detention without the need to subsequently keep the applicant in immigration detention’ (§ 73). The applicant’s detention was duly held to be arbitrary owing to the lack of a sufficiently close connection between the measure in question and the prevention of unauthorised entry (§ 75).

It would therefore be overly simplistic to conclude that necessity is not a relevant consideration in the ECtHR’s case law on immigration detention. Moreover, the principle of necessity may be engaged where other rights protected by the ECHR are impacted by a detention measure. For instance, the Court has repeatedly held that detaining children together with their parents constitutes an interference with the right to private and family life under Article 8 of the ECHR, with States required under that provision to demonstrate that detention pursues a legitimate aim and is ‘necessary in a democratic society’ for the achievement of that aim (*Popov v France*, [ECtHR App No 39472/07 \(2012\) §§ 134–135](#)). In the *Popov* judgment, the Court found that ‘[i]n the absence of any indication to suggest that the family was going to abscond, the measure of detention for fifteen days in a secure centre appears disproportionate to the aim pursued’, resulting in a finding of a violation of Article 8 of the ECHR (§ 147). The immigration detention of a family also violated Article 8 where, despite strong indicators of a risk of absconding, the governmental authorities nonetheless failed to treat the detention of the family as a measure of last resort after having considered possible alternatives (*Bistieva v Poland*, [ECtHR App No 75157/14 \(2018\) §§ 83, 86](#)).

Applying the Necessity Test

In applying the principle of necessity to immigration detention—including the question of viable alternatives—the risk of absconding will often be the central question. This is because absconding may directly affect the attainment of the very objective for which immigration detention may be justifiably imposed—namely, to enforce entry and exit controls. For this reason, it has been regarded as ‘self-evident that the risk of absconding is of critical and paramount importance in assessing the lawfulness of the detention’ (*Fardous v SSHD* [2015] EWCA Civ 931, § 44 (Lord Thomas CJ)). Nonetheless, it should be emphasised that a risk of absconding does not dispel the requirement for detention to pursue a legitimate immigration control aim (SP7: Legitimate Aim). In other words, a risk of absconding can only justify detention where the authorities are taking active steps to prevent unauthorised entry or to effect removal (*UNWGAD, Opinion No 7/2019 concerning Ebrahim Toure (Canada)* [A/HRC/WGAD/2019/7](#) (2019) § 62).

Moreover, when it comes to determining the risk of absconding, ‘a very careful assessment [...] must be made in each case, as the magnitude of that risk will vary according to the circumstances’ (*Fardous v SSHD* [2015] EWCA Civ 931, § 45 (Lord Thomas CJ)) (SP6: Individualisation). To ensure that detention decisions are consistent with the principle of legality (SP3: Prescription), individualised assessments of the risk of absconding should also be based on objective criteria which are ‘clearly defined and exhaustively enumerated in legislation’ (*Report of UNWGAD, A/HRC/13/30* (2010) § 59). The latter requirement is reflected in EU law, which defines the risk of absconding as ‘the existence of specific reasons and circumstances in an individual case, which are based on objective criteria defined by national law, to believe that an applicant might abscond’ (*EU Reception Conditions Directive* (2024), Article 2(11); *EU Returns Directive* (2008), Article 3(7); see also *CJEU, Case C- 528/15* (2017)).

Despite a primary emphasis on abscond risk, it has been accepted that other factors may be relevant to determining the necessity of immigration detention, including evidence of a risk of re-offending (*Lumba (WL) v SSHD* [2011] UKSC 12, § 110 (Lord Dyson)). In this respect, it is important to emphasise the distinction between the legitimate aim and the principle of necessity. As already established in this Handbook, immigration detention cannot be justified as a preventive measure based on national security or public order interests (SP2: Equality; SP7: Legitimate Aim). However, where it is established that detention *does* pursue a legitimate immigration control aim, a risk of re-offending may inform whether detention is considered necessary to achieve this aim, as well as the reasonableness of the length of detention (see SP12: Maximum). This is based on the understanding that, in deportation cases, ‘protection of the public [...] is the purpose of the deportation order’, meaning that prevention of reoffending is consistent with the aim underpinning the removal measure (*R (A) v SSHD* [2007] EWCA Civ 804, § 55 (Toulson LJ)). Moreover, it has been held that a risk of reoffending is also directly relevant to the ability of the authorities to carry out a deportation order, given that ‘if a person re-offends there is a risk that he will abscond so as to evade arrest or if he is arrested that he will be prosecuted and receive a custodial sentence’ (*Lumba (WL) v SSHD* [2011] UKSC 12, § 109 (Lord Dyson)). Nonetheless, as with the risk of absconding, a risk of reoffending—and its relevance to determining the necessity of detention—will require a careful and evidenced-based assessment conducted on an individualised basis (SP6: Individualisation).

SP9. ALTERNATIVES.

Alternatives to detention must be sought and applied on the basis of minimum intervention.

The principle of necessity (SP8: Necessity) means that detention will be arbitrary unless the authorities have first considered whether less coercive alternatives could achieve the same legitimate aim (SP7: Legitimate Aim). Alternatives to detention must be realistic and applied according to a logic of minimum intervention, not exceeding the level of restriction necessary. They must not amount to deprivation of liberty in a different form, nor must they be presented as alternatives to release (i.e. where the grounds for detention no longer apply). Whenever alternatives are applied, these must be subject to the same stringent safeguards as detention measures, including by ensuring that they are amenable to judicial review (SP21: Judicial Review).

PACE, [Resolution 1707 \(2010\)](#) on 10 Guiding Principles on Detention of Asylum Seekers and Irregular Migrants, § 9.3.2: [Member States are encouraged to] ‘clarify the framework for the implementation of alternatives to detention and incorporate into national law and practice a proper legal institutional framework to ensure that alternatives are considered first, if release or temporary admission is not granted’; **§ 9.3.3:** ‘ensure that the[] application [of alternatives] is non-discriminatory, proportionate and necessary and that the individual circumstances and vulnerabilities of those to whom they are applied are taken into account and that the possibility of review by an independent judicial body or other competent authority is provided for’; **§ 9.3.4:** ‘commission and carry out empirical research and analysis on alternatives to detention, their use and effectiveness, and best practice, distinguishing between community-based alternatives that allow for freedom of movement and those which curtail freedom of movement.’

Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/65/222 \(2010\)](#) § 91: ‘Alternatives to detention should be available to all irregular migrants and asylum-seekers, whether documented or undocumented. Recourse to alternative measures should be based on an individual assessment of the migrant’s particular circumstances and be available in practice without discrimination.’

- **§ 92:** ‘Alternative measures should be systematically considered by States before resorting to immigration detention. States should ensure that the conditions and criteria to choose alternative measures do not discriminate in law or practice against particular groups of non-nationals, whether on the basis of their origin, economic situation, immigration or other status. These means also should be: (a) The least intrusive and restrictive in order to attain the same objectives of immigration-related detention, such as avoiding that migrants abscond and guaranteeing their presence in court or at administrative proceedings; (b) Subjected to legal review and migrants should therefore be granted the possibility of challenging them before a judicial or other competent and independent authority or body.’
- **§ 94:** ‘States should enact and use a broad range of alternative measures [...] Bail, bond and surety should be made available to irregular migrants under conditions that are reasonable and realistic. The use of open centres, directed residence or special accommodation should be developed, with open centres preferred over more restrictive alternatives.’

- **§ 95:** '[...] The application of alternative measures must itself be governed by international human rights standards, including the basic principles of legality, necessity and proportionality, as well as non-discrimination. Alternative measures must take into account the particular situation of irregular migrants and asylum-seekers, including their frequently unstable financial or housing situation. Safeguards surrounding alternatives to detention should be as rigorous as those applied to situations of detention, including ensuring that the alternative measure is established in law, is non-discriminatory in purpose and effect and is subject to judicial review, and that the migrant has access to legal counsel. States should always use the least restrictive means necessary as alternatives to detention.'

Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24 (2012) § 53: 'When considering alternatives to detention, States must take full account of individual circumstances and those with particular vulnerabilities, including pregnant women, children, victims of trafficking, victims of torture, older persons and persons with disabilities.' **§ 68:** 'Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure.' **§ 66:** 'In order to ensure the success of alternatives to detention, all persons subject to noncustodial measures should receive clear and concise information about their rights and duties in relation to the measures in place, and on the consequences of non-compliance.' **§ 73:** '[...] alternatives to detention should not become alternatives to unconditional release, whenever such release is a possibility. Governments should put in place safeguards to ensure that those eligible for release without conditions are not diverted into alternative measures. Alternatives to detention should have a human rights-based approach, be established by law, be non-discriminatory and be subject to judicial review and independent monitoring and evaluation [...].'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 17 'Alternatives to detention should be realistic and must not depend upon the ability of the individual to pay for these. Alternatives to detention may take various forms, including reporting at regular intervals to the authorities, community-based solutions, release on bail or other securities, or stay in open centres or at a designated place.' **§ 18** 'The application of measures alternative to detention must be reviewed by a judicial authority and alternatives to detention must not be considered as alternatives to release.'

UNHCR Detention Guidelines (2012) § 38: '[...] 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.'

SP9. Alternatives: Commentary.

The principle of necessity stipulates that detention can only be justified when less coercive alternatives have been actively considered and found to be ineffective in securing the legitimate immigration control aim (SP8: Necessity). These alternatives may take several forms, 'including reporting at regular intervals to the authorities, community-based solutions, release on bail or other securities, or stay in open centres or at a designated place' (**UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 17**). While less harmful in principle than depriving an individual of

their liberty, alternatives may nonetheless involve varying degrees of restriction on an individual's liberty. Accordingly, the use of alternatives must be guided by key safeguarding considerations.

As a first point, it should be emphasised that alternatives to detention 'must not be considered as alternatives to release' (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 18*). Given that alternatives to detention typically impose some degree of restriction on liberty, they are only permissible where detention would otherwise be justified. Alternatives must therefore never be imposed 'where detention no longer has a legal basis, for example, when deportation, expulsion or removal is no longer a viable objective' (*CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 47*). The UK Supreme Court has expressed a similar position, noting that, '[a]s a matter of legal instinct, the proposition that the ability to exercise a lawful power to detain is a precondition to a power to grant bail seems entirely sound' (*B (Algeria) v SSHD [2018] UKSC 5, § 48 (Lord Lloyd-Jones)*).

Moreover, 'the safeguards surrounding [alternatives to detention] should be as stringent as those applied to detention situations', and should include 'ensuring that the alternative measure is established by law, limited in duration, not discriminatory in its purpose and effect, not arbitrary and subject to procedural safeguards, including regular judicial review and independent supervision, and that they protect the rights and dignity of the individual' (*CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 50*). An electronic monitoring condition was duly held to be unlawful where the Secretary of State failed to conduct timely reviews of the continued appropriateness of the measure in line with its stated policy, with the result that the condition was not 'in accordance with the law' for the purpose of restrictions permitted under Article 8 of the ECHR (*ADL & Ors v SSHD [2024] EWHC 994 (Admin)*) (SP5: Adherence). In addition, any decision to impose alternatives to detention 'must be notified promptly and in writing to the individual concerned [...] in a format that is accessible to the individual, taking into account any language or literacy barriers.' Such notification should 'include a detailed explanation of the reasons the specific ATDs [alternatives to detention] are needed', as well as any consequences of non-compliance (*EU Agency for Asylum, Guidelines on Alternatives to Detention (2024) 44–45*) (SP19: Reasons).

Critically, to qualify as alternatives, States cannot employ non-custodial measures which essentially amount to deprivation of liberty in a different guise. In other words, States are required to consider alternatives *to* detention, not simply alternatives *of* detention. Determining whether alternatives amount to de facto detention will depend on 'the aggregated impact, degree and intensity of the particular measure(s) in place' (*Council of Europe Steering Committee for Human Rights (CDDH), Legal and Practical Aspects of Effective Alternatives to Detention in the Context of Migration (2017) 7*) (SP1: Liberty). For instance, 'too strict or frequent reporting duties that impose an excessive burden on a person in terms of time and cost may, on its own or on a cumulative basis with other forms of ATDs [alternatives to detention], amount to de facto detention or to violation of fundamental rights such as the right to family life' (*EU Agency for Asylum, Guidelines on Alternatives to Detention (2024) 24*). The UNWGAD, meanwhile, has found that strict residence requirements imposed as alternatives to detention may amount to a deprivation of liberty in the form of house arrest 'provided that it is carried out in closed premises that the person is not allowed to leave' (*UNWGAD, Opinion No 2/2019*

concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia) [A/HRC/WGAD/2019/2 \(2019\) § 84](#)).

More generally, concerns have been raised around the appropriateness of certain forms of alternatives to detention in the immigration context, such as the use of electronic surveillance in the form of ‘GPS tagging’. It has been held that the intrusive and stigmatising nature of this measure—traditionally limited to the criminal justice context—makes it an unsuitable alternative to immigration detention which ‘should as far as possible be avoided’ ([UNHCR Detention Guidelines \(2012\) § 63](#)). This reflects broader observations that ‘many of the alternative measures employed by States [in the context of immigration detention] appear to emulate measures from the field of criminal justice’, which in turn ‘can exacerbate the stigmatization of migrants, unnecessarily interfere with their personal freedom and generate excessively onerous requirements [...]’ (**CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights** [CMW/C/GC/5, § 48](#)). In this respect, it is important to recall that ‘alternatives to detention are intended to be more humane, to have less harmful physical and psychological effects on individuals, in particular individuals in vulnerable situations, and to be designed to protect people’s health, well-being and human rights’ (**CMW, General Comment No 5 (2021) § 49**).

Consistent with this approach, ‘[i]n designing and applying alternatives to detention, states should observe the principle of minimum intervention’, based on ‘an individual assessment of the needs and circumstances of the [...] person concerned’ (*The Equal Rights Trust, [Guidelines to Protect Stateless Persons from Arbitrary Detention \(2012\) Guideline 33](#)*) (SP6: Individualisation). The principle of minimum intervention means that States must impose the *least restrictive alternative* to achieve the legitimate immigration objective (*EU Agency for Asylum, [Guidelines on Alternatives to Detention \(2024\) 42](#)*). Alternatives to detention must therefore not exceed any restrictions that are strictly necessary to achieve the relevant immigration control aim. To ensure this, a range of potential alternatives to detention should be made available under domestic law (SP3: Prescription), based on ‘a sliding scale of measures from least to most restrictive’ (*Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/HRC/20/24 \(2012\) § 53](#)*). States must also ensure that any restrictions imposed in lieu of detention are tailored to the special needs of vulnerable individuals (SP6: Individualisation).

Finally, ‘[a]lternatives to detention should be realistic and must not depend upon the ability of the individual to pay for these’ (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45 \(2018\) § 17](#)*). States will not comply with their duty to prioritise alternatives to detention if the alternatives considered are not practically feasible (SP8: Necessity). For instance, the UNWGAD has held that setting immigration bail so high that it was unaffordable for the individual concerned meant that it could not be considered a ‘realistic’ alternative to detention. This was tantamount to ‘disregard[ing] the requirement to make detention in the course of immigration proceedings an exception’, leading the Working Group to conclude that there had been a ‘serious breach’ of Article 9 of the ICCPR (*UNWGAD, Opinion No 72/2017 concerning Marcos Antonio Aguilar-Rodríguez (United States of America) [A/HRC/WGAD/2017/72 \(2017\) § 59](#); UNWGAD, Opinion No 49/2020 concerning Fernando Aguirre-Urbina (United States of America) [A/HRC/WGAD/2020/49 \(2020\) § 105](#)*). When it comes to depositing financial guarantees as an alternative to detention, States have duly been encouraged to calculate the sum on a case-by-case

basis, taking into account the financial means available to the individual in question (*EU Agency for Asylum, [Guidelines on Alternatives to Detention](#) (2024) 25*).

SP10. ACHIEVABILITY.

The legitimate aim must be realistic and be achievable within a reasonable timeframe.

The requirement of a legitimate aim means that immigration detention must be specifically for the purpose of carrying out entry or exit controls (SP7: Legitimate Aim). However, this aim must also be realistically achievable. If it becomes apparent at any stage that this aim is no longer achievable within a reasonable timeframe, the individual must be released immediately. This constitutes an important safeguard against excessive immigration detention, particularly when the prospect of removal is undermined by practical or legal obstacles.

Lumba (WL) v SSHD [2011] UKSC 12, § 22 (Lord Dyson): 'If [...] it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, he should not seek to exercise the power of detention.' (*Hardial Singh, Principle 3*)

Kim v Russia, ECtHR App No 44260/13 (2014) § 52: '[...] detention cannot be said to have been effected with a view to the applicant's deportation if this [is] no longer feasible.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 52: 'If there are obstacles to identifying migrants who are in an irregular situation or deporting them from the territory, or if the return is not legally possible due to the application of the principle of non-refoulement or other international or domestic obligations, thereby making deportation or expulsion impossible, the detained person must be immediately released in order to avoid indefinite detention, which would be arbitrary [...] Detaining stateless persons when there is no real prospect of removal would [...] render the detention arbitrary, and the detained stateless person must therefore be immediately released.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 27: 'There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them — including non-cooperation of the consular representation of the country of origin, the principle of nonrefoulement or the unavailability of means of transportation — thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 28: 'The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.'

CMW, General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families CMW/C/GC/2 (2013) § 27: 'In cases where an expulsion order cannot be executed for reasons beyond the detained migrant worker's control, he or she shall be released in order to avoid potentially indefinite detention.'

Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return (2005) Guideline 9 (Commentary): '[...] when it appears that the removal of the person within a reasonable period is unrealistic, the detention ceases to be justified and release must follow.'

PACE, Report on the Detention of Asylum Seekers and Irregular Migrants in Europe Doc No 12105 (2010) Appendix 1, Principle V (§ 5): ‘[...] it would be arbitrary to detain a person where there is no imminent prospect of removal [...].’

SP10. Achievability: Commentary.

In determining whether immigration detention pursues a legitimate aim (SP7: Legitimate Aim), it is not sufficient to consider the general nature of the objective pursued. Rather, States must also demonstrate that this aim is *realistic* and *accomplishable within a reasonable timeframe*. While applicable to all forms of immigration detention, this principle is most likely to be relevant when individuals are detained with a view to removing them from the territory. This is because a range of external factors may frustrate the prospects of a timely removal, potentially leading to situations of prolonged detention. These include: the existence of legal barriers preventing removal (such as the principle of *non-refoulement*); practical obstacles (such as the absence of suitable transportation); and the unwillingness of other countries to cooperate in the return (***UNWGAD Annual Report 2008 A/HRC/10/21 (2009) § 82***). The last of these presents a particular issue when it comes to the immigration detention of stateless persons. This is because, as highlighted by the ECtHR, enforcing a removal order against stateless persons may involve ‘considerable difficulty and even prove impossible because there is no readily available country to which they may be removed’ (***Amie v Bulgaria, ECtHR App No 58149/08 (2013) § 77***).

Maintaining detention without a realistic prospect of removal has been described as the ‘warehousing of undeportable migrants’—a practice which clearly exceeds the legitimate purposes of immigration detention (***London Detainee Support Group, No Return, No Release, No Reason: Challenging Indefinite Detention (2010) 25***). As explained by the UNWGAD: ‘[t]he principle of proportionality requires that detention has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal’ (***UNWGAD Annual Report 2009 A/HRC/13/30 (2010) § 64***). Following the same logic, the ECtHR has held that ‘detention cannot be said to have been effected with a view to the applicant’s deportation if this was no longer feasible’ (***Kim v Russia, ECtHR App No 44260/13 (2014) § 52***). As a result, when potential barriers to removal become known, ‘the domestic authorities have an obligation to consider whether removal is a realistic prospect [...]’ (***Amie v Bulgaria, ECtHR App No 58149/08 (2013) § 77***). Where it is concluded that such a realistic prospect of removal no longer exists, the detained person must be released immediately, regardless of whether the possibility of deportation continues to be kept ‘under active review’ by the authorities (***A v UK, ECtHR GC App No 3455/05 (2009) § 167***).

The principle of achievability is widely recognised as a limit on the lawful exercise of powers of immigration detention. The UNWGAD has found immigration detention to be arbitrary where the prospects of removal are ‘dim’, ‘deteriorating’ or ‘entirely unrealistic’ (***UNWGAD, Opinion No 45/2006 concerning Mr Mustafa Abdi (UK) A/HRC/7/4/Add.1 (2007) §§ 25–26***). The HRC has adopted a similar stance—for instance, finding that the authorities had acted consistently with their obligations under Article 9(1) of the ICCPR in releasing the author ‘[o]nce a reasonable prospect of expelling him no longer existed’ (***Jalloh v Netherlands CCPR/C/74/D/794/1998 (2002) § 8.2***). Consensus is also broad at the national level. While a former outlier, the High Court of Australia recently overturned a twenty-year-old precedent which had found statutory mandatory indefinite detention to be constitutional even when there was no prospect of removal (***NZYQ v Minister for Immigration, Citizenship and***

Multicultural Affairs [2023] HCA 37). In the UK, meanwhile, it has long been established that detention for the purpose of removal will be unlawful if ‘it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period’ (**Lumba (WL) v SSHD [2011] UKSC 12, § 22 (Lord Dyson)**)—a position which clarifies that the prospect of removal is only ‘realistic’ if it is achievable without rendering the length of detention excessive (SP12: Maximum). The detained person must therefore be released if the executive has not ‘proved on the balance of probabilities that there is a reasonable prospect of securing the claimant’s removal within a reasonable time’ (**R (Rostami) v SSHD [2009] EWHC 2094 (QB), § 71 (Foskett J)**).

The principle of achievability is therefore an important safeguard against excessive immigration detention. It complements the principle of ‘Maximum’ (SP12), requiring the *immediate* release of the detained person if it becomes clear, before this threshold has been reached, that a timely removal is no longer a realistic possibility (see, in the EU context, CJEU, **Case C-357/09 (2009) §§ 65–67**). Moreover, the principle of achievability applies regardless of whether the limited prospects of removal are attributable to the conduct of the detained person. In **Mikolenko v Estonia, ECtHR App No 10664/05 (2009)**, while accepting that the applicant’s detention may have initially been justified for the purpose of securing his removal to Russia, the ECtHR found that ‘it must have become clear quite soon that these attempts were bound to fail as the applicant refused to co-operate and the Russian authorities were not prepared to issue him documents in the absence of his signed application [...]’ (**§ 65**). As a result, ‘expulsion had become virtually impossible’, rendering any further detention arbitrary—a conclusion not altered by the fact that this situation was attributable to the applicant’s refusal to cooperate (**§ 65**) (see also **Louled Massoud v Malta, ECtHR App No 24340/08 (2010) § 67**).

Elsewhere, while recognising that ‘the applicant repeatedly refused to cooperate with the authorities’ in facilitating his return, the Court stated that this could not be relied on as an element ‘capable of justifying any period of detention, however long’ (**J.N. v UK, ECtHR App No 37289/12 (2016) § 106**). This point was made with reference to pronouncements of the UK Supreme Court, which has held that ‘the fact that the detained person has refused voluntary return should not be regarded as a “trump card” which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be’ (**Lumba (WL) v SSHD [2011] UKSC 12, § 128 (Lord Dyson)**). The UNWGAD has also rejected the relevance of claims relating to the conduct of the applicant in determining whether detention was realistically achievable (**UNWGAD, Opinion No 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (Australia) A/HRC/WGAD/2019/2 (2019) §§ 89–90**).

The principle of achievability is therefore an objective test, requiring an individualised and evidence-based assessment (SP6: Individualisation). It applies both to the initial decision to detain and to the continuation of detention (i.e. once a ‘realistic prospect’ of removal has vanished). Importantly, in determining whether a removal is achievable within a reasonable timeframe, it is necessary to consider the *overall time* that an individual is likely to be detained for immigration purposes, including time already spent in detention. For instance, in **R (SB) Ghana v SSHD [2020] EWHC 668 (Admin)**, the fact that the appellant had already been detained for six months, combined with the time it would likely take for a judgment to be obtained from the First Tier Tribunal on the appeal of his negative asylum decision, was sufficient to conclude that ‘the prospect of deportation within a reasonable time had vanished [...]’ (**§ 94 (John Kimbell QC)**). A similar conclusion was reached when the appellant had already been detained for 16 months when he applied for the revocation of his deportation order. Not only was this application considered to have a high likelihood of success, but even if unsuccessful, it

was emphasised that this could lead to subsequent appeals, meaning that any realistic prospect of a timely deportation had vanished by that point (*R (Bizimana) v SSHD* [2012] EWCA Civ 414, §§ 60–65 (Jackson LJ)).

This is not to say that a suspensive appeal against removal will necessarily render any ongoing detention for that purpose unlawful. The same holds true for interim measures applied by the ECtHR, which may temporarily preclude the removal of an individual to a specific country to avoid a risk of serious and irreversible harm. The ECtHR has emphasised that such a measure ‘does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 of the Convention’, indicating that the State may still be able to pursue proceedings for the applicant’s removal to another country not included in the interim measure (*Gebremedhin v France*, ECtHR App No 25389/05 (2007) §§ 74–75). Indeed, it has held that, ‘where there are obstacles to deportation to a given country, but where other destinations are in principle possible, detention pending active efforts by the authorities to organise removal to a third country may fall within the scope of Article 5 § 1 (f)’ (*Al Husin v Bosnia and Herzegovina (No 2)*, ECtHR App No 10112/16 (2019) § 104). There are, nonetheless, limits to this, even where the State continues to actively attempt to organise removal to a third country. For instance, it was held that after 38 countries had refused to accept the applicant, ‘from that point in time it must have become clear to the authorities that the attempts to remove the applicant to a safe third country were bound to fail’, rendering his continued detention arbitrary ‘owing to the lack of a realistic prospect of his expulsion’ *Al Husin v Bosnia and Herzegovina (No 2)*, §§ 104–107).

Where States are not actively pursuing efforts to effect removal to a third country, continued detention following the application of an interim measure may nonetheless continue to satisfy the requirements of Article 5 of the ECHR. However, detention in such circumstances is only permitted ‘provided that the authorities still envision expulsion at a later stage, so that “action is being taken [with a view to deportation]”, [...] and on condition that the detention will not be unreasonably prolonged’ (*M.D. v Russia*, ECtHR App Nos 71321/17 et al. (2021) § 125). Accordingly, a Rule 39 measure ‘cannot be employed as a justification for the indefinite detention of persons without resolving their legal status’ (*Ryabikin v Russia*, ECtHR App No 8320/04 (2008) § 132). Applying these principles, the Court held that detention was justified even when imposed for a protracted period of 25 months following the imposition of a Rule 39 interim measure. Key to the Court’s reasoning was that there was no indication that the proceedings relevant to the lifting of the interim order would take longer than usual, there was no presumption that deportation would not eventually be possible, all other aspects of the applicant’s immigration status had been dealt with, and the detention was surrounded by appropriate procedural safeguards with the possibility for the applicant to apply for judicial review at all times (*Ahmed v UK*, ECtHR App No 59727/13 (2017) §§ 45–51).

SP11. DILIGENCE.

Detention must be for the shortest time that is reasonably practicable.
This requires the legitimate aim to be pursued diligently and expeditiously.

Detention will be justified only for as long as the State acts diligently and expeditiously in the pursuit of the legitimate immigration control aim (SP7: Legitimate Aim). This is required to ensure that detention is imposed for the shortest time that is reasonably practicable, given that inactivity in the conduct of immigration proceedings will result in detention being unduly prolonged. A requirement of diligence should not, however, be equated with the elimination of procedural safeguards during the relevant immigration proceedings. Whether States have acted diligently will depend on the context and nature of those proceedings, rather than the overall time taken.

[Convention on the Rights of the Child \(1990\) Article 37\(b\)](#): '[...] detention [...] shall be used only [...] for the shortest appropriate period of time [...]'

[Chahal v UK, ECtHR GC App No 22414/93 \(1996\) § 113](#): '[...] any deprivation of liberty under Article 5 para. 1 (f) (art. 5-1-f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f).'

[Lumba \(WL\) v SSHD \[2011\] UKSC 12, § 22 \(Lord Dyson\)](#): 'The Secretary of State should act with reasonable diligence and expedition to effect removal.' (*Hardial Singh, Principle 4*)

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 7](#): 'Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible [...]' **[Guideline 8\(1\)](#)**: 'Any detention pending removal shall be for as short a period as possible [...]' The national authorities are under an obligation to exercise due diligence to ensure that this period of detention is limited to the shortest possible time.'

[PACE, Recommendation 1624 \(2003\) § 9](#): '[...] under no circumstances should detention for immigration or asylum reasons be any longer than is reasonably necessary and should not be prolonged unduly.'

[UNHCR, Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\) § 37](#): 'the duration of detention in accordance with Article 31(2) should be as short as possible [...]' It is impermissible to prolong immigration-related administrative detention due to inefficient processing modalities or resource constraints'

[CMW, General Comment No 5 \(2021\) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 51](#): 'Detention should be permitted only for the shortest possible period of time [...].'

Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/HRC/20/24 \(2012\) § 21](#): ‘[...] the duration of administrative detention of a migrant should be as short as possible [...].’

PACE, [Resolution 1707 \(2010\)](#) on 10 Guiding Principles on Detention of Asylum Seekers and Irregular Migrants, § 9.1.10: ‘Detention must be for the shortest time possible.’

[UNHCR Detention Guidelines \(2012\) Guideline 6, § 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.’

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of Detention of Asylum Seekers, § 4: ‘Measures of detention of asylum seekers [...] should be applied for the shortest possible time.’

SP11. Diligence: Commentary.

The right to liberty (SP1: Liberty) means that every hour, every day for which an individual is deprived of their liberty matters. Accordingly, the administrative detention of migrants ‘should be permitted only for the shortest possible period of time [...]’ (**CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 51](#)**). This is reflected in the principle of diligence, which guards against the unnecessary prolongation of detention by requiring the authorities to actively pursue the relevant immigration objective (SP7: Legitimate Aim). The principle of diligence therefore operates as a constraint on the excessive use of immigration detention: while States are entitled to impose detention where this is necessary to ensure the enforcement of immigration controls, they must ensure that this period is kept as short as possible through the expeditious pursuit of that aim. It is also important for the detained person to know that actions are being taken to end their situation of confinement. For instance, the HRC has criticised the Australian authorities for detaining individuals under immigration powers in ‘circumstances where they [were] not informed [...] of the efforts undertaken [...] to find solutions which would allow them to obtain their liberty’ (**F.K.A.G. v Australia [CCPR/C/108/D/2094/2011 \(2013\) § 9.4](#)**).

Accordingly, the authorities must ‘act with reasonable diligence and expedition to effect removal’ (**Lumba (WL) v SSHD [\[2011\] UKSC 12, § 22 \(Lord Dyson\)](#)**), with the result that detention will be unlawful where it is longer than it would have been were it not for the inaction of the authorities (**R (Krasniqi) v SSHD [\[2011\] EWCA Civ 1549, § 12 \(Carnwath LJ\)](#)**). Diligence is also a core requirement imposed by Article 5(1)(f) of the ECHR in the context of immigration detention. As already established in this Handbook, when resorted to for the purpose of effecting removal from the territory, ‘any deprivation of liberty [...] will be justified only for as long as deportation proceedings are in progress’ (SP7: Legitimate Aim). However, ‘[i]f such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5§1(f)’ (**A v UK, ECtHR [App No 3455/05 \(2009\) § 164](#)**). It is therefore not sufficient that removal proceedings are merely ‘in progress’; to justify detention, they must be ‘actively pursued’ (**M v Bulgaria, ECtHR [App No 41416/08 \(2011\) § 74](#)**) so that ‘the length of the detention [does] not exceed that reasonably required’ (**Auad v Bulgaria, ECtHR [App No 46390/10 \(2011\) § 128](#)**) (SP12: Maximum). Detention was duly held to be unlawful where there was ‘no

indication that [the authorities] pursued the matter [of removal] vigorously' (*Raza v Bulgaria*, [ECtHR App No 31465/08 \(2010\) § 73](#)), and where it was determined that the authorities 'should have been more active' (*Singh v Czech Republic*, [ECtHR App No 60538/00 \(2005\) § 64](#)) in organising the practical arrangements to facilitate the applicant's removal.

Diligence thus requires the authorities to take 'all the necessary steps to enforce the removal measure as quickly as possible and thus limit the time spent in detention' (*Popov v France*, [ECtHR App No 39472/07 \(2012\) § 146](#)). This requirement applies to all aspects of legal proceedings relevant to the length of immigration detention, including the resolution of any challenges to removal or other outstanding issues related to the applicant's status (*N.M. v Belgium*, [ECtHR App No 43966/19 \(2023\) § 114](#)). The UNWGAD, for instance, expressed concerns that 'a visa application of someone whom is held in custody by the State [sic] can take more than three and a half years, with no clear prospect of resolution in sight' (*Opinion No 1/2019 concerning Premakumar Subramaniam (Australia)* [A/HRC/WGAD/2019/1 \(2019\) § 84](#)). Significantly, in unreasonably prolonging the duration of detention, a lack of diligence will automatically render detention arbitrary, regardless of other factors that may provide a strong case for detention to be maintained (*J.N. v UK*, [ECtHR App No 37289/12 \(2016\) § 107](#)).

Moreover, certain factors may also affect the *degree* of diligence required to avoid a breach of Article 5 of the ECHR. In *S.M.M. v UK*, [ECtHR App No 77450/12 \(2017\)](#), for instance, the ECtHR emphasised that the applicant's vulnerability, the length of time he had already been detained, and the lack of a statutory time limit for immigration detention (SP12: Maximum) together gave rise to 'a heightened duty on the authorities to act with "due diligence" in order to ensure that he was detained for the shortest time possible' (§§ 82–85). Similarly, in a case involving the detention of a family with children, the Court determined that the proceedings related to their asylum application 'ought to have been conducted with particular vigilance' due to the vulnerability of the minors involved and the need 'to limit, as far as possible, the detention of the applicant family' *M.H. v Croatia*, [ECtHR App Nos 15670/18 and 43115/18 \(2021\) § 254–257](#) (SP6: Individualisation). Diligence is therefore an elastic concept. While the authorities must always remain active in pursuing the legitimate aim of immigration detention, the degree of diligence required may vary based on the vulnerability of the detained person (*Kim v Russia*, [ECtHR App No 44260/13 \(2014\) § 54](#)) and the length of time already spent in detention (*J.N. v UK*, [ECtHR App No 37289/12 \(2016\) § 105](#)). Where these factors combine, the authorities will be subject to a particularly strict duty to act with diligence. For instance, even a 'relatively short' delay in responding to new representations from the applicant amounted to a failure to conduct domestic proceedings with due diligence 'in view of the overall length of detention and the applicant's deteriorating mental health' (*V.M. v UK*, [ECtHR App No 49734/12 \(2016\) § 99](#)).

Importantly, States cannot invoke the aim of minimising the duration of detention to do away with important procedural safeguards in the context of immigration proceedings. This is reflected in the fact that the principle of diligence requires sensitivity to context, rather than focusing exclusively on the overall time taken. In *R (JS (Sudan)) v SSHD* [\[2013\] EWCA Civ 1378](#), the Court of Appeal held that what constituted a 'reasonable' time for the Secretary of State to decide on whether to proceed with the removal of an individual detained under immigration powers must be measured, among other things, against 'the gravity of the decision that is to be taken'. In relation to the facts of the case, the Court emphasised that deciding whether a convicted offender 'should, exceptionally, be given leave to remain is a serious and important matter requiring proper and careful evaluation which, of necessity,

will occupy a period of time' (**§ 52 (McFarlane LJ)**). Similarly, in ***K.G. v Belgium*, ECtHR App No 52548/15 (2019)**, the ECtHR held that the overall period of detention was not attributable to a failure of the authorities to conduct proceedings with the requisite level of diligence. This was based on the nature of the legal issues in question, with the Court emphasising that '[i]t was in both the applicant's interests and the general interest in the proper administration of justice that the authorities should carry out a thorough examination of all relevant points and evidence [...]' (**§ 87**). The conduct of the detained person may also be a relevant consideration in determining whether the authorities acted diligently. For instance, the ECtHR has found that the period of detention was lawful where its prolongation was attributed to the actions of the applicant in failing to disclose the relevant information to secure his removal, rather than any failure of the authorities to pursue this matter diligently (***Tabassum v UK (dec)* ECtHR App No 2134/10 (2012) § 19**). Such conduct does not, however, dispel the requirement for removal to be realistically achievable within a reasonable timeframe (SP10: Achievability).

SP12. MAXIMUM.

The period of detention cannot exceed what is reasonably necessary to achieve the immigration control aim and should be subject to a statutory maximum time limit resulting in immediate release.

To avoid being arbitrary, immigration detention cannot extend beyond what is reasonably necessary to achieve the legitimate aim of immigration control (SP7: Legitimate Aim). Immigration detention can never be imposed indefinitely: there will always be a point at which it is no longer tenable to deprive an individual of their liberty for the purpose of enforcing immigration controls. This should be reflected in the form of a statutory legal maximum for immigration detention which results in the individual's immediate release once met.

Saadi v UK, ECtHR GC [App No 13229/03](#) (2008) § 74: '[...] the length of the detention should not exceed that reasonably required for the purpose pursued.'

Lumba (WL) v SSHD [2011] UKSC 12, § 22 (Lord Dyson): 'The deportee may only be detained for a period that is reasonable in all the circumstances.' (*Hardial Singh, Principle 3*)

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 51: 'Detention should never be excessive or indefinite during the course of immigration proceedings, because it would then become arbitrary. States should therefore establish in their legislation the maximum period of detention allowable during the course of immigration proceedings [...].'

UNWGAD, Revised deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45](#) (2018) § 25: 'A maximum detention period in the course of migration proceedings must be set by legislation [...] Excessive detention in the course of migration proceedings is arbitrary. Upon the expiry of the detention period set by law, the detained person must automatically be released.' § 26 'Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.'

CMW, General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families [CMW/C/GC/2](#) (2013) § 27: 'Administrative detention of migrants that is initially lawful and non-arbitrary may become arbitrary if it continues beyond the period for which a State party can provide proper justification. To prevent such a situation from occurring, a maximum period of administrative detention shall be established by law, upon expiry of which a detainee must be automatically released in the absence of such justification. Administrative detention must never be unlimited or of excessive length.'

UNHCR Detention Guidelines (2012) Guideline 6: '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.'

UNHCR/OHCHR [Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons](#) (2011) § 2: 'Maximum time limits on [...] administrative [immigration detention] in national legislation are an important step to avoiding

prolonged or indefinite detention.’

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of Detention of Asylum Seekers, § 5: ‘Measures of detention [...] should be applied only under the [...] maximum duration provided for by law.’

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85](#) (2002) § 75(g): ‘Governments should [ensure] that the law sets a limit on detention pending deportation [...]’

SP12. Maximum: Commentary.

‘Reasonable’ Duration of Detention

Lord Bingham has described it as ‘a gross injustice to deprive of his liberty for significant periods a person who has committed no crime and does not intend to do so. No civilized country should willingly tolerate such injustices’ (**Tom Bingham, *The Rule of Law* (Penguin Books 2010) 73**). Similarly, Lord Nicholls has held that ‘[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law’ (**A v SSHD [\[2004\] UKHL 56, § 74 \(Lord Nicholls\)](#)**). Limits on the length of immigration detention are imposed by the principle of ‘Diligence’ (SP10), which requires detention to be for the shortest period possible. However, this alone does not guard against excessive periods of immigration detention. Even where the authorities continue to pursue the legitimate aim expeditiously, there will inevitably be a point when immigration detention can no longer be justified as a proportionate measure for the enforcement of immigration controls.

The UNWGAD has explicitly rejected the argument that immigration detention may last for as long as the original justification continues to apply, noting that this would create ‘a situation akin to indefinite detention which cannot be remedied even by the most meaningful review of detention on an ongoing basis’ (**Opinion No 70/2020 concerning Mr Laltu (alias Somrat Morol) (Australia) [A/HRC/WGAD/2020/70](#) (2020) § 82**; see also **Opinion No 7/2019 concerning Ebrahim Toure (Canada) [A/HRC/WGAD/2019/7](#) (2019) § 64**). Consistent with this position, the UN HRC has frequently held that, ‘in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification’ (**D&E v Australia [CCPR/C/87/D/1050/2002](#) (2006) § 7.2**), while the case law of the ECtHR indicates that ‘the length of the detention should not exceed that reasonably required for the purpose pursued’ (**Saadi v UK, ECtHR GC [App No 13229/03](#) (2008) § 74**). In the *Saadi* case, detaining asylum seekers for a period of seven days while deciding on whether to authorise entry was considered reasonable for the purpose pursued (§ 79). The Court also concluded that a one-month period of pre-entry detention ‘should not, in principle, be considered excessive’ for the purpose of conducting the necessary administrative formalities related to the implementation of the EU-Turkey Statement (**J.R. v Greece, ECtHR [App No 22696/16](#) (2016) §§ 112, 114**). However, detention for periods of three and six months, respectively, was considered excessive for the purpose of preventing unauthorised entry, particularly when combined with inappropriate detention conditions (respectively, **Kanagaratnam v Belgium [App No 15297/09](#) (2011) §§ 94–95**, and **Suso Musa v Malta, ECtHR [App No 42337/12](#) (2013) §§ 102–103**). Unsurprisingly, detention for a period of two years and nine months pending authorisation of entry was also held to be disproportionate, particularly when ‘[t]he Government did not point to any difficulties in

determining the applicant's age and identity or to the absence of necessary documents, which might have justified the length of the detention for over two years' (*B.A. v Cyprus*, [ECtHR App No 24607/20 \(2024\) §§ 65–66](#)).

In the UK, meanwhile, it has long been established that '[t]he deportee may only be detained for a period that is reasonable in all the circumstances' (*Lumba (WL) v SSHD* [\[2011\] UKSC 12, § 22 \(Lord Dyson\)](#)). This is necessarily a 'heavily fact-sensitive enquiry' (*R (SB) Ghana v SSHD* [\[2020\] EWHC 668 \(Admin\), § 78 \(John Kimbell QC\)](#)), in the context of which '[t]he likelihood or otherwise of the detainee absconding and/or re-offending [is] an obviously relevant circumstance' (*R (SK (Zimbabwe) v SSHD* [\[2011\] UKSC 23, § 94 \(Lord Brown\)](#)) (SP8: Necessity). The ECtHR has similarly accepted that factors related to the risk of absconding and re-offending are relevant to deciding whether the period of detention exceeded what was 'reasonably required' for the purpose of removal (*J.N. v UK*, [ECtHR App No 37289/12 \(2016\) § 107](#); *N.M. v Belgium*, [ECtHR App No 43966/19 \(2023\) §§ 119–120](#)). Nonetheless, 'the risk of absconding cannot justify detention of any length, as that would sanction indefinite detention' (*Fardous v SSHD* [\[2015\] EWCA Civ 931, § 46 \(Lord Thomas CJ\)](#)), while '[t]here must come a time when, however grave the risk of absconding and however grave the risk of serious offending, it ceases to be lawful to detain a person pending deportation' (*Lumba (WL) v SSHD* [\[2011\] UKSC 12, § 144 \(Lord Dyson\)](#)). The UNWGAD has similarly concluded that a prior criminal record can never be used to justify indefinite immigration detention based on perceived security risks (*UNWGAD, Opinion No 71/2020 concerning Mohammad Qais Niazy (Australia)* [A/HRC/WGAD/2020/71 \(2020\) § 100](#)).

Statutory Time Limits on Detention

The principle of legal certainty demands that this upper limit be given clear expression in the form of a statutory maximum period for immigration detention. The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has expressed the view that 'the prolonged detention of persons under aliens legislation, without a time limit and with unclear prospects for release, could easily be considered as amounting to inhuman treatment' (*CPT, Immigration Detention Factsheet*, [CPT/Inf\(2017\)3, 2](#)). Indeed, '[l]ack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention [...]' (*UNHCR/OHCHR, Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011) § 11*), with a broad range of evidence pointing to 'a considerable mental health cost to detainees caused by the lack of a time limit in detention' (*All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration, 'Report of the Inquiry into the Use of Immigration Detention in the United Kingdom' (2015) 19*). A comparison with criminal law and procedure is apposite. Maximum sentences of imprisonment are standard practice in the criminal context, where 'custody time limits' have been embraced as 'a vital feature' of any national criminal justice system (*R (McAuley) v Coventry Crown Court* [\[2012\] EWHC 680 \(Admin\), § 25](#)). It is difficult to see why those held in executive immigration detention—that is to say, not detained in connection with a criminal offence—should be in a weaker position, with weaker safeguards.

It has duly been recognised that '[a] maximum detention period in the course of migration proceedings must be set by legislation', with the effect that, once this period has expired, 'the detained person must automatically be released' (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of*

Migrants [A/HRC/39/45 \(2018\) § 25](#)). Setting a maximum period of detention in law promotes legal certainty and protects against arbitrariness. Those subject to immigration control should be able to ascertain in advance the longest period for which they could be detained pending examination of their case or pending removal. Moreover, once released, individuals 'should be provided with a document protecting them against renewed detention' (**CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights** [CMW/C/GC/5, § 51](#)). This prevents the prescribed maximum being circumvented by using a practice of release and re-detention, or sequential detention imposed for purportedly different purposes.

The case law of the ECtHR supports the notion that a statutory maximum is an important safeguard against arbitrary immigration detention. Admittedly, the Court has rejected the argument that a statutory maximum is a mandatory feature of the 'quality of law' requirement in the immigration context (SP3: Prescription), holding that such time limits 'in and of themselves are neither necessary nor sufficient to ensure compliance with the requirements of Art. 5(1)(f)' (**J.N. v UK, ECtHR App No 37289/12 (2016) § 90; K.G. v Belgium, ECtHR App No 52548/15 (2018) § 72**). Despite this, the Court has recognised that the absence of such time limits risks exposing applicants to an indeterminate period of detention, meaning that a greater emphasis is placed on the effectiveness of other safeguards against arbitrariness to ensure that detention does not exceed beyond the period that it is justified (**Louled Massoud v Malta, ECtHR App No 24340/08 (2010) § 71**). For instance, the absence of a statutory maximum period of immigration detention contributed to the finding that the UK authorities were under a heightened duty of 'due diligence' in ensuring the swift conclusion of the applicant's asylum procedure while he was held in detention (**S.M.M. v UK, ECtHR App No 77450/12 (2017) § 84**) (SP11: Diligence). The same approach has been applied to time limits on the detention of asylum seekers under EU law (**CJEU, Joined Cases C-924/19 and C-925/19 (2020) §§ 264–265**).

Critically, setting a maximum period of detention does not mean that this should be routinely applied. Indeed, the ECtHR has recognised that adherence to the legal maximum defined in national law 'cannot automatically be regarded' as justifying the length of detention (**Auad v Bulgaria, ECtHR App No 46390/10 (2011) § 131**). A statutory maximum is therefore an upper limit that aims to avoid excessive detention and to provide certainty for detained persons. It is not a 'permission' to detain that individual for the specified period—for instance, where it becomes evident at an earlier stage that there is no realistic prospect of deportation before the maximum is reached (SP10: Achievability). To this end, the implementation of a statutory maximum must be accompanied by safeguards 'to ensure that this maximum does not become a default period of detention that is routinely applied', including by ensuring 'that a robust and individualised review of detention occurs on a regular basis' (**Home Affairs Committee, 'Immigration detention—Fourteenth Report of Session 2017-19' (2019) § 226**).

IV. Treatment in Detention

IV. TREATMENT IN DETENTION

Having focused thus far on the decision to impose or maintain detention, this set of Safeguarding Principles addresses standards of treatment during detention. Grounded in the basic right to human dignity, these principles identify certain core requirements relating to the regime applied in immigration detention facilities (SP13: Environment), the material conditions of detention (SP14: Conditions), access to healthcare (SP15: Healthcare) and contact with the outside world (SP16: Contact). Importantly, States must guarantee the dignified treatment of detained persons in all cases, including where the management of detention facilities has been contracted out to private agencies (SP17: Privatisation). To achieve this, States must ensure the regular monitoring of all immigration detention facilities by independent bodies (SP18: Monitoring).

By the very nature of their situation, detained persons are deprived of the ability to provide for their basic needs. As a result, it is widely accepted that ‘the State is directly responsible for the well-being of persons deprived of their liberty’ (*Davydov v Ukraine*, [ECtHR App Nos 17674/02 and 39081/02 \(2010\) § 262](#)), owing a special duty of protection to any individual held within its custody (*Keenan v UK* [ECtHR App No 27229/95 \(2001\) § 91](#)). Responsibility for ensuring the basic dignity and wellbeing of detained persons applies regardless of the justification for detention. It must also take into account any special needs of detained migrants in a vulnerable situation—for instance, due to their age, sexual orientation, or health (*CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights* [CMW/C/GC/5, § 25](#)).

In recognition of this relationship of dependency, international legal standards ascribe a special importance to the concept of dignity in situations involving deprivation of liberty. The ICCPR, for instance, expressly requires that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’ ([ICCPR, Article 10\(1\)](#)), with the HRC clarifying that this provision extends to all forms of detention and cannot be made conditional on resource availability (*HRC, General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (1992) §§ 2, 4*). A similar formulation is reproduced in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ([CMW, Article 17\(1\)](#)) and the Convention on the Rights of the Child ([UNCRC, Article 37\(c\)](#)), with the latter placing additional emphasis providing a dignified standard of treatment ‘in a manner which takes into account the needs of persons of his or her age’.

The duty to ensure dignified conditions of detention is frequently linked to the prohibition of torture and cruel, inhuman or degrading treatment, as enshrined in the [ICCPR \(Article 7\)](#), the [UNCAT \(Articles 2 and 16\)](#), and the [ECHR \(Article 3\)](#). The [Nelson Mandela Rules](#) lead with the basic requirement that ‘[a]ll prisoners shall be treated with the respect due to their inherent dignity and value as human beings’, adding that ‘[n]o prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification’ ([Rule 1](#)). The ECtHR, meanwhile, has held that Article 3 of the ECHR ‘requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that,

given the practical demands of imprisonment, their health and well-being are adequately secured’ (**Z.A. v Russia, ECtHR GC [App Nos 61411/15 et al. \(2019\) § 182](#)**). As such, States’ obligations to prevent ill-treatment in detention go beyond a duty to refrain from deliberate actions that inflict physical or mental harm; they also encompass positive duties to ensure appropriate conditions and access to healthcare that respect the basic dignity of detained persons. Further to this, States are required to adopt regulatory and operational measures to prevent and respond to risks of ill-treatment emanating from non-State actors, such as other detained persons (**Preminyin v Russia, ECtHR [App No 44973/04 \(2011\) §§ 87–90](#)**).

The following principles draw on international standards developed to minimise the inherently harmful effects of *any* form of detention, addressing matters related to the material conditions of detention (SP14: Conditions), access to healthcare (SP15: Healthcare) and the possibility of contact with the outside world (SP16: Contact). While relevant to the treatment of detained persons generally, a failure to apply these standards to persons detained under immigration powers has frequently been highlighted as a source of particular concern (**Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, [A/HRC/37/50 \(2018\) § 18](#)**). In this respect, it is important to recall that *all* persons deprived of their liberty have a right to dignified treatment, irrespective of their nationality or immigration status or the purpose for which they have been detained (**HRC, [General Comment No 15 on the Position of Aliens under the Covenant \(1986\) § 7](#)**) (SP2: Equality). Moreover, the right to humane conditions in detention are *minimum guarantees*, meaning that it cannot be derogated under any circumstances, including migratory situations of ‘mass influx’ (**Z.A. v Russia, ECtHR GC [App Nos 61411/15 et al. \(2019\) § 127](#)**).

At the same time, the specific purpose pursued by immigration detention—namely, the enforcement of immigration entry- and exit-controls (SP7: Legitimate Aim)—also demands treatment which is consistent with that aim. This is particularly relevant when considering what kind of detention regime is appropriate. Indeed, the fact that persons detained under immigration powers are not held in relation to the commission of a criminal offence means that punitive aspects of detention that may be lawful in the criminal context are simply untenable for persons detained under immigration powers (SP13: Environment). The following principles also establish key safeguards related to the increasingly widespread practice of delegating to management of immigration detention facilities to private enterprises (SP17: Privatisation), while also underscoring the importance of independent monitoring of (potential) places of detention to ensure the prevention of undignified or degrading treatment (SP18: Monitoring).

SP13. ENVIRONMENT.

Detention must take place in a suitable, non-carceral setting, while also ensuring appropriate separation between detained persons based on their gender and sexual orientation.

Persons detained for immigration purposes must be treated in a manner which is consistent with that aim. Accordingly, immigration detention should never take place in prisons or in any other setting which reproduces aspects of a carceral institution—either due to the physical environment or the nature of the restrictions imposed by the detention regime. Nor should migrants be detained for extensive periods in settings which are unsuitable for this purpose, such as point of entry holding facilities or airport transit zones. Facilities must also ensure privacy and safety from other detained persons, including through the separation of men and women.

Non-Carceral Environment

[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families \(1990\) Article 17\(3\)](#): 'Any migrant worker or member of his family who is detained [...] shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.'

Saadi v UK, ECtHR GC App No 13229/03 (2008) § 74: '[to comply with Article 5(1)(f),] the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"' (***citing Amuur v France, ECtHR App No 19776/92 (1996) § 43***).

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 14: '[...] detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.' **§ 18**: 'Any necessary detention [in the course of immigration proceedings] should take place in appropriate, [...] non-punitive facilities and should not take place in prisons.'

PACE, Resolution 1707 (2010) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.1.8: 'The place, conditions and regime of detention shall be appropriate.' **§ 9.2.2**: 'Detainees shall be accommodated in centres specially designed for the purpose of immigration detention and not in prisons.' **§ 9.2.6**: 'the detention regime must be appropriate to the individual's legal and factual situation.'

Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return (2005) Guideline 10: '(1) Persons detained pending removal should normally be accommodated [...] in facilities specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel. (2) [...] care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a 'carceral' environment.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 38: 'All detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.' **§ 44**: 'The detention of asylum

seekers or other irregular migrants must not take place in facilities such as police stations, remand institutions, prisons and other such facilities since these are designed for those within the realm of the criminal justice system. The mixing of migrants and other detainees who are held under the remit of the criminal justice system must not take place.'

Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/65/222 \(2010\) § 87](#): 'In cases where, exceptionally, detention of migrants is justified, this should not be made in facilities for criminals. Migration-related detention centres should not bear similarities to prison-like conditions.'

UNHCR/OHCHR, [Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons \(2011\) § 12](#): 'All asylum-seekers and migrants who have not been convicted of recognizable crimes should be kept separate from convicted criminals and housed in specific facilities adapted to their particular circumstances and needs.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 82](#): 'The Committee stresses that detention should never take place in facilities with punitive characteristics.'

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85 \(2002\) § 75\(i\)](#): 'Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law.'

CPT, Immigration Detention: Factsheet, [CPT/Inf\(2017\)3, 3–4](#): 'A prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence [...] Immigration detainees are frequently initially held at "point of entry holding facilities", airport transit zones and police stations. Clearly, these places are often inadequate places in which to accommodate persons, in particular for extended stays. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum (i.e. less than 24 hours) [...].'
5: 'Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. Within the detention facility, detained persons should be restricted in their freedom of movement as little as possible.'
6: 'The ethos of an immigration detention setting should not be carceral, which means that staff working within immigration detention facilities should not be equipped with batons, handcuffs or pepper spray.'

Report of UNWGAD [E/CN.4/1999/63/Add.3 \(1998\) § 30](#): 'Detainees should be held in special immigration detention centres in conditions appropriate to their status and not with persons charged with or convicted of criminal offences (unless so charged or convicted themselves).'

UNHCR, [ExCom Conclusion No 44 \(XXXVII\) \(1986\) § f](#): '[...] conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, wherever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered.'

UNHCR, [Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\) § 37](#): '[...] detention of

a refugee in accordance with Article 31(2) can only be lawful when taking place in designated places of detention [...] Immigration-related administrative detention in accordance with Article 31(2) should not be carried out in criminal or penal detention facilities, even when criminal and administratively detained populations are separated.'

[UNHCR Detention Guidelines \(2012\) Guideline 8, § 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 [...] **(iii)** Detention of asylum-seekers for immigration-related reasons should not be punitive in nature. 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. Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5 on Measures of Detention of Asylum Seekers, § 10](#): 'The place of detention [of asylum seekers] should be appropriate and, wherever possible, be provided for the specific purpose of detaining asylum seekers. In principle, asylum seekers should not be detained in prison. If special detention facilities are not available, asylum seekers should at least be separated from convicted criminals and prisoners on remand.'

Principles of Separation

[UN Convention on the Rights of the Child \(1989\) Article 37\(c\)](#): '[...] every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so [...].'

UN General Assembly, UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) [A/RES/70/175 \(2016\) Rule 11](#): 'The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus, (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate; [...] (c) [...] other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence; (d) Young prisoners shall be kept separate from adults.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 83](#): 'In order to guarantee that immigration detention takes place in non-punitive facilities, States must ensure, among other things, that: (a) migrant workers are not detained with persons prosecuted for or convicted of crimes; (b) men and women remain separated, taking into consideration the particular needs of lesbian, gay, bisexual, transgender and intersex persons [...].'

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 10](#): '(4) Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.' **Guideline 11**: '(2) Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45](#) (2018) § 42: 'Men and women in detention should be always separated unless they are a part of an immediate family unit.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of Detention of Asylum Seekers, § 14: 'Separate accommodation within the detention facilities between men and women, as well as between children and adults should, as a rule, be ensured, except when the persons concerned are part of a family unit, in which case they should be accommodated together. The right to a private and family life should be ensured.'

CPT, Immigration Detention: Factsheet, [CPT/Inf\(2017\)3](#), 8: 'When, exceptionally, children are held with their parents in a detention centre, the deprivation of liberty should be for the shortest possible period of time. Mother (or any other primary carer) and child should be accommodated together in a facility catering for their specific needs.'

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85](#) (2002) § 75(a): 'Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings.'

Non-Carceral Environment

It is a recognised international principle that, '[t]o guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention' (HRC, [General Comment No 20: Article 7 \(Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment\) \(1992\) § 11](#)) (SP1: Liberty). In addition to this, States must ensure that the facilities used for the purpose of immigration detention are consistent with the administrative (i.e. non-criminal) nature of that aim. Accordingly, immigration detention 'must not take place in in facilities such as police stations, remand institutions, prisons and other such facilities [...] designed for those within the realm of the criminal justice system' (UNWGAD, [Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 \(2018\) § 44](#)). A range of international standards support the position that '[a] prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence' (CPT, [Immigration Detention: Factsheet, CPT/Inf\(2017\)3, 3](#)), while also contravening the basic requirement for immigration detention to be non-punitive in nature (UNHCR, [Association for the Prevention of Torture \(APT\) and the International Detention Coalition \(IDC\), Monitoring Immigration Detention: Practical Manual \(2014\) 27](#)) (SP7: Legitimate Aim). Instead, persons detained under immigration powers should be held 'in facilities specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel' (Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 10](#)).

The ECtHR has emphasised that, to avoid arbitrary detention within the meaning of Article 5(1)(f) of the ECHR, 'the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"' (Saadi v UK, [ECtHR GC App No 13229/03 \(2008\) § 74, citing Amuur v France, ECtHR App No 19776/92 \(1996\) § 43](#)). In interpreting this provision, the English Court of Appeal held that detaining foreign national offenders in prisons pending their deportation was not necessarily contrary to the ECHR, determining that this assessment will depend, among other things, on the vulnerability of the individual, the nature of the regime in question (for instance, the level of restrictions imposed) and the reasons underlying the detention (for instance, if detention is imposed to secure a deportation order based on a former criminal conviction) (*R (Idira) v SSHD* [2015] EWCA Civ 1187, §§ 40–43). This judgment nonetheless suggests that detaining persons in prisons under immigration powers may be 'unduly harsh', in which case detention may become arbitrary under Article 5 of the ECHR without necessarily meeting the threshold of inhuman or degrading treatment (§§ 52–53).

Despite the more restrictive position adopted by the Court of Appeal, the weight of international consensus suggests that prisons should never be considered a suitable environment for persons detained for immigration purposes, even if such a practice is reserved for time-served foreign national offenders (TSFNOs) or if detained persons are separated from the general prison population (UNHCR, [Guidelines on International Protection No. 14: Non-Penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\) § 37](#)). The HRC has held that detention may be arbitrary 'if the manner in which the detainees are treated does not relate to the purpose for

which they are ostensibly being detained’, specifying that ‘[a]ny necessary detention [for immigration purposes] should take place in appropriate, [...] non-punitive facilities and not in prisons’ (**Ali and Ali v Norway** [CCPR/C/135/D/2926/2017](#) (2022) § 10.6). The UNWGAD has similarly emphasised that persons detained for immigration purposes must only ever be held in facilities ‘which are suitable for such purpose and which respect the non-convicted status of such individuals’, concluding that detaining a time-served offender in a maximum-security prison pending his deportation was ‘clearly a punitive detention in breach of article 9 of the Covenant’ (**UNWGAD, Opinion No 71/2020 concerning Mohammad Qais Niazy (Australia)** [A/HRC/WGAD/2020/71](#) (2020) §§ 103–104).

Not only should prisons be categorically avoided, but the authorities must also take special steps to ensure that immigration detention facilities do not reproduce elements of a carceral institution. Accordingly, ‘[m]igration-related detention centres should not bear similarities to prison-like conditions’ (**Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau**, [A/65/222](#) (2010) § 87) and ‘[...] care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a “carceral” environment’ (**Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return** (2005) **Guideline 10**). As stipulated by the CPT: ‘The ethos of an immigration detention setting should not be carceral, which means that staff working within immigration detention facilities should not be equipped with batons, handcuffs or pepper spray’. Moreover, ‘detained persons should be restricted in their freedom of movement as little as possible’ and provided with ‘a varied regime of activities’ (**CPT, Immigration Detention: Factsheet**, [CPT/Inf\(2017\)3](#), 5–6). As a general principle, the HRC has held that ‘the extent of movement in an officially designated place of detention may be relevant to the reasonableness and proportionality of the detention’ (**Nabhari v Australia** [CCPR/C/142/D/3663/2019](#) (2025) § 7.16).

The effects of a carceral environment may additionally contribute to a finding of inhuman or degrading treatment in detention—a risk which is heightened with respect to vulnerable individuals (SP6: Individualisation; SP14: Conditions). In **M.H. v Croatia**, **ECtHR** App Nos [15670/18 and 43115/18](#) (2021), while accepting that the conditions of detention in the Tovarnik Centre were generally satisfactory for accommodating a family with young children, the ECtHR could not overlook the fact that there were elements of the centre which resembled a prison environment (§ 194). This, together with the duration of detention over a period of 2 months and 14 days, was sufficient to meet the threshold to be considered inhuman or degrading treatment under Article 3 of the ECHR (§§ 199, 201). Similar issues were identified in relation to the Rösztke transit zone in Hungary, where the Court’s finding of a violation of Article 3 of the ECHR in relation to the applicant’s young children was informed by ‘the presence of elements resembling a prison environment even in the sections of the [...] transit zone designated for families’ (**R.R. v Hungary**, **ECtHR** [App No 36037/17](#) (2021) § 63). Recently, the English High Court found that the claimant’s treatment in the Brook House IRC violated Article 3 of the ECHR based on the fact that, among other things, ‘he was kept in prison-like conditions [...] which were oppressive and made him feel humiliated’ (**Adegboyega v SSHD** [\[2024\] EWHC 2365 \(KB\)](#), § 172–173 (**Roberts HHJ**)).

In sum, States must ensure an environment and regime that is appropriate to the administrative and non-punitive nature of immigration detention, avoiding the use of prisons or any other facilities that provide the impression of a penal institution. In addition, States must also avoid the prolonged detention of migrants in other facilities that are not adapted for such purposes, such as ‘point of entry holding facilities’ or airport transit zones (SP1: Liberty). Indeed, such environments ‘are often inadequate

places in which to accommodate persons, in particular for extended stays. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum (i.e. less than 24 hours) [...]’ (*CPT, Immigration Detention: Factsheet*, [CPT/Inf\(2017\)3, 3](#)).

Principles of Separation

International standards additionally require appropriate gender separation within immigration detention, together with necessary safeguarding measures for children to ensure sufficient their safety and privacy. Accordingly, ‘[m]en and women in detention should be always separated unless they are a part of an immediate family unit’ (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 42*), while facilities dedicated to accommodating women should also ensure the appropriate presence of female staff to ensure that privacy and feelings of safety are duly respected (*All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration, ‘Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’ (2015) 67*). Where children are exceptionally detained under immigration powers (SP1: Liberty), it is imperative that they are separated from adults (*A.D. v Malta, ECtHR App No 12427/22 (2023) § 126*). This is notwithstanding the fact that accompanied minors—if detained at all—should be kept together with family members in a specialised facility to satisfy the right to preservation of family unity (*CPT, Immigration Detention: Factsheet*, [CPT/Inf\(2017\)3, 8](#)).

Principles of separation in detention also require the safeguarding of other vulnerable categories of migrants, such as LGBTQI persons. For instance, when detaining asylum seekers who claim to be members of a vulnerable group in their home country, the ECtHR has held that ‘the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place’. Article 5 of the ECHR was therefore violated when the authorities did not display ‘adequate reflection’ on the applicant’s membership of a vulnerable group (in belonging to a sexual minority in Iran) when deciding to place him ‘in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons’ (*O.M. v Hungary, ECtHR App No 9912/15 (2016) § 53*) (SP6: Individualisation).

SP14. CONDITIONS.

Detention conditions must be humane and dignified.

The material conditions of detention must respect the basic right to human dignity and guarantee freedom from inhuman or degrading treatment. Accordingly, detention conditions must be sanitary, avoid overcrowding, ensure ventilation, natural light and appropriate temperatures and provide access to outdoor exercise and other recreational activities. In ensuring appropriate material conditions of detention, the authorities must also consider whether the individual has any special needs (SP6: Individualisation).

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\) Principle 1](#): 'All persons under any form of detention [...] shall be treated in a humane manner and with respect for the inherent dignity of the human person.'

PACE, [Resolution 1707 \(2010\) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers](#), § 9.1.8: 'The place, conditions and regime of detention shall be appropriate.' § 9.2.5: '[...] the material conditions shall be appropriate to the individual's legal and factual situation.'

UN General Assembly, [Global Compact for Safe, Orderly and Regular Migration A/RES/73/195 \(2019\) Objective 13, § 29\(f\)](#): [Committing to] 'Reduce the negative and potentially lasting effects of detention on migrants by guaranteeing [...] that it safeguards physical and mental integrity, and that, at a minimum, access to food, basic health care, legal orientation and assistance, information and communication as well as adequate accommodation is granted, in accordance with international human rights law.'

CMW, [General Comment No 5 \(2021\) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5](#), § 81: 'The Committee considers that poor conditions of detention may constitute torture or cruel, inhuman or degrading treatment and may increase the risk of violations of other rights, including the right to health, food, adequate housing, safe water and sanitation. In addition, torture or cruel, inhuman or degrading treatment may occur if inadequate detention conditions are intentionally imposed, encouraged or tolerated by the State on the basis of discrimination of any kind, including migration status, or in order to deter migrant workers and members of their families from continuing their immigration or international protection proceedings, or to intimidate or punish them for doing so.' § 83: 'States must ensure, among other things, that: [...] (c) sufficient space is provided and overcrowding is avoided at all costs; (d) facilities have open spaces for coexistence and recreation; (e) adequate cleaning and lighting is provided; and (f) other measures are taken that enable detainees to have an adequate standard of living, which includes appropriate clothing and bedding, heating, sufficient food in line with the physical and health conditions of the migrants and their religious beliefs, and access to safe water and sanitation and to health care, including health-care professionals, independent from detaining authorities.'

[Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, A/HRC/37/50 \(2018\) § 19](#): 'Any detention regime that, as a matter of deliberate policy or as a consequence of negligence, complacency or impunity, subjects or exposes migrants to treatment or conditions of detention grossly inconsistent with universally recognized

standards, most notably the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), is incompatible with the prohibition of torture and ill-treatment, regardless of economic or budgetary considerations. The threshold of prohibited ill-treatment generally will be reached sooner with regard to migrants with an irregular status or with other vulnerabilities. Moreover, ill-treatment or grossly inadequate detention conditions can even amount to torture if they are intentionally imposed, encouraged or tolerated by States for reasons based on discrimination of any kind, including based on immigration status, or for the purpose of deterring, intimidating or punishing migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to “voluntary” return, providing information or fingerprints, or with a view to extorting money or sexual acts from them.’

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return](#) (2005) Guideline 10: ‘(1) Persons detained pending removal should normally be accommodated [...] in facilities specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel. (2) Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved [...] Organised activities should include outdoor exercise, access to a day room and to a radio/television and newspapers/magazines, as well as other appropriate means of recreation. (3) Staff in such facilities should be carefully selected and receive appropriate training [...] (4) Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.’

CPT, [Immigration Detention: Factsheet](#), [CPT/Inf\(2017\)3](#), 4–6: ‘Immigration detention centres should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved.’

- ‘The longer the period for which persons are held, the more developed should be the activities which are offered to them. Purposeful activities, in an immigration detention context, can include, inter alia, language classes, IT/computer classes, gardening, arts and crafts, cookery skills and so-called “cultural kitchens”. [...]
- ‘Detained irregular migrants should in principle have free access to outdoor exercise throughout the day (i.e. considerably more than one hour per day) and outdoor exercise areas should be appropriately equipped (benches, shelters, etc.).’ [...] ‘Immigration detention centres should include access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis, sports), a library and a prayer room.
- All multiple occupancy rooms should be equipped with tables and chairs commensurate with the number of persons detained.’ [...]
- Custodial staff in detention centres for immigration detainees should be carefully selected and receive appropriate training.’ [...] ‘Staff should possess well-developed qualities in the fields of interpersonal communication and cultural sensitivity, given the diverse backgrounds of the detainees. Further, at least some of them should have relevant

language skills. The presence of female custodial staff members should be guaranteed in all establishments accommodating female detainees' [...] 'They should also be taught to recognise possible symptoms of stress reaction displayed by detained persons and to take appropriate action.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of Detention of Asylum Seekers, § 9: 'Measures of detention should be implemented in a humane manner, respecting the inherent dignity of the person and in accordance with applicable norms of international law and international standards.' **§ 11:** 'The basic needs and requirements of detained asylum seekers to ensure a standard of living adequate for their health and well-being should be met.' **§ 15:** 'Detained asylum seekers should be allowed to practice their religion and to observe any special diet in accordance with their religion.'

UNHCR, [Guidelines on International Protection No 14: Non-penalization of Refugees on account of Their Irregular Entry or Presence and Restrictions on Their Movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees \(2024\)](#) § 37: '[...] detention of a refugee in accordance with Article 31(2) can only be lawful when taking place in designated places of detention. Such places must be properly equipped to ensure conditions are humane and dignified and otherwise in accordance with human rights standards.'

[UNHCR Detention Guidelines \(2012\) Guideline 8, § 48:](#) 'Conditions of detention must be humane and dignified. If detained, asylum-seekers are entitled to the following minimum conditions of detention: [...]

- **(ii)** Asylum-seekers should be treated with dignity and in accordance with international standards.'
- **(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 to at least primary education.⁹⁴ Preferably children should be educated offsite in local schools.'
- **(xvi)** 'All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence,⁹⁶ 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;⁹⁷ and codes of conduct should be signed and respected.'

Committee on the Elimination of Racial Discrimination, General Recommendation No 30 on the Discrimination of Non-citizens [CERD/C/64/Misc.11/rev.3 \(2004\)](#) § 19: 'ensure that conditions in centres for refugees and asylum-seekers meet international standards.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5 on Measures of Detention of Asylum Seekers](#), § 11: 'The basic needs and requirements of detained asylum seekers to ensure a standard of living adequate for their health and well-being should be met.' § 12: 'Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them.' § 13: 'Appropriate medical treatment and, where necessary, psychological counselling should be provided. This is particularly relevant for persons with special needs: minors, pregnant women, elderly people, persons with physical or mental disabilities and people who have been seriously traumatised, including torture victims.'

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85 \(2002\)](#) § 75: 'Children should be provided with adequate food, bedding and medical assistance and granted access to education and to open-air recreational activities. When migrant children are detained, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be strictly adhered to.' § 119: 'Officials dealing with migrants who are in detention or who have been subjected to trafficking or degrading work because they have no documentation must receive special training relating to the situation of these persons. Codes of conduct must be drafted so that professional attention may be given to this problem.' § 122: 'The Special Rapporteur urges States to work together with organs of civil society on the human rights situation in detention centres. Links between States and NGOs must be strengthened with a view to assistance for migrants in detention centres.'

SP14. Conditions: Commentary.

Detention conditions that fail to respect human dignity, including by exposing detained persons to inhuman or degrading treatment, constitute a serious breach of international human rights law. The prohibition of inhuman or degrading treatment is 'a fundamental value in democratic societies' that is 'closely bound up with respect for human dignity' and which cannot be derogated from under any circumstances (*Z.A. v Russia*, *ECtHR GC App Nos 61411/15 et al. (2019)* § 188). Intentionally subjecting persons deprived of their liberty to poor conditions of detention or otherwise tolerating such treatment—for instance, as a form of punishment or deterrence—is plainly unacceptable (*CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights* [CMW/C/GC/5, § 81](#)). Even where not intentionally imposed, undignified conditions of detention are incompatible with the duty to provide minimum standards of treatment for all individuals deprived of their liberty. As such, while States may face a range of practical, administrative, and financial challenges when experiencing a sharp increase in arrivals of migrants and refugees, this does not absolve them of the duty to ensure that 'persons deprived of their liberty [are] guaranteed conditions that are compatible with respect for their human dignity' (*Khlaifia v Italy*, *ECtHR GC App No 16483/12 (2016)* § 184).

A wealth of international materials and standards address this important safeguarding principle. In assessing whether the physical conditions of detention meet the threshold of inhuman or degrading

treatment, the ECtHR has held that it is necessary to consider the 'cumulative effects' of different factors. These include access to outdoor exercise, natural light or air, ventilation and basic sanitation and hygiene (*Abdullahi Elmi and Aweys Abubakar v Malta*, ECtHR [App No 25794/13 \(2016\) § 102](#)), with a severe lack of personal space considered to weigh particularly heavily in the assessment (*Ananyev v Russia*, ECtHR [App Nos 42525/07 and 60800/08 \(2012\) §§143–148](#)). Detention conditions for asylum seekers thus amounted to degrading treatment where the Court observed 'overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, [and] limited access to care' (*M.S.S. v Belgium and Greece*, ECtHR GC [App No 30696/09 \(2011\) § 162](#)), and where asylum seekers were detained in holding centres without physical exercise, contact with the outside world or medical attention (*S.D. v Greece*, ECtHR [App no 53541/07 \(2009\)](#)) (SP15: Healthcare; SP16: Contact).

Another important factor concerns the duration of detention (*Aden Ahmed v Malta* [App No 55352/12 \(2013\) § 86](#)) (SP12: Maximum). In assessing the immigration detention of a family, the ECtHR held that the physical conditions could not be said on their own to meet the threshold of inhuman or degrading treatment, despite inevitably causing a significant degree of anxiety and stress for their four-year-old child. It nonetheless asserted that, 'in the case of a longer period, the repetition and accumulation of such mental and emotional aggression would necessarily have harmful consequences for a young child', concluding that a period of detention of 18 days in these conditions amounted to a breach of Article 3 of the ECHR (*A.B. v France*, ECtHR [App No 11593/12 \(2016\) §§ 112–115](#)). In other cases, manifestly inappropriate detention conditions were found to meet the threshold of inhuman or degrading treatment despite being very short in duration. In *S.F. v Bulgaria*, ECtHR [App No 8138/16 \(2017\)](#), for instance, the detention of a family in a police cell for less than two days was held to breach Article 3 of the ECHR due to the fact that the cell was extremely run-down, there were limited possibilities for accessing the toilet, the applicants were not provided food and drink for more than 24 hours, and the mother was only supplied with a bottle for the toddler 19 hours after they were taken into custody (§§ 84–88). As the Court has held elsewhere, 'the detention of minor immigrants even for very short periods of time in unsuitable conditions gives rise to issues under Article 3' (*G.B. v Turkey*, ECtHR [App No 4633/15 \(2019\), § 117](#)).

The suitability of detention conditions will thus vary according to the individual circumstances of the detained individual and the impacts on their physical and mental health. For instance, a 14.5-month period of immigration detention was held to breach Article 3 of the ECHR due to a lack of heating, the absence of female staff (in a female detention facility) and a period of more than 3 months where the applicant had no access to open air and exercise. These impacts were exacerbated by the fact that the applicant was in a 'vulnerable position'—not only due to her status as an irregular migrant, but also because of her 'fragile health' (owing to insomnia, recurrent physical pain and episodes of depression) (*Aden Ahmed v Malta*, ECtHR [App No 55352/12 \(2013\) §§ 94–99](#)). Article 3 was also breached where a woman was detained under immigration powers during the advanced stages of a high-risk pregnancy. While acknowledging that the applicant had received adequate medical assistance, the Court concluded 'that the constraints inherent during confinement, to which she was subjected throughout her advanced stage of pregnancy, must have caused her anxiety and psychological suffering, which, given her vulnerability, attained the threshold of severity required to engage Article 3 of the Convention' (*H.M. v Hungary*, ECtHR [App No 38967/17 \(2022\) § 18](#)).

Where States detain children for immigration purposes, the threshold of inhuman or degrading treatment will be met much more easily, regardless of whether they are accompanied by an adult (**R.R. v Hungary**, [ECtHR App No 36037/17 \(2021\) § 49](#)), while a lack of appropriate conditions may additionally result in a breach of the right to liberty under Article 5 of the ECHR (**M.H. and S.B. v Hungary**, [ECtHR App Nos 10940/17 and 15977/17 \(2024\) § 239](#)). In relation to the detention of asylum-seeking children generally, the Court has repeatedly asserted the need to be attentive to ‘specific needs that are related in particular to their age and lack of independence, but also their asylum-seeker status’, emphasising that ‘the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not “create [...] for them a situation of stress and anxiety, with particularly traumatic consequences”’. (**Abdullahi Elmi and Aweys Abubakar v Malta**, [ECtHR App No 25794/13 \(2016\) §§ 103–104](#)). As such, detention of children has been held to amount to degrading treatment where the conditions were not adapted to their specific needs—for instance, due to the lack of proper counselling or educational assistance, or of purposeful recreational activities (**J.B. v Malta**, [ECtHR App No 1766/23 \(2024\) § 50](#); **R.R. v Hungary**, [ECtHR App No 36037/17 \(2021\) § 61](#)). The Court has further held that inappropriate conditions of detention for children may also result in a breach of Article 3 of the ECHR for the accompanying parent, owing to the emotional connection that they share with their child (**M.D. and A.D. v France**, [ECtHR App no 57035/18 \(2021\) § 71](#)).

The duty to protect against inhuman and degrading conditions is proactive and preventive: the state must act where there is an ‘imminent prospect’ of a violation, and is not entitled to wait for the breach to begin (**R (Limbuella) v SSHD [2005] UKHL 66, § 62**). However, it is important to emphasise that maintaining conditions of detention that ensure the dignity of detained persons is a minimum threshold. States must therefore aim for a higher standard of treatment that is consistent with the purpose of the detention measure and the understanding that many persons detained under immigration powers have fled situations of extreme hardship, particularly among those seeking asylum (SP13: Environment).

SP15. HEALTHCARE.

Detained persons must be medically assessed and receive timely and appropriate treatment.

To ensure basic respect for human dignity, persons held in immigration detention must be provided with access to appropriate medical treatment. This should be based on continuous monitoring of the individual's mental and physical health. Where appropriate medical treatment cannot be made available, or where detention would lead to a worsening of health despite the availability of such treatment, the individual must be released into the community or provided with alternatives to detention as a matter of absolute priority (SP6: Individualisation; SP9: Alternatives).

UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)

[A/RES/70/175 \(2016\) Rule 24\(1\)](#): 'The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.'

- **Rule 25(1)**: 'Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation.'
- **Rule 26(1)**: 'The health-care service shall prepare and maintain accurate, up-to-date and confidential individual medical files on all prisoners, and all prisoners should be granted access to their files upon request.'
- **Rule 27(1)**: 'All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care.'
- **Rule 30**: 'A physician or other qualified health-care professionals, whether or not they are required to report to the physician, shall see, talk with and examine every prisoner as soon as possible following his or her admission and thereafter as necessary.'
- **Rule 31**: 'The physician or, where applicable, other qualified health-care professionals shall have daily access to all sick prisoners, all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed. All medical examinations shall be undertaken in full confidentiality.'
- **Rule 33**: 'The physician shall report to the prison director whenever he or she considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.'
- **Rule 34**: 'If, in the course of examining a prisoner upon admission or providing medical care to the prisoner thereafter, health-care professionals become aware of any signs of

torture or other cruel, inhuman or degrading treatment or punishment, they shall document and report such cases to the competent medical, administrative or judicial authority. Proper procedural safeguards shall be followed in order not to expose the prisoner or associated persons to foreseeable risk of harm.'

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\) Principle 24](#): 'A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.' **Principle 26:** 'The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45 \(2018\) § 39](#): 'All detained migrants must have free access to appropriate medical care, including mental health care.'

PACE, [Resolution 1707 \(2010\) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.2.7](#): '[...] the detention authorities shall safeguard the health and well-being of all detainees in their care'.

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 76](#): 'States should ensure that detained migrants have access to physical and mental health services, including sexual and reproductive health services and psychological care. In the absence of adequate conditions in detention centres, detained migrants in need of medical care should be transferred to adequate facilities. Moreover, taking into account the psychological and physical effects of detention on migrants, States should assess detained migrants' physical and mental health on a regular basis.'

CPT, Immigration Detention: Factsheet, [CPT/Inf\(2017\)3, 7–8](#):

- 'All newly-arrived detainees should benefit from comprehensive medical screening (including screening for transmissible diseases) by a doctor or a fully-qualified nurse reporting to a doctor as soon as possible after their admission.'
- 'The record drawn up after a medical examination of a detainee, whether newly-arrived or not, should contain: (i) a full account of objective medical findings based on a thorough examination; (ii) an account of statements made by the person concerned which are relevant to the medical examination, including any allegations of ill-treatment made by him/her; (iii) the doctor's observations in the light of (i) and (ii), indicating the consistency between any allegations made and the objective medical findings. In addition, the results of every examination, including the above-mentioned statements and the doctor's observations, should be made available to the detainee and his/her lawyer.'

- 'Medical confidentiality should be observed in the same way as in the outside community; in particular, irregular migrants' medical files should not be accessible to non-medical staff but, on the contrary, should be kept under lock and key by the nurse or doctor. Moreover, all medical examinations should be conducted out of the hearing and – unless the doctor concerned requests otherwise in a particular case – out of the sight of custodial staff.'
- 'At a minimum, a person with a recognised nursing qualification must be present on a daily basis at all centres for detained irregular migrants. Such a person should, in particular, perform the initial medical screening of new arrivals [...] receive requests to see a doctor, ensure the provision and distribution of prescribed medicines, keep the medical documentation and supervise the general conditions of hygiene.'
- 'Whenever members of the medical and/or nursing staff are unable to make a proper diagnostic evaluation due to language problems, they should be able to benefit without delay from the services of a qualified interpreter.'
- 'Detained irregular migrants should be fully informed about the treatment being offered to them.' – 'Adequate access to psychological assistance and psychiatric care should be provided to detainees. Further, procedures and training should be in place to prevent acts of self-harm and suicides.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of Detention of Asylum Seekers, § 12: 'Asylum seekers should be screened at the outset of their detention to identify torture victims and traumatised persons among them so that appropriate treatment and conditions can be provided for them.' **§ 13:** "Appropriate medical treatment and, where necessary, psychological counselling should be provided. This is particularly relevant for persons with special needs: minors, pregnant women, elderly people, persons with physical or mental disabilities and people who have been seriously traumatised, including torture victims.'

[UNHCR Detention Guidelines \(2012\) Guideline 8, § 48 \(vi\)](#): 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.'

SP15. Healthcare: Commentary.

The negative physical and mental health impacts of immigration detention are well documented and must not be underestimated, even over the course of a short stay (**Walter Forrest and Zachary Steel, 'The Impact of Immigration Detention on the Mental Health of Refugees and Asylum Seekers' (2023) 36 *Journal of Traumatic Stress* 642**). There is, indeed, a host of evidence to support to

conclusion that, '[a]s a consequence of detention, people who did not have a mental condition prior [...] are more likely to develop one, those who do have a mental health condition are likely to deteriorate, and these risks continue to increase the longer people are detained' (**Medical Justice, [Harmed not Heard: Failures in Safeguarding for the Most Vulnerable People in Immigration Detention](#) (2022) 12**). It is therefore imperative to individually monitor the medical situation of detained persons to ensure that they are provided with appropriate treatment and, where necessary, released to prevent lasting impacts on their wellbeing (SP6: Individualisation).

A duty to actively identify and treat medical needs in immigration detention is widely recognised. The CPT stipulates that '[a]ll newly-arrived detainees should benefit from comprehensive medical screening [...] by a doctor or a fully-qualified nurse reporting to a doctor as soon as possible after their admission' (**CPT, [Immigration Detention: Factsheet](#), [CPT/Inf\(2017\)3 2](#)**). Similarly, the CAT has held that 'medical checks upon arrival in detention facilities should be ensured, and a medical and psychological follow-up by a specially trained independent health expert should be provided when signs of torture or traumatization have been detected during the asylum proceedings' (**A.A. v Denmark [CAT/C/49/D/412/2010](#) (2012) § 7.3**). Where, exceptionally, the authorities are considering detaining a child under immigration powers, a medical examination must be performed *prior* to any such decision to detain to allow for the proper assessment of the proportionality of this measure (SP1: Liberty; SP6: Individualisation). As held by the ECtHR, 'if the authorities are considering depriving a child of his or her liberty, a medical assessment should be made of the child's state of health to determine whether or not he or she can be placed in a juvenile detention centre' (**A.D. v Malta, [ECtHR App No 12427/22](#) (2023) § 120**).

As with inappropriate material conditions of detention (SP14: Conditions), detention of an individual with special health needs may violate the right to be free from inhuman and degrading treatment if those needs are not adequately treated. The ECtHR has consistently emphasised the need to ensure that the 'health and well-being [of detainees] are adequately secured', holding that detention can amount to inhuman or degrading treatment where this results in worsening the individual's state of health (**Riad and Idiab v Belgium, [ECtHR App Nos 29787/03 and 29810/03](#) (2008) § 99**). A violation of the prohibition of inhuman and degrading treatment was recognised, for instance, where the situation of a detained person with a psychotic illness who was refusing food and water was met with bureaucratic inertia (**R (BA) v SSHD [\[2011\] EWHC 2748 \(Admin\)](#), § 237 (Elizabeth Laing QC)**), where the claimant 'was not given appropriate medical treatment to alleviate his mental illness for a prolonged period of more than 5 months' (**R (HA) (Nigeria) v SSHD [\[2012\] EWHC 979 \(Admin\)](#), § 179 (Singh JJ)**), and where the 'absence of proper psychiatric treatment [...] lasted for many months and [...] exacerbated [the claimant's] suffering' (**R (D) v SSHD [\[2012\] EWHC 2501 \(Admin\)](#), § 181 (Charles George QC)**). The HRC, meanwhile, found a breach of the corresponding provision of the ICCPR where the State was 'aware of [the author's] mental condition and failed to take the steps necessary to ameliorate [his] mental deterioration' (**C. v Australia [CCPR/C/76/D/900/1999](#) (2002) § 8.4**).

The diagnosis and treatment of medical conditions in detention must address both the physical and mental health of the detained person. In **R.R. v Hungary, [ECtHR App No 36037/17](#) (2021)**, the ECtHR expressed particular concern that a young child did not seem to have been provided with the vaccinations recommended at her age. Her pregnant mother, meanwhile, had not received any psychological or psychiatric treatment despite the fact that her condition had been brought to the attention of the authorities, contributing to the finding of a breach of Article 3 of the ECHR for both

applicants (§§ 62–63, 65). Similar concerns were raised for the minor applicant in *A.D. v Malta, ECtHR App No 12427/22 (2023)*. While no issues were found in terms of his examination and treatment for physical health issues, in terms of his mental health, the Court highlighted how he was only transferred for counselling 3 months after he had been diagnosed as suffering from PTSD and depression. The Court noted that '[t]here is therefore little doubt that the applicant was particularly vulnerable not only because he had mental health problems but also because these had not been seen to, despite the recommendations to that effect' (§ 130).

More generally, in assessing the adequacy of healthcare provided under Article 3 of the ECHR, the Court has held that 'the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate'. Rather, it is also necessary to:

ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention, that diagnosis and care are prompt and accurate and that, where necessitated by the nature of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis (*A.D. v Malta, ECtHR App No 12427/22 (2023) § 119*).

Moreover, 'medical treatment within detention facilities must be appropriate and comparable to the quality of treatment which the State authorities have committed themselves to providing for the population as a whole' (*Feilazoo v Malta, ECtHR App No 6865/19 (2021) § 86*). This includes specialised medical standards for children in the wider community (*A.D. v Malta, ECtHR App No 12427/22 (2023) § 120*).

In sum, while some individuals and groups should not, by reason of their special needs, be subjected to immigration detention at all (SP6: Individualisation), others should only be detained if appropriate conditions of detention are guaranteed, including the provision of any necessary healthcare. Initial and ongoing medical examinations are thus critical for assessing these needs and the proportionality of any detention measure imposed. To this end, examinations should be performed by a qualified medical professional, both when the individual is first admitted to a detention facility and at regular intervals thereafter. Repeat consultations with a medical professional are necessary to monitor any ongoing treatment plans, as well as to ensure the identification of healthcare needs which may not have been present at the point of admission, but which have arisen during (including as a result of) detention.

SP16. CONTACT.

Detained persons must not be held *incommunicado* and must be provided with the means to maintain contact with the outside world.

States must take active measures to ensure that persons detained under immigration powers can remain in contact with the outside world. Failure to do so can cause considerable distress to the individual deprived of their liberty, as well as to friends and family who are concerned with their welfare. Contact with the outside world is also critical to facilitate the independent monitoring of detention conditions (SP18: Monitoring) and to ensure that detained persons can access legal representation and advice (SP20: Legal Representation).

[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families \(1990\) Article 16\(7\)](#): 'When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor; (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay; (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.'

[UN Convention on the Rights of the Child \(1989\) Article 37\(c\)](#): '[...] every child deprived of liberty [...] shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.'

[HRC, General Comment No 35: Article 9 \(Liberty and Security of Person\) CCPR/C/GC/35 \(2014\) § 58](#): 'Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members. [...] Detained foreign nationals should be informed of their right to communicate with their consular authorities, or, in the case of asylum seekers, with the Office of the United Nations High Commissioner for Refugees.'

[Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2004/56 \(2003\) § 43](#): '[...] persons deprived of their liberty shall be permitted to have contact with, and receive regular visits from, their relatives, lawyers and doctors and, when security requirements so permit, third parties such as human rights organizations or other persons of their choice.'

[UN General Assembly, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\) Principle 15](#): 'communication of the detained [...] person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.' **[Principle 16](#)**: '(1) Promptly after arrest and after each transfer from one place of detention or

imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody. (2) If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.’ **Principle 19:** ‘A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.’ **Principle 29(2):** ‘A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment [to supervise the strict observance of relevant laws and regulations therein] [...] subject to reasonable conditions to ensure security and good order in such places.’

UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)

[A/RES/70/175 \(2016\) Rule 58:](#) ‘(1) Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and (b) By receiving visits.’

Rule 62: ‘(1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong. (2) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.’

Council of Europe Committee of Ministers, Recommendation [Rec\(2006\)2-rev](#) on the European Prison Rules, § 24.1: ‘Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.’

CPT, Immigration Detention: Factsheet, [CPT/Inf\(2017\)3, 3:](#) ‘Detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world, and should have regular access to a telephone or to their mobile phones.’ [...] ‘Arrangements should be made to enable detained irregular migrants to consult a lawyer or a doctor on an ongoing basis, to receive visits from NGO representatives, family members.’ [...] ‘International law recognises the right of a detained irregular migrant to ask for consular assistance. However, as not all irregular migrants may wish to contact their national authorities, the exercise of this right must be left to the person concerned.’ **5:** ‘Immigration detainees should be offered the possibility to have visits several times per week. As a minimum, they should be allowed to receive at least one visit of one hour per week.’ [...] ‘Immigration detainees should have access to computers along with Voice over Internet Protocol or Skype facilities and basic internet access.’

CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5, § 65:](#) ‘The Committee

emphasizes that the right to consular assistance and protection is essential for enforcing access to justice for migrant workers and is particularly pressing when it comes to persons deprived of their liberty, regardless of whether they are detained on criminal or immigration-related grounds. The Committee therefore considers that States of origin should ensure access to effective consular assistance and protection, including by providing sufficient human, technical and financial resources.’ § 70: ‘The Committee recalls that solitary confinement is not appropriate to manage or ensure the protection of migrants, asylum-seekers, refugees, persons in need of complementary or subsidiary protection, stateless persons, victims of trauma, torture or cruel, inhuman or degrading treatment or persons with disabilities.’

Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González, A/73/178/Rev.1 (2018) § 21: ‘Consular assistance is [...] essential for effective access to justice for migrants. It is particularly urgent in the case of persons deprived of their liberty, whether for criminal or immigration reasons, as it often has a decisive impact on respect for procedural guarantees.’ § 75 ‘[States should] [e]nsure access for all migrants in detention, regardless of their status and circumstances, to competent lawyers, interpreters and translators, legal aid and judicial assistance programmes, NGOs, consular authorities and asylum procedures, and independent external monitoring of all migrant detention facilities.’

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 36: ‘All detained migrants from the moment of their detention and during the course of detention must be informed of the right to contact their consular representatives. If the migrant wishes to exercise that right, it is the duty of the authorities holding the migrant to facilitate such contact.’ § 37: All detained migrants must be able to communicate with the outside world and relatives, including by telephone or email.’ § 47: ‘The Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and other relevant organizations, including national human rights institutions, national preventive mechanisms and international and national non-governmental organizations, must be allowed free access to the places of detention where those detained in the course of migration proceedings are held.’

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court A/HRC/30/37 (2015) § 17: ‘No restrictions may be imposed on the detainee’s ability to contact his or her legal representative, family members or other interested parties.’

PACE, Resolution 1707(2010) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.2.8: ‘detainees shall be guaranteed effective access to the outside world (including access to lawyers, family, friends, the Office of the United Nations High Commissioner for Refugees (UNHCR), civil society, religious/spiritual representatives) and the right to receive frequent visits from the outside world.’

UNHCR, Detention Guidelines (2012) Guideline , § 48 (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 normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.’

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 10\(5\)](#): 'National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5 on Measures of Detention of Asylum Seekers](#), § 16: 'Detained asylum seekers should have the right to contact a UNHCR office and the UNHCR should have unhindered access to asylum seekers in detention.' § 17: 'Detained asylum seekers should also have the right to contact a legal counsellor or a lawyer and to benefit from their assistance.' § 18: 'Asylum seekers should be allowed to contact and, wherever possible, receive visits from relatives, friends, social and religious counsellors, non-governmental organisations active in the field of human rights or in the protection of refugees or asylum seekers, and to establish communication with the outside world.'

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, [E/CN.4/2004/56 \(2004\) § 43](#): 'With regard to access to the outside world, the Special Rapporteur reiterates that persons deprived of their liberty shall be permitted to have contact with, and receive regular visits from, their [...] lawyers.'

UNHCR, [ExCom Conclusion No. 44 \(XXXVII\) \(1986\) § \(g\)](#): 'refugees and asylum-seekers who are detained [should] be provided with the opportunity to contact the Office of the UNHCR or, in the absence of such office, available national refugee assistance agencies.'

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85 \(2002\) § 75\(i\)](#): '[...] Representatives of UNHCR, ICRC, NGOs and churches should be allowed access to the place of custody.'

SP16. Contact: Commentary.

The right to maintain contact with the outside world is widely recognised as a key safeguarding principle for persons deprived of their liberty on any ground. It is essential to protecting the human dignity of detained persons, while also ensuring that detention does not interfere disproportionately in the right to a private and family life. No individual deprived of their liberty should ever be 'incomunicado'. Persons deprived of their liberty under immigration powers must therefore be ensured the possibility of regular contact with family, friends and their wider community through visits and written and correspondence, telephone contact, and access to the internet. Those who are concerned with the welfare and interests of detained persons must know where they are held.

Detained persons must also be guaranteed access to the UNHCR, consular representatives, NGOs and legal professionals. Such access is a vital safeguard to ensure that the detained individual can exercise the right to challenge the grounds and/or conditions of their detention (SP20: Legal Representation). Indeed, the 'rights of persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence' (*CPT, 12th General Report, [CPT/Inf \(2002\) 15, § 44](#)*). The right to inform the consulate of the State of nationality, meanwhile, is protected under international law (*Germany v USA (LaGrand Case) [\[2001\] ICJ Rep 466, § 4.07](#)*). It is important that organisations such as the UNHCR, the International Committee of the Red Cross, the CAT, the CPT and relevant NGOs should be able to

visit immigration detention facilities, monitor the use and conditions of detention and make contact with persons deprived of their liberty (SP18: Monitoring). All contact and access rights should be explained to detained persons without delay, together with the reasons for detention (SP19: Reasons).

Solitary detention can have particularly grave effects on the psychological wellbeing of detained migrants (*CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights* [CMW/C/GC/5, § 70](#)). The CAT has duly raised concerns around the use of this practice, holding that 'the particular conditions of solitary confinement, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned must all be taken into account when determining whether or not it amounts to a violation of article 16 of the Convention [prohibition of inhuman or degrading treatment].' In applying these principles to the context of immigration detention, the CAT has placed a strong emphasis on ensuring continued contact with the outside world. For instance, a period of 4 days of solitary confinement has been held to be lawful when 'during that period of time [the detained person] was visited by his girlfriend, his lawyer, a psychologist and a medical doctor [and] had a television in his cell' (*A.A. v Denmark* [CAT/C/49/D/412/2010 \(2012\) § 7.4](#)).

A similar approach is reflected in the case law of the ECtHR. In assessing whether the treatment of an asylum-seeking family in detention amounted to a breach of Article 3 of the ECHR, the ECtHR drew attention to the fact that—once transferred to the isolation section of the Hungarian transit zone—'the applicants, including the applicant children, had no contact with other asylum-seeking families or NGO representatives in the zone' (*R.R. v Hungary, ECtHR App No 36037/17 (2021) § 61*). More generally, the Court has held that the lawfulness of any decision to subject an individual to isolated detention must take into account 'the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned' (*Feilazoo v Malta, ECtHR App No 6865/19 (2021) § 91*). For instance, subjecting an individual to isolation in immigration detention for 40 days where 'the applicant had barely any contact with anyone (except for the guards and the possibility of a few phone calls)' was held to be 'excessive'. This was exacerbated by the fact that no measures were taken to ensure the suitability of isolated detention in light of the applicant's physical and psychological condition, nor to consider the feasibility of alternatives to isolation (*Feilazoo v Malta, § 91*). In the UK, meanwhile, it has been held that the use of 'removal from association' in IRCs may also engage Article 8 of the ECHR (right to private and family life). This right was duly breached when the removal from association was imposed without the authority of the Secretary of State, meaning that the interference with this right was not 'in accordance with the law' as required under Article 8(2) of the ECHR *R (Muusa) v SSHD* [\[2017\] EWHC 2267 \(Admin\), § 114–115 \(Holman J\)](#) (Section II Legality).

SP17. PRIVATISATION.

- A.** Where detention management is outsourced to a private actor, the State must ensure that human rights standards are upheld and protect against any violations.
- B.** A private actor managing any aspect of detention must respect human rights standards.

There are two interrelated yet distinct components of the principle of 'privatisation', broadly reflecting the 'protect' and 'respect' pillars of the [UN Guiding Principles on Business and Human Rights](#). The first concerns the overarching duty of the State to ensure that minimum standards are upheld when detention is outsourced to a private corporation, and to protect against any human rights violations. The second component relates to the responsibility of all corporate actors involved in the delivery, financing or management of detention to ensure respect for human rights.

A. *As powers to impose and maintain detention can only be exercised by a duly authorised State body (SP4: Authority), it follows that in circumstances where operational responsibility for detention is outsourced to a private corporation, the State retains a duty to protect human rights and to ensure that minimum standards relating to treatment in detention are upheld.*

B. *Private actors that take on operational responsibility for any aspect of detention themselves have an obligation to respect human rights standards, including in relation to the treatment of detained persons and conditions of detention. This obligation extends to the activities of members of staff, subcontractors and suppliers.*

A. State Duty to Protect

OHCHR, [Principles and Guidelines, supported by practical guidance, on the Human Rights Protection of Migrants in Vulnerable Situations \(2018\)](#) 3–4: 'States may also be responsible for the human rights consequences of actions, or failures to act, by private actors, including corporations, members of civil society and private security contractors. They have a duty to take appropriate steps to prevent human rights abuses that they are in a position to be aware of, to investigate and punish such abuses, and provide effective remedies and reparation.'

OHCHR, [UN Guiding Principles on Business and Human Rights \(2011\)](#) Principle 1: 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.' **Principle 2:** 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'

PACE, [Report on the Detention of Asylum Seekers and Irregular Migrants in Europe Doc No 12105 \(2010\) Explanatory Memorandum, § 16:](#) '[W]here the member state "outsources" the running of immigration detention centres (open or closed) to private contractors, it nonetheless retains its human rights responsibilities.' **Appendix 2, Rule XIII(1):** 'Attention shall be paid to the relationship between the detention centre staff and the detainees under their care. The human rights obligations of the state

apply equally to agents operating on their behalf, even if they are employed directly by private security companies.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45 \(2018\)](#)

§ 46: 'If a State outsources the running of migration detention facilities to private companies or other entities, it remains responsible for the way such contractors carry out that delegation. The State in question cannot absolve itself of the responsibility for the way the private companies or other entities run such detention facilities, as a duty of care is owed by that State to those held in such detention.'

UN General Assembly, Global Compact for Safe, Orderly and Regular Migration [A/RES/73/195](#)

(2019) Objective 13, § 29(g): (Commitment to) 'Ensure that all [...] private actors duly charged with administering immigration detention do so in a way consistent with human rights and are trained on non-discrimination and the prevention of arbitrary arrest and detention in the context of international migration [...].'

CMW, General Comment No 5 on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights (2021) [CMW/C/GC/5](#), **§ 29:**

'[I]f a State subcontracts the management, safety or security of immigration detention centres to private enterprises, it remains responsible for the manner and conditions in which the subcontractors hold individuals in detention. Because the State has an obligation to care for detainees, it has an obligation to actively prevent acts of torture and ill-treatment by its agents and to act with due diligence to prevent abuse by private agents in particular.' **§ 30:** 'In principle, security personnel in detention facilities must be from the public sector. However, States parties may use private security services provided that a correct monitoring scheme is put in place and that the private security service personnel receive adequate training on human rights norms and standards for the treatment of detainees, in accordance with international instruments on persons deprived of liberty.' **§ 31:** 'It is necessary for States to develop and strengthen their human rights capacity. That includes [...] ensuring that, in exceptional cases where deprivation of liberty is permitted, detention centres have the equipment and conditions and supervising security personnel, whether public or private, necessary to carry out such a measure and provide adequate training on international human rights law and the specific rights of groups in vulnerable situations, including training in the identification of victims of trafficking, stateless persons, unaccompanied children, older persons and pregnant women, for all officials who have contact with migrants.'

UNHCR Detention Guidelines (2012) Guideline 8, § 48 (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.' **Guideline 9.7, § 65:** 'Measures may need to be taken to ensure 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 [...].'

Council of Europe Committee of Ministers, Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures: Explanatory Memorandum [H/INF\(2009\)4](#), § 63: ‘The use of force shall always be carried out in a form and manner prescribed by law and in accordance with the prohibition on discrimination and the prohibition on arbitrariness. These principles should be equally applicable to members of both the State authorities and private security firms carrying out the work of immigration control on behalf of the State. [...] agents and officials should be given appropriate training in order to raise standards and secure human rights compliance.’

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85 \(2002\)](#) § 75: ‘Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by: [...] (j) [...] ensuring that centres for the administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public supervision to ensure the application of international and national human rights law.’

SP17A. Privatisation: Commentary.

In recent years, responsibility for the management of immigration detention facilities has increasingly been contracted out to private companies. In the UK, for instance, all seven IRCs currently in operation are managed by private for-profit companies under contracts with the Home Office ([Migration Observatory, ‘Briefing: Immigration Detention in the UK’ \(2024\) 4](#)). In this respect, it has been observed that ‘[i]mmigration detention has become an industry, with private prison contractors [...] reporting sizeable annual profits from detaining migrants and asylum-seekers, including those awaiting a decision on their applications and migrants in the process of being deported’ (**CMW, General Comment No 5 on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights (2021) [CMW/C/GC/5](#), § 5**).

Where detention is outsourced to a private corporation, the facility must be operated in accordance with any relevant legislative and regulatory standards, as well as in compliance with the terms of a contract with the State. However, the company typically has significant discretion regarding the conditions of detention. It may have control over matters like welfare, access to healthcare, movement, communication, behaviour, accommodation, food, clothing, water, security and general conditions in detention. Various aspects of a facility’s operation, for example, security services, may be subcontracted out to other private actors. The facility will generally be staffed exclusively by persons selected and employed by the company or its subcontractors. In certain circumstances, the company and its employees or subcontractors will be able to use force or authorise the use of force against detainees. This high level of authority and discretion, coupled with minimal oversight, results in an environment where serious violations of basic rights can go unnoticed and remain unchecked (**Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, [A/HRC/20/24 \(2012\)](#) § 35**).

Reports of corporate perpetration of, or complicity in, violations of human rights in the context of detention are concerningly common. The exposure of grave human rights abuses by staff at Brook House, a privately-operated UK IRC, prompted a report by the House of Commons Home Affairs Committee in 2019, which identified serious problems with many aspects of the privatisation of detention and called upon the Home Office to ‘urgently monitor more closely the policies, procedures and practices of its immigration detention contractors in order to more effectively expose inappropriate

behaviour’ (*Home Affairs Committee, ‘Immigration detention—Fourteenth Report of Session 2017-19’ (2019) § 261*). This report subsequently led to a special investigation by the Prisons and Probation Ombudsman, which was later converted to a statutory public inquiry after the High Court condemned the ‘serious systemic failures, and problems of organisational culture, leadership and management’ at the facility and the ‘egregious nature of the breaches’ reportedly perpetrated by staff members (see *MA and BB v SSHD [2019] EWHC 1523, § 62*). The inquiry report included 33 recommendations across ten key issues of concern, notably including the Home Office’s management of its contractual arrangements with private actors, the use of force by private actors and issues with staffing and culture at privately-operated detention facilities (*Brook House Inquiry Report (2023) Vol II*).

Where the State outsources any aspect of the delivery or management of detention to a private actor, it retains ultimate responsibility for the manner in and conditions under which a detention facility is run (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 46*). National authorities cannot contract out of their obligations under international, regional and domestic law by outsourcing detention, and cannot absolve themselves of responsibility for the conduct of private companies in operating such detention facilities (*GB v Home Office [2015] EWHC 819 (QB), §§ 42–43 (Coulson J)*; *Brook House Inquiry Report (2023) Vol II, Chapter D.1 § 4*). The HRC has affirmed that ‘the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State Party of its obligations’ under international human rights law (*Cabal and Bertran v Australia CCPR/C/78/D/1020/2001 (2003) § 7.2*). The State has an ongoing duty of care to those placed in immigration detention, and that duty is not discharged by the employment of a suitably qualified and competent private contractor (*S v Secretary to the Department of Immigration & Multicultural & Indigenous Affairs [2005] FCA 549, § 207*). Similarly, accountability for any serious misconduct perpetrated in private detention facilities ultimately rests with the State (*Home Affairs Committee, ‘Immigration detention—Fourteenth Report of Session 2017-19’ (2019) § 269*).

Accordingly, the State must set out clear requirements for private actors involved in the management and delivery of detention to uphold human rights standards. These requirements should be reflected in rigorous legislative and policy standards, as well as embedded within contractual arrangements with entities to whom detention is outsourced (*Brook House Inquiry Report (2023) Vol II, Recommendation 2*). Private actors responsible for detention must owe the same duties and responsibilities as State authorities would, including with regard to the conditions of detention and duties of release and of compensation (Section V. Judicial Oversight & Remedies).

B. Corporate Responsibility to Respect

Venice Commission, Rule of Law Checklist (2016) § 56: ‘There are a number of areas where hybrid (State-private) actors or private entities exercise powers that traditionally have been the domain of State authorities, including in the fields of prison management and health care. The Rule of Law must apply to such situations as well.’

OECD, Guidelines for Multinational Enterprises on Responsible Business Conduct (2023) Chapter IV: ‘Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a publicly available policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.'

OHCHR, [UN Guiding Principles on Business and Human Rights \(2011\) Guiding Principle 11:](#)

'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'

Guiding Principle 12: 'The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.'

Guiding Principle 13: 'The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.'

Guiding Principle 14: 'The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure [...].'

SP17B. Privatisation: Commentary.

The second component concerns the responsibility of all private actors involved in the delivery and management of detention to respect human rights. The corporate responsibility to respect human rights is a global standard, applying to all businesses, anywhere in the world. It encompasses all internationally-recognised human rights, meaning that in any activities related to the administration or management of detention, private actors must respect each of the rights contained in the so-called International Bill of Rights and those outlined in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (**OHCHR, [UN Guiding Principles on Business and Human Rights \(2011\) Guiding Principle 12](#)**). Not only must private actors seek to avoid causing or contributing to adverse human rights impacts within their own activities in the context of detention and address such impacts where they occur, but they also have a duty to prevent or mitigate any such impacts that are linked to their operations through business relationships.

The corporate responsibility to respect human rights 'exists independently of States' abilities and/or willingness to fulfil their own human rights obligations' and 'over and above compliance with national laws and regulations' (**OHCHR, [UN Guiding Principles on Business and Human Rights \(2011\) Guiding Principle 11 Commentary](#)**). Thus, the mere fact that immigration detention is authorised and

directed by the State does not absolve corporate actors involved in the delivery and management of detention of their ongoing responsibility to ensure respect for human rights standards, nor does it excuse such companies for perpetration of, or complicity in, human rights violations (*FGP v Serco Plc* [2012] EWHC 1804 (Admin), §§ 53–55 (Collins J)). Further, the responsibility of private actors to prevent and mitigate adverse human rights impacts linked to their operations through business relationships means that corporations with delegated operational responsibility for a detention facility have a duty to ensure that any subcontractors and suppliers, for example, security personnel, also respect human rights. By the same token, a similar responsibility exists for companies and investors that provide financial and other support to private actors with operational responsibility for detention facilities.

For these reasons, any private actors with involvement in immigration detention must implement strong policies and processes to safeguard against involvement or complicity in human rights violations. This should involve a process of human rights due diligence: identifying and assessing actual and potential human rights impacts associated with their involvement in detention and those of their suppliers, partners and subsidiaries; integrating and acting upon the findings; tracking responses; and communicating how impacts are addressed. This process should draw upon independent human rights expertise, for example, in migrants' or children's rights, and involve a process of meaningful consultation with former and current detained persons and other stakeholders. Any findings should be integrated across all internal functions and processes and be met with tangible action, the impact and effectiveness of which must be tracked. Finally, to the extent permitted under contractual or other arrangements, private actors involved in detention should make efforts to communicate externally about human rights risks and impacts in detention management and efforts made to address them.

SP18. MONITORING.

Independent monitoring of immigration detention facilities must be ensured, together with access to mechanisms for detained persons to complain about treatment in detention.

States must arrange for the independent monitoring of immigration detention centres, while also ensuring unrestricted access for national preventive mechanisms, NGOs, national human rights institutions and international organisations.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002) Article 3: 'Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).'

Article 4(1): 'Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence [...] These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.'

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) Article 2: 'Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014), § 58: '[...] Independent and impartial mechanisms should be established for visiting and inspecting all places of detention [...].'

PACE, Resolution 1707 (2010) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.2.15: '[...] independent inspection and monitoring of detention centres and of conditions of detention shall take place.'

Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return (2005) Guideline 10(5): '[...] the functioning of these facilities should be regularly monitored, including by recognised independent monitors.'

CPT, Immigration Detention: Factsheet, CPT/Inf(2017)3, 8: '[...] 'Independent monitoring of detention facilities for irregular migrants is an important element in the prevention of ill-treatment and, more generally, of ensuring satisfactory conditions of detention. To be fully effective, monitoring visits should be both frequent and unannounced. Further, monitoring bodies should be empowered to interview irregular migrants in private and should examine all issues related to their treatment (material conditions of detention, custody records and other documentation, the exercise of detained persons' rights, health care, etc.) [...] 'Effective complaints procedures are basic safeguards against ill-treatment in immigration detention. As regards complaints procedures, immigration detainees should have avenues open to them, both internally and externally, and be entitled to confidential access to an appropriate complaints authority.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 30: 'In principle, security personnel in detention facilities must be from the public sector. However, States parties may use private security services provided that a correct monitoring scheme is put in place and that the private security service personnel receive adequate training on human rights norms and standards for the treatment of detainees, in accordance with international instruments on persons deprived of liberty.' **§ 84:** 'It is essential that States effectively and credibly monitor the conditions in immigration detention centres, including privately run immigration detention facilities. States are obliged to take the legislative and other measures necessary to ensure the constant monitoring of detention centres, with no restricted areas. The Committee stresses that the authority responsible for monitoring places of detention must be independent and impartial. It is not permissible for the same authority responsible for implementing the immigration policy or in charge of detention centres to carry out that task.' **§ 84:** 'Even if there is an authority or body responsible for the supervision of places of detention, the participation of national human rights institutions and civil society organizations, which do not replace the obligations of States, is essential and relevant for the defence of the rights of migrant workers and members of their families.' **§ 84:** '[...] States should authorize access to detention facilities, including privately run immigration detention facilities, for national human rights institutions, civil society organizations, academia and international and regional bodies, such as the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund and the International Committee of the Red Cross, to ensure independent and autonomous monitoring. Information and documentation relating to the facility and persons held there, and the possibility of conducting private and confidential interviews with detainees and staff, must be available for independent monitoring entities.' **§ 89:** 'States should establish independent monitoring and accountability mechanisms in immigration detention centres and generate systematic reporting mechanisms.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\)](#) § 110: 'The monitoring of all places of immigration detention and public reporting by relevant United Nations agencies, regional and international human rights mechanisms, national human rights institutions, non-governmental organizations and consular officials (conditional upon request by persons in immigration detention) shall be permitted to ensure that the exercise of the right to bring proceedings before court to challenge the lawfulness and arbitrariness of detention and to receive appropriate remedies is accessible and effective.'

SP18. Monitoring: Commentary.

It is widely accepted that '[t]ransparency and independent oversight of the public administration of a State are critical parts of any system based on principles of democracy and the rule of law' (**UNHCR, Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), [Monitoring Immigration Detention: Practical Manual \(2014\)](#) 21**). Such oversight is critically important to ensure the appropriate treatment of individuals detained under State powers, and particularly in the context of immigration detention, where widespread reporting of incidents of ill-treatment continues to cause serious concern at the global, regional and national levels. To reduce the risk of ill-treatment in immigration detention, it is thus essential for States to establish monitoring

mechanisms that operate independently of those responsible for managing the relevant facilities. Through a system of regular and unannounced visits, the ethos of these mechanisms should be preventive, aiming 'to avert human rights violations at either an individual or systemic level before they happen' (*UNHCR, Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), [Monitoring Immigration Detention: Practical Manual \(2014\) 21](#)*).

This obligation is reflected in the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (2002), which requires States Parties to establish independent national bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment associated with deprivation of liberty (National Preventive Mechanisms) (Article 3). These mechanisms are designed to prevent ill-treatment through a system of regular visits to places of deprivation of liberty (*OPCAT, § 1*), with States Parties required to 'guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel' (*§ 18(1)*). To ensure the effectiveness of monitoring arrangements in preventing ill-treatment in detention, these should have a regular and unannounced presence behind closed doors (to discourage the development of closed cultures where rights violations are more likely) and provide recommendations to authorities with the aim of improving the treatment and conditions of the persons deprived of their liberty. To maximise transparency, States should also allow reports of national monitoring bodies to be made publicly available.

To guarantee these functions, States must adopt the measures necessary to ensure unrestricted access to detention facilities for National Preventive Mechanisms, as well as more generally to NGOs, national human rights institutions and international organisations. This includes a duty to ensure access to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) (*OPCAT, Article 4*) and to the CPT (*OPCAT, Article 2*). As emphasised by the SPT, States must 'ensure the autonomy of the Subcommittee and the [National Preventive Mechanisms] to decide which places to visit', allowing unrestricted access not only to locations formally designated as places of detention, but also to those in which individuals *may potentially* be deprived of their liberty in the opinion of those bodies (*Subcommittee on Prevention of Torture, General Comment No 1 (2024) on Article 4 of the Optional Protocol CAT/OP/GC/1 (2024) §§ 41–42*) (SP1: Liberty). States must grant access to all information concerning the number of persons deprived of their liberty in places of detention, as well as to all information referring to treatment of those persons and conditions of detention (*OPCAT, § 20*). Furthermore, detained persons should be able to communicate freely with monitoring mechanisms during visits without witnesses (*OPCAT, § 20(d)*) and without fear of sanctions or reprisals (*OPCAT, § 21*) (SP16: Contact).

States are not relieved of this duty where the management of immigration facilities is contracted out to private entities (SP17: Privatisation). To the contrary, the implementation of a robust monitoring scheme must be considered a strict condition for any such arrangement (*CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 30*). For instance, as a result of initial investigations into allegations of ill-treatment at Brook House (a privately-operated UK IRC), the House of Commons Home Affairs Committee called upon the Home Office to 'urgently monitor more closely the policies, procedures and practices of its immigration detention contractors in order to more effectively expose inappropriate behaviour' (*Home Affairs Committee, 'Immigration detention—Fourteenth Report of Session 2017-19' (2019) § 261*). Shortcomings in this respect were highlighted by the subsequent

Brook House inquiry, which found that the Home Office did not contribute sufficient resources to ensure effective oversight of the activities of the private contractor ([Brook House Inquiry Report \(2023\) Vol II, Chapter D2 § 26](#)).

Finally, monitoring arrangements must not only address undignified and inhumane treatment in detention (whether inflicted internationally or negligently), but also whether detained persons are prevented from exercising other essential rights—including the right to initiate legal proceedings to challenge the lawfulness of their detention before an independent judicial body (SP21: Judicial Review) (*UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* [A/HRC/30/37 \(2015\) Guideline 21, § 110](#)). They should also address any barriers to accessing non-judicial mechanisms to complain about detention conditions. In the UK, for instance, it has duly been recommended that '[t]he Home Office and its contractors operating immigration removal centres must take steps to identify and address the barriers to making complaints that are faced by detained people, including a fear of repercussions' ([Brook House Inquiry Report \(2023\) Vol II, Recommendation 28](#)).

V. Judicial Oversight & Remedies

V. JUDICIAL OVERSIGHT & REMEDIES

The following set of Safeguarding Principles address issues of compliance with the substantive Safeguarding Principles set out in the previous sections of this Handbook. The focus of this section is on ensuring effective judicial oversight of the lawfulness of detention through the guarantee of an individual right to judicial review (SP21: Judicial Review), together with specific safeguards required to facilitate the exercise of this right (SP19: Reasons, SP20: Legal Representation). This section also emphasises the importance of ensuring that the lawfulness of detention is reviewed automatically by an independent judicial body, both initially and on a period basis thereafter (SP22: Automatic Court Control). Finally, it addresses the importance of ensuring that detained persons are adequately compensated for unlawful detention and/or ill-treatment during detention, including where the latter is inflicted by private entities (SP23: Compensation).

Effective judicial oversight is critical to ensuring that immigration detention complies with the rule of law, based on the substantive principles set out in Sections I (Overarching Safeguarding Principles), II (II Legality), III (III. Non-Arbitrariness) and IV (IV. Treatment in Detention) of this Handbook. It is commonly recognised as a core principle of the rule of law that '[a]buse of discretionary power should be controlled by judicial or other independent review' (**Venice Commission, [Rule of Law Checklist \(2016\) § 66](#)**). On this basis, judicial oversight of detention can be considered 'a fundamental safeguard of personal liberty' (**UNWGAD, [Opinion No 49/2020 concerning Fernando Aguirre-Urbina \(United States of America\) A/HRC/WGAD/2020/49 \(2020\) § 86](#)**) which is 'essential to preserving legality in a democratic society' (**UNWGAD, [United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court A/HRC/30/37 \(2015\) § 3](#)**). The critical importance of judicial oversight in this context is reflected in the individual right to challenge the lawfulness of one's detention before an independent judicial body (SP21: Judicial Review). This right has a long history in national constitutional orders and is firmly entrenched in international human rights law. Indeed, 'the argument that detention is legitimate rests partly on the claim that people can challenge it' (**Anna Lindley, "Hit and Miss?" [Access to Legal Assistance in Immigration Detention](#)' (2021) *13 Journal of Human Rights Practice* 629**). As a result, States are not only required to guarantee this right within their domestic laws (SP3: Prescription), but also to facilitate its exercise by providing detained persons with information related to the reasons for their detention (SP19: Reasons) and with access to (free) legal representation (SP20: Legal Representation).

Alongside facilitating an individual right of petition, it is also necessary to put in place procedures for courts to automatically review any administrative detention decision, as well as to periodically review the lawfulness of detention over time (SP22: Automatic Court Control). This does not displace the right of the detained individual to initiate legal proceedings on their own motion. Rather, these Safeguarding Principles must operate in harmony to ensure effective checks on the exercise of executive powers of detention and to guarantee the individual's legal rights. These twin procedures should also both be capable of ensuring an effective remedy for any unlawful interference with the individual right to liberty (SP1: Liberty). While such a remedy must, first and foremost, bring an end to any ongoing violation (namely, by ensuring immediate release), this alone is insufficient. Rather, international standards recognise that individuals subjected to unlawful detention (and/or ill-treatment in detention) must also be able to claim adequate compensation for the harm suffered (SP23: Compensation). This is a critical

safeguard for redressing individual violations of rights and ensuring the accountability of State (and, where relevant, non-State) actors.

SP19. REASONS.

Detained persons must be promptly and clearly informed of the grounds of their detention and of their rights in a language they understand.

All individuals deprived of their liberty have the basic right to know and understand the reasons underpinning this decision. Being detained without this knowledge can have profound psychological effects on detained persons while also practically impeding the exercise of the right to challenge the lawfulness of one's detention. The reasons for detention should therefore be communicated promptly in an accessible manner and in a language that the detained person can understand. In addition, individuals must be informed of their rights in detention, including the right to appeal their detention before an independent judicial body (SP21: Judicial Review) and to receive legal representation for this purpose (SP20: Legal Representation).

International Covenant on Civil and Political Rights (1966) Article 9(2): 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest [...].'

European Convention on Human Rights (1950) Article 5(2): 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest [...].'

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) Article 16(5): 'Migrant workers and members of their families who are arrested shall be informed at the time of their arrest as far as possible in a language they understand of the reasons for their arrest [...].'

UN General Assembly, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principle 11(2): 'A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.'

Principle 13: 'Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.' **Principle 14**: 'A person who does not adequately understand or speak the language used by the authorities responsible for his [...] detention [...] is entitled to receive promptly in a language which he understands the information [regarding the reasons for his arrest and on his rights].'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 (2018) § 33: 'Those detained in the course of migration proceedings have the right to be informed, in writing and in a language which they understand, of the nature of and grounds for the decision to detain, the duration of detention, as well as of the possibility to challenge the legality and arbitrariness of such decision.'

Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return (2005) Guideline 6(2): 'The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies [...].'

PACE, [Resolution 1707 \(2010\)](#) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.2.3: ‘All detainees must be informed promptly, in simple, non-technical language that they can understand, of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention.’

UN General Assembly, [Global Compact for Safe, Orderly and Regular Migration A/RES/73/195 \(2019\) Objective 13, § 29\(e\)](#): [Commitment to] ‘Ensure that all migrants in detention are informed about the reasons for their detention, in a language they understand, and facilitate the exercise of their rights, including to communicate with the respective consular or diplomatic missions without delay, legal representatives and family members, in accordance with international law and due process guarantees.’

UNWGAD, [United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court A/HRC/30/37 \(2015\) § 10](#): ‘Persons deprived of their liberty shall be informed about their rights and obligations under law through appropriate and accessible means. Among other procedural safeguards, this includes the right to be informed, in a language and a means, mode or format that the detainee understands, of the reasons justifying the deprivation of liberty, the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty and the right to bring proceedings before the court and to obtain without delay appropriate and accessible remedies.’ **§ 56:** ‘The factual and legal basis for the detention shall be disclosed to the detainee and/or his or her representative without delay so as to provide adequate time to prepare the challenge. Disclosure includes a copy of the detention order, access to and a copy of the case file, in addition to the disclosure of any material in the possession of the authorities or to which they may gain access relating to the reasons for the deprivation of liberty.’ **§ 57:** ‘In any facility where persons are deprived of their liberty, the detaining authorities must inform detainees of their entitlement to bring proceedings and to receive a reasoned and individualized decision without delay, including on how to commence the procedure and potential consequences of voluntarily waiving those rights. Such information should be provided in a manner that is gender- and culture-sensitive and corresponds to the needs of specific groups, including [...] non-nationals, including migrants regardless of their migration status, refugees, asylum seekers, stateless persons [...].’

Report of the Special Rapporteur on the Human Rights of Migrants, [Gabriela Rodríguez Pizarro, E/CN.4/2003/85 \(2002\) § 75\(d\)](#): ‘Governments should take measures to ensure [...] that migrants deprived of their liberty are informed in a language they understand, if possible in writing, of the reasons for the deprivation of liberty, of the available appeal mechanisms and of the regulations of the facility. Detained migrants shall also be accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. A briefing on the facility and information on the immigration law should also be provided.’

CMW, [General Comment No 5 \(2021\) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 59](#): ‘The right to information is essential for the exercise of other rights, such as access to justice. The authorities responsible for the detention must inform the migrant worker about the reasons for detention immediately preceding, or at the latest at the commencement of, the detention. Such notification should be given in a language and format that the person understands, taking into consideration factors such

as age, ethnic and cultural background, disability and educational level.’ **§ 60:** ‘[...] States parties should prepare model notification forms containing information, including in accessible formats, on, inter alia, resources available in the languages, means or methods of communication most frequently used or understood by migrant workers who are in an irregular situation in the countries concerned. Migrants should be given adequate time and support to read or access them and should also be given copies. The forms should always accompany a detention order containing specific information on the facts of and the legal basis for the detention, the place of detention and information on, and an explanation of, migrants’ rights and how to claim those rights.’

UNHCR Detention Guidelines (2012) Guideline 7: ‘Decisions to detain or to extend detention must be subject to minimum procedural safeguards’, including **§ 47(i)** the right for detainees ‘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.’

HRC, General Comment No 35: Article 9 (Liberty and Security of the Person) CCPR/C/GC/35 (2014) § 46. ‘Detainees should be informed, in a language they understand, of their right to take proceedings for a decision on the lawfulness of their detention.’

CPT, Immigration Detention: Factsheet, CPT/Inf(2017)3, 2: ‘Detained irregular migrants should be expressly informed, without delay and in a language they understand, of their rights and the procedure applicable to them. To this end, all immigration detainees should be systematically provided with a document setting out this information; the document should be available in the languages most commonly spoken by those concerned and, if necessary, the services of an interpreter should be made available. The persons concerned should confirm in writing that they have been informed of their rights, in a language they can understand.’

CMW, General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families CMW/C/GC/2 (2013) § 34: ‘In the Committee’s view, States parties should take effective measures to ensure that all migrant workers held in migration detention centres, including those who opt for voluntary repatriation, are properly informed of their rights in a language they understand, especially with regard to their rights to consular assistance, to challenge the lawfulness of their detention and/or to release, to request asylum and to receive information about protection measures available to victims or witnesses of trafficking in persons.’

SP19. Reasons: Commentary.

Duty to Supply Reasons

The requirement to give individualised reasons (SP6: Individualisation) for any deprivation of liberty is a well-rooted principle in international human rights and national (constitutional) law. The **ICCPR (Article 9(2))** and the **ECHR (Article 5(2))** both require individuals to be provided promptly with the reasons for their arrest. As clarified by the HRC, this requirement is not limited to arrest in connection with criminal charges, but ‘applies broadly to the reasons for any deprivation of liberty’ (**HRC, General Comment No 35 on Article 9 (Liberty and Security of the Person) CCPR/C/GC/35 (2014) § 24**). Similarly, the ECtHR has confirmed that this right ‘is applicable both to persons deprived of their liberty by arrest and to those deprived of it by detention’ (**Suso Musa v Malta, ECtHR App No 42337/12**

(2013) § 113). To ensure that the reasons for detention are properly understood, information must be provided in ‘simple, non-technical language that [the individual] can understand’ (*Shamayev v Georgia and Russia*, ECtHR [App No 36378/02](#) (2005) § 413), with the assistance of an interpreter (where necessary). The factual and legal grounds for detention must also be provided in writing (*UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45* (2018) § 32).

A duty to supply reasons is a critical rule of law safeguard, in the absence of which detained persons will not be able to meaningfully exercise the right to challenge the lawfulness of their detention before a court (SP21: Judicial Review) (*Shamayev v Georgia and Russia*, ECtHR [App No 36378/02](#) (2005) § 413). Indeed, ‘[o]ne major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded’ (*HRC, General Comment No 35 on Article 9 (Liberty and Security of the Person) CCPR/C/GC/35* (2014) § 25). The duty to give reasons is also essential for any reviewing court to be in a position to carry out an assessment of the lawfulness of detention (*CJEU, Joined Cases C-924/19 and C-925/19* (2020) § 273). Failure to adhere to this procedural safeguard will therefore render detention arbitrary, regardless of the substantive justification for detention—a position upheld by the UK Supreme Court, which found that ‘the failure to provide a detainee with the reasons for the arrest should be regarded as [...] an unlawful exercise of the power to arrest’ (*Lumba (WL) v SSHD [2011] UKSC 12, § 77 (Lord Dyson)*; see also *R (SK (Zimbabwe) v SSHD [2011] UKSC 23, § 72*). Moreover, any omissions in the reasons provided require cogent justification. On this basis, the HRC held that a lack of justification for why the complainant could not be supplied with the reasons for his detention on national security grounds amounted to a breach of Article 9(2) of the ICCPR (*Hamadie Al-Gertani v Bosnia & Herzegovina CCPR/C/109/D/1955/2010* (2013) § 10.4).

Content of Reasons Provided

The adequacy of the information provided must be assessed in relation to whether it allows the individual to contest the legality of their detention (*Suso Musa v Malta*, ECtHR [App No 42337/12](#) (2013) § 116). To enable an application for judicial review, the reasons provided must address the person’s specific situation (SP6: Individualisation) and ‘include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint’ (*F.K.A.G. v Australia CCPR/C/108/D/2094/2011* (2013) § 9.5). For instance, Article 5(2) of the ECHR was violated where the leaflet supplied to the applicants did not provide sufficient detail as to the legal and factual reasons for their detention to enable them to challenge its lawfulness before a court (*J.R. v Greece*, ECtHR [App No 22696/16](#) (2018) §§ 123–124). To demonstrate that detention has been imposed as a measure of last resort, the reasons provided should also state why alternatives were not applicable in the individual case (SP9: Alternatives). Such a duty is expressly provided for under EU asylum standards (*EU Reception Conditions Directive (2024), Article 11(2)*).

The use of automated decision-making tools and artificial intelligence in the context of immigration detention raise additional concerns regarding the duty to give reasons. Where decisions to detain and to maintain detention are made by or with the assistance of an algorithm, the quality and veracity of any reasons provided for a decision may be compromised. Even where decisions made by automated decision-making tools are subject to human oversight, in practice this often amounts to little more than a box-ticking exercise (*Privacy International, ‘Automating the Hostile Environment: Uncovering a Secretive Home Office Algorithm at the Heart of Immigration Decision-making’* (2024)). Further,

there is often very little transparency around the algorithms employed by these tools to make their decisions, together with little scrutiny of what information is fed into the algorithm, meaning that the precise basis on which any decision to detain is made is often not known to either the detained person or the person overseeing and giving effect to that decision (SP4: Authority) (*Kate Evans and Robert Koulis, 'Manipulating Risk: Immigration Detention through Automation' (2020) 24 Lewis & Clark Law Review 789*). This can have significant flow-on effects for the right and ability of an individual to challenge the lawfulness of their detention before a court (SP21: Judicial Review).

Timing in Supply of Reasons

Under Article 5(2) of the ECHR, there is a requirement of promptness in the supply of the reasons for the detention. According to the ECtHR, this does not require reasons to be provided at the point of arrest (*Khlaifia v Italy, ECtHR GC App No 16483/12 (2016) § 115*). Nonetheless, only a very brief delay will generally be acceptable. For instance, informing the individual 29 hours after he was detained under immigration powers did not satisfy the requirement of promptness in Article 5(2) ECHR (*Kortesis v Greece, ECtHR App No 60593/10 (2012) § 62*), nor did intervals of 76 hours (*Saadi v UK, ECtHR GC App No 13229/03 (2008) § 84*) or four days (*Shamayev v Georgia and Russia, ECtHR App No 36378/02 (2005) § 416*). By contrast, Article 9(2) of the ICCPR imposes a more stringent requirement of promptness, requiring reasons to be provided immediately upon arrest. According to the HRC, States Parties can depart from this duty only 'in exceptional circumstances [when] such immediate communication may not be possible', such as when an interpreter is required to be present. However, in such cases, 'any such delay must be kept to the absolute minimum necessary' (*HRC, General Comment No 35 on Article 9 (Liberty and Security of the Person) CCPR/C/GC/35 (2014) § 27*).

The first few days following arrival in detention are a chaotic and stressful period during which detained persons may not readily take in information. Moreover, the reasons for detention and/or their justification may vary over time. The duty to provide reasons is therefore a continuous one that applies throughout the period of detention. According, detained persons must 'remain properly informed' of the reasons for their detention, including any relevant changes in the circumstances justifying the order (*Commentary to Committee of Ministers Recommendation Rec(2006)2-rev on the European Prison Rules, Rule 30*).

Duty to Supply Information on Rights

Finally, the duty to give reasons must also address the rights enjoyed in connection with the detention order. As explained by the UNWGAD, '[t]his includes the right to bring proceedings before a court to challenge the arbitrariness and lawfulness and the necessity and proportionality of their detention, and to receive without delay appropriate and accessible remedies' (*UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court A/HRC/30/37 (2015) § 42*). A duty to supply reasons will not achieve its intended effect if the individual remains unaware of their right to challenge the lawfulness of the detention order (SP21: Judicial Review), to claim compensation for any unlawful deprivation of their liberty (SP23: Compensation) and to access legal advice for these purposes (SP20: Legal Representation). Moreover, '[t]o alleviate the psychological effects of indefinite detention, detainees should also be informed from the outset of the maximum period for which they may be

detained, where such a statutory limit exists' (SP12: Maximum) (*The Equal Rights Trust, [Guidelines to Protect Stateless Persons from Arbitrary Detention](#) (2012) Guideline 37(iv)*).

SP20. LEGAL REPRESENTATION.

Every detained person is entitled to prompt legal assistance, together with guarantees of access to their legal representatives. Such legal assistance must be funded by the State.

A right to legal advice and representation is critical for ensuring access to justice for individuals held in immigration detention, including by facilitating the exercise of the right to challenge the lawfulness of one's detention before a judicial body (SP21: Judicial Review). Where necessary for the interests of justice, States are required to fund the provision of legal services through legal aid schemes. The conditions of eligibility for publicly funded legal advice must be sufficiently broad to secure representation for all persons detained under immigration powers in need of such assistance and must be applied without discrimination.

Venice Commission, [Rule of Law Checklist \(2016\)](#) § 99: 'Individuals are usually not in a position to bring judicial proceedings on their own. Legal assistance is therefore crucial and should be available to everyone. Legal aid should also be provided to those who cannot afford it.'

UNWGAD Annual Report 1997 [E/CN.4/1998/44 \(1997\)](#) § 33: 'With reference to [asylum seekers whose detention is considered necessary by the authorities] [...] (e) Access to legal counselling and representation [...] is of exceptional importance. Aliens seeking immigration or asylum are ill equipped to pursue effectively their legal rights or remedies that they might have under the applicable legislation. They would invariably suffer from material constraints or constraints of language disabling them from representing their cause effectively. Many might not be informed of the legal remedies available.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\)](#) § 46: '[...] To facilitate effective review, detainees should be afforded prompt and regular access to counsel.'

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\)](#) Principle 11(1): '[...] A detained person shall have the right [...] to be assisted by counsel as prescribed by law.' **Principle 17:** '(1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. (2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.' **Principle 18:** '(1) A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. (2) A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel. (3) The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. (4) Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official. (5) Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as

evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\) Principle 9, § 12:](#) 'Persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. Upon apprehension, all persons shall be promptly informed of this right.' **§ 13:** 'Assistance by legal counsel in the proceedings shall be at no cost for a detained person without adequate means or for the individual bringing proceedings before a court on the detainee's behalf. In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty; this includes, but is not limited to, the detainee's unhindered access to legal counsel provided by the legal aid regime.' **§ 14:** 'Persons deprived of their liberty shall be accorded adequate time and facilities to prepare their case, including through disclosure of information in accordance with the present Basic Principles and Guidelines, and to freely communicate with legal counsel of their choice.'

- **Guideline 18, § 69:** 'Respect for the confidentiality of communications, including meetings, correspondence, telephone calls and other forms of communications, with legal counsel are to be ensured. Such communications may be held in the sight of officials provided that they are conducted out of their hearing. In the event that confidentiality is broken, any information obtained shall be considered inadmissible as evidence.' **§ 70:** 'Access to legal counsel should not be unlawfully or unreasonably restricted. If access to legal counsel is delayed or denied, or detained persons are not adequately informed of their right to assistance by legal counsel in a timely manner, a range of remedies shall be available in accordance with the present Basic Principles and Guidelines.'
- **Guideline 21, § 109:** 'All individuals who find themselves in the territory or subject to the State's jurisdiction shall be guaranteed effective and free access to the courts of law. This includes the right [...] (c) To contact, and be contacted by, any interested parties that might be able to address their needs and to provide them with relevant information or legal assistance, including providing facilities to meet with such persons. This is particularly important where migrant detention facilities are located in remote locations far from population centres.'

Report of the UNWGAD [A/HRC/45/16 \(2020\) § 51:](#) 'The right to legal assistance [...] is essential to preserve the right of all those deprived of their liberty to challenge the legality of detention.' [...] 'All persons deprived of their liberty must be made aware of their right to legal assistance from the moment of detention and should have access to legal aid services if they cannot afford such assistance themselves.'

United Nations Specialised Conferences, [Basic Principles on the Role of Lawyers \(1990\) Principle 5:](#) 'Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.'

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, [E/CN.4/2003/68 \(2002\) § 26\(g\):](#) '[...] Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention. In accordance with the

Basic Principles on the Role of Lawyers, all persons arrested or detained should be informed of their right to be assisted by a lawyer of their choice or a State-appointed lawyer able to provide effective legal assistance [...] In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 66: 'In the context of immigration detention, migrant workers and members of their families have the right to legal advice and legal representation, provided by the State free of charge for persons who cannot afford it, making the rights to due process and access to justice truly operational.'

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 6\(2\)](#): 'The person detained [...] should be given the immediate possibility of contacting a lawyer.'
Guideline 9(2): '[The judicial] remedy [against detention] should be readily accessible and effective and legal aid should be provided for in accordance with national legislation.'
Guideline 10(5): 'National authorities should ensure that the persons detained in these facilities have access to lawyers.'

PACE, [Resolution 1707 \(2010\)](#), 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.2.9: 'detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge.'

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45 \(2018\) § 35](#): 'All detained migrants must have access to legal representation and advice and interpreters, including with the view to challenging the detention order, appealing deportation decisions or preventing cases of refoulement. If necessary, access to free and effective legal aid should be ensured.'

Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, [E/CN.4/2003/85 \(2002\) § 75](#): 'When [abolishing all forms of administrative detention] is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by: (c) [Ensuring that] [...] Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings [...] (e) Facilitating migrants' exercise of their rights, including by providing them with lists of lawyers offering pro bono services [and] [...] organizations providing assistance to detainees and by creating mechanisms, such as toll-free numbers, to inform them of the status of their case. Efforts should be made to conclude agreements with NGOs, universities, volunteers, national human rights institution and humanitarian and other organizations to provide basic services, such as translation and legal assistance, when they cannot otherwise be guaranteed.'

Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González, [A/73/178/Rev.1 \(2018\) § 15](#): 'The Special Rapporteur stresses the fundamental role of NGOs, university legal clinics and law firms that take on pro bono work, among others, in the legal representation of migrants. Nevertheless, he recalls that this does not free the State from its responsibility to provide free legal assistance and representation.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5](#) on Measures of Detention of Asylum Seekers, § 17: ‘Detained asylum seekers should [...] have the right to contact a legal counsellor or lawyer and to benefit from their assistance.’

[UNHCR Detention Guidelines \(2012\) Guideline 7, § 47:](#) ‘If faced with the prospect of being detained, as well as during detention, asylum seekers are entitled to the following minimum procedural guarantees: (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.’

CPT, Immigration Detention: Factsheet, [CPT/Inf\(2017\)3, 9:](#) ‘Any unaccompanied or separated child deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative who keeps them informed of their legal situation and effectively protects their interests. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.’

SP20. Legal Representation: Commentary.

The UNWGAD rightly recognises that ‘access to legal counselling and representation [...] is of exceptional importance’ for persons detained under immigration powers (***UNWGAD Annual Report 1997 E/CN.4/1998/44, § 33(a)***). Adequate and competent legal representation is essential to secure release from arbitrary detention, as well as on bail conditions, and must therefore be ensured for detained persons who lack the ability to secure such representation through their own financial means. It is also a critical safeguard to ensure the ability for detained persons to complain about ill-treatment in detention (***HRC, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) § 11***). Where there is a language barrier to securing effective legal advice and assistance, the State must also ensure that interpreters are provided. In an opinion delivered by the UNWGAD, for instance, failure to provide the complainant ‘with the assistance of counsel and access to the services of a translator or interpreter’ was held to have ‘adversely affected his ability to challenge the legality of his continued detention’, amounting to ‘a serious violation of article 9 of the [ICCPR]’ (***UNWGAD, Opinion No 72/2017 concerning Marcos Antonio Aguilar-Rodríguez (United States of America) A/HRC/WGAD/2017/72 (2017) § 63***). This was also held to be the case where the authorities failed to provide access to legal representation for a detained migrant suffering from serious mental health conditions (***UNWGAD, Opinion No 49/2020 concerning Fernando Aguirre-Urbina (United States of America) A/HRC/WGAD/2020/49 (2020) § 107***).

The ECHR enshrines the right to have access to a lawyer for defendants in criminal cases (Article 6(c)) but does not expressly provide for such a right when it comes to contesting the lawfulness of an interference with the right to liberty under Article 5 (***Lebedev v Russia, ECtHR App No 4493/04 (2007), § 84***). Nonetheless, the Court has held that access to legal aid is relevant for guaranteeing the right to bring legal proceedings under Article 5(4) of the ECHR (SP21: Judicial Review). With respect to Malta, for instance, the Court has drawn attention to ‘the apparent lack of a proper system enabling

immigration detainees to have access to effective legal aid', concluding that this may negatively impact the accessibility of remedies for challenging the lawfulness of detention (*Suso Musa v Malta*, [ECtHR App No 42337/12 \(2013\) § 61](#)). Issues may also arise under Article 5(4) of the ECHR where the applicant is prevented for any other reason from securing (effective) access to a lawyer (*Rahimi v Greece*, [ECtHR App No 8687/08 \(2011\) § 120](#)). For instance, Belgium acted unlawfully when information and services provided did not enable the detained persons to access legal assistance, and their legal representative was informed too late of the detention order to be able to react prior to the applicants' expulsion (*Čonka v Belgium*, [ECtHR App No 51564/99 \(2002\) §§ 44–46, 55](#)). In another judgment, the fact that the applicants were denied access to legal assistance during their detention at the police headquarters meant that their 'right to appeal against their detention was deprived of all effective substance', in contravention of Article 5(4) of the ECHR (*Abdolkhani and Karimnia v Turkey*, [ECtHR App No 30471/08 \(2009\) § 141](#)).

SP21. JUDICIAL REVIEW.

Detained persons must be guaranteed the right to have the lawfulness of their detention reviewed without delay by a court empowered to order release.

All individuals held in immigration detention have the right to challenge their detention before an independent judicial body empowered to order release—a right which must be guaranteed without exception. This right applies from the moment that individuals are deprived of their liberty and for the full duration of detention. It necessitates a speedy review by the competent judicial body, while the scope of the review must be capable of addressing all aspects of the lawfulness of detention—that is, whether it has been ordered in accordance with a procedure prescribed by law (II II Legality) and whether it complies with the substantive requirements for non-arbitrariness (III. Non-Arbitrariness).

Right to Judicial Review

International Covenant on Civil and Political Rights (1966) Article 9(4): ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’

European Convention on Human Rights (1950) Article 5(4): ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ **Article 13**: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) Article 16(8): ‘Migrant workers and members of their families who are deprived of their liberty by [...] detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful.’

UN Convention on the Rights of the Child (1989) Article 37(d): ‘Every child deprived of his or her liberty shall have [...] the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.’

UN General Assembly, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principle 32(1): ‘A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.’

UN Commission on Human Rights, Resolution 2004/39 on Arbitrary Detention E/CN.4/RES/2004/39 (2004) § 3: ‘Encourages the Governments concerned: (c) To respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring

proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations.'

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\)](#)

§ 39: 'Paragraph 4 of article 9 entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.' **§ 42:** 'The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible. In general, the detainee has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill-treatment of the detainee arise.' **§ 43:** '[...] After a court has held that the circumstances justify the detention, an appropriate period of time may pass, depending on the nature of the relevant circumstances, before the individual is entitled to take proceedings again on similar grounds.' **§ 46:** 'Laws that exclude a particular category of detainees from the review required by paragraph 4 violate the Covenant. Practices that render such review effectively unavailable to an individual, including incommunicado detention, also amount to a violation.' **§ 47:** 'Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay. The refusal by a competent court to take a decision on a petition for the release of a detained person violates paragraph 4. The adjudication of the case should take place as expeditiously as possible.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\)](#):

- **Principle 1, § 1:** '[...] everyone is guaranteed the right to take proceedings before a court in order that that court may decide on the arbitrariness or lawfulness of the detention, and to obtain without delay appropriate and accessible remedies.' [...] **Guideline 1, § 47:** 'The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies is applicable: (a) To all situations of deprivation of liberty, including [...] migration detention [...] (b) Irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.'
- **Principle 4, § 4:** 'The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law.'
- **Principle 8, § 11:** 'The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies applies from the moment of apprehension and ends with the release of the detainee or the final judgement, depending on the circumstances.'
- **Guideline 7, § 61:** 'To ensure that an individual is not deprived of his or her liberty without being given an effective opportunity to be heard without delay by a court of law, no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention. Authorities shall facilitate the detainee's right to bring proceedings before a court and immediate access to legal counsel to prepare the detainee's case.' **§ 62:** 'Given that

circumstances can change and lead to the possibility that a previous legal justification for a detention is no longer applicable, detainees should have the right to challenge their detention periodically.’ **§ 63:** ‘After a court has held that the circumstances justify the detention, the individual is entitled to take proceedings again on similar grounds after an appropriate period of time has passed, depending on the nature of the relevant circumstances’ **§ 64:** ‘There shall be no substantial waiting period between each application and no waiting period in cases of alleged torture or other ill-treatment, or risk of such treatment, or incommunicado detention, or where the life, health or legal situation of the detainee may be irreversibly damaged.’

UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants [A/HRC/39/45](#) (2018)

§ 15: ‘Non-nationals, including immigrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty, shall be guaranteed access to a court of law empowered to order immediate release or able to vary the conditions of release.’ **§ 29:** ‘The right of anyone deprived of his or her liberty to bring proceedings before a court in order that it may decide without delay on the lawfulness of his or her detention and obtain appropriate remedies upon a successful challenge, is a self-standing human right, the absence of which constitutes a human rights violation. This right applies to everyone, including immigrants regardless of their migration status, refugees and asylum seekers and stateless persons.’ **§ 30:** ‘Any detention in the course of migration proceedings that makes it impossible to mount an effective challenge to the continued detention is arbitrary.’ **§ 38:** ‘[...] Detention conditions and treatment must not be such as to impede the ability to challenge the lawfulness of detention [...].’

CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 61:

The Committee reaffirms that all migrant workers and members of their families who are deprived of their liberty have the right to bring proceedings before a court so that the court can rule without delay on the lawfulness or arbitrariness, including the legitimate objective, legality, necessity and proportionality of their detention [...].’ **§ 62:** ‘[...] States must guarantee migrants their right to appeal before a higher court. That right should be guaranteed at the moment of deprivation of liberty, as well as periodically throughout the duration of the detention [...].’

CPT, Immigration Detention: Factsheet, [CPT/Inf\(2017\)3](#), 3: ‘Detained irregular migrants should benefit from an effective legal remedy enabling them to have the lawfulness of their deprivation of liberty decided speedily by a judicial body. This judicial review should entail an oral hearing with legal assistance, provided free of charge for persons without sufficient means, and interpretation (if required). Moreover, detained irregular migrants should be expressly informed of this legal remedy.’

PACE, [Resolution 1707 \(2010\)](#) on 15 European Rules Governing Minimum Standards of Conditions of Detention for Migrants and Asylum Seekers, § 9.2.10: ‘Detainees must be able periodically to challenge their detention before a court.’

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return](#) (2005) Guideline

9: ‘1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful. 2. This remedy shall be readily accessible and effective.’

Scope of Review

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 62: '[...] The scope of judicial review should not be confined to a formal assessment of the individual's migration status; it requires an individual assessment of the elements pertaining to the arbitrariness of the measure.'

[UNHCR Detention Guidelines \(2012\) Guideline 7, § 47 \(v\):](#) '[...] the right to challenge the lawfulness of detention before a court of law at any time needs to be respected [...] 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.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\) Principle 11, § 18:](#) 'The court should guarantee the physical presence of the detainee before it, especially for the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court.' **Principle 14, § 22:** 'No restriction may be imposed on the court's authority to review the factual and legal basis of the arbitrariness and lawfulness of the deprivation of liberty.' **§ 23:** 'The court shall consider all available evidence that has a bearing on the arbitrariness and lawfulness of detention, namely, the grounds justifying the detention, and its necessity and proportionality to the aim sought in view of the individual circumstances of the detainee, and not merely its reasonableness or other lower standards of review.'

Features of the Reviewing Body

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [A/HRC/30/37 \(2015\) Principle 6, § 9:](#) 'A court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful.' **Guideline 4, § 51:** 'The court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention.' [...] 'In the event of an unsuccessful challenge, the court, in its decision, must provide reasons for why the individual should remain in detention in the light of the principle that liberty should be the rule and detention the exception.'

CMW, General comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 61: 'The authority assessing the lawfulness of detention must be independent from the entity that ordered or carried out the detention, in order to prevent the assessment from becoming a mere formality that prevents an impartial analysis. The assessment must also be carried out by an official authorized by law to exercise judicial functions and with the power to order the release of the migrant worker.'

SP20. Judicial review: Commentary.

A large volume of material supports the basic right to challenge the lawfulness of one's detention by way of judicial review—a principle which applies regardless of the justification for the deprivation of liberty and '[i]rrespective of the place of detention or the legal terminology used in the legislation' (**UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court** [A/HRC/30/37 \(2015\) § 47](#)) (SP1: Liberty). Judicial review of detention is an essential, inalienable safeguard under the rule of law which protects against unlawfulness and abuse of power by the State. It is also a core component of the right to liberty under international law ([ICCPR, Article 9\(4\)](#); [ECHR, Article 5\(4\)](#)), meaning that it must be secured for everyone without discrimination (SP2: Equality). The right to judicial review confers a right on the individual to take the initiative and insist that the legality of detention be assessed by a court, and is complemented by the duty of the State to undertake periodic reviews of the lawfulness of detention on an automatic basis (SP22: Automatic Court Control). These principles should operate in harmony, ensuring no gaps in safeguarding the individual under the rule of law.

Access to Review Proceedings

The principle of judicial review requires detained persons to have access to an 'effective remedy by which to contest the lawfulness and length of [their] detention' (**Louled Massoud v Malta, ECtHR App No 24340/08 (2010) § 71**). States must take active measures to guarantee this basic rule of law safeguard, including by ensuring that this right is enshrined within domestic legislation 'in clear and unambiguous language' and with a 'sufficient degree of precision' (**UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court** [A/HRC/30/37 \(2015\) § 48](#)) (SP3: Prescription). Legal guarantees of the right to challenge the lawfulness of detention before a court constitute an important safeguard against arbitrariness (**J.N. v UK, ECtHR App No 37289/12 (2016) § 48**). Accordingly, repeated violations of Article 5(4) of the ECHR have been found against Russia 'on account of the absence of any domestic legal provision which could have allowed an applicant to bring proceedings for judicial review of his or her detention pending expulsion' (**S.K. v Russia, ECtHR App No 52722/15 (2017) § 108**).

States must also ensure that access to a judicial remedy is a 'realistic possibility' (**Čonka v Belgium, ECtHR App No 51564/99 (2002) § 46**). Concerns have been raised that 'migrant workers and members of their families are often severely impeded in gaining access to national courts and to monitoring and complaint mechanisms' owing to factors such as lack of access to legal representation, limited availability of translation services, and formal restrictions on the right to initiate proceedings (**CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights** [CMW/C/GC/5, § 56](#)). Failure to create the practical conditions for individuals to be able to challenge the lawfulness of their detention—for instance, by guaranteeing a right to legal aid (SP20: Legal Representation) and by informing them of the right to challenge their detention through legal proceedings (SP19: Reasons)—will thus render detention arbitrary. For this reason, the ECtHR deemed that Turkey had violated Article 5(4) of the ECHR where the applicant did not have access to a lawyer and had not been served with a detention order or been informed of the available remedies (**Akkad v Turkey, ECtHR App No 1557/19 (2022) §§ 107–108**). Violations were also found where Bulgarian 'orders for the detention of deportees were not

amenable to judicial review’ (*Raza v Bulgaria*, ECtHR [App No 31465/08 \(2010\) § 77](#)), and where the absence of an administrative decision authorising detention deprived the applicants of the possibility of pursuing a remedy (*Khlaifia v Italy*, ECtHR GC [App No 16483/12 \(2016\) § 105](#); *Moustahi v France*, ECtHR [App No 9347/14 \(2020\) §§ 102–104](#)) (SP4: Authority).

Regarding the timing of applications, the opportunity to initial judicial review of detention ‘must be provided, both in theory and in practice, soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter’ (*Molotchko v Ukraine*, ECtHR [App No 12275/10 \(2012\) § 148](#)). An initial right to challenge the lawfulness of detention is necessary ‘to ensure that an individual is not being deprived of his or her liberty without being given an effective opportunity to be heard without delay by a court of law’, as required expressly by Article 9(4) of the ICCPR. This means that ‘no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention’ (*UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court A/HRC/30/37 (2015) § 61*). A delay of over one month before the author’s first hearing, for instance, was held to breach this requirement (*UNWGAD, Opinion No 72/2017 concerning Marcos Antonio Aguilar-Rodríguez (United States of America) A/HRC/WGAD/2017/72 (2017)*).

An ongoing right of appeal, meanwhile, reflects the fact that an initially justifiable deprivation of liberty may cease to be lawful over time. As a result, the right to judicial review was violated where ‘the domestic court refused to look again into the reasonableness of the applicant’s detention on the ground that it had ruled on the lawfulness of his detention on several previous occasions, therefore denying the applicant’s right to a review of the lawfulness of his detention as guaranteed by Article 5(4)’ (*Yeloyev v Ukraine*, ECtHR [App No 17283/02 \(2008\) § 65\). While it is acceptable to impose some waiting period between repeat applications, these cannot be ‘substantial’ in duration, and do not apply ‘in cases of alleged torture or other ill-treatment, or risk of such treatment, or incommunicado detention, or where the life, health or legal situation of the detainee may be irreversibly damaged’ \(*UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court A/HRC/30/37 \(2015\) § 64*\).](#)

A judicial remedy must not only be available to challenge the lawfulness of detention, but also to complain about the conditions of detention where there is an ‘arguable claim’ that these amount to inhuman or degrading treatment (*Khlaifia v Italy*, ECtHR GC [App No 16483/12 \(2016\) §§ 269–271](#)). This applies equally to situations where management is contracted out to private entities. As this Handbook has indicated, delegating responsibility for managing detention centres to the private sector does not relieve the State of its responsibilities to ensure humane and dignified conditions for individuals deprived of their liberty or to prevent foreseeable infringements of human rights (SP17: Privatisation). In line with this, States must ensure that effective judicial remedies exist to respond to any allegations of ill-treatment in immigration detention—a measure necessary to ensure that private actors involved in abuses are held to account (SP23: Compensation). The right to judicial review for abuses by private entities is recognised a general principle in standards on business and human rights (*OHCHR, UN Guiding Principles on Business and Human Rights (2011) Guiding Principle 26*), as well as a right that applies specifically in the immigration detention context (*CMW, General Comment No 5 on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights (2021) CMW/C/GC/5, § 30*). In this respect, signatories of the Global Compact for Safe, Orderly and Regular Migration have expressly committed to ‘[e]nsur[ing] that all [...]

private actors duly charged with administering immigration detention [...] are held accountable for violations or abuses of human rights' (*UN General Assembly, Global Compact for Safe, Orderly and Regular Migration A/RES/73/195 (2019) Objective 13, § 29(g)*).

Right to a Speedy Review

The severity of any interference with the right to liberty necessitates a swift judicial response to a claim of unlawfulness (*Khlaifia v Italy, ECtHR GC App No 16483/12 (2016) § 131*). To ensure the effectiveness of the right to judicial review, a decision on the lawfulness of detention must therefore be rendered 'speedily' (*ECHR, Article 5(4)*) and 'without delay' (*ICCPR, Article 9(4)*), while to meet these requirements, '[r]easonable deadlines should [...] be introduced to avoid protracted review proceedings without undermining their fairness' (*EU Agency for Fundamental Rights, Detention of Third-Country Nationals in Return Procedures (2011) 44*). Delays which result in a decision being delivered after the release date will necessarily mean that the 'remedy is devoid of any legal or practical effect' (*Aden Ahmed v Malta ECtHR App No 55352/12 (2013) § 120*). The speediness requirement was also breached when appeal proceedings to a higher court lasted over two years (*B.A. v Cyprus, ECtHR App No 24607/20 (2024) §§ 73–74*), while regarding Malta, the ECtHR has repeatedly found that the possibility of being issued a decision on the lawfulness of detention by lodging a constitutional application does not meet the 'very strict' requirements of speediness imposed by Article 5(4) of the ECHR (*Suso Musa v Malta, ECtHR App No 42337/12 (2013) § 52*). Where exceptionally a child is detained for immigration purposes, 'particular expedition and diligence are required on the part of the domestic courts in reviewing the lawfulness of their detention' (*G.B. v Turkey, ECtHR App No 4633/15 (2019) §§ 167, 186*).

The requirement for expedience also applies where the complaint concerns allegations of inhuman or degrading treatment in detention (rather than the legality of detention *per se*). The ECtHR has held that the independent judicial scrutiny required by Article 5(4) of the ECHR is 'essential to the prevention of life-threatening acts or serious ill-treatment in detention' (*Ilias and Ahmed v Hungary, ECtHR GC App No 47287/15 (2019) § 245*). With respect to the right to an effective remedy under Article 13 of the ECHR, the Court has held that the initiation of judicial proceedings based on allegations of inhuman or degrading treatment in detention require an 'urgent reaction', particularly when issues regarding the conditions of detention are well documented and vulnerable persons (such as children) are involved (*G.B. v Turkey, ECtHR App No 4633/15 (2019) § 134*). In such cases, a 'purely compensatory remedy' following release cannot be considered to comprise an effective remedy. Rather, 'the special importance attached by the Convention to Article 3 requires that the States Parties establish, over and above a compensatory remedy, an effective mechanism in order to put an end to the kind of treatment prohibited by Article 3 rapidly' (SP23: Compensation) (*G.B. v Turkey, ECtHR App No 4633/15 (2019) § 136*).

Scope of Review

To ensure compliance with Article 5(4) of the ECHR, the scope of judicial review 'should [...] be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5 § 1' (*Suso Musa v Malta*, [ECtHR App No 42337/12 \(2013\) § 50](#)). Domestic laws which narrow the permissible scope of judicial review—for instance, by preventing the courts from reviewing the lawfulness of the removal order that serves as the legal basis for detention, or from addressing complaints concerning the conditions of detention—are contrary to the requirements imposed by Article 5(4) (*A.M. v France*, [ECtHR App No 56324/13 \(2016\) § 41](#)). The HRC has similarly held that 'judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1' (*F.K.A.G. v Australia* [CCPR/C/108/D/2094/2011 \(2013\) § 9.6](#)). Domestic provisions which impose limits on the ability of courts to review compliance with international requirements for non-arbitrary detention will therefore be unlawful. For instance, ICCPR Art 9(4) was violated where 'there was no discretion for a domestic court to review the justification of [the] detention in substantive terms', and specifically whether the period of detention 'had become [...] contrary to article 9, paragraph 1' of the ICCPR (*Bakhtiyari v Australia* [CCPR/C/79/D/1069/2002 \(2003\) §§ 9.4–9.5](#)).

The scope of judicial review must also enable domestic courts to consider all the legal and factual circumstances that are relevant to the justification for detention. This extends to situations where the reasons for immigration detention encompass potentially sensitive issues related to national security (*Chahal v UK*, [ECtHR GC App No 22414/93 \(1996\) § 130](#)). For instance, the HRC found a breach of Article 9(4) of the ICCPR where 'the courts had no access to the information leading the Intelligence and Security Agency to the conclusion that the author was considered a threat to the public order, peace and security of the State party and did not question the reasons why they themselves could not be informed of the grounds on which such assessment was based' (*Hamadie Al-Gertani v Bosnia & Herzegovina* [CCPR/C/109/D/1955/2010 \(2013\) § 10.6](#)). The ECtHR has similarly held that, while 'the use of confidential material may be unavoidable where national security is at stake[,] [t]his does not mean [...] that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved' (*Chahal v UK*, [ECtHR GC App No 22414/93 \(1996\) § 131](#)). In this respect, it is also essential to ensure the fairness of judicial review proceedings through equality of arms, including in detention cases involving national security considerations. This requirement was breached, for instance, where allegations about the risks posed by the applicants relied primarily on closed material which was not accessible to them (*A v UK*, [ECtHR GC App No 3455/05 \(2009\) §§ 223–224](#)).

Features of the Reviewing Body

The right to challenge the lawfulness of detention requires the review to be conducted by a court which is 'established by law and bear[s] the full characteristics a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful' (*UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court* [A/HRC/30/37 \(2015\) § 9](#)). This was not satisfied, for instance, where reviews were conducted exclusively by administrative authorities, thereby

falling short of the guarantees enshrined in Article 9(4) of the ICCPR (*UNWGAD, Opinion No 70/2020 concerning Mr Laltu (alias Somrat Morol) (Australia)* [A/HRC/WGAD/2020/70](#) (2020) §§ 102–104).

Critically, detained persons must be able to initiate proceedings before a judicial body that is competent to rule on the legality of their detention and to order their release if detention is found to be unlawful—a requirement expressly contained in Article 9(4) of the ICCPR and Article 5(4) of the ECHR. This requirement will not be met where individuals are limited to lodging a bail application, which only allows for provisional release (which can be revoked if the conditions of bail are not met), and which in any case does not provide for a formal assessment of the lawfulness of detention and the subsequent possibility of receiving compensation (SP23: Compensation) (*Suso Musa v Malta, ECtHR App No 42337/12* (2013) §§ 56–57). As held by the UK Supreme Court, there is an important distinction between judicial review and bail (*Lumba (WL) v SSHD* [2011] UKSC 12, § 118 (Lord Dyson)): while the former must address the legality of detention, the latter assumes the legality of detention and then asks whether there is good reason to order release on conditions. In other words, bail is no substitute for release where the individual ought not to be in detention in the first place (SP9: Alternatives).

The requirements of independence and impartiality mean that '[t]he authority assessing the lawfulness of detention must be independent from the entity that ordered or carried out the detention, in order to prevent the assessment from becoming a mere formality that prevents an impartial analysis' (*CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights* [CMW/C/GC/5](#), § 61). For instance, in assessing whether the Maltese Immigration Appeals Board (IAB) could be considered a 'court' within the meaning of Article 5(4) of the ECHR, the ECtHR shared the applicants' concerns around its judicial character, independence and impartiality, noting, for instance, that it is composed of non-professional judges, its appointments lack a clear and transparent process and members' initial mandates and reappointment depend on the satisfaction of the executive (*J.B. v Malta, ECtHR App No 1766/23* (2024) §§ 149–155). Based on these conclusions, the Court called on the Maltese Government 'to ensure that legislation is put in place in order for the IAB to conform with those requirements, having regard to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the necessity for the body to present an appearance of independence' (§ 167).

SP22. AUTOMATIC COURT CONTROL.

Detained persons must be brought promptly before a court to review the lawfulness of their detention. Such reviews must be conducted periodically by a judicial body until detention ceases.

States must ensure that the lawfulness of immigration detention is subject to automatic review by a judicial body. Where the initial decision to detain is made by an administrative authority, a court must approve the lawfulness of this decision as swiftly as possible (SP4: Authority). In addition, courts should be required to conduct periodic reviews of the continued lawfulness of detention, as well as to determine conditions for release on bail. Automatic court control should be supplemented with—but not replaced by—mechanisms for automatic administrative reviews by an independent body.

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) [CCPR/C/GC/35 \(2014\)](#) § 12: 'Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.' **§ 19:** '[...] Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity. The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.'

UN General Assembly, [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment \(1988\) Principle 11\(3\)](#): 'A judicial or other authority shall be empowered to review as appropriate the continuance of detention.'

UNWGAD, [United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court A/HRC/30/37 \(2015\) Principle 21, § 43](#): 'Irrespective of the body responsible for their detention order, administrative or other, such non-nationals [including migrants regardless of their status, asylum seekers, refugees and stateless persons] [...] shall promptly be brought before a judicial authority before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.'

UNWGAD, [Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 \(2018\) § 13](#): 'Anyone detained in the course of migration proceedings must be brought promptly before a judicial authority, before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.'

UNWGAD [Annual Report 2003 E/CN.4/2004/3 \(2003\) § 86](#): '[...] any decision to place [illegal immigrants and asylum-seekers] in detention must be reviewed by a court or a competent, independent and impartial body in order to ensure that it is necessary and in conformity with the norms of international law [...]'

CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights [CMW/C/GC/5](#), § 62: 'The necessity for the continuation of any detention should be automatically reviewed at reasonable intervals by a court.'

Council of Europe Committee of Ministers, [Twenty Guidelines on Forced Return \(2005\) Guideline 8\(2\)](#): 'In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority [...].'

UNWGAD Annual Report 1997 [E/CN.4/1998/44 \(1997\) § 33\(c\)](#): 'Appeal and review procedures' should include 'an automatic review by a judge after a specific period [...].'

[UNHCR Detention Guidelines \(2012\) Guideline 7, § 47](#): 'asylum-seekers are entitled to the following minimum procedural guarantees: [...] (iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. The 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 [...] 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.'

UNHCR's [Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons \(2013\) Summary Conclusions, 2](#): 'Governments need to ensure ... independent review of decisions to detain [...] Ideally, review of detention should be carried out periodically and automatically.'

Council of Europe Committee of Ministers, Recommendation [Rec\(2003\)5 on Measures of Detention of Asylum Seekers, § 5](#): 'Measures of detention of asylum seekers, reviewed regularly by a court in accordance with Article 5, paragraph 4, of the [ECHR], should be applied only under the conditions and maximum duration provided for by law. If a maximum duration has not been provided for by law, the duration of the detention should form part of the review by the above-mentioned court [...].'

SP22. Automatic Court Control: Commentary.

While the principle of judicial review (SP21: Judicial Review) addresses the individual's right to initiate proceedings, automatic court control places the onus on the State to ensure judicial supervision of detention—both on an initial basis (when the detention order is first issued), and on a continuing basis (through periodic reviews). Automatic court control must address all aspects of detention that pertain to its lawfulness. If detention is held to be lawful, the court should establish a timeline for automatic reconsideration of the case (if the timescales for periodic court control are not specified in domestic law). With each review, the court should also consider whether to direct release on bail, under suitable conditions (SP9: Alternatives).

Mandatory reviews of detention orders by a court are widely recognised in the criminal context, with various human rights provisions requiring that an individual detained on a criminal charge 'shall be brought promptly before a judge or other officer authorized by law to exercise judicial power' (**ICCPR, Article 9(3); ECHR, Article 5(3)**). This guarantee must be 'prompt' and 'automatic' (**Aquilina v Malta, ECtHR GC App No 25642/94 (1999) § 49**) to 'keep to a minimum any unjustified interference with individual liberty' (**Ladent v Poland, ECtHR App No 11036/03 (2008) § 72**). By contrast, immigration detention provisions in human rights instruments, such as ECHR Article 5(1)(f), do not contain a clear corresponding duty (**Lumba (WL) v SSHD [2011] UKSC 12, § 48 (Lord Dyson)**). This, however, cannot be the last word. Many of the relevant safeguards applicable to immigration detention are not expressly spelled out. They have evolved, as the implications of immigration detention have been grappled with by those who need to discern and enforce appropriate limiting principles. There is no reason why persons detained under immigration powers, subjected to executive detention and not accused of any criminal offence, should have a *lower* level of protection than applies to criminal suspects (**Joint Committee on Human Rights, 'Immigration detention—Sixteenth report of Session 2017–19' (2019) § 73**). Moreover, applying the principle of automatic court control not only protects the individual, but also minimises the scope for compensation claims against the State for unlawful detention (SP23: Compensation).

Automatic reviews of immigration detention by a judicial body are applied widely at the national level, often flowing from basic constitutional guarantees. German law provides that 'only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay' (**Basic Law for the Federal Republic of Germany, Article 104(2)**). This protection applies explicitly in the context of immigration detention, where 'the foreigner shall be brought before the court forthwith for a decision on the order for detention pending deportation' (**Aufenthaltsgesetz (Residence Act) 2004, Article 62(5)**). Several States have adopted similar protections, which are often subject to strict timescales. For instance, in the Netherlands, a court must be informed of the individual's detention within 28 days and must hear the case within 14 days of receiving notice (**Aliens Act 2000, Articles 94.1 and 94.2**). In Denmark, 'an alien deprived of liberty must, if not already released, be brought before a court of justice within 3 full days and the court must rule on the lawfulness of the deprivation of liberty and its continuance' (**Aliens (Consolidation) Act, § 37(1)**), while in Switzerland, 'the legality and appropriateness of detention must be reviewed at the latest within 96 hours by a judicial authority on the basis of an oral hearing' (**Federal Act on Foreign Nationals of 16 December 2005, Article 80(2)**).

Appropriately, many international bodies consider automatic judicial reviews of immigration detention (rather than merely automatic administrative reviews) to be a critical rule of law safeguard (**Report of UNWGAD A/HRC/13/30 (2010) § 61**). Given the gravity of any interference with the right to liberty, it has been suggested that, 'as a general rule, the procedure and the decision ordering the detention of a migrant must be carried out and dictated by a judge or court' (**CMW, General Comment No 5 (2021) on Migrants' Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 62**). Where a non-judicial authority is responsible for issuing an administrative detention order (SP4: Authority), the individual affected should therefore be promptly brought before a judicial authority for validation of this decision. Moreover, irrespective of the issuing authority, individuals detained under immigration powers 'should have access to automatic, regular periodic reviews of their detention [by a judicial body] to ensure that it remains necessary, proportional, lawful and non-arbitrary' (**UNWGAD, United Nations Basic Principles and Guidelines on Remedies**

and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court [A/HRC/30/37 \(2015\) Principle 21, § 42](#)). The importance of this safeguard has been recognised under EU law, which requires the detention of asylum seekers to 'be reviewed by a judicial authority at reasonable intervals of time [...] in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention' ([EU Reception Conditions Directive \(2024\), Article 11\(5\)](#)). A similar requirement in the context of returns, where automatic judicial review is required to any periods of detention that are 'prolonged' ([EU Returns Directive \(2008\), Article 15\(2\)](#)).

Applying this principle, the UNWGAD has found that, by relying on the detained migrant to initiate judicial proceedings, 'his detention was not subject to automatic, periodic review to ensure that it was compatible with article 9 of the Covenant', amounting to a breach of the State's human rights obligations under the ICCPR ([UNWGAD, Opinion No 72/2017 concerning Marcos Antonio Aguilar-Rodríguez \(United States of America\) A/HRC/WGAD/2017/72 \(2017\) § 59](#); see also [UNWGAD, Opinion No 49/2020 concerning Fernando Aguirre-Urbina \(United States of America\) A/HRC/WGAD/2020/49 \(2020\) § 106](#)). While accepting that there is no implied duty to conduct automatic judicial reviews in relation to detention under Article 5(1)(f) of the ECHR ([J.N. v UK, ECtHR App No 37289/12 \(2016\) § 94](#)), the ECtHR has recognised that such a measure can nonetheless form a key component of the judicial protection afforded to persons detained under immigration powers ([S.K. v Russia, ECtHR App No 52722/15 \(2017\) § 104](#)), labelling this 'an important safeguard' ([Aquad v Bulgaria, ECtHR App No 46390/10 \(2011\) § 132](#)). The Court has also suggested that a system of automatic periodic review may alone be sufficient to guarantee the rights of detained persons under Article 5(4) of the ECHR (i.e. in the absence of an individual right of petition). However, in such cases, decisions must follow at 'reasonable intervals' to protect against the risk of the individual remaining in detention long after their deprivation of liberty has become unjustified ([J.B. v Malta, ECtHR App No 1766/23 \(2024\) § 146](#)), and reviews must be sufficiently frequent to respond to changing circumstances that may affect the lawfulness of immigration detention ([Abdulkhakov v Russia, ECtHR App No 14743/11 \(2012\) § 214](#)). Notwithstanding this possibility, a robust approach to judicial protection necessitates that these measures operate in a complementary manner, rather than as alternatives ([UNWGAD, Revised Deliberation No 5 on Deprivation of Liberty of Migrants A/HRC/39/45 \(2018\) § 13](#)).

SP23. COMPENSATION.

Everyone unlawfully detained is entitled to adequate compensation reflecting the violation of their rights.

The right to an effective remedy under international human rights law requires the individual to be compensated for the violation of their rights. Access to compensation must therefore be provided in relation to any period for which an individual was detained unlawfully, as well as for any harm suffered due to ill-treatment in detention (whether or not the detention itself was unlawful). This represents a formal acknowledgement of the wrong suffered by the victim, while also helping ensure compliance by the State authorities with key Safeguarding Principles.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) Article 16(9): 'Migrant workers and members of their families who have been victims of unlawful [...] detention shall have an enforceable right to compensation.'

International Covenant on Civil and Political Rights (1966) Article 2(3): '3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.' **Article 9(5)**: 'Anyone who has been the victim of unlawful [...] detention shall have an enforceable right to compensation.'

European Convention on Human Rights (1950) Article 5(5): 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.' **Article 13**: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

UNWGAD, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court A/HRC/30/37 (2015) Principle 15, § 25: 'Any person arbitrarily or unlawfully detained is guaranteed access to effective remedies and reparations capable of providing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be adequate, effective and prompt. States shall undertake prompt, effective and impartial investigations wherever there is reasonable ground to believe that detention has been arbitrary.' (**§ 26**): 'Where a court determines that the deprivation of liberty is arbitrary or unlawful, it shall order a conditional or unconditional release from detention. Relevant authorities shall give immediate effect to any order for release. **Guideline 16, § 87**: 'Judicial orders of release must be executed as soon as they become operative, as continued detention would be considered arbitrary.' **§ 88**: 'A copy of the decision finding the detention arbitrary or unlawful is to be transmitted to the person concerned, with notification of the procedures for obtaining reparations. The person has the right to full compensation for material harm, elimination of

the consequences of material harm and restoration of all rights that were either denied or infringed.’
§ 90: ‘The enforceable right to receive compensation for anyone determined to have been arbitrarily or unlawfully detained and for any harm suffered by the person as a result of unlawful deprivation of liberty, irrespective of whether the detaining authorities were responsible for such harm, shall be regulated by comprehensive legislation.’

HRC, General Comment No 35: Article 9 (Liberty and Security of Person) CCPR/C/GC/35 (2014) § 50: ‘Paragraph 5 [of Article 9 of the ICCPR] obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time.’

UN General Assembly, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) Principle 35(1): ‘Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.’

CMW, General Comment No 5 (2021) on Migrants’ Rights to Liberty and Freedom from Arbitrary Detention and Their Connection with Other Human Rights CMW/C/GC/5, § 55: ‘[...] the reparation of the harm caused to a migrant by the violation of a human right requires comprehensive reparation. The State should implement measures to ensure the enjoyment of the rights that have been violated and to redress the consequences of those violations. In doing so, the State should implement different measures of reparation in order to redress the harm integrally, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.’ **§ 69:** ‘The Committee notes that migrants are at an increased risk of human rights violations while in detention, and States have an obligation to prevent, investigate, prosecute and punish any acts of torture, cruel, inhuman or degrading treatment or punishment or other human rights violations by detention facility personnel, detainees or any other person.’ **§ 89:** ‘[...] States should establish official mechanisms and procedures to provide effective remedies for human rights violations perpetrated in detention centres, provide comprehensive redress to victims and hold State and private authorities accountable for such violations.’

OHCHR, Principles and Guidelines, supported by practical guidance, on the Human Rights Protection of Migrants in Vulnerable Situations (2018) Principle 8, § 10: ‘[...] private actors, including the security forces, should be held accountable for unlawful or arbitrary detention, poor standards of detention, or other violations or abuses of human rights. Any detained migrant who suffers such abuses or ill-treatment is entitled to obtain an effective remedy and reparation.’

OHCHR, UN Guiding Principles on Business and Human Rights (2011) Guiding Principle 25: ‘As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.’

- **Guiding Principle 26:** ‘States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses [...].’
- **Guiding Principle 27:** ‘States should provide effective and appropriate non-judicial grievance mechanisms [...] for the remedy of business-related human rights abuse.’

- **Guiding Principle 28:** ‘States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.’
- **Guiding Principle 29:** ‘To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.’

Council of Europe Committee of Ministers, Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures, Explanatory Memorandum H/INF(2009)4, § 63: ‘There should be clear complaint mechanisms and effective remedies to address the acts and omissions of private security firms which give rise to alleged human rights violations (and/or civil or criminal liability as prescribed by law).’

SP23. Compensation: Commentary.

The right to an effective remedy is a basic principle of human rights law ([Universal Declaration of Human Rights \(1948\) Article 8](#)). Where unlawful detention is continuing, the right to an effective remedy requires prompt release to bring an end to the violation. The right to an effective remedy must also be ensured to bring an end to any ongoing violation with respect to treatment in detention—either by ensuring release, or by providing the necessary conditions to avoid further harm (IV. Treatment in Detention). In these contexts, it is insufficient to ensure a purely compensatory remedy after-the-fact ([G.B. v Turkey, ECtHR App No 4633/15 \(2019\) § 136](#)). The right to a preventive remedy must also be guaranteed for persons detained in facilities managed by private actors, with the State responsible for ensuring that judicial and non-judicial grievance mechanisms can effectively and appropriately respond to human rights abuses ([OHCHR, UN Guiding Principles on Business and Human Rights \(2011\) Guideline 25](#)).

The right to an effective remedy also applies *after* an individual has been released from immigration detention. In this context, the aim of the remedy is not to prevent further violations of substantive rights, but to adequately remediate any violations suffered by the individual (usually in the form of a monetary award). This is spelled out by the core international and regional human rights instruments, which recognise that any victim of unlawful detention must have ‘an enforceable right to compensation’ ([ICCPR, Article 9\(5\)](#); [ECHR, Article 5\(5\)](#)). As such, in addition challenging the lawfulness of any ongoing detention (SP21: Judicial Review), detained persons must also be guaranteed a right to initial proceedings to review the lawfulness of *past* detention, in the absence of which a right to compensation would be devoid of substance ([Akkad v Turkey, ECtHR App No 1557/19 \(2022\) § 109](#)).

Compensation ‘should include adequate compensation for the length of the [unlawful] detention’ ([A v Australia CCPR/C/59/D/560/1993 \(1997\) § 11](#)). As held by the UK Supreme Court, the level of damages awarded for a tort of false imprisonment ‘will depend on the circumstances and degree of harm the claimant has suffered by reason of his or her wrongful detention’ ([R \(Hemmati\) \(AP\) v SSHD \[2019\] UKSC 56, § 91 \(Lord Kitchin\)](#)). It can also include an additional component of ‘exemplary’ damages in particularly egregious cases of unlawful detention ‘to deter and to vindicate the strength of the law’ ([Muuse v SSHD \[2010\] EWCA Civ 453, § 11 \(Thomas LJ\)](#)). For instance, in [Adegboyega v SSHD \[2024\] EWHC 2365 \(KB\)](#), the claimant was awarded exemplary damages on account of the fact that his unlawful imprisonment ‘was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous’ ([§§ 140–142 \(Roberts HHJ\)](#)).

Significantly, the UK Supreme Court has held that it is appropriate to order only ‘nominal’ damages where it is established that, had the State exercised its powers of immigration detention lawfully, the individual would have been detained in any event (*Lumba (WL) v SSHD* [2011] UKSC 12, §§ 90–96 (Lord Dyson)). Such an approach is not necessarily contrary to the requirements imposed by Article 5(5) of the ECHR, depending on the specific facts of the case (*V.M. v UK*, ECtHR App No 49734/12 (2016) §§101–102). Nonetheless, it is arguably unsatisfactory to characterise detention as unlawful, and yet to award nominal damages. A more favourable and balanced solution would be to grant a level of ‘vindicatory’ damages—an approach which has found favour in some quarters (*Lumba (WL) v SSHD* [2011] UKSC 12, § 217 (Lady Hale), § 195 (Lord Walker); § 180 (Lord Hope)) and which can be seen to fit alongside ECtHR’s concept of just satisfaction (*Abdi v UK*, ECtHR App No 27770/08 (2013) § 92).

Moreover, courts should be careful not to assume that an individual would have been detained in any event due to the practical exigencies of the situation. In *V.M. v UK (No 2)*, ECtHR App No 62824/16 (2019), the domestic courts concluded that the applicant was only entitled to nominal damages given that, even had her detention reviews been conducted lawfully, she would likely have been detained in any event due to the lack of practical arrangements in place to ensure her immediate release (SP7: Legitimate Aim). However, the ECtHR emphasised that such a lack of preparedness cannot be relied on to conclude that the applicant would have been lawfully detained in any event, and that ‘it [was] not possible to know when the applicant would have been released had [...] the appropriate arrangements for her release made’ (*V.M. v UK (No 2)* §§ 37–39). Accordingly, the applicant’s rights had been breached under Article 5(1) of the ECHR, and she was awarded substantive damages by the ECtHR (§§ 40, 44).

Compensation cannot turn the clock back to the time when safeguards should have been complied with (or the individual released). Nonetheless, the right to compensation serves a vitally important function with respect to the rule of law. It reflects an acknowledgment of the harm committed by the State, compensating the individual for the ‘loss’ that they have suffered through unlawful interference with their right to liberty (SP1: Liberty). It also indicates that unlawful deprivation of liberty is something which *matters* and for which the relevant actors must be held accountable. By ensuring that there are financial consequences for a State’s failure to exercise its powers of detention lawfully, the right to compensation plays an important role in ensuring compliance with rule of law safeguards in the context of deprivation of liberty.

This principle applies equally to ensuring the accountability of private actors for violations of human rights in immigration detention. As with the preventive component of the right to an effective remedy, the right to compensation must address *any* violation of the individual’s rights in detention, including any ill-treatment. This is particularly relevant in the context of private management of detention facilities (SP17: Privatisation). In such cases, access to compensatory remedies is an important aspect of ensuring appropriate accountability. The right to an effective remedy also requires that, in addition to ensuring access to remedies against the perpetrators of abuses, the State effectively investigates and punishes such ill-treatment (including, where appropriate, through criminal prosecution) (OHCHR, [UN Guiding Principles on Business and Human Rights](#) (2011) Guiding Principle 1).

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