

# Immigration Detention and the Rule of Law

Safeguarding Principles

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with  
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## SAFEGUARDING PRINCIPLES

**SP1. LIBERTY.** Everyone, whatever their immigration status, has a basic freedom from detention.

**SP2 EQUALITY.** Everyone, whatever their immigration status, has a basic right to equal treatment under equal law.

**SP3. PRESCRIBED RULES.** Detention requires clear and published prescribed rules setting out the criteria and process.

**SP4. SPECIAL NEEDS.** The prescribed rules must protect vulnerable persons and groups from unsuitable detention or conditions.

**SP5. AUTHORITY.** Detention can only be imposed by decision, and carried out by action, of prescribed and duly-authorized authorities.

**SP6. ADHERENCE.** Detention must always be compliant with the prescribed rules.

**SP7. INDIVIDUALISATION.** Detention must be based on due appraisal of the individual circumstances.

**SP8. ALTERNATIVES.** Detention must be based on due appraisal of the alternatives to detention.

**SP9. NON-ROUTINE.** Detention cannot be used as a routine measure of immigration control.

**SP10. NON-PENALISING.** Detention cannot be used as a routine measure to penalise irregular immigration status.

**SP11. NON-ARBITRARY.** Detention must not be arbitrary.

**SP12. LEGITIMATE AIM.** Detention can only be used for a legitimate aim: for carrying out entry or removal controls effectively.

**SP13. NECESSITY.** Detention must be a last resort: sufficiently closely connected to the legitimate aim as to be necessary to achieve it.

**SP14. ACHIEVABILITY.** Detention cannot be imposed, or maintained, unless the legitimate aim is achievable expeditiously.

**SP15. DILIGENCE.** Detention is unlawful if the legitimate aim is not pursued diligently and expeditiously.

**SP16. BREVITY.** Detention must be as short as possible.

**SP17. MAXIMUM.** The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.

## *SAFEGUARDING PRINCIPLES*

**SP18. REASONS.** Detainees must promptly, clearly and regularly be told the grounds and maximum duration of detention, and their rights.

**SP19. CONDITIONS.** Detention must be in humane, dignified conditions, in distinctive non-penal facilities.

**SP20. CONTACT.** Detainees must always be able to communicate with the outside world, legal representatives and relevant agencies.

**SP21. AUTOMATIC COURT-CONTROL.** Every detainee must promptly be brought before a court to impose conditions or order release.

**SP22. ADMINISTRATIVE REVIEW.** The executive must regularly review the appropriateness and conditions of detention.

**SP23. JUDICIAL REVIEW.** A detainee has the right to have the lawfulness of detention reviewed by a court empowered to order release.

**SP24. LEGAL REPRESENTATION.** Every detainee is entitled to prompt, continuing, adequate legal assistance; state-funded if unaffordable.

**SP25. COMPENSATION.** Everyone unlawfully detained is entitled to adequate compensation reflecting the violation of their rights.

## INTRODUCTION

This Report articulates principles, 25 of them. They are unashamedly 'safeguarding' principles, because their function is to protect. They delineate protections for individuals facing the deprivation of their liberty at the hands of a State exercising immigration powers. They are intended to be capable of giving protection which is practical and effective. They arise from a legal and a factual context. The legal backcloth involves a growing body of materials delineating appropriate standards: international, regional or national; legally binding, persuasive or informative.

The factual backcloth is a harsh reality for the very many migrants faced with immigration detention. That must never be overlooked. There are many serious concerns. For example, NGO reports "*expose a catalogue of damage that has been both caused and exacerbated by detaining children for the purposes of immigration control*" (***Medical Justice, State Sponsored Cruelty: Children in Immigration Detention (2010)***); also ***Bail for Immigration Detainees, Last Resort or First Resort? Immigration Detention of Children in the UK (2011)***, bring to light "*the injustice that victims of torture face in immigration detention*" (***Medical Justice, The Second Torture: The Immigration Detention of Torture Survivors (2012)***), draw attention to the serious implications of long-term detention (***Detention Action, Long-Term Immigration Detention: A Waste of Money and Lives***" (2011)), and highlight the brutal and damaging reality of immigration detention in the context of family life (***Fractured childhoods: the separation of families by immigration detention (Bail for Immigration Detainees, 2013)***). These are but illustrations.

Each of the 25 principles in this Report gathers relevant sources, accompanied by a commentary. The aims of the Report are ambitious, and to some extent pull in opposite directions. Those aims are to be clear, concise, comprehensive; creative and credible.

Immigration detention is executive detention. It is detention for administrative reasons. It is imposed by State authorities against a disempowered and marginalised group: 'foreigners'. Whether these individuals are asylum-seekers, economic migrants, or foreign

national prisoners, this group is a 'soft' target. Its members can all too readily be locked away, out of sight and mind (cf. ***Bail for Immigration Detainees, Out of Sight, Out of Mind: Experiences of Immigration Detention in the UK (2009)***). Their freedom and welfare is politically cheap. Respecting their liberty may not win praise in the popular media, and it may not win votes. Locking them up may do both. Governments know this. Even where governments are held accountable, the "unpopularity" of immigration detainees "has allowed policy-makers to shrug off defeats in the courts and continue regardless" (***London Detainee Support Group, No Return, No Release, No Reason (2010) p.24***).

The political grip of immigration detention seems ever tightening. The United Nations (UN) Working Group on Arbitrary Detention (WGAD) reported in February 2009, noting "with concern ... a development yet again towards tightening restrictions, including deprivation of liberty, applied to asylum-seekers, refugees and migrants in an irregular situation" (***WGAD Annual Report 2008, A/HRC/10/21, 16 February 2009, §65***). The position has been that: "Countries around the world are increasingly using detention as a migration management tool" (***International Detention Coalition, The Issue of Immigration Detention at the UN Level (2011)***). As explained in a 2010 Council of Europe report (***PACE Committee on Migration, Refugees and Population, Report on the detention of asylum seekers and irregular migrants in Europe (the Mendonça Report), 11 January 2010, Doc. 12105, pp.1–2***), immigration detention in Europe "has increased substantially in recent years ... to a large extent due to policy and political decisions resulting from a hardening attitude towards irregular migrants and asylum seekers", while "conditions and safeguards afforded to immigration detainees who have committed no crime are often worse than those of criminal detainees", "Detention has a high cost in financial terms" and "there is a clear lack of a precise, accessible legal framework governing the use of detention under international human rights law and refugee law".

Here are some examples. In the United States (US), immigration detention tripled between 1996 and 2008, many immigration detainees being left to "languish in detention indefinitely if their home country is unwilling to accept their return", and many "held

... without access to an immigration judge or judicial body” and left “to represent themselves if they cannot afford a lawyer” (**Amnesty International, *Jailed Without Justice* (2008), pp.3, 6**). By 2011, US immigration detention involved some “400,000 people, including elderly, women, mentally ill and disabled people ... detained each year in restrictive conditions ... designed for punitive purposes ... Asylum seekers and other survivors of human rights violations often spend months and sometimes years in detention ... Immigration detention rates have grown dramatically in the last decade ... Within the network of approximately 250 detention locations, immigrants are often detained in harsh conditions meant to house convicted offenders” (**Physicians for Human Rights, *Dual Loyalties: The Challenges of Providing Professional Health Care to Immigration Detainees* (2011), pp.1, 29**). In the Netherlands, by 2008 some 20,000 irregular migrants were being detained each year in around 3,000 cells; the Dutch position having “hardened” (**Amnesty International, *The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers* (2008), p.51**). France reportedly held more than 5,000 children in immigration detention in the territory of Mayote; Greece reportedly held 572 unaccompanied minors in Filakio detention centre; and in the United Kingdom (UK) – the only EU member state to practise indefinite immigration detention – “at any one time, several thousand immigrants and asylum seekers are detained indefinitely without trial or charge ... many ... for over a year and some for even longer” (**Johnston (2009) 23 *Imm Asylum and Nationality Law* 351, 364**). In 2006, the UK Government had instituted “a practice of blanket detention” of foreign national prisoners following completion of their prison sentences pending deportation, “with a ruthless determination that precluded consideration of the merits of any individual case and was wholly at odds with the ... published policy” (**R (Kambadzi) v Secretary of State for the Home Department (SSHD) [2011] UKSC 23 §27 Lord Hope**).

Detention without clear limits is a very troubling problem. As has been explained (**Migration Observatory, Oxford University, *Policy Primer, Immigration Detention: Policy Challenges* (2011), p.5**): “However long they are held, detainees rarely know the term of their confinement” and “find it hard to bear not knowing what will happen in their case”.

Immigration detention is an expensive practice. Detaining the approximately 30,000 migrants who enter UK immigration detention every year is very costly: to operate a typical facility, holding an average of 194 detained migrants at any one time, costs some £8.5million per year (***Migration Observatory, Oxford University, Briefing: Immigration Detention in the UK (2012)***). By 2005/2006, the annual cost of one UK place in low-security detention had reached £68,000 (***Detention Action, Fast Track to Despair: The Unnecessary Detention of Asylum Seekers (2011), p.44 fn.52***).

The rule of law is not silent. It finds a voice. Enlightened courts know the seriousness of executive detention, not imposed as a criminal sentence on conviction by a court for committing a crime. Executive detention is a “dramatic” response, “unprecedented in peacetime” in the UK until 1971 (***Pankina v SSHD [2010] England and Wales Court of Appeal (EWCA) Civ 719 §13, Sedley LJ***). It was Winston Churchill who said: “The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government ... Nothing is more abhorrent than to imprison a person or keep him in prison because he is unpopular. That really is the test of civilisation” (***cited by Lord Bingham, Personal Freedom and the Dilemma of Democracies, 52(4) ICLQ 841 (2003)***).

It is a corrosive and discriminatory idea, that the individual liberty of foreigners lacking immigration status is less worthy of protective safeguards under the rule of law than those – whether own nationals or foreigners – who are detained because they are suspected of committing crimes.

It may be corrosive, but it is not new. In June 1947 the UK representative on the Human Rights Commission wrote a letter to the UN Secretary General, attaching a draft International Bill of Human Rights (***UN Human Rights Commission, E/CN.4/AC.1/4, 5 June 1947***). Article 10 of the draft protected the right to individual liberty, with safeguards including (a) the right to be brought without delay before a judge and (b) the right not to be detained for an unreasonably prolonged period. The draft is revealing about the 1947 mindset

regarding immigration detention. Draft Article 10(4) stated expressly that the safeguards described above *would not apply to “the lawful detention of a person to prevent his effecting an unauthorised entry into the country”*.

The denial of such basic protections is unsustainable. In the event, ICCPR Article 9 was framed more open-textually. It has been the function of the UN Human Rights Committee to look to imply safeguards and apply rigour. In Europe, Article 5 of the European Convention on Human Rights (ECHR) had spelt out that immigration detention could be lawful (Art 5(1)(f)) and linked it to some, but sadly not all, of the safeguards applicable to criminal process. Protective standards favoured by the European Court of Human Rights (ECtHR) have been mixed. European Union (EU) law has legislated in the asylum and removals context, where it has produced some new layers of safeguarding standards.

Conscientious judges and adjudicators in committees, tribunals and courts throughout the world, together with some legislators and policy-makers, have searched for ways to promote principled protection. Some safeguarding protections are well-established. Others are still emerging. The task is an important one. As it has convincingly been articulated (***Bail for Immigration Detainees, The Liberty Deficit (2012), p.5***):

*“It is essential that appropriate safeguards are in place when people are deprived of their liberty for months or even years at a time. The absence of such safeguards is exposed by the grinding, mundane, damaging existence of extended immigration detention imposed by the ... State without any form of routine external oversight”*.

An increasing body of materials has emerged. It includes an impressive range of carefully crafted guidance. Inspiration comes in particular from the sustained and rigorous work of numerous non-governmental organisations (NGOs) who recognise injustice in this area, and who speak out about problems and solutions. It is NGOs who have frequently sought to articulate principled, practical and effective standards. In this area, where there is much cause for despair, the NGOs bring hope.

## INTRODUCTION

In the words of the International Detention Coalition (IDC), comprising over 200 NGOs and others from more than 50 countries, working to protect the rights of migrants, refugees and asylum-seekers in immigration detention around the world (***International Detention Coalition, The Issue of Immigration Detention at the UN Level (2011)***):

*“given the lack of one UN body with an overarching mandate on immigration detention, no international instrument on detention standards specifically for refugees, asylum seekers and migrants and the growing use of immigration detention worldwide, both the UN and civil society must remain vigilant, proactive and work collaboratively to ensure governments uphold international human rights standards for those in immigration detention”.*

This Report is the Bingham Centre’s contribution, adding a voice to an existing chorus.

What should immigration detention under the rule of law look like? A principled system of protection, as articulated in this Report, could be outlined as follows. It starts with the individual’s right to liberty (SP1) and equal treatment (SP2). There must be protection against arbitrary detention (SP11), including detention which is routine (SP9) or penalising (SP10), with prescribed rules (SP3) and adherence to those rules (SP6). The appropriate authority (SP5) must impose detention only if necessary (SP13) to deliver an achievable (SP14) legitimate aim (SP12), diligently pursued (SP15). Decisions to detain must be based always on an assessment of individual circumstances (SP7) and special needs (SP4), alternatives to detention (SP8) and conditions (SP19). Detention must be for the minimum period (SP16) within a prescribed maximum (SP17). The detainee must promptly receive reasons (SP18), and be promptly and automatically referred to the supervision of a court (SP21). With legal representation (SP24) and other appropriate contact (SP20), the case must also be administratively reviewed (SP22) and judicially reviewable (SP23). In cases of unlawful detention there must be compensation (SP25).

This Report deliberately gathers together sources. There is ‘hard’ law and ‘soft’ law. There are ‘binding’ sources, ‘persuasive’ sources,

informative reference-points. There are international, regional and national materials. Cited sources and illustrations are examples. Many more can be found, and could be included in an encyclopaedia. (This Report is not an encyclopaedia.) The Report is accompanied by a note on the method used by the project, followed by a detailed bibliography with a commentary, to assist in placing sources in their proper place on the legal map. The Report itself gathers a thematic mix of materials.

There is strong precedent for such a gathering together of sources. When Lord Bingham wrote his judgment on immigration internment (***A v SSHD [2004] United Kingdom House of Lords (UKHL) 56***), explaining why immigration detention could not lawfully be used for anti-terrorism purposes, he brought together a range of materials. He presented them in characteristically clear, concise and comprehensive style. In a crucial passage in the judgment (**§§57–63**), he cited an array of sources: a Resolution from the Parliamentary Assembly of the Council of Europe; Guidelines of the Committee of Ministers of the Council of Europe; an Opinion of the Commissioner for Human Rights; General Policy Recommendations of the European Commission against Racism and Intolerance; the Universal Declaration of Human Rights; a Declaration of the UN General Assembly; two General Comments of the UN Human Rights Committee; a Resolution of the UN Security Council; a report of the UN Commission on Human Rights; General Recommendations and Concluding Observations of the UN Committee supervising the UN Convention on the Elimination of All Forms of Racial Discrimination; and Standards adopted by the International Law Association. None of these materials, Lord Bingham explained, were “*binding*”. All of them, he added, were “*inimical*” to the use of immigration detention he was exposing as contrary to the rule of law. Lord Bingham found such sources useful and illuminating. Perhaps he would have forgiven the use of a range of sources to cast light, more generally, on immigration detention under the rule of law. Perhaps others will too.

**SP1. LIBERTY.** Everyone, whatever their immigration status, has a basic freedom from detention.

**See also SP2 Equality.**

*“The fundamental right ... to liberty ... of person [is] expressed in all international and regional human rights instruments, and [an] essential component ... of legal systems built on the rule of law.”*

**(UNHCR Detention Guidelines (2012), Guideline 2 §12)**

***International Covenant on Civil and Political Rights (1966), Art 9(1):*** “Everyone has the right to liberty ... of person”.

***Universal Declaration of Human Rights (1948), Art 3:*** “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), Art 16(1):*** “Migrant workers and members of their families shall have the right to liberty ... of person”.

***Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle III(1):*** “Every person shall have the right to personal liberty”.

***American Convention on Human Rights (1969), Art 7(1):*** “Every person has the right to personal liberty”.

***American Declaration of the Rights and Duties of Man (1948), Art I:*** “Every human being has the right to ... liberty ... of his person”.

***African (Banjul) Charter on Human and Peoples’ Rights (1981), Article 6:*** “Every individual shall have the right to liberty ... of his person”.

***League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 14(1):*** “Everyone has the right to liberty ... of person”.

***European Convention on Human Rights (1950), Art 5(1):*** “Everyone has the right to liberty ... of person”.

***Charter of Fundamental Rights of the EU (2000), Art 6:*** “Everyone has the right to liberty ... of person”.

**SP1C. Liberty: Commentary.**

There are twin principles which provide the sound starting-point for examining all questions of immigration detention. They are: liberty (SP1) and equality (SP2). The individual's basic right to liberty is the default position under the rule of law. Deprivation of liberty is a derogation from that right. It requires cogent justification.

Immigration detention is not prohibited. It can be permissible. But it needs to be justified and compliant with appropriate safeguards, including national and international legal standards. Linked to liberty are basic rights of freedom of movement. Of its essence, liberty is an 'individual' right. That calls for immigration detention to be focused on the position of the individual (SP7). The right to liberty must be a practical and effective protection. It requires adherence to principled norms. It calls for detention to be the exception: a last resort. It means every power of detention, every purpose, every exception, every ground is to be interpreted restrictively.

In principle, liberty should be expected to place an onus on the State to demonstrate the lawful justification for detention in the individual case. This is so, even if a State adopts a general policy of immigration detention for a narrow and defined sub-group (e.g. deportees who have served criminal prison sentences for very serious crimes). 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. The rule of law must be "*alert to see that any coercive action is justified in law*", there being "*a principle which ... is one of the pillars of liberty*", namely that: "*every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act*" (**Liversidge v Anderson [1941] UKHL 1, 12 Lord Atkin**). This principle applies to every person within the State's jurisdiction, "*citizen or not*" (**R (Abbassi) v SSFCA [2002] EWCA Civ 1598 §60; R (Lumba) v SSHD [2011] UKSC 12 §§42, 44, 65**).

As Lord Bingham put it: "*freedom from executive detention is arguably the most fundamental and probably the oldest, the most hard[est] won and the most universally recognised of human rights*" (**Bingham (2003) 52 ICLQ 841, 842**, endorsed in **R (Lumba) v SSHD [2011] United Kingdom Supreme Court (UKSC) 12 §341 Lord**

**Brown**). “Indefinite 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**). Freedom from indefinite executive imprisonment is the “very core of liberty” (**Hamdi v Rumsfeld, 542 US 507, (2004), United States Supreme Court, Justice Scalia, dissenting, p.554**). This core principle of liberty explains: why the law operates “a strong presumption in favour of liberty, and against indefinite detention” (**Al-Kateb v Godwin [2004] HCA 37 High Court of Australia §150 Kirby J**); why Courts “construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention” (**Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97, 111E (UK Privy Council (UKPC), on an appeal from Hong Kong), Lord Browne-Wilkinson**); why “[i]nternational and national jurisprudence has held that decisions around detention must be exercised in favour of liberty, with due regard to the principles of necessity, reasonableness and proportionality” (**UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §3**). It supplies through the rule of law (**Amnesty International, Jailed Without Justice (2008), p.44**) the much-needed “presumption in law, policy, and practice against the administrative detention of immigrants and asylum seekers”: the “presumption against detention” (**Amnesty International, Migration-Related Detention (2007), p.9 §1**).

Liberty is to be contrasted with the deprivation of liberty (detention). Rigour is needed in characterising actions as deprivations of liberty, and safeguarding against circumvention of the fundamental right to individual liberty. The right cannot therefore be circumvented through designating areas within the State’s territorial jurisdiction as being a ‘transit zone’ or otherwise not a real part of the State’s territory. An individual detained in a ‘transit hall’, who has not crossed the border and is under no formal detention procedure, is deprived of his liberty in a way which engages the State’s responsibility (**Nolan v Russia, ECtHR App.No. 2512/04 [2009] §§95–96**). The same is true of detention in a ‘holding zone’ or airport hotel (**Amuur v France, ECtHR App.No. 19776/92 [1996] §50**), or in an ‘inadmissible facility’ at a port of entry (**Abdi v Minister of Home Affairs, South African Supreme Court of Appeal [2011] ZASCA 2**). It is sufficient if

the detained individual is physically present in the country; it does not matter whether they have “entered” the country in a “technical sense” (*D v UK, ECtHR App.No. 30240/96 [1997] §48*). As the Spanish Courts have recognized (*Spain, Tribunal Constitucional, Case 0174/1999, Liji Chun*) detention at border zones constitutes a deprivation of liberty to which safeguards must apply, even where the individual is free to depart the Spanish territory. As the South African Constitutional Court explained (*Lawyers for Human Rights v Minister of Home Affairs [2004] ZACC 125 §§25–26*), speaking of those “rights ... integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order”: “The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution”.

The right of liberty must always be applied robustly, with consequences which are concrete and immediate. That affects the individual’s primary effective remedy. Immigration detention which is not compatible with basic standards applicable under the rule of law is unlawful, and the individual must be released, immediately. That is an uncompromising legal consequence. As EU law neatly puts it (*EU Returns Directive 2008/115/EC, Art 15(2)*): “The third-country national ... shall be released immediately if the detention is not lawful”.

**SP2. EQUALITY.** Everyone, whatever their immigration status, has a basic right to equal treatment under equal law.

See also SP1 Liberty.

*“Everyone is equal before the law.”*

**(Charter of Fundamental Rights of the European Union (2000), Art 20)**

***Universal Declaration of Human Rights (1948), Art 1:*** “All human beings are born free and equal in dignity and rights”. ***Art 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”. ***Art 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), Art 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”. ***Art 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”.

***General Comment No. 15 (1986) of the Human Rights Committee on The position of aliens under the Covenant (ICCPR), §1:*** “... the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness”.

***General Comment No. 18 (1989) of the Human Rights Committee on Non-discrimination (ICCPR), §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”.

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art 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”.

***International Convention on the Elimination of All Forms of Racial Discrimination (1969), Art 2(1):*** “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation”.

***UN Standard Minimum Rules for the Treatment of Prisoners (1977), Rule 6(1):*** “The [standard minimum] rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

***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”.

***Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §75:*** “The Special Rapporteur has strenuously promoted the idea that the only way to halt the continuing deterioration in immigrants’ situation,

## *SP2. EQUALITY*

particularly that of illegal immigrants, is to recognize the human rights of this group and apply the principle of non-discrimination”.

***UNHCR, ExCom Conclusion No. 22 (XXXII) – 1977, §II(B)(2)***: “... [A]sylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards: ... (e) There should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity”.

***Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 (2004), §19***: “Ensure that non-citizens enjoy equal protection and recognition before the law”.

***The Equal Rights Trust, Declaration of Principles on Equality (2008), §1***: “All human beings are equal before the law and have the right to equal protection and benefit of the law”.

***African (Banjul) Charter on Human and Peoples’ Rights (1981), Art 3***: “Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law”.

***League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 3(2)***: “The States Party to the present Charter shall undertake necessary measures to guarantee effective equality in the enjoyment of all rights and liberties established in the present Charter, so as to protect against all forms of discrimination based on any reason mentioned in the previous paragraph [including national origin]”.

***Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle II §1***: “Every person deprived of liberty shall be equal before the law and be entitled to equal protection of the law and the tribunals”.

***American Declaration of the Rights and Duties of Man (1948), Art II***: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor”.

***American Convention on Human Rights (1969), Art 1***: “The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the

free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

***Inter-American CtHR, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, §103:*** “States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons”.

***European Convention on Human Rights (1950), Art 1:*** “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” ***Art 14:*** “The enjoyment of the rights and freedoms set forth in this Convention [including liberty of person] 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”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 14:*** “All persons, including stateless persons, are equal before the law and are entitled without discrimination to the equal benefit and protection of the law, including equal and effective access to justice”.

### **SP2C. Equality: Commentary.**

Immigration control is a State’s sovereign right, entitling it to regulate the status of citizenship and residency, and to decide – subject to its international law obligations – whether to give individuals permission to enter, and whether to return or deport them. It does not follow, however, that the State may in the *name* of immigration control constrain the freedoms of those who are *subject* to immigration control, simply because of their immigration status. Beyond the

question of their removability, those who are within the State's jurisdiction are entitled to equal protection under equal law, which extends to the question of detention. This is why preventative detention applied only to those with irregular immigration status is discriminatory, being a violation of the principle of equal treatment. Lord Bingham wrote (**Bingham, The Rule of Law, 6<sup>th</sup> Sir David Williams Lecture (2006), Cambridge Law Journal 66(1)**): *"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"*.

Equality accompanies liberty (SP1), as dual rights which are the principled starting-point (SP1C) for all protective standards in this field. Professor Lauterpacht put it in this way (**cited in A v SSHD [2004] UKHL 56 §46**): *"The claim to equality before the law is in a substantial sense the most fundamental of rights"*. As has been said: *"Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights"* (**CERD General Recommendation No. 14: Definition of Discrimination (Art. 1, par. 1)**, 22 March 1993). As explained by The Equal Rights Trust (**Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless People (2010), p.34**): *"The right to equality is a universal right, to which everyone is entitled, regardless of their nationality or lack thereof"*. Typical among national constitutional provisions is the **Constitution of the Republic of South Africa, No.108 of 1996, Art 9(1)**: *"Everyone is equal before the law and has the right to equal protection and benefit of the law"*; and **Art 33(1)**: *"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair"*. As Justice Jackson of the US Supreme Court famously stated (**Railway Express Agency, Inc. et al. v New York, 336 US 106 (1949), p.112**), it is *"a salutary doctrine that ... the Federal Government must exercise their powers so as not to discriminate ... except upon some reasonable differentiation fairly related to the object of regulation ... [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose*

*upon a minority must be imposed generally ... Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation*". When in UK law a question arose as to whether remedies of habeas corpus and judicial review were available to those in immigration detention, Lord Scarman responded in emphatic terms (***Khawaja v SSHD [1984] AC 74, 111***): "Every person within the jurisdiction enjoys the equal protection of our laws".

The use of immigration detention 'to prevent harm', where similar constraints are not imposed on own-nationals posing similar threats, deprives those detained of equal protection of the law and violates the right of equal treatment. That was the conclusion of the UN Working Group on Arbitrary Detention, applying ICCPR Article 26 (***WGAD Opinion No. 45/2006 A/HRC/7/4/Add.1 (2007), p.40 (Abdi v UK) §§28–29***). It was the conclusion of the UK courts (***A v SSHD [2004] UKHL 56***) that immigration detention to address a "security problem" treated people differently "because of their nationality or immigration status" whereas "the threat presented ... did not depend on ... nationality or immigration status" (***§§53–54***). As Lord Bingham explained: "What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another". It was impermissible to "discriminate against foreign nationals by detaining them but not nationals presenting the same threat" (***§63***). Preventative immigration detention is objectionable because it is differential treatment of foreigners (***Migration Observatory, Oxford University, Policy Primer, Immigration Detention: Policy Challenges (2011), p.7***), detention to "incapacitate" being "a goal that the prison service and criminal courts have rejected as sufficient on its own". Preventative immigration detention is an "insufficient" rationale, making "liberty ... the preserve of the popular, denying the rights that would be accorded to [own] nationals in similar situations"; indeed, "[b]y maintaining one rule for immigrants and another rule for everyone else we forget the lessons of history" (***Johnston, 23 Imm Asylum and Nationality Law 351 at 361, 364 (2009)***).

This demonstrates that the principle of equality (SP2) is capable of operating as a powerful protective safeguard in the context of immigration detention. It can address discrimination within the immigrant

## *SP2. EQUALITY*

community: where one group of migrants is treated differently from another, without justification. It can also protect all migrants—by insisting that immigration detention, imposed by reason of immigration status, must be cogently justified. Equality is a dynamic principle, whose impact in the area of immigration detention has surely not yet been fully appreciated. Its force and relevance extend far beyond the issue of preventative detention. It informs the assessment of why immigration detention should never be routine (SP10), nor justified as a penal measure (SP11). Inequality is a badge of arbitrariness (SP11). It brings into sharp focus the question of how detention is justified as necessary (SP13) to achieve a legitimate aim (SP12).

**SP3. PRESCRIBED RULES.** Detention requires clear and published prescribed rules setting out the criteria and process.

See also SP6 Adherence, SP17 Maximum.

*"[T]he grounds and procedure for detention should be certain and accessible."*

**(A (Torture Claimant) v Director of Immigration [2008] 4 HKLRD 752 (Hong Kong Court of Appeal) §63)**

***International Covenant on Civil and Political Rights (1966), Art 12(3):*** "The above-mentioned rights [including the right to liberty of movement] shall not be subject to any restrictions except those which are provided by law".

***UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §2:*** "Detention ... must ... be prescribed by law".

***Council of Europe, 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 this is in accordance with a procedure prescribed by law".

***Committee of Ministers Recommendation (2003)5, §4:*** "Measures of detention of asylum seekers ... are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights."

***International Convention for the Protection of All Persons from Enforced Disappearance (2006), Art 17(2)(as):*** "each State Party shall, in its legislation ... [e]stablish the conditions under which orders of deprivation of liberty may be given".

***Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 8(3):*** "Grounds for detention shall be laid down in national law".

***European Convention on Human Rights (1950), Art 5(1):*** "No one shall be deprived of his liberty save ... in accordance with a procedure by law ... (f) the lawful arrest or detention".

### SP3. PRESCRIBED RULES

**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 Committee on Migration, Refugees and Population, Report on the detention of asylum seekers and irregular migrants in Europe (the Mendonça Report), 11 January 2010, Doc. 12105, Appendix 1, §9:** “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”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 25(i):** “Detention will be arbitrary unless it is ... provided for by national law”.

#### SP3C. Prescribed Rules: Commentary.

The principle of ‘prescription’ (prescribed rules) (SP3) is frequently rolled up together with the principle of adherence (SP6). That is because adherence implies and presupposes proper prescribed rules to which to adhere. Though the two principles can go together, it is helpful to separate them out. Prescribed rules are a key protection against arbitrariness (SP11), and a prior requirement of the legal and policy framework for immigration detention. This protection means there must be substantive criteria and procedure which are accessible, clear and certain. The prescribed rules must be in place before an authorised decision-maker (SP5) comes to make a decision whether to detain an individual (SP7). This prior requirement is a standard under which national arrangements can be designed and scrutinised for compatibility with the rule of law. Any individual who is detained by a state whose arrangements do not comply with standards of prescription is entitled to challenge such

detention as arbitrary. That is not because the decision-maker failed to adhere to prescribed criteria or process, but because there were no legally adequate prescribed criteria in the first place. The prescribed rules (SP3) must address other key questions, such as special needs (SP4), authority (SP5), legitimate aim (SP12) and general maximum (SP17).

As Lord Bingham explained: *“The law must be accessible and so far as possible intelligible, clear and predictable”* (**Bingham, Rule of Law (2010), p.37**). He added: *“The rule of law 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”* (p.54). As Bingham previously stated: *“arbitrariness ... is the antithesis of the rule of law”*; *“a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification”* (**Bingham, The Rule of Law, 6<sup>th</sup> Sir David Williams Lecture (2006), Cambridge Law Journal 66(1)**). So, the *“criteria for detention should be clearly set out in law”* (**Amnesty International, Migration-Related Detention (2007), p.9**). That means that both *“the grounds and procedure for detention”* need to be *“certain and accessible”* (**A (Torture Claimant) v Director of Immigration [2008] 4 HKLRD 752 (Hong Kong Court of Appeal) §63**) (applying ICCPR Art 9, through the Hong Kong Bill of Rights Art 5(1)); and that: *“The existence of clear and lawful policy ensures that the Director, when making his decision whether or not to detain, would have had all the relevant circumstances under consideration, and that the decision to detain would not be arbitrary”*. Where legal powers of immigration detention are expressed in general terms, then *“the rule of law”* will require *“a transparent statement by the executive of the circumstances in which [they] will be exercised ... so that the individual knows the criteria that are being applied and is able to challenge an adverse decision”* (**R (Lumba) v SSHD [2011] UKSC 12 §§34, 36 Lord Dyson**).

Prescription is a strong value in the ECHR system, where rights-interferences must be ‘prescribed by law’, ‘in accordance with the law’, ‘lawful’. In EU law too, *“it is for Member States to establish, in full compliance with their obligations arising from both international law and European Union law, the grounds on which an asylum*

seeker may be detained or kept in detention" (**Arslan, CJEU Case C-534/11 [2013] §56**). As the ECtHR has explained, "it is essential, in matters of deprivation of liberty, that the domestic law define clearly the conditions for detention and that the law be foreseeable in its application" (**Creangă v Romania, ECtHR GC App.No. 29226/03 [2012] §101**). "The words 'in accordance with a procedure prescribed by law' do not merely refer back to domestic law; they also relate to the quality of this law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness" (**Massoud v Malta, ECtHR App.No. 24340/08 [2010] §61**). "[W]here a national law authorises deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness" (**Amuur v France, ECtHR App.No. 19776/92 [1996] §50**). As explained in the related context of extradition, detention is unlawful if the national "legislation does not provide for a procedure that is sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention" (**Soldatenko v Ukraine, ECtHR App.No. 2440/07 [2008] §114**); or where there is "the absence of a coherent procedure for ordering and extending detention ... and setting time-limits for such detention" (**Ergashev v Russia, ECtHR, App.No. 12106/09 [2011] §159**).

The opinion of a senior prosecutor, for example, is not a 'law' with sufficient 'quality' (**Mathloom v Greece, ECtHR App.No. 48883/07 [2012] §69**). France's transit zone immigration detention breached the requirement of prescribed rules in **Amuur v France, ECtHR App.No. 19776/92 [1996] §53** ("neither the Decree of 27 May 1982 nor the – unpublished – circular of 26 June 1990 (the only text at the material time which specifically dealt with the practice of holding aliens in the transit zone) constituted a 'law' of sufficient 'quality' within the meaning of the Court's case-law"). Russia's Border Crossing Guidelines violated this requirement in **Nolan v Russia, ECtHR App.No. 2512/04 [2009] §99**, because they had "never been published or accessible to the public". A good illustration is **Abdolkhani and Karminia v Turkey, ECtHR App.No. 30471/08 [2009] §133**: "the legal provisions ... provide that foreigners who do

*not have valid travel documents or who cannot be deported are obliged to reside at places designated by the Ministry of the Interior. These provisions do not refer to a deprivation of liberty in the context of deportation proceedings ... Nor do they provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention. The Court therefore finds that the applicants' detention ... did not have a sufficient legal basis".* The UK's detained fast-track arrangements were found to need a written policy as to exceptions, so that appropriate cases could be taken out of the system (**R (Refugee Legal Centre) v SSHD [2004] EWCA Civ 1481**).

The content of the prescribed rules should be such as to ensure that detention is *"carried out in accordance with the procedural and substantive safeguards of international law"* (**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 25(vi)**). Prescribed rules bring focus and practical enforceability, through an insistence on adequate provisions of domestic law. Proper prescribed rules can mean that *"the formal 'lawfulness' of detention under domestic law"* becomes *"the primary ... element in assessing the justification of deprivation of liberty"* (**Lokpo and Toure v Hungary, ECtHR App.No. 10816/10 [2011] §21**). Indefinite executive detention not *"based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty ... and arbitrary, and runs counter to the fundamental aspects of the rule of law"* (**Assanidzé v Georgia, ECtHR GC App.No. 71503/01 [2004] §175**). Detention was contrary to law where it *"lacked any legal basis"* (**GK v Poland, App.No. 38816/97 [2004] §76**). It was unlawful where (**Massoud v Malta, ECtHR App.No. 24340/08 [2010] §53**): *"policies regulating detention ... [and] relating to exceptions to detention were subject to change by Government at their discretion", and "unclear procedures ... were devoid of procedural safeguards"*.

**SP4. SPECIAL NEEDS.** The prescribed rules must protect vulnerable persons and groups from unsuitable detention or conditions.

See also SP3 Prescribed Rules, SP7 Individualisation, SP19 Conditions.

*“Immigration detention authorities should recognise the rights of persons ... with special needs, including unaccompanied elderly persons and minors, single women, torture and trauma victims and persons with a mental or physical disability.”*

**(Human Rights and Equal Opportunity Commission (Australia)  
Immigration Detention Guidelines (2000), §15.1)**

***Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 21:*** “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national legislation implementing this Directive”. ***Art 22:*** “In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with reception special needs. This assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that these special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure. Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation”.

***EU Returns Directive 2008/115/EC, Art 14(1)(d):*** “Member States shall ... ensure that the ... special needs of vulnerable persons are taken into account”.

***Council of Europe (PACE), Resolution 1707(2010), 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 and specifically, unaccompanied minors should never be detained”.

**Committee of Ministers Recommendation (2003)5, §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”. **§20:** “As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time”.

**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”.

**UN Standard Minimum Rules for the Treatment of Prisoners (1977), Rule 22(1):** “At every institution ... medical services should be organized in close relationship to the general health administration of the community or nation”, including “a psychiatric service”. **(2):** “Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers”. **(3):** “The services of a qualified dental officer shall be available to every prisoner”. **Rule 24:** “The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures ...”. **Rule 25(1):** “The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed”. **(2):** “The medical officer shall report to the director whenever he considers that a prisoner’s physical or mental

#### *SP4. SPECIAL NEEDS*

health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment”.

***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 9.2 §51:*** “children ... should in principle not be detained at all”. ***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]).

***UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §7:*** “children ... should in principle not be detained at all”.

***UN Convention on the Rights of Child (1990), Art 37(c):*** “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”.

***International Covenant on Civil and Political Rights (1966), Art 24(1):*** “Every child shall have ... the right to such measures of protection as are required by his status as a minor”.

**WGAD Annual Report 2009, A/HRC/13/30, 18 January 2010, §60:** “The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort”.

**Report of the WGAD on its visit to the UK on the issue of immigrants and asylum seekers), E/CN.4/1999/63/Add.3, §37:** “Unaccompanied minors should never be detained”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 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: **(a)** Ensuring that the legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child, including access to education and health. Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings. 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. Should 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”.

**Human Rights and Equal Opportunity Commission (Australia) Immigration Detention Guidelines (2000), §14.4:** “Survivors of torture and trauma shall have access without delay to assessment and treatment by a qualified professional with expertise in the assessment and treatment of torture and trauma.” **§15.1:** “Immigration detention authorities should recognise the rights of persons in immigration detention with special needs, including unaccompanied elderly persons and minors, single women, torture and trauma victims and persons with a mental or physical

#### SP4. SPECIAL NEEDS

disability”. **§15.3**: “In all actions concerning a child in immigration detention, the best interests of the child shall be a primary consideration”.

**Council of Europe (PACE), Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum, §9.2.4.**: “legal and factual admission criteria shall be complied with, including carrying out appropriate screening and medical checks to identify special needs. Proper records concerning admissions, stay and departure of detainees must be kept”.

**Council of Europe, Twenty Guidelines on Forced Return (2005), Guideline 11**: “[1] Children shall only be detained as a measure of last resort and for the shortest appropriate period of time. [2] Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.”

**Committee of Ministers Recommendation (2003)5, Rec 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”.

**Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1 20 May 2002, Guideline 2 §6**: “[States should ensure] that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody”.

#### SP4C. Special needs: Commentary.

It is a documented but deeply troubling characteristic of the practice of immigration detention that (**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §50**): “Often elderly people, persons with disabilities, pregnant women and ill people, including the mentally ill, are detained without any particular regard for their conditions and specific needs”. So, for example, the UN Committee Against Torture (CAT) (**Concluding observations on the fifth periodic**

**report of UK (2013), §30(a)** was “concerned at ... Instances where children, torture survivors, victims of trafficking, and persons with seriously mental disability were detained while their asylum cases were decided”. Some individuals and groups should not, by reason of their special needs, be subjected to immigration detention at all. Others should only be detained if appropriate conditions of detention are guaranteed. Accordingly, there are two key respects in which consideration must always be given, on an individualized basis (SP5), to the special needs of the person in respect of whom immigration detention is contemplated. First, as to whether detention is necessary and appropriate at all. Secondly, as to what detention arrangements would have to be secured before such a person could be detained. This is a double layer of protection.

Special needs are not always present or identifiable at the outset, but can arise during detention. Great care must be taken promptly to identify emerging vulnerability, which may arise during or because of detention. The negative impacts of detention – including a short stay and even the traumatizing impact of being subject to or invoking protective safeguards such as judicial process – must not be underestimated. Anxious consideration must be given to whether detention is appropriate. So, it was “disturbing ... that a young man who apparently did not suffer from any mental condition when taken into detention now does so” (**R (Wang) v SSHD [2009] EWHC 1578 (Admin) §27**).

There are many types of special needs and a valuable range of instruments and standards to promote guidance. Examples involving special needs or special considerations have included: children; families; pregnant women; elderly people; persons with physical or mental disabilities; torture victims; trauma victims; victims of trafficking; asylum-seekers; stateless persons; lesbian, gay and bisexual persons.

One obvious category of special needs involves health and mental health. As has been encapsulated in the context of asylum seekers (**UNHCR’s Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons (2013), Summary Conclusions §16**): “Any decision to restrict the liberty of an [individual] with mental and/or physical

*medical needs must consider the compounding impact of detention on those needs and how to address them*". Detention of an individual where the state was "aware of [his] mental condition and failed to take the steps necessary to ameliorate [his] mental deterioration constituted a violation of his rights under [ICCPR] article 7" (**C v Australia, CCPR/C/76/D/900/1999 [2002] §8.4**). NGOs have, for example, exposed failed systems of care for immigration detainees living with HIV (**Medical Justice, Detained and Denied: The Clinical Care of Immigration Detainees Living with HIV (2011)**). In the United States, it has been reported that in immigration detention, the "provision of health care in the detention system suffers from ... conflicting missions of the agencies handling health care, inadequate staffing, muddled accountability, inadequate independent oversight, insufficient procedural protections for detainees, and lack of legally enforceable standards" (**Physicians for Human Rights, Dual Loyalties: The Challenges of Providing Professional Health Care to Immigration Detainees (2011), p.29**). Detention of an individual with mental health difficulties may violate other rights, beyond the right of individual liberty (SP1), such as the right to freedom from inhuman and degrading treatment. That was the case where the situation of a detainee with a psychotic illness who was refusing food and water was met with bureaucratic inertia (**R (BA) v SSHD [2011] England and Wales High Court (EWHC) 2748 (Admin) §237**). Cogent calls have been made (e.g. **London Detainee Support Group, No Return, No Release, No Reason: Challenging Indefinite Detention (2010), p.27**) that immigration detention "of mentally ill people should end. The distress and psychological deterioration caused to mentally disordered detainees is disproportionate to the ends sought by immigration control". It is difficult to disagree.

Another obvious relevant category is children. Their immigration detention has been held unlawful as exposing them to "demonstrable, documented and on-going adverse effects" and where "the measures taken [are] not ... guided by the best interests of the children" (**Bakhtiyari v Australia, CCPR/C/79/D/1069/2002 (6 November 2003), §9.7**). UK arrangements are said to mean that unaccompanied children can only be detained in "the most exceptional circumstances ... where it is necessary ... for their care and safety and for no other reason" (**R (AN (A Child)) v SSHD [2012] EWCA Civ 1636 §132**) this being "a context whose vulnerability and

welfare are of ‘specific concern’” (§185). The Austrian Asylum Court has recognized the increased vulnerability of a minor asylum-seeker placed in detention facility (**Asylgerichtshof (Asylum Court), Case S1 416.449-3/2012/10E [2012]**). Protection for children means proper “age assessments” are “of paramount importance” (**UK Joint Committee on Human Rights, Human Rights of Unaccompanied Children and Young People in the UK, HL Paper 9 HC 196 (2013)**). It is impossible to disagree with the *Global Campaign to End Immigration Detention of Children*, whose objective to put an end to all immigration detention of children is endorsed by some 80 organisations worldwide.

There are many other situations involving special needs. For example, the immigration detention of pregnant women has been exposed for its seriously damaging implications (**Medical Justice, Expecting Change: The case for ending the detention of pregnant women (2013)**), with the compelling recommendation that (p.115): “Pregnant women should not be detained for immigration purposes”.

Immigration detention is “practically devastating” for survivors of torture and mothers with their children (**Legal Action for Women, Self-Help Guide (2013), p. 12**).

Those who make international protection claims have particular characteristics and are invoking particular rights. They have a special status in that they are exercising a fundamental right in seeking protection. They may have been victims of torture or arbitrary detention in a country of persecution, and should not be detained in a country of refuge. Their distinct position needs to be addressed, it being important (**UNHCR, ExCom Conclusion No.44 (XXXVIII) – 1986 §(d)**) for “national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens”, so that (**Council of Europe (PACE), Resolution 1707(2010) on the detention of asylum seekers and irregular migrants in Europe, 10 guiding principles on detention of asylum seekers and irregular migrants, §9.1.2**): “Detention shall distinguish between asylum seekers and irregular migrants”.

These are non-exhaustive illustrations. There are many other examples. Relevant safeguards for special needs should be reflected in

#### SP4. SPECIAL NEEDS

the prescribed rules for detention (SP3), and in the conditions of detention (SP19). Where relevant safeguards are not complied with, there will be non-adherence (SP6) and detention will be unlawful. For example, *“if an immigration detainee, in the absence of good reason, is not medically examined within 24 hours of his arrival at a detention centre, his detention thereafter will be unlawful”* (**R (EO) v SSHD [2013] EWHC 1236 (Admin) §53**). In **Popov v France, ECtHR App.No. 39472/07 [2012]**, immigration detention of family was unlawful: it violated the children’s rights because (§75) they were *“held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied”,* arrangements *“manifestly ill-adapted to their age”* which *“created for them a situation of stress and anxiety, with particularly traumatic consequences”*; it also violated the rights of family life (§114) because *“the applicants did not present any risk of absconding that required their detention”* so that *“confinement in a secure centre did not therefore appear justified by a pressing social need”*.

**SP5. AUTHORITY.** Detention can only be imposed by decision, and carried out by action, of prescribed and duly-authorized authorities.

See also **SP3 Prescribed Rules, SP6 Adherence.**

*“Orders of deprivation of liberty shall be ... issued by the competent authority.”*

**(Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle IV)**

***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 ... by competent officials or persons authorized for that purpose”. ***Principle 6:*** “The decision [to detain] must be taken by a duly empowered authority with a sufficient level of responsibility”.

***WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 6:*** “The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law”.

***EU Returns Directive 2008/115/EC, Art 15(1):*** “Detention shall be ordered by administrative or judicial authorities”.

#### **SP5C. Authority: Commentary.**

There is here an obvious and straightforward principle. It is frequently unstated and implied, and yet it is important. Wherever an individual is subjected to immigration detention, a first question which arises under the rule of law is as to the state agent making the decision to detain. Detention cannot be lawful unless imposed by a duly-authorized state body. The prescribed rules (SP3) must identify which bodies have the power to impose, maintain and carry out detention. They must identify the detaining authority as being obliged to give reasons (SP18). The duty of adherence (SP6) extends to compliance with those rules. If the State enlists the assistance of

## SP5. AUTHORITY

other bodies to implement the detention, those bodies must themselves owe the same responsibilities as state authorities would, including duties of release and of compensation (SP25). In a powerful decision of the Israeli Supreme Court it was held that entrusting detention to a profit-making organisation was incompatible with the fundamental right to personal liberty (***Academic Centre of Law and Business v Minister of Finance, HCJ 2605/05 [2009]***). There must be a specific, distinct and concrete decision to detain the individual (SP7): detention must not follow automatically by operation of a statute or rules, nor from a decision to refuse permission to enter, nor from a decision to remove or deport. A straightforward illustration of this principle in action is ***Shamsa v Poland, ECtHR App.No. 45355/99 [2003] §§58–59***, where detention was contrary to law because it was not ordered by a person authorised under Polish law to exercise the relevant power.

The authority principle (SP5) extends beyond the initial decision to detain. The responsibility and accountability of duly-authorised authorities is a continuing one. The safeguard of administrative review (SP22) should in principle involve a review “*by the authority that issued the decision for the detention*” (***Greece, Law 3907/2011, Art 30***). The principle of automatic court-control (SP21) means that duly-authorised state authorities detain for a short initial period, requesting the court to approve continued detention: such systems can be seen (SP21C) in many countries including Spain, Ukraine and the Russian Federation.

**SP6. ADHERENCE.** Detention must always be compliant with the prescribed rules.

See also SP3 Prescribed Rules.

*"The state may ... detain ... only in accordance with the law."*  
**(Charkaoui v Canada, Supreme Court of Canada, [2007] 1 SCR 350 §88)**

***International Covenant on Civil and Political Rights (1966), Art 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".

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art 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".

***Convention on the Rights of the Child (1989), Art 37:*** "The ... detention ... of a child shall be in conformity with the law".

***UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) (adopted by UN General Assembly Resolution 43/173, 9 December 1988), Principle 2:*** "... detention ... shall only be carried out in accordance with the provisions of the law".

***UN Declaration on the Human Rights of Individuals who are not nationals of the country in which they live (adopted by UN General Assembly Resolution 40/144, 13 December 1985), Art 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".

***WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 6:*** "The decision [to detain] must be founded on criteria of legality established by the 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".

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**UNHCR, ExCom Conclusion No. 44 (XXXVII) 1986, §(b):** "... detention may be resorted to only on grounds prescribed by law".

**African (Banjul) Charter on Human and Peoples' Rights (1981), Art 6:** "No one may be deprived of his freedom except for reasons and conditions previously laid down by law".

**League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 14(2):** "No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as it established thereby".

**European Convention on Human Rights (1950), Art 5(1):** "No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law".

**Committee of Ministers Recommendation (2003)5, §4:** "Measures of detention of asylum seekers ... are to be implemented as prescribed by law".

**Council of Europe, 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".

**Committee of Ministers Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, Guideline XI(4):** "Asylum seekers may only be deprived of their liberty if this is in accordance with a procedure prescribed by law".

**American Convention on Human Rights (1969), Art 7(2):** "No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto".

**American Declaration of the Rights and Duties of Man (1948), Art XXV:** "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law".

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §15:** "Deprivation of liberty of migrants must comply not only with national law, but also with international legislation".

**International Detention Coalition, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants – A Guide (2011), Standard 8:** “Decisions to detain must be exercised in accordance with fair policy and procedures”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 25(vi):** “Detention will be arbitrary unless it is ... carried out in accordance with the procedural and substantive safeguards of international law”.

### SP6C. Adherence: Commentary.

Hand in hand with the requirement that there must be clear and published prescribed rules (SP3), which set out the criteria and process for immigration detention, there is the duty to adhere to those criteria and to that process. As Article 7 of France’s ***Déclaration des droits de l’Homme et du Citoyen of 1789*** had put it: “No man may be ... detained ... except in cases determined by law, and according to the forms prescribed”.

Immigration detention is unlawful where the competent national authorities do not respect the criteria laid out in national law (***Jusic v Switzerland, ECtHR App.No. 4691/06 [2010] §82***) and where there is “a failure by the executive to adhere to its published policy without good reason” (***R (Kambadzi) v SSHD [2011] UKSC 23 §41***). Non-adherence may be procedural, where “the procedure prescribed by law has not been followed” (***Voskuil v Netherlands, ECtHR App.No. 64752/01 [2008] §83***). That is why detention is not “lawful under domestic law [where] the regular reviews required by the Secretary of State’s published policy were not carried out” (***Abdi v UK, ECtHR App.No. 27770/08 [2013] §69; Kambadzi [2011] UKSC 23***). It is also why, if there is breach of a requirement in the prescribed rules that an immigration detainee is “medically examined within 24 hours of his arrival at a detention centre, his detention thereafter will be unlawful” (***R (EO) v SSHD [2013] EWHC 1236 (Admin), Burnett J §53***). Detention will be unlawful if (***Kolesnik v Russia, ECtHR App.No. 26876/08 [2010] §86–87***) “decisions of the courts ... failed to refer to the relevant national legislation governing the detention”; or if there

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was detention without the required warrant (***Jeebhai v Minister for Home Affairs, South Africa Supreme Court of Appeal, Case No.139/08 [2009] §38***); or detention without the required ministerial declaration (***Naidike v Attorney-General of Trinidad and Tobago [2004] UKPC 49 §39***).

**SP7. INDIVIDUALISATION.** Detention must be based on due appraisal of the individual circumstances.

See also SP13 Necessity.

*“Any decision to detain must be based on an individual assessment.”*  
**(The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention, (2012) §30(i))**

**UNHCR Detention Guidelines (2012), Guideline 4:** “any decision to detain must be based on an assessment of the individual’s particular circumstances”. **§19:** “decisions to detain are to be based on a detailed and individualised assessment”.

**Council of Europe, 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”.

**Committee of Ministers Recommendation (2003)5, Rec 4:** “Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case”.

### **SP7C. Individualisation: Commentary.**

The basic right to liberty (SP1) is an individual right which calls for an appraisal of whether detention is justified *in the case of the individual*. Whether to detain must, as with the length of detention, “*depend upon the circumstances of the particular case*” (***R v Governor of Durham Prison, ex p Hardial Singh [1984] 1 WLR 704, 706E, Woolf J***). In the case of a class of persons, such as foreign national prisoners facing deportation after serving sentences of imprisonment, it is contrary to law to adopt “*a blanket policy*”, it being important that “*each case is considered individually*” (***R (Lumba) v SSHD [2001] UKSC 12 §§20–21***). As the UN Human Rights Committee has explained, immigration detention must be based on “*factors particular to the individuals*” (***A v Australia, HRC CCPR/C/59/D/560/1993 [1997] §9.4***), so that there are

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“grounds particular to the [individuals’] cases which would justify their continued detention” (***Shams v Australia, HRC CCPR/C/90/D/1255 [2007] §11***). As made explicit in Spanish immigration legislation (***Organic Law 4/2000, Art 62.1b***), a judge’s reasoned ruling in an immigration detention case is one in which, following the principle of proportionality, the specific circumstances of the case must be taken into consideration.

Each individual whom the State is contemplating placing in immigration detention is entitled to have their case considered on its individual merits, as to whether detention is justified as necessary (SP13) for a legitimate aim (SP12) which is achievable (SP14). The decision-making must be evidence-based, and conclusions should have a clear evidential basis. The relevant state authority (SP5) must ensure that, as it has cogently been articulated, “any decision to detain immigrants and asylum seekers is based on a detailed and individualized assessment, which should include the individual’s personal history” (***Amnesty International, Jailed Without Justice (2008), p.44***). Further, the individual is entitled to be detained only if there are conditions (SP19) which are suitable in the light of their individual circumstances and special needs (SP4). If detained, the individual is entitled to be told the reasons (SP18), the legal maximum period of detention (SP17), and the requirements imposed on the automatic court-control (SP21). The application of all safeguarding principles must start with, and focus on, the position of the individual. The right of individual liberty (SP1) demands no less.

Knowing that the case has been considered individually is linked to the question of knowing the maximum term (SP17) and the release date set in the individual case, under automatic court-control (SP21C). These form part of a basic human need. The implications have been graphically exposed through detainee testimonies (***London Detainee Support Group, No Return, No Release, No Reason (2010)***). Take this typical detainee, who having served a 3-month prison sentence (for driving while disqualified) was then held in indefinite immigration detention for 3 years. He says: “You see people here in detention, they are losing it ... When they were in prison they were normal! Because they knew they had a date for their release. You are here indefinitely, without [a] date for release ... We need the people to know that this is very unjust”. And so it is.

**SP8. ALTERNATIVES.** Detention must be based on due appraisal of the alternatives to detention.

See also SP13 Necessity.

*“Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.”*

**(Council of Europe, Committee of Ministers  
Recommendation (2003)5, Rec 6)**

***UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §3:*** “detention 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”.

***UNHCR Detention Guidelines (2012), Guideline 4.3:*** Alternatives to detention which may be considered are as follows: (i) Monitoring Requirements [Reporting and Residency Requirements]; (ii) Provision of a Guarantor/Surety; (iii) Release on Bail; (iv) Open Centres. **§35:** “The consideration of alternatives to detention from reporting requirements to structured community supervision and/or case management programmes) – 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. Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken”. **§38:** “Notably, alternatives to detention should not be used as alternative forms of detention; nor should alternatives to detention become alternatives to release. Furthermore, they should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers”. [See also **Annex A** discussing examples of alternatives to detention: (i) Deposit or surrender of documentation; (ii) Reporting conditions; (iii) Directed residence; (iv) Residence at open or semi-open reception or asylum centres; (v) Provision of a guarantor/surety; (vi) Release on bail/bond; and (vii) Community supervision arrangements].

## SP8. ALTERNATIVES

**UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986, Recital §(b):** expressing “the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, 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”.

**International Detention Coalition, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants – A Guide (2011), Standard 6:** “Where a person is subject to detention, alternatives must first be pursued. Governments should implement alternatives to detention that ensure the protection of the rights, dignity and wellbeing of individuals”.

**WGAD Annual Report 2009, A/HRC/13/30, 18 January 2010, §65:** “Alternatives to detention can take various forms: reporting at regular intervals to the authorities; release on bail; or stay in open centres or at a designated place. Such measures are already successfully applied in a number of countries. They must however not become alternatives to release”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 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”. **Rec §73:** “The Special Rapporteur would like to remind Governments that 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. In designing alternatives to detention, Governments should pay attention to the specific situation of particular groups of migrants, such as children, pregnant women and persons with disabilities, and use the least intrusive measure possible”.

**Council of Europe (PACE), Resolution 1707(2010), §8:** “The Assembly reiterates that the grounds for immigration detention are limited by Article 5.1.f of the European Convention on Human Rights. Detention should be used only if less intrusive measures have been tried and found insufficient. Consequently, priority should be given to alternatives to detention for the individuals in question (although they may also have human rights implications). Alternatives to detention are financially more attractive for the states concerned and have found to be effective. Unfortunately, in some states, alternatives to detention are rarely used or they do not even find expression in national law, notwithstanding all obligations to consider these”.

**Council of Europe, 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”.

**Committee of Ministers Recommendation (2003)5, §6:** “Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention”.

**Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures (1 July 2009) Guideline XII(4):** “Asylum seekers may only be deprived of their liberty if this is in accordance with a procedure prescribed by law and 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”.

**Council of Europe (PACE), Resolution 1707(2010), 10 Guiding Principles on detention of asylum seekers and irregular migrants, §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”.

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 8(2):** “When it proves necessary ... Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 31:** “Whenever a restriction of liberty is deemed necessary to fulfil a legitimate administrative objective, states have an obligation in the first instance to consider and apply appropriate and viable alternatives to immigration detention that are less coercive and intrusive than detention, ensure the greatest possible freedom of movement and that respect the human rights of the individual”. **Guideline 32:** “It is preferable that states have a range of alternatives available, so that the best alternative for a particular individual and/or context can be applied in keeping with the principle of proportionality and the right to equal treatment before the law”. **Guideline 33:** “The choice of an alternative should be influenced by an individual assessment of the needs and circumstances of the stateless person concerned and prevailing local conditions. In designing and applying alternatives to detention, states should observe the principle of minimum intervention”. **Guideline 34:** “The imposition of alternatives to detention which restrict a stateless person’s human rights including the right to liberty should be subject to the same procedural and substantive safeguards as detention. States should therefore, apply all the relevant standards specified in the Guidelines and under international law to ensure that alternatives to detention pursue a legitimate objective, are lawful, non-discriminatory, necessary, proportionate and reasonable”. **Guideline 35:** “Where stateless persons are subject to alternatives to detention which restrict their human rights including the right to liberty, they should be subject to automatic, regular, periodic review before an independent judicial body to ensure that they continue at all times to pursue a legitimate objective, be lawful, non-discriminatory, necessary, proportionate and reasonable”. **Guideline 36:** “Alternatives to detention should be applied for the shortest time necessary within which the administrative objective can be achieved. If there is evidence to demonstrate that the administrative objective pursued cannot be achieved within a reasonable period of time, the person concerned should not be subject to such alternatives to detention and should instead be released”.

**SP8C. Alternatives: Commentary.**

***UNHCR's Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons (2013), Summary Conclusions, p.2*** articulates the principled position that immigration detention should be imposed “*only after less restrictive alternatives to detention have been determined inappropriate*”. That report summarises initiatives for community-based alternatives in Canada, Sweden, Australia and the United States; and makes the cogent observation that (**§38**): “*There are many practical reasons for the use of [alternatives to detention], including the human rights consequences and the social and economic costs*”.

It is imperative that due consideration must be given to alternatives. That means alternatives *to detention*, not simply alternatives *of detention*. Alternatives are linked to the principle of necessity (SP13). As the Federal Court of Canada explained (***Sahin v Canada (Minister of Citizenship and Immigration) [1995] 1 FC 214 pp.14–15***), “*in deciding whether or not to continue detention*” adjudicative decision-makers should address: “*The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc*”. As the Inter-American Court of Human Rights has explained (***Vélez Loor v Panama, Inter-American Court of Human Rights (IACtHR) [2010] §171***): “*it is essential for States to seek alternatives to detention whenever possible, which may be effective for the achievement of the purposes described*”.

By way of example, under Spanish immigration legislation (***Organic Law 4/2000, Art 61***), the administrative authorities must, on a case by case basis, consider the following options: reporting requirements; passport withdrawal; compulsory residence in a determined place; any other measures determined by the judicial authority. French immigration detention has been held to violate ECHR Art 5(1)(f) because of the authorities’ failure to seek to establish whether alternative solutions could be found (***Popov v France, ECtHR***

**App.No. 39472/07 [2012]**. EU law provides that detention for removal is impermissible “*unless other sufficient but less coercive measures can be applied effectively in [the] specific case*” (**EU Returns Directive 2008/115/EC, Art 15(1)**). In UK prescribed policy, the stated principle is (**UK Border Agency Operational Enforcement Manual, §55.3(2)**): “*All reasonable alternatives to detention must be considered before detention is authorised*”. In **Saadi v UK, ECtHR GC App.No. 13229/03 [2008] §50** the ECtHR rejected necessity in the sense that the legitimate aim did not need to be prevention of absconding (SP12C), but alternatives and necessity *in achieving the legitimate aim* remained relevant (SP13C); hence the importance of the finding that “*any arrangement short of detention would not have been as effective*” (**Saadi §70**).

**SP9. NON-ROUTINE.** Detention cannot be used as a routine measure of immigration control.

See also **SP10 Non-Penalising, SP12 Legitimate Aim, SP13 Necessity, SP8 Alternatives, SP7 Individualisation.**

*“The simple fact of being an irregular migrant should never be considered as a sufficient ground for detention.”*

**(EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), p.19)**

***International Covenant on Civil and Political Rights (1966), Art 12(3):***

“The above-mentioned rights [including the right to liberty of movement] shall not be subject to any restrictions except those which are ... necessary to protect national security, public order, public health or morals or the rights and freedoms of others”.

***UNHCR Detention Guidelines (2012), Guideline 4.1.4 §32:*** “Illegal entry or stay ... does not give the State an automatic power to detain or to otherwise restrict freedom of movement”.

***UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986, Recital §(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”.

***UNHCR, ExCom Conclusion No. 22 (XXXII) – 1977, §2:*** “[Asylum seekers] (a) should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful”.

***Committee of Ministers Recommendation (2003)5, §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

*SP9. NON-ROUTINE*

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”.

***Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/23/46, 24 April 2013, Rec §92:*** “Promote viable alternatives to detention, and not insist on further entrenching detention as a migration control mechanism through support for expanded networks of detention centres”.

***Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, §69:*** “If, as a measure of last resort, a State resorts to detention for immigration-control purposes in an individual case, this should be considered only when someone presents a risk of absconding or presents a danger to their own or public security”.

***EU Asylum Procedures Directive 2005/85/EC, Art 18(1):*** “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum”. (***See also: Recast EU Asylum Procedures Directive [to enter into force mid-2015], Art 26(1)***).

***Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 8(1):*** “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 27:*** “Immigration detention should solely be for the administrative purposes of preventing unlawful entry or removal. The following do not constitute legitimate objectives for immigration detention: The imposition of detention as a deterrent against irregular migration ...; as a direct or indirect punishment for irregular migration ...; as a direct or indirect punishment for those who do not cooperate with immigration proceedings ...; for the purpose of status determination ...; solely to protect public safety or national security ...; solely for the purpose of administrative expediency”.

***International Detention Coalition, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants – A Guide (2011), Standard 5:*** “Detention ... must be necessary and

proportionate to the objective of identity and security checks, prevention of absconding or compliance with an expulsion order”.

**SP9C. Non-Routine: Commentary.**

The ‘normalisation’ of immigration detention is a vice against which it is necessary to protect. Individuals should not be deprived of their liberty, as a matter of routine, on the grounds of their immigration status. Nor can routine detention be justified as a penalising measure (SP10). Immigration detention must always be the exception, never the norm. It must be justified, as a derogation from the principled human rights starting-point (SP1C): that everyone, whatever their immigration status, is entitled to their individual liberty (SP1).

Perhaps there is a temptation here. It proceeds from a premise: that States have a sovereign right to control entry to their territory and the conditions of presence. It then suggests a conclusion: that States are entitled to impose immigration detention, as a condition of the individual’s presence, suffered by the State. This is a corrosive logic, against which the rule of law must hold firm. Insofar as there is such a temptation, it must be robustly resisted. Immigration status does not excuse the State from the need to justify interferences with human rights; nor of itself does it supply such a justification. To detain individuals simply because of their immigration status is a serious violation of the right to liberty (SP1) and the right to equal treatment (SP2). Migrants are relevantly different from non-migrants, in that they are amenable to removal. Immigration control can provide a justification for certain interferences with human rights. But it does not follow, from any of this, that migrants can be detained for no other reason than their immigration status. Migrants cannot be routinely deprived of their liberty, any more than they can be denied basic welfare benefits, the right to marry, or their children the right to education.

ICCPR Article 9 does not permit an untrammelled exception for immigration detention. Nor does ECHR Article 5(1)(f), which provides for immigration detention. As is well-recognised and accurately summarised (***PACE Committee on Migration, Refugees and***

**Population, Report on the detention of asylum seekers and irregular migrants in Europe (the Mendonça Report), Appendix 1 §13**, ECHR Article 5(1) sets out a “list of exceptions to the right to liberty” which is “an exhaustive one” and requires “a narrow interpretation”; the two limbs of ECHR Article 5(1)(f) (SP12C) “are interpreted restrictively and no other circumstances, such as detention as a deterrent or on the basis that an individual has not co-operated with the authorities, may justify detention”.

Immigration powers may be broad and general in their ambit and application, but the ambit and application of immigration *detention* powers must not be. As the UN Human Rights Committee has explained (**A v Australia, CCPR/C/59/D/560/1993 [1997] §9.4**): “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal”. In the same way, judicial review (SP23) cannot be adequate if it does not address the “substantive justification” for immigration detention, beyond “the question whether the person in question was a ‘non-citizen’ without an entry permit” (**C v Australia, CCPR/C/76/D/900/1999 [2002] §8.3**). As Greek asylum legislation spells out (**Presidential Decree No. 114/2010**): “A third-country national or stateless person who applies for international protection shall not be held in detention for the sole reason that he/she entered and stays illegally in the country. The detention of such applicants ... is allowed in exceptional cases, and only when alternative measures cannot be applied”. The same holds for other migrants.

**SP10. NON-PENALISING.** Detention cannot be used as a routine measure to penalise irregular immigration status.

**See also SP9 Non-Routine.**

*“Infractions of immigration laws and regulations should not be considered criminal offences under national legislation ... [I]rregular migrants are not criminals per se and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.”*

**(Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §73)**

**WGAD Annual Report 2009, A/HRC/13/30, 18 January 2010, §58:**

“Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting [their] territories and regulating irregular migration flows”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/23/46, 24 April 2013, Rec §89:** “Avoid criminalization of irregular migrants in language, policies and practice, and refrain from using incorrect terminology such as ‘illegal migrant’”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, §70:** “Administrative detention should not be applied as a punitive measure for violations of immigration laws and regulations, as those violations should not be considered criminal offences”.

**UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), Main messages, p.2:** “States should avoid criminalizing persons moving irregularly through imposing penal sanctions or conditions of treatment that are not suitable to persons who have not committed a crime”; **p.3, §4:** “While recognising the legitimate interests of States in controlling and regulating immigration, criminalising illegal entry or irregular stay by penal sanctions ... would exceed the legitimate interests of the State”.

## SP10. NON-PENALISING

**UNHCR Detention Guidelines (2012), Guideline 4.1.4 §32:** “detention is not permitted as a punitive – for example, criminal – measure, or a disciplinary sanction for irregular entry or presence in the country”.

**Geneva Convention Relating to the Status of Refugees (1951), Art 31(1):** “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who ... 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”.

**Committee of Ministers Recommendation (2003)5, Rec 3:** “The aim of detention is not to penalise asylum seekers”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 27:** “Immigration detention should solely be for the administrative purposes of preventing unlawful entry or removal. The following do not constitute legitimate objectives for immigration detention: The imposition of detention as a direct or indirect punishment for irregular migration ...; as a direct or indirect punishment for those who do not cooperate with immigration proceedings”.

### SP10C. Non-penalising: Commentary.

Third country nationals lacking regular immigration status are not, for that reason, ‘criminals’ whom the State can lock away. The criminalisation of irregular entry or presence, so as to be able routinely to impose immigration detention, is a dangerous vice. It threatens to supply a route to normalising immigration detention (SP9). The UN Working Group on Arbitrary Detention has (**WGAD Annual Report 2009, A/HRC/13/30, 18 January 2010, §55**) “noted with concern ... a development towards tightening restrictions ... even to the extent of making the irregular entry into a State a criminal offence or qualifying the irregular stay in the country as an aggravating circumstance for any criminal offence”. To prosecute irregular migrants, albeit before a criminal court with sentences of imprisonment based on irregular status, is unjustified and incompatible with the rule of law. It would circumvent the human rights protection applicable to immigration detention.

As the ECtHR Grand Chamber explained (**Saadi v UK, ECtHR GC App.No. 13229/03 [2008] §74**) immigration detention under Art 5(1)(f) is not “applicable ... to those who have committed criminal offences”. It would subvert international human rights law if irregular immigration status were characterised as criminality so that, by conviction in a criminal court, immigration detention was routinely imposed. As the Inter-American Court for Human Rights has held (**Vélez Looz v Panama, IACtHR [2010] §§169, 171**): “imposing a punitive measure upon a migrant that re-enters in an irregular manner to a country after a previous deportation order cannot be considered a lawful purpose in conformity with the Convention”; “the detention of people for non-compliance with immigration laws should never involve punitive purposes”. As the Spanish Courts have held (**Madrid Supreme Court of Justice, Case 344/2012**), illegal stay in principle, is sanctioned with a fine. It is a “concerning trend” that there is an “increasing use of immigration detention, including for punitive purposes”, together with “the criminalisation of irregular migration by a growing number of states” (**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention, p.8**). Unsurprisingly, the UN Working Group on Arbitrary Detention has felt “duty bound to reiterate” that “immigrants in irregular situations should not be qualified or treated as criminals” (**WGAD Annual Report 2008, A/HRC/10/21, 16 February 2009, §§68, 75**). Under the EU Returns Directive, it has been held that States are not entitled to legislate to impose imprisonment on the sole ground of remaining on the territory without valid grounds (**El Dridi, CJEU Case C-61/11**).

In the case of foreign national prisoners who have served their criminal sentences and whom the state wishes to deport, the criminal sentence has dealt with the question of punishment and deterrence. The appropriate length of custody has been imposed by an informed criminal court. The sentence has been prescribed and communicated, and the individual has served it. To impose a further, indefinite, period on individuals to penalise them for their criminal offending or irregular immigration status cannot be fair or justified. Furthermore, immigration detention “is not to be used as a disguised form of preventative detention for the public safety” (**R (Abdi) v SSHD [2009] EWHC 1324 (Admin) §41 (Davis JJ)** (SP2C)).

**SP11. NON-ARBITRARY.** Detention must not be arbitrary.

See also SP1 Liberty, SP2 Equality, SP3 Prescribed Rules, SP13 Necessity.

*"No one should be subject to arbitrary detention."*  
**(International Detention Coalition (2011) Legal framework  
and standards relating to the detention of refugees,  
asylum seekers and migrants, §8)**

***Universal Declaration of Human Rights (1948), Art 9:*** "No one shall be subjected to arbitrary ... detention".

***International Covenant on Civil and Political Rights (1966), Art 9(1):*** "No one shall be subjected to arbitrary ... detention".

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (1990), Art 16(4):*** "Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary ... detention".

***Committee on the Elimination of Racial Discrimination, Discrimination Against Non-Citizens, General Rec No. 30 (2004), §19:*** "Ensure the security of non-citizens, in particular with regard to arbitrary detention".

***General Assembly Resolution on Protection of migrants (A/RES/59/194), 18 March 2005, §12:*** "Urges all States to adopt effective measures to put an end to the arbitrary ... detention of migrants".

***UNHCR ExCom Conclusion No. 50 (XXXIX) – 1988, §i:*** "The Executive Committee [c]alled upon states ... to take all necessary measures to ensure that refugees are protected from arbitrary detention".

***UNHCR ExCom Conclusion No. 85 (XLIX) – 1998, §dd:*** "*Deplores* that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis".

***Report of the UN Special Rapporteur on the Human Rights of Migrants E/CN.4/2003/85, Rec §15:*** "It is a fundamental principle of international law that no one should be subjected to arbitrary detention".

**Final Report of David Weissbrodt, UN Special Rapporteur on the Rights of Non-Citizens, E/CN.4/Sub.2/2003/23, §27:** “All individuals, including non-citizens, must be protected from arbitrary detention”.

**Council of Europe, Committee of Ministers Recommendation (2003)5, Rec 4:** “Measures of detention of asylum seekers ... should be ... non-arbitrary”.

**Council of Europe (PACE), Resolution 1707(2010), 10 Guiding Principles on detention of asylum seekers and irregular migrants, §9.1.5:** “Detention shall not be arbitrary”.

**Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle III(1):** “Every person shall have the right to ... be protected against any ... arbitrary deprivation of liberty”.

**American Convention on Human Rights (1969), Art 7(3):** “No one shall be subject to arbitrary ... imprisonment”.

**African (Banjul) Charter on Human and Peoples’ Rights (1981), Art 6:** “no one may be arbitrarily detained”.

**League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 14(1):** “No one shall be subjected to arbitrary ... detention without a legal warrant”.

**UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §1:** “There is a solid legal framework that sets out the permissible purposes and conditions of immigration detention. This legal framework is guided by the principles of necessity, reasonableness in all the circumstances and proportionality. The starting point is that no one shall be subjected to arbitrary or unlawful detention”. **§3:** “International and national jurisprudence has held that decisions around detention must be exercised in favour of liberty, with due regard to the principles of necessity, reasonableness and proportionality”.

**Amnesty International, Migration-Related Detention (2007), p.9 §4:** “the decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding presented by, the individual concerned. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved”.

**SP11C. Non-Arbitrary: Commentary.**

The protection from arbitrary detention is a core human rights norm. Non-arbitrariness (SP11) is in the nature of an ‘umbrella’ protection, which embraces or overlaps with many other safeguarding principles. That ought not to prevent those other principles being articulated as self-standing safeguards in their own right. Non-arbitrariness is also an important ‘safety-net’, a baseline layer of protection, which tests the legitimacy and justification of immigration detention. It is in many ways the overarching principle, under the rule of law, in this area. Unsurprisingly, it can be expressed as encapsulating many familiar safeguards, for example: legitimate aim (SP12); conditions (SP19); brevity (SP16); necessity (SP13); individualization (SP7). As explained by the ECtHR (**A v UK, ECtHR GC App.No. 3455/05 [2009] §164**): *“To avoid being branded as arbitrary, detention under art 5(1)(f) must be carried out in good faith; it must 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”*. As the Human Rights Committee had put it (**A v Australia, CCPR/C/59/D/560/1993 [1997] §9.2**) *“the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”*.

So, arbitrariness can include an excessive duration, the absence of a legitimate aim, lack of achievability (SP14) or lack of equal treatment (SP2) (**WGAD Opinion No. 45/2006 A/HRC/7/4/Add.1 (2007), p.40 (Abdi v UK) §29**). Arbitrariness includes *“lack of predictability”* (**Van Alphen v Netherlands UNHRC CCPR/C/39/D/305/1988 [1990] §5.8**), as where there is an absence of adequate prescribed rules (SP3). Arbitrariness can be a function of the duration of immigration detention, engaged by the principle of brevity (SP16), since *“in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification”* (**Shams v Australia, UNHRC CCPR/C/90/D/1255 [2007]**

**§7.2).** Arbitrariness can also mean abuse of power, such as detention of individuals with “*a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty*” (**Čonka v Belgium, ECtHR App.No. 51564/99 [2002] §42**); or detention which is “*an outrageous and arbitrary exercise of executive power*” (**Muuse v SSHD [2010] EWCA Civ 453 §84**); or detention involving “*an element of bad faith or reception on the part of the authorities*” (**Nowak v Ukraine, ECtHR App.No. 60846/10 [2011] §60**).

Arbitrariness can arise in a distinct way, where rights other than the right to liberty (SP1) are interfered with by detention, without justification. For example, immigration detention may violate the right to private life. In 2007 the Appeals Court of the Hague (**KG 07/03 and KG.46, 26 April 2007**) ruled that holding individuals in detention boats in Rotterdam would, by reason of limited freedom of movement and lack of privacy, violate ECHR Article 8 if it extended beyond 6 months (**Amnesty International, The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers (2008), p.25**). This is itself an invocation of a necessity test (SP13), distinct from the way necessity operates in relation to the right to individual liberty (SP13C). Immigration detention can be unjustified and arbitrary as a violation of family life, and various rights can also be violated by failure to address special needs (SP4) and conditions (SP19).

**SP12. LEGITIMATE AIM.** Detention can only be used for a legitimate aim: for carrying out entry or removal controls effectively.

**See also SP13 Necessity.**

*“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.”*

**(Council of Europe (PACE), Resolution 1707(2010),  
10 guiding principles on detention of asylum seekers  
and irregular migrants, §9.1.2.)**

***International Covenant on Civil and Political Rights (1966), Art 12(3):***  
“The above-mentioned rights [including the right to liberty of movement] shall not be subject to any restrictions except those which are ... necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others”.

***European Convention on Human Rights (1950), Art 5(1)(f):*** “No one shall be deprived of his liberty save in the following cases ... 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”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 27:*** “Immigration detention should solely be for the administrative purposes of preventing unlawful entry or removal. The following do not constitute legitimate objectives for immigration detention: The imposition of detention as a deterrent against irregular migration ...; as a direct or indirect punishment for irregular migration ...; as a direct or indirect punishment for those who do not cooperate with immigration proceedings ...; (iv) for the purpose of status determination ...; (v) solely to protect public safety or national security ...; (vi) solely for the purpose of administrative expediency”.

***Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, §69:*** “If, as a measure of last resort, a State resorts to detention for immigration-control purposes in an individual case, this should be considered only when someone presents a risk of absconding or presents a danger to their own or public security”.

**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”.

**EU Asylum Reception Conditions Directive 2003/9/EC, Art 7(3):** “When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law”.

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 9(3):** “An applicant may only be detained: (a) in order to determine or verify his/her identity or nationality; (b) in order to determine the elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding; (c) in the context of a procedure, to decide on the right to enter the territory; (d) when he/she is detained subject to a return procedure under Directive 2008/115/EC in order to prepare the return and/or carry on the removal process and the Member State can substantiate on the basis of objective criteria, including that he/she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he/she makes the application for international protection merely in order to delay or frustrate the enforcement of the return decision; (e) when protection of national security or public order so requires; (f) in accordance with Article 27 of the Dublin Regulation”.

**EU Returns Directive 2008/115/EC, Art 15(1):** “... Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process”.

**UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986 (approved by the UN General Assembly by Resolution 41/124, 4 December 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”.

## SP12. LEGITIMATE AIM

**Committee of Ministers Recommendation (2003)5, §3:** “The aim of detention is not to penalise asylum seekers. 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”.

**Council of Europe Commissioner for Human Rights, UK Report (Gil-Robles), CommDH(2005)6 (8 June 2005), §65:** “The United Kingdom authorities have indicated to me that the UK courts have approved detention for the sole purpose of processing asylum applications. I do not exclude the possibility of detention being appropriate in certain circumstances, but I do not believe that this would be an appropriate rule. Open processing centres providing on-site accommodation and proceedings are, I believe, a more appropriate solution for the vast majority of applicants whose requests are capable of being determined rapidly”.

### SP12C. Legitimate aim: Commentary.

The essence of immigration control involves the State regulating two things: (a) controlling whether individuals are permitted to *enter* the country (permission to enter or remain); and (b) controlling whether individuals are required to *exit* the country (removal or deportation). Immigration detention must have a legitimate aim. It must be detention for – and only for – one of these immigration-control purposes: entry or exit. There is no legitimate general aim, where detention is itself justified as immigration control, as though it were a condition of stay. Otherwise, immigration detention could be imposed routinely (SP9). So, immigration detention is not justified as general immigration control (SP9C). Rather, it must be detention for a specific purpose of *carrying out entry-control and exit-control effectively*.

Ultimately, the question of the risk of absconding is likely to become the central question: if at liberty, will the individual ‘abscond’ so as

to impede or frustrate further legitimate steps? This is likely to be the central question *not* because preventing a risk of absconding is the sole permissible legitimate aim for immigration detention. Rather, it is likely to be the central question because a question of necessity arises (SP13): is detention *necessary to achieve the legitimate aim*? Detention, and especially long-term detention, is likely to be necessary – in order to achieve the legitimate aim – only where the individual is an abscond-risk. If the legitimate aim is perfectly achievable by use of an alternative to detention, the necessity test will not be satisfied (SP13C).

In relation to immigration-entry control, it is recognised that “*the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so*” must be “*closely connected to the purpose of preventing unauthorised entry*” (**Saadi v UK, ECtHR GC App.No. 13229/03 [2008] §65**). Entry-control may include a restriction of liberty for initial steps such as the verification of identity or to discern the nature and elements of an asylum claim being put forward to avoid immediate removal. At that stage, abscond-risk need not be the focus. Indeed, it would be premature to try and assess abscond-risk on any informed basis. As the UN Human Rights Committee has put it, “*initial detention*” can be justifiable where it is “*for purposes of ascertaining identity and other issues*” (**D&E v Australia, CCPR/C/87/D/1050/2002 [2006] §7.2**). But once the authorities have sufficient information to determine the question of abscond-risk, an informed decision should be taken as to whether to detain. Detention should never be permissible merely because that is convenient for the immigration authorities.

In fact, justified short-term control of individual liberty may not be ‘detention’ at all. The ECtHR has recognised that initial very short-term “*holding*” at an airport, provided that it is not “*prolonged excessively*”, can be characterised as a “*restriction on liberty – inevitable with a view to organising the practical details of the alien’s repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered*” (**Amuur v France, ECtHR App.No. 19776/92 [1996] §43**). This may illustrate the fact that the “*specific context*” can inform whether there is a deprivation of liberty, where for a short period of time there are “*restrictions on freedom of movement or liberty in the*

*interests of the common good” (Austin v UK, ECtHR App.No. 39692/09 [2012] §59).*

The rule of law needs to confront the controversial practice of detention for a few days for ‘accelerated asylum decision-making’. In **Saadi v UK, ECtHR GC App.No. 13229/03 [2008]** the UK persuaded the ECtHR that, in the specific context of a crisis of asylum-overload and using short-term (7 day) detention in relaxed facilities, fast-track asylum decision-making detention was justified by reference to a legitimate aim, even where the individual detainee presents no risk of absconding and will be released once the decision is made. The legitimate aim was that this was detention “*enabling the authorities quickly and efficiently to determine the applicant’s claim to asylum*” (**Saadi §77**). That overall outcome in **Saadi** is regrettable and contrary to international refugee and human rights law. It is one thing to say that abscond-risk – in that sense ‘necessity’ – is not the sole legitimate aim, and that detention can be justified *to carry out entry controls effectively*. But it should not follow that immigration detention for administrative convenience is legitimate. As the UN CAT states, (**Concluding observations on the fifth periodic report of UK (2013), §30**) detention should be “*used only as a last resort in accordance with the requirements of international law and not for administrative convenience.*” At the very least, the conclusion in **Saadi** was surely contextual, and should not support practices of any lengthier periods of detained asylum decision-making, nor measures where there is no genuine crisis of asylum-overload. As has cogently been more recently observed (**Detention Action, Fast Track to Despair: The unnecessary detention of asylum seekers (2011), p.3**), the detained fast-track involves “*maximum disadvantage of asylum-seekers*”, making it “*impossible for many asylum-seekers to understand or actively engage with the asylum process*” and has become “*entirely unnecessary, as the circumstances it was designed to address no longer exist*”. These considerations bring into sharp focus the function of a necessity test, which must be considered alongside the legitimate aim (SP13C).

In relation to immigration-exit control, the legitimate aim for immigration detention requires more than that detention is *while* removal action is being taken, or *during* removal action which is being taken. It must, again, be detention *for the purpose of effectively carrying*

out removal action. The EU Returns Directive apparently encapsulates the legitimate aim (Article 15(5)), referring to detention “to ensure successful removal”. The detention measure must, to paraphrase the CJEU, “contribute to the achievement of the removal” (**Md Sagor, CJEU Case C-430/11 [2011] §44**). Again, it is said that abscond-risk – and in that sense ‘necessity’ – is not the sole legitimate aim (**Chahal v UK, ECtHR App.No. 22414/93 [1996]**). An individual held in readiness for an imminent removal need not be an abscond-risk: the detention may be justified for the purpose of *making the removal action effective*. But, in such a case, the removal ought to be truly imminent – a matter of hours or a day. Beyond an imminent removal, the effectiveness of removal action will be jeopardised by permitting the individual to be at liberty only where there is an abscond risk, absent which the individual should not be detained.

The CJEU has emphasised that “it is for Member States to establish, in full compliance with their obligations arising from both international law and European Union law, the grounds on which an asylum seeker may be detained or kept in detention” (**Arslan, CJEU Case C-534/11 [2013] §56**). Many national statutory detention powers are expressly “for the purpose of safeguarding deportation” (**Germany, Residence Act 2004 §62(2)**) or “with a view to expulsion” (**Netherlands, Aliens Act 2000 (2007/19) Section 57**). Testing the legitimate aim for maintaining temporary admission status of an individual at liberty can involve asking whether the executive “remains intent upon removing the person and there is some prospect of achieving this” (**R (Khadir) v SSHD [2005] UKHL 39 §32**). But “some prospect” is not sufficient to justify detention. Merely invoking the need to execute a deportation order does not justify detention with a view to removal (**SD v Greece, ECtHR App.No. 53541/07 [2009] §62**).

Immigration detention for carrying out entry or removal controls effectively has a legitimate aim; immigration detention for other purposes is contrary to law. So, it has been recognised as “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 Collins J §29**), for international norms do not permit detention “imposed in order to deter future

## SP12. LEGITIMATE AIM

*asylum-seekers, or to dissuade those who have commenced their claims from pursuing them” (UNHCR Detention Guidelines (2012), Guideline 4.1.4 §32). Immigration detention to prevent criminal offending or reoffending is impermissible: it lacks a direct immigration control purpose, and preventative detention applied to those with irregular immigration status will infringe the principle of equality (SP2C) as well as lacking a legitimate aim (SP12). Immigration detention imposed for a preventative purpose is contrary to law, as “circumventing” the procedures available under criminal law to deal with dangerousness (WGAD Opinion No. 45/2006 A/HRC/7/4/Add.1 (2007), p.40 (Abdi v UK) §§26–28). A deprivation of liberty is also unlawful if it “amounted in fact to a disguised form of extradition ... and not to ‘detention’ necessary in the ordinary course of ‘action ... taken with a view to deportation” (Bozano v France, ECtHR App.No. 9990/82 [1986] §60). It is also “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).*

**SP13. NECESSITY.** Detention must be a last resort: sufficiently closely connected to the legitimate aim as to be necessary to achieve it.

See also SP12 Legitimate Aim, SP8 Alternatives.

*“[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.”*

**(UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §3)**

***International Covenant on Civil and Political Rights (1966), Art 12(3):***

“The above-mentioned rights [including the right to liberty of movement] shall not be subject to any restrictions except those which are ... necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others”.

***Council of Europe (PACE), Resolution 1707(2010), 10 guiding principles on detention of asylum seekers and irregular migrants, §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:** “detention shall only be used when necessary”; **§9.1.7:** “detention shall be proportionate to the objective to be achieved”.

***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:** “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”. **Guideline 6 §45:** “Asylum-seekers should not be held

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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 (PACE), Resolution 1707(2010), §8:** “Detention should be used only if less intrusive measures have been tried and found insufficient”.

**Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures (1 July 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”.

**Council of Europe, 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”.

**Committee of Ministers Recommendation (2003)5, Rec 4:** “Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case”.

**EU Returns Directive 2008/115/EC, Recital (16):** “The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient”. **Art 15(1):** “Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may ... keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when (a) there is a risk of absconding; or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process”; **Article 15(5):** “Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled *and it is necessary to ensure successful removal*”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), §31:*** “Detention should only be used as a measure of last resort. Whenever a restriction of liberty is deemed necessary to fulfil a legitimate administrative objective, states have an obligation in the first instance to consider and apply appropriate and viable alternatives to immigration detention that are less coercive and intrusive than detention, ensure the greatest possible freedom of movement and that respect the human rights of the individual”.

### SP13C. Necessity: Commentary.

The principled position has been encapsulated, in the context of asylum-seekers, as follows (***UNHCR’s Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons (2013), Summary Conclusions §1***): “*Detention ... should in principle be avoided, be a measure of last resort ... applied only where necessary, reasonable and proportionate to a legitimate purpose*”. Put straightforwardly, as it has been by the Belgian courts (***Cour de Cassation, No.P.12.1028.F [2012], p.3***), detention should not be ordered if other less coercive means are available. The question of alternatives (SP8) is directly relevant here.

It is important not to confuse legitimate aim (SP12) with necessity (SP13). The ECtHR ruled in ***Saadi*** and ***Chahal*** that prevention of absconding is not the sole legitimate aim for immigration detention (SP12C). But that does not exclude the question whether detention is ‘necessary’. There must be a legitimate aim. And it remains very important to ask whether detention is necessary *to achieve the legitimate aim*. In asking that question, in the context of any ongoing detention, the question of abscond-risk will often become the central question. The concept of minimum-interference (use of the least-intrusive measure) is recognizable as an essential human rights standard. This is an important safeguard in the context of immigration detention.

The ECtHR rejected a test of ‘necessity’ *in the sense that, unless detained, the individual would abscond* (***Saadi v UK, ECtHR GC App.No. 13229/03 [2008] §§50, 72–73***). That calls for an analysis of

legitimate aim (SP12C): immigration detention need not be for the sole purpose of preventing absconding. Rather, the legitimate aim requires that immigration detention must be for the purpose of effectively carrying out entry or removal controls (SP12). Even so, once the legitimate aim has been identified, the question of ‘necessity’ must surely still arise. The question becomes whether the detention is necessary *in order effectively to carry out the entry or removal control purpose*. Necessity is the nature of the ‘close connection’ which should be called for, between detention and the legitimate aim: *“To avoid being branded as arbitrary, [immigration] detention ... must be closely connected to the ground of detention relied on by the Government”* (**A v UK, ECtHR GC App.No. 3455/05 [2009] §164**). It was significant in **Saadi** for the ECtHR to find that (**§66**): *“any arrangement short of detention would not have been as effective”*. Once the legitimate aim (SP12) is understood and properly identified (SP12C), the general principle of necessity is therefore correctly invoked. It is surely relevant, therefore, that (**Saadi §70**): *“The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained”*. If the ECtHR Grand Chamber had intended to abandon any relevance for the principle of ‘least-intrusive measure’, that would surely have been incorrect. As the minority judgment convincingly spelled out (**Saadi, minority judgment §13**): *“the requirements of necessity and proportionality oblige the state to furnish relevant and sufficient grounds for the measure taken and to consider other less coercive measures, and also to give reasons why those measures are deemed insufficient”*.

A helpful question, in an immigration-removal (or deportation) case, is to ask whether detention was *“necessary in the ordinary course of ‘action ... taken with a view to deportation”* (**Bozano v France, ECtHR App.No. 9990/82 [1986] §60**). In this way, the imposition of detention must be shown to *“contribute to the achievement of the removal”* (**Md Sagor, Court of Justice of the European Union (CJEU) Case C-430/11 [2011] §44**). In Belgium (**Cour de Cassation, No. P.12.1028.F, 27 June 2012, p.2**), the law provides that an alien subject to removal procedures may be detained if he or she presents a real and present danger of evasion of authorities,

which risk must be assessed on the basis of objective criteria. The English common law approach to broad statutory powers of immigration detention has involved (***R (Kambadzi) v SSHD [2011] UKSC 23 §94 Lord Brown***) the approach that the individual “*may only be detained for a period that is reasonable in all circumstances*”, as to which “[t]he likelihood or otherwise of the detainee absconding and/or re-offending [is] an obviously relevant circumstance”. Moreover, the CJEU has held that that “*the mere fact that an asylum seeker ... is the subject of a return decision and is being detained on the basis of [the EU Returns Directive] does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that ... it is objectively necessary and proportionate to maintain detention*” (***Arslan, CJEU Case C-534/11 [2013] §62***).

As it is put in German national legislation (***Aufenthaltsgesetz (Residence Act) 2004, Art 62(1)***): “*custody awaiting deportation shall not be permissible if the purpose of the custody can be achieved by other, less severe means which are also sufficient*”. The English High Court in the ***Saadi*** case was correct when it said (***R (Saadi) v SSHD [2001] EWHC Admin 670 Collins J §§35–36***): “*It is ... necessary to identify the reason for the detention ... [and] it is necessary to show that detention was ... required to achieve that purpose*”. The ECtHR GC did regard detention as necessary to achieve the purpose, in the circumstances of the ***Saadi*** case.

A failure to embrace any notion of necessity would be unsatisfactory and falls short of robust protection of the basic right to liberty (SP1). The EU Returns Directive (***2008/115/EC, Art 15(1)***) imposes a necessity test. The CJEU has explained (***Kadzoev, CJEU Case C-357/09 PPU [2009] §64***) that “*the detention of a person for the purpose of removal may ... be maintained ... provided that it is necessary to ensure successful removal*”. It is certainly the position in international refugee law and international human rights law that detention must be necessary – a measure of last resort – in order to be lawful. ICCPR Article 9 requires necessity. As the UN Human Rights Committee robustly recognized (***A v Australia, CCPR/C/59/D/560/1993 [1997] §9.2***): “*the notion of ‘arbitrariness’ must ... be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is*

*not necessary in all circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context*". Accordingly, immigration detention can be regarded as unjustified and unlawful where the state authorities have "not demonstrated 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**); where "the State party has not demonstrated that, in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends" (**Shams v Australia, CCPR/C/90/D/1255 [2007] §7.2**); and where "[i]t has not been demonstrated that other, less intrusive measures could not have achieved the same end" (**D&E v Australia, CCPR/C/87/D/1050/2002 [2006] §7.2**).

In other areas of detention, it is readily and directly implied that ECHR Article 5 requires that a deprivation of liberty be necessary in the circumstances (**NC v Italy, ECtHR App.No. 24952/94 [2002] §41; Winterwerp v Netherlands, ECtHR App.No. 6301/73 [1979]; Litwa v Poland, ECtHR App.No. 26629/95 [2000]**). Moreover, even in this area a necessity test is applied under ECHR law, *where other rights are interfered with*, and where considerations of arbitrariness come into play (SP11C). So for example, where immigration detention interferes with family life, the State must establish a pressing social need, so that (**Popov v France, ECtHR App.No. 39472/07 [2012] §116**) "*[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*". The interference with private life will also require a 'pressing social need', such that the interference is 'necessary in a democratic society' (**ECHR Art 8**). Similarly, the rights of the child raise the question whether "*[o]ther measures could have been taken that would have been more conducive to the ... interest of the child*" (**Mayeka v Belgium, ECtHR App.No. 13178/03 [2006] §83**). It would be somewhat bizarre for necessity not to have a role where administrative measures deprive individuals of *their right to liberty*.

All in all, it is far too simplistic a view to say that there is no necessity test in action in the context of immigration detention. Indeed, there is a clear trend (**Dubinsky, Foreign National Prisoners Law and Practice (2012) §36.32**) involving the ECtHR “moving towards the adoption of a full necessity test in ECHR article 5(1)(f). In a number of recent judgments concerning article 5(1)(f), various sections of the ECtHR have applied a test of whether less restrictive alternatives exist to detention”. This development is to be welcomed. Examples include **Massoud v Malta, ECtHR App.No. 24340/08 [2010] §68** (“the Court finds it hard to conceive that ... the authorities could not have had at their disposal measures other than the applicant’s protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion”); **Raza v Bulgaria, ECtHR App.No. 31465/08 [2010] §74** (“the authorities had at their disposal measures other than the applicant’s protracted detention to secure the enforcement of the order for his expulsion”); **Mwanje v Belgium, ECtHR App.No. 10486/10 [2011] §124–125** (detention insufficiently linked to deportation purpose where failure to consider a lesser measure such as temporary residence permit); and **Mikolenko v Estonia, ECtHR App.No. 10664/05 [2009] §67** (“the authorities in fact had at their disposal measures other than the applicant’s protracted detention in the deportation centre in the absence of any immediate prospect of his expulsion”). A robust and principled approach calls for an assessment of “the necessity and appropriateness of the detention, including whether it is proportionate to the objective to be achieved” (**Amnesty International, Jailed Without Justice (2008), p.44**).

Two fundamental truths emerge from the twin requirements of a legitimate aim (SP12) and necessity to achieve that legitimate aim (SP13). First, even if the prevention of absconding is not the aim of the detention, it should be a central feature – and often the central question – in deciding whether immigration detention can be justified (SP12C). Secondly, immigration detention – imposed in order to make immigration controls effective – should be short-term only. It is surely right, for example, that individuals detained for speedy processing should not “spend weeks in detention waiting for the [authorities] to start the process” (**Detention Action, Fast Track to Despair: The unnecessary detention of asylum seekers (2011), p.38**); and that detention “for deporting and removing people”

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should not be imposed “where this is not imminent” (**London Detainee Support Group, No Return, No Release, No Reason (2010), p.27**). From first to last, the immigration detention context, and the factual reality for those deprived of their liberty for administrative reasons, amply illustrate why a proper protective standard of necessity is so very important. It must be embraced.

**SP14. ACHIEVABILITY.** Detention cannot be imposed, or maintained, unless the legitimate aim is achievable expeditiously.

See also **SP12 Legitimate Aim** and **SP15 Diligence**.

*“Detention ... may be continued until the reason for its imposition has ceased to exist or its purpose can no longer be achieved.”*  
**(Austria, Federal Act FLG I No. 100/2005 as amended, §80(2))**

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 28:*** “Removal will not be a legitimate objective and detention pending removal will therefore be arbitrary in instances where removal ... is not practicable within a reasonable period of time”.

***UNHCR Detention Guidelines (2012), Guideline 6 §45:*** “where justification is no longer valid, the [individual] should be released immediately”.

***EU Returns Directive 2008/115/EC, Art 15(4):*** “When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 [detention only of persons who are subject to return procedures] no longer exist, detention ceases to be justified and the person concerned shall be released immediately”. ***Art 15(5):*** “Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal”.

#### **SP14C. Achievability: Commentary.**

The requirement of a legitimate aim (SP12) means immigration detention must have the specific purpose of effectively carrying out entry controls or removal controls (SP12C). Linked to this is the principle that if – at any stage – the relevant entry controls or removal controls are not realistically achievable, the detention is impermissible and unlawful and the individual must be released immediately. Achievability (SP14) is a practical standard, to be approached realistically. It is often expressed in domestic legislation and identified by

Courts considering the lawfulness of immigration detention. In principle, it applies *whatever* the legitimate aim of the immigration detention (SP12), whether it relates to entry-control or exit-control. The aim must be demonstrably achievable within a reasonable time, having regard to the deprivation of liberty which is envisaged. Where the purpose is not achievable, the detention is for that reason unlawful, and independently of any question of alternatives (SP8). Achievability means an evidence-based assessment of whether the legitimate aim (SP12) can be brought about, and the period within which that can happen. Achievable means within a reasonable time, addressed in the context of a deprivation of liberty. The period of time should be an exacting one. In order to address the achievability of the legitimate aim, there must be a concrete identification of what the specific purpose is: so, if the aim is to carry out a removal, it will be necessary to specify the country of intended removal. Otherwise, achievability cannot properly be assessed.

The achievability principle can affect the question whether to detain in the first place. Detention should not be imposed at all if the purpose is unachievable within a reasonable period. For *“the authorities ... should consider whether removal is a realistic prospect, and accordingly whether detention with a view to removal is from the outset ... justified”* (**Amie v Bulgaria, ECtHR App.No. 58149/08 [2013] §77**), since detention on the grounds of *“action taken with a view to ... deportation”* is unlawful where there is *“the lack of a realistic prospect of his expulsion”* (§79). The achievability principle also applies to the continuation of detention. The individual’s detention will not *“remain valid”* where there arises a *“lack of a realistic prospect of his expulsion”* (**Mikolenko v Estonia, ECtHR App.No. 10664/05 [2009] §§66, 68**). The ongoing and updated assessment of achievability is a function of continuing automatic court control (SP21), administrative review (SP22) and judicial review (SP23). *“The 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”* (**WGAD Annual Report 2009, A/HRC/13/30, 18 January 2010, §91**). For detention to be justified, it is not sufficient to keep the relevant individuals’ deportation *“under active review”* if there is no *“realistic prospect of their being expelled”* (**A v UK, ECtHR GC App.No. 3455/05 [2009] §§164, 167**).

Under both EU and ECHR law, there must be a realistic prospect of removing someone who is detained for the purpose of removal (**ECtHR/EU Agency for Fundamental Rights, Handbook on European Law relating to asylum, borders and immigration (2013), p.161**). Under EU law, it must be “*apparent ... that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down ... for it to be possible to consider that there is a ‘reasonable prospect of removal’*”; the individual must be immediately released where there is no reasonable prospect of removal, including where removal appears unlikely having regard to applicable to permissible detention periods (**Kadzoev, CJEU Case C-357/09 PPU [2009] §§65–67**). Under ECHR law, the “*probable lack of a realistic prospect of his expulsion*” is sufficient to put the lawfulness of immigration detention in “*grave doubt*” (**Massoud v Malta, ECtHR App.No. 24340/08 [2010] §69**). As it was put in **Ali v Switzerland, EComHR App.No. 24881/94 [1998] §41**: “*where the authorities are aware ... that a deportation order cannot be enforced, detention under an order made at that specific time can no longer be considered to be detention of a person ‘against whom action is being taken with a view to deportation’*”. In the US, the Supreme Court accepted (**Zadvydas v Davis, 533 US 678 (2001), p.699**) that “*to avoid a serious constitutional threat ..., once removal is no longer reasonably foreseeable, continued detention is no longer authorised by statute*”. In Australia, by contrast, it was held constitutional for achievability to be statutorily excluded: mandatory statutory immigration detention pending removal was applicable even where there was no prospect of removal (**Al-Kateb v Godwin [2004] HCA 37**). The UN Working Group on Arbitrary Detention applies the principle of achievability, and has found immigration detention to be arbitrary where the prospects of removal are “*dim*”, “*deteriorating*”, “*entirely unrealistic*” (**WGAD Opinion No. 45/2006 A/HRC/7/4/Add.1 (2007), p.40 (Abdi v UK) §§25–26**). In UK law (**R (Lumba) v SSHD [2011] UKSC 12 §22**), where “*it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention*”. The individual 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 same approach has been applied in Hong Kong

**(Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97, 111E (UK Privy Council (UKPC), on an appeal from Hong Kong), Lord Browne-Wilkinson)**. If deportation is unachievable because of a risk on return, detention is unjustified (**A v SSHD [2004] UKHL 56 §9 Lord Bingham**). As recognised by the German Federal Court, the deprivation of liberty is always linked to the purpose named in the detention order; if the purpose of detention no longer exists before the end of the stipulated deadline, the detention order must be annulled without delay (**German Federal Court of Justice (Bundesgerichtshof), V ZB 129/08, 18 September 2009, §§24–26**). Immigration detention under ICCPR Article 9 “should not continue beyond the period for which the State can provide appropriate justification” (**C v Australia, UNHRC CCPR/C/87/D/900/1999 [2001] §8.2**). It is quite right to characterise as unjustifiable “the warehousing of undepotable migrants” (**London Detainee Support Group, No Return, No Release, No Reason: Challenging Indefinite Detention (2010), p.25**).

**SP15. DILIGENCE.** Detention is unlawful if the legitimate aim is not pursued diligently and expeditiously.

See also **SP12 Legitimate Aim, SP14 Achievability.**

*“[A]ny deprivation of liberty ... 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.”*

**(Chahal v United Kingdom ECtHR App.No. 22414/93 [1996] §113)**

**EU Returns Directive 2008/115/EC, Art 15(1):** “Any detention ... shall only be maintained as long as removal arrangements are in progress and executed with due diligence”.

**Council of Europe, 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”.

### **SP15C. Diligence: Commentary.**

Linked to the principles that immigration detention requires a legitimate aim (SP12), which must be achievable (SP14), is the further requirement that the State must at all times demonstrate the diligent and expeditious pursuit of that aim. Such diligence is the price of the State being entitled to detain the individual for the legitimate aim. If there is a lack of diligence, the individual should be released immediately. The assessment of diligence is relevant from the outset, and is a proper subject of automatic court-control (SP21), administrative review (SP22) and judicial review (SP23).

Under ECHR Article 5, the “*relevant test*” is “*whether the deportation proceedings have been prosecuted with due diligence*” (**Auad v Bulgaria, ECtHR App.No. 46390/10 [2011] §131**). So, where deportation 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**). Detention is unlawful for “the domestic authorities’ failure to conduct the proceedings with due diligence” (**Mikolenko v Estonia, ECtHR App.No. 10664/05 [2009] §68; Amie v Bulgaria, ECtHR App.No. 58149/08 [2013] §79**); or where “no meaningful ‘action with a view to deportation’ was under way and actively pursued” (**M v Bulgaria, ECtHR App.No. 41416/08 [2011] §74**); or where “there is no indication that [the authorities] pursued the matter vigorously” (**Raza v Bulgaria, ECtHR App.No. 31465/08 [2010] §73**); or where they ‘should have been more active’ (**Singh v Czech Republic, ECtHR App.No. 60538/00 [2005] §64**).

In the US it is recognised that “[t]he period of custody is inherently limited by the pending deportation hearing, which must be concluded with ‘reasonable dispatch’ to avoid habeas corpus” (**Reno v Flores, 507 US 292 (1993), p.314**). Under EU law (**Kadzoev, CJEU Case C-357/09 PPU [2009] §64**), “the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal”. In UK law (**R (Lumba) v SSHD [2011] UKSC 12 §22**), lawful detention requires that “the Secretary of State should act with reasonable diligence and expedition to effect removal”. The same applies in Hong Kong (**Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97, 111E (UK Privy Council (UKPC), on an appeal from Hong Kong), Lord Browne-Wilkinson**). Swiss immigration detention has, for example, been held unlawful for lack of diligence, where no action had been taken for more than two months to enforce removal (**Switzerland, Federal Supreme Court, Case ATF 124 II 49, 51**).

**SP16. BREVITY.** Detention must be as short as possible.

See also SP13 Necessity SP17 Maximum.

*"[T]he duration of administrative detention of a migrant should be as short as possible."*

**(Report of UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, §21)**

***UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011), §2:*** "Detention ... must, ... where used, last only for the minimum time necessary".

***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".

***Convention on the Rights of the Child (1990), Art 37(b):*** "... detention ... shall be used only ... for the shortest appropriate period of time".

***Council of Europe, Twenty Guidelines on Forced Return (2005), Guideline 8(1):*** "Any detention pending removal shall be for as short a period as possible."

***Council of Europe (PACE), Resolution 1707(2010), 10 guiding principles on detention of asylum seekers and irregular migrants, §9.1.10:*** "Detention must be for the shortest time possible".

***Council of Europe, Committee of Ministers Recommendation (2003)5, §4:*** "Measures of detention of asylum seekers ... should be applied for the shortest possible time".

***Council of Europe, Parliamentary Assembly Recommendation 1624(2003), Rec 9:*** "With regard to detention linked to immigration or asylum: (v) under no circumstances should detention for immigration or asylum reasons be any longer than is reasonably necessary and should not be prolonged unduly".

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**EU Returns Directive 2008/115/EC, Art 15(1):** “Any detention shall be for as short a period as possible”.

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 9(1):** “Detention shall be for as short a period as possible”.

**WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7:** “... custody may in no case be unlimited or of excessive length”.

**EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), p.37:** “Given the interference that detention has on personal dignity, it is of utmost importance to regulate in national legislation that detention shall be ordered or maintained only for as long as it is strictly necessary to ensure successful removal”.

**Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle III.1:** “As a general rule, the deprivation of liberty of persons shall be applied for the minimum necessary period”.

**International Detention Coalition, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants – A Guide (2011), Standard 7:** “Detention should be for the shortest possible time”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 39:** “Detention should always be for the shortest time possible”.

### SP16C. Brevity: Commentary.

The principled position is that immigration detention “*should always be for the shortest possible time*” (**Amnesty International, Migration-Related Detention (2007), p.10; also Amnesty International, Jailed Without Justice (2008), p.44**). The question ‘how long?’ and ‘how much longer?’ are key questions arising from the individual’s basic human needs (SP7C). The right of individual liberty (SP1) means that every hour, every day, for which an individual

is deprived of their liberty matters. Lord Bingham 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*” (**Bingham, *The Rule of Law* (2010), p.73**). Just as immigration detention must be necessary (SP13) in order to achieve the relevant legitimate aim (SP12), it must also be for the shortest period necessary to achieve that purpose. The basic right of individual liberty (SP1) and the duty of individualisation (SP7) mean that the State must be able to justify why it is necessary to *continue* to detain the individual in question. The principles of achievability (SP14) and diligence (SP15) are applied against a minimalist philosophy: short-term detention.

As it has been explained by the UN Human Right Committee: “*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**). As explained by the ECtHR, “*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**). Unsurprisingly the Working Group on Arbitrary Detention found 4.5 years immigration detention to be excessive (**WGAD Opinion No. 45/2006 A/HRC/7/4/Add.1 (2007), p.40 (Abdi v UK) §25**). Detention should not be imposed at all unless the legitimate aim (SP12) can be achieved (SP14) within an appropriately short period. Any ‘on-entry’ detention should be short-term, until the State can assess abscond-risk. Absent such an abscond-risk, detention should not be continued. Any ‘exit’ detention to make removal or deportation effective should only be imposed where deportation is imminent.

**SP17. MAXIMUM.** The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.

**See also SP3 Prescribed Rules.**

*"[T]here should be a maximum duration for [migration-related] detention provided by law which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released."*

**(Amnesty International, Migration-Related Detention (2007), p.10 §8)**

**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". **§11:** "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons".

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §75(g):** "Governments should [ensure] that the law sets a limit on detention pending deportation".

**WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7:** "A maximum period should be set by law".

**Council of Europe, Committee of Ministers Recommendation (2003)5, §5:** "Measures of detention ... should be applied only under the ... 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 ... court".

**EU Returns Directive 2008/115/EC, Art 15(5):** “Each Member State shall set a limited period of detention, which may not exceed six months”. **Art 15(6):** “Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries”.

**European Union Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2010), p.35:** “The FRA encourages EU Member States not to extend the maximum period of detention beyond six months. Where – in line with the Return Directive – such a possibility is introduced or maintained, national legislation should include strict safeguards to ensure that such a possibility is only used in extremely exceptional cases”.

**International Detention Coalition, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants: A Guide (2011), Guideline 7:** “No one should be subject to indefinite detention. Detention should be for the shortest possible time with defined limits on the length of detention, which are strictly adhered to”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 39:** “Detention should always be for the shortest time possible. There should be a reasonable maximum time-limit for detention. It is highly desirable that states do not detain stateless persons for more than six months. States which at present have a lower than six month maximum time-limit for detention are urged not to increase it, and all states are urged to review and reduce their maximum time-limit for detention”.

#### **SP17C. Maximum: Commentary.**

Setting an applicable maximum period of detention in law is an aspect of the duty of prescription (SP3) which promotes certainty and protects against arbitrariness (SP8). 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. In addition, they should be told in an administrative authority's reasons (SP18), or under automatic court supervision (SP21), the time limit set for detention (SP21C) in their individual case (SP7C).

It is worth comparing the position under criminal law and procedure. Maximum criminal sentences of imprisonment are familiar in criminal statutes. A criminal sentence will itself give a term of imprisonment or a tariff. In criminal law, 'custody time limits' have been embraced as "a vital feature" of a national "system of justice" (***R (McAuley) v Coventry Crown Court [2012] EWHC 680 (Admin) §25***). Immigration detention is not the same as criminal detention. But it is impossible to see why those in executive immigration detention – not detained in connection with being accused of committing a crime – should be in a weaker position, with weaker safeguards. Surely, an individual in immigration detention should have equal, if not greater, protection. There is no persuasive basis on which it can be said that the rationale for maximum periods is applicable only to the criminal law.

In the context of immigration detention, the UN CAT (***Concluding observations on the fifth periodic report of UK (2013), §30***) has cogently urged the UK to: "Introduce a limit for immigration detention". The "adoption of a statutory upper time limit" has convincingly been described as an "obvious way forward" (***Johnston, 23 Imm Asylum and Nationality Law 351, 363 (2009)***). This is a matter for prescribed rules (SP3), and maximum periods should be contained in legislation, not changeable policy. As the US Supreme Court has recognised, it is "practically necessary to recognize some presumptively reasonable period of detention" (***Zadvydas v Davis, 533 US 678 (2001), p.680***).

The EU created a maximum period for detention for removals (***EU Returns Directive 2008/115/EC, Art 15***) set at 6 months, and capable of extension in certain circumstances to an overall period of 18 months (***Arts 15(5), 15(6)***). Maximum periods for which such EU Directives provide are absolute, applicable even if the legitimate aim (SP12) remains achievable (SP14), and even if the detainee is pursuing judicial review (SP23) (***Kadzoev, CJEU Case C-357/09 PPU [2009] §§60, 68, 70***). In the asylum context, no maximum single

period is yet agreed across the EU, so that Member States should instead apply the criterion of detention for “*as short a period as possible*” (**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 9(1)**). An international or regional maximum, like the EU’s 6 months, brings certainty and discourages arbitrariness. But it should not encourage States to enlarge the domestic maximum periods which would otherwise be imposed, as with the extension in Greece from 3 months to 12 months. A regional maximum should not become the routine national maximum, as a highest common denominator. Happily, some EU States recognise the appropriateness of maintaining lower limits. The UK stands as the only EU State to have no time limits at all on administrative detention of migrants.

Maximum detention periods are an unanswerable safeguarding protection against arbitrariness (SP11). As has been cogently explained (**ECTHR/EU Agency for Fundamental Rights, Handbook on European Law relating to asylum, borders and immigration (2013) p.153**) “*Under the ECHR ... [t]ime limits are an essential component of precise and foreseeable law governing the deprivation of liberty*”. They constitute “*an important safeguard against arbitrary detention*”, so that “*In a series of cases, the ECtHR has found that in the absence of clear legal provisions, among other safeguards, setting up time limits for detention for expulsion, the deprivation of liberty was not circumscribed by adequate safeguards against arbitrariness*” (**Dubinsky, Foreign National Prisoners Law and Practice (2012), §36.24**). In the related extradition context, in **Ismoilov v Russia, ECtHR App.No. 2947/06 [2008] §140** “*the provisions of the Russian law governing detention pending extradition were neither precise nor foreseeable in their application and did not meet the ‘quality-of-law’ requirement. [I]n the absence of clear legal provisions ... setting up time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness*”. Likewise, in the immigration detention context, in **Mathloom v Greece, ECtHR App.No. 48883/07 [2012] §71** the ECtHR held that, in the absence of mandatory time limits, Greek law governing administrative detention of foreign nationals for the purposes of expulsion was insufficiently precise and foreseeable in its consequences to have the quality of law.

A State should have maximum periods of detention which are justifiable as to the length and are prescribed by law. Good examples of national maximum periods are Belgium (**Royal Decree on the access, stay, establishment and removal of foreigners, 2 August 2002, Arts 7, 74/5 §3 and 74/6 §2**), with its two-month limits for asylum; Germany (**Aufenthaltsgesetz (Residence Act), Art 62.1.1**) where detention in preparation for expulsion must not exceed six weeks; and Italy (**Decreto Legislativo 25/2008, Art 20(3)**), where asylum seeker's detention for verifications/checks must not exceed 20 days, and for processing international protection claims, 35 days. In Switzerland (**Federal Act on Foreign Nationals of 16 December 2005 (FNA), Art 79**), detention for deportation or removal must not exceed 6 months, extendable by a further 12 months but only on application to a court. In the Netherlands border detention is limited by statute to a maximum of 6 months, after which there can be an extension for a further 12 months (**Aliens Act 2000 Implementation Guidelines, §A5/6.8 IG**) but the interests of the individual to be free weighs more heavily than the fulfilment of the objective of preventing illegal entry (**Rechtbank Haarlem, 19 April 2000, LJN: AA5762, §2.4**). Ukraine immigration legislation now provides that detention to effect expulsion must not be more than 12 months, on the expiry of which detainees must be released and provided with a temporary stay permit (**Ukraine, Law on the Legal Status of Foreigners and Stateless Persons, Art 30(4)**). Detention exceeding the relevant prescribed maximum will be contrary to law, breaching the principle of adherence (SP6), as with Greece's immigration detention exceeding the statutory 3 months (by releasing and immediately re-detaining) in **John v Greece, ECtHR App.No. 199/05 [2006] §33**; and Portugal's detention beyond the maximum 60 day period, enforced by the Supreme Court of Portugal (**Case 07P2836 Habeas Corpus Oliveira Mendes, 19 July 2007**).

Once the maximum duration for immigration detention has been prescribed by law in rules (SP3), it does not dictate that there will be detention, nor that detention will be for the duration of the maximum period. The maximum period should not routinely be applied. The fact that detention complies with the prescribed limit "cannot automatically be regarded" as justifying the detention (**Auad v Bulgaria, ECtHR App.No. 46390/10 [2010] §131**). The maximum is not in the nature of a 'permission' to detain an individual; nor to detain that

individual for the specified period. It remains essential for detention in the individual case to be justified, and for the legitimate aim to be achievable (SP14). The prescribed general maximum may only be invoked where it is justified in the individual case (SP7). Moreover, the prescribed maximum cannot be circumvented by using a practice of release and re-detention, nor sequential detention imposed for supposedly different purposes. The question of a specific time limit for detention in the individual case should be considered by the Court with the function of automatic court-control (SP21), and on any administrative review (SP22) or judicial review (SP23).

**SP18. REASONS.** Detainees must promptly, clearly and regularly be told the grounds and maximum duration of detention, and their rights.

*“Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority.”*

**(UN Working Group on Arbitrary Detention,  
Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999  
(Deliberation No. 5), Principle 8)**

***International Covenant on Civil and Political Rights (1966), Art 9(2):*** “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest”.

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art 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 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 ... the reasons”. ***Principle 13:*** “Any person shall ... at the commencement of detention ..., 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 charges against him]”.

***UNHCR Detention Guidelines (2012), Guideline 7:*** “Decisions to detain or to extend detention must be subject to minimum procedural safeguards”. **§47(i):** including “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”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 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”.

**UNHCR Report on Reception Standards for Asylum Seekers in the European Union (2000), p.8:** “Asylum seekers should be informed in writing and without delay of the practical arrangements for their reception and of other useful information concerning the asylum procedure (interviews, supporting documentation, appeal possibility, access to legal aid, etc.). They should in particular be made aware of how the procedure works and what their rights and obligations are. Information leaflets should be in a language and in terms understandable to asylum seekers, preferably in their own language. The authorities should share any other relevant information with asylum seekers”.

**European Convention on Human Rights (1950), Art 5(2):** “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”.

**Council of Europe (PACE), Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum, §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”.

**Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures (2009), Guideline XI(5):** “Detained asylum seekers shall be informed promptly, in a language which they understand, of the legal and factual reasons for their detention, and the available remedies”.

SP18. REASONS

**Council of Europe, 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”. **Guideline 10(7):** “Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations”.

**EU Returns Directive 2008/115/EC, Art 15(2):** “Detention shall be ordered in writing with reasons being given in fact and in law”.

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 9(2) §2:** “Detained asylum seekers shall immediately be informed in writing of the reasons for detention and the procedures laid down in national law for challenging the detention order and the possibility to request free legal assistance and representation, in a language they understand or are reasonably supposed to understand”. **Art 9(3):** “Detention shall be ordered in writing. The detention order shall state the reasons in fact and in law on which it is based”.

**American Convention on Human Rights (1969), Art 7(4):** “Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him”.

**Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle V §2:** “Persons deprived of liberty shall have the right to be promptly informed in a language they understand of the reasons for their deprivation of liberty and of the charges against them, as well as to be informed of their rights and guarantees; to have access to a translator or interpreter during the proceedings”.

**League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 14(3):** “Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him”.

**Amnesty International, Migration-Related Detention (2007), p.9 §6:** “detainees have the right to be informed of the reason for their detention in writing in a language which they understand”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 37:*** “(ii) The individual shall receive prompt and full written communication in a language and in terms that they understand, of any order of detention, together with the reasons for their deprivation or liberty. (iii) The individual shall be informed of their rights in connection with the detention order, including the right to legal advice, the right to apply for bail, seek judicial review and/or appeal the legality of the detention. Where appropriate, they should receive free legal assistance. (iv) “The individual should be informed of the maximum time-limit of their detention”.

***EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), p.40:*** “Given the challenges to implement Article 5.2 ECHR in practice, it may be advisable to specify expressly in national legislation that the reason for detention as contained in the detention order and the procedure to access judicial review be translated in a language the detainee understands. The reasons should also be given to him/her in written form as well as read out with the help of an interpreter, if necessary”.

#### **SP18C. Reasons: Commentary.**

The requirement to give reasons for detention is very well-rooted in international, regional and national law. Reasons promote certainty and access to justice, enabling an informed assessment and challenge to detention. They require focused discipline. The giving of reasons preserves the rule of law, and facilitates proper consideration by a court (***Spain, Tribunal Constitucional, Case 0066/1996, SFS §5***). It is a basic principle that (***Amnesty International, Migration-Related Detention (2007), p.9***): “*detainees have the right to be informed of the reason for their detention in writing in a language which they understand*”. This is a very familiar constitutional guarantee (e.g. ***Canadian Charter of Rights and Freedoms 1982 Schedule B §10(a)***). Detainees and their legal representatives (SP24) must be promptly and regularly told of the grounds for the detention, its maximum duration and the detainee’s rights. This duty must be imposed on the duly-obligated authority (SP5) under the prescribed rules (SP3). This is an “*elementary safeguard*” which is “*integral*” to human rights protection (***Čonka v Belgium, ECtHR***

**App.No. 51564/99 [2002] §50**). Both the legal and factual grounds for their detention must be provided in writing (**15 European rules governing minimum standards of conditions of detention for migrants and asylum (2010), Rule III**).

Reasons must be prompt. Consequently, informing the detainee 29 hours after he was detained did not satisfy the promptness requirement in Article 5(1) 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**).

Reasons must be adequate, and must relate to the individual case (SP7). It is not sufficient to provide individuals with a mere restatement of the applicable legal norms (**Vélez Loor v Panama, IACtHR [2010] §116**). Individuals should be provided with information on how to challenge their detention, the availability of legal assistance and bail. Detainees should also be informed of the maximum period of detention (**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 37(iv)**). All information provided should be in a language the detainee can reasonably be expected to understand. The communication must be in “*simple, non-technical language that [the individual] can understand*” (**Shamayev v Georgia and Russia, ECtHR App.No. 36378/02 [2005] §413**). As the Inter-American Court has explained (**Yvon Neptune v Haiti, IACtHR [2008] §§105–106**), “*information on the ‘motives and reasons’ for the detention ... constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defense of the individual detained*”, it “*allows the person detained to contest its lawfulness, using the legal mechanisms that all States must offer*”; and it means being informed “*in simple language, free of technicalities, of the essential facts and legal grounds on which the detention is based*”.

Absent fulfilment of the legal duty to give reasons, detention should be regarded as unlawful. German legislation (**Bundesgerichtshof Beschluss V ZB 223/09 vom 06.05.2010 in der Abschiebehaftsache, §18 p.8**) spells out that in the absence of the required information, a detention order is the result of a procedural default and thus unlawful.

The Supreme Court of the UK reached the same conclusion in **R (Lumba) v SSHD [2011] UKSC 12 §77** (Lord Dyson: “*the failure to provide a detainee with the reasons for the arrest should be regarded as ... an unlawful exercise of the power to arrest*”; see also **R (Kambadzi) v SSHD [2011] UKSC 23 §§72–73**).

Proper and adequate reasons will inform the automatic court-control (SP21), the automatic administrative review (SP22), and effective judicial review (SP23). If the reason for detention at any stage becomes inapplicable, detention will become unlawful and the individual must be released. As it has been put (**Spain, Organic Law 4/2000 on the rights and freedoms of foreigners in Spain, Art 62(3)**): “*Where the grounds for detention are no longer applicable, the alien shall be immediately released*”.

Reasons duties are enshrined in national legislation, as for example in Italy (**20 D.P.R. 394/99 (implementing Decreto Legislativo No. 286 of 1998)**); Switzerland (**Fed Constitution, Art 31(2)**); and Greece (**Law 3386/2005, Art 76(3)**). In the Netherlands, detention on the basis of the Aliens Act 2000 requires an official order that must be reasoned, dated and signed (**Administrative Judicial Review Division of the Council of State, 1 May 2002, LJN: AE3705**).

The first few days following arrival in detention is a chaotic and stressful period during which detainees may not readily take in information. Moreover, reasons, or whether they can be justified, may change over time. The duty to give reasons should be a continuing duty involving regular information throughout. An example of an explicit duty to give regular reasons is the UK (**Detention Centre Rules 2001 SI 238, §9(1)**): “*Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly*”. The importance of ensuring that detainees “*remain properly informed*” is recognised in the commentary to the European Prison Rules (**Commentary to Recommendation (2006)2 on The European Prison Rules, Rule 30.1**).

**SP19. CONDITIONS.** Detention must be in humane, dignified conditions, in distinctive non-penal facilities.

See also SP4 Special Needs.

*“The place, conditions and regime of detention shall be appropriate.”*  
**(Council of Europe (PACE), Resolution 1707(2010), 10 guiding principles on detention of asylum seekers and irregular migrants, §9.1.8.)**

***International Covenant on Civil and Political Rights (1966), Art 10(1):*** “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. **(2):** “[a] Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”. **(3):** “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status”.

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art 17(1):*** “Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity”. **(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”. **(7):** “Migrant workers and members of their families who are subjected to any form of detention ... shall enjoy the same rights as nationals of those States who are in the same situation”.

***UN Standard Minimum Rules for the Treatment of Prisoners (1977), Rule 8:*** “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”. **Rule 94:** “In countries where the law permits imprisonment ... by order of a court under any ... non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order”.

**Committee on the Elimination of Racial Discrimination, Discrimination Against Non-Citizens, General Recommendation No. 30 (2004), §19:** “ensure that conditions in centres for refugees and asylum-seekers meet international standards”.

**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”.

**UNHCR Detention Guidelines (2012), Guideline 8:** “Conditions of detention must be humane and dignified. 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. (ii) Asylum-seekers should be treated with dignity and in accordance with international standards. (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”.

**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”.

**UNHCR, ExCom Conclusion No. 44 (XXXVIII) – 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”.

*SP19. CONDITIONS*

**UNHCR, ExCom Conclusion No. 85 (XLIX) – 1998, §(ee):** “Notes with concern that asylum-seekers detained only because of their illegal entry or presence are often held together with persons detained as common criminals, and reiterates that this is undesirable and must be avoided whenever possible, and that asylum-seekers shall not be located in areas where their physical safety is in danger”.

**WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 9:** “Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law”.

**WGAD Report (on its visit to the UK on the issue of immigrants and asylum seekers), E/CN.4/1999/63/Add.3, Rec 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)”.

**WGAD Report (Visit to Argentina) E/CN.4/2004/3/Add.3, 23 December 2003, §75:** “The ... practice of detaining foreigners for reasons related to immigration together with individuals charged with ordinary offences should be halted”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 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”. **§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”.

**European Convention on Human Rights (1950), Art 3:** “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

**Council of Europe (PACE), Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers, §9.2.2:** “Detainees shall be accommodated in centres specially designed for the purpose of immigration detention and not in prisons”. **§9.2.5:** “the material conditions shall be appropriate to the individual’s legal and factual situation”. **§9.2.6:** “the detention regime must be appropriate to the individual’s legal and factual situation”. **§9.2.7:** “the detention authorities shall safeguard the health and well-being of all detainees in their care”.

**European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards 2011, p.65:** “where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in *centres specifically designed for that purpose*, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel. Obviously, such 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. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them”.

**Council of Europe, 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. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a ‘carceral’ environment. 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

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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”.

***Committee of Ministers Recommendation (2003)5, §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”. ***§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”. ***§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”.

***Charter of Fundamental Rights of the EU (2000), Art 1:*** “Human dignity is inviolable. It must be respected and protected”.

***Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 10:*** “Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the asylum seeker in detention shall be kept separately from ordinary prisoners and the detention conditions provided in this Directive shall apply”. ***Art 16:*** “Applicants who are in detention should be treated with full respect of human dignity and their reception should be specifically designed to meet their needs in that situation”.

**EU Returns Directive 2008/115/EC, Recital (17):** “Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities”.

**African (Banjul) Charter on Human and Peoples’ Rights (1981), Art 5:** “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status”.

**League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 20(1):** “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

**American Declaration of the Rights and Duties of Man (1948), Art XXV:** “[Every individual] has the right to humane treatment during the time he is in custody”.

**American Convention on Human Rights (1969), Art 5:** “(1) Every person has the right to have his physical, mental, and moral integrity respected. (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

**Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle I:** “All persons subject to the jurisdiction of any Member State of the Organization of American States shall be treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments. In particular, and taking into account the special position of the States as guarantors regarding persons deprived of liberty, their life and personal integrity shall be respected and ensured, and they shall be afforded minimum conditions compatible with their dignity”.

**Principle XIX:** “In cases of deprivation of liberty of asylum or refugee status seekers, and in other similar cases, children shall not be separated from their parents. Asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges”.

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**Human Rights and Equal Opportunity Commission (Australia) Immigration Detention Guidelines (2000), §1.3:** “Each immigration detainee shall be treated in a humane manner and with respect for the inherent dignity of the human person. Each immigration detainee aged under 18 years shall, in addition, be treated in a manner which takes into account the needs of a person of his or her age”.

**Amnesty International, Migration-Related Detention (2007), p.10 §10:** “there should be a prohibition on the detention of unaccompanied children provided by law”.

**The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 43:** “Conditions of detention should be prescribed by law and should comply with international human rights law and standards ... (i) Conditions of detention for stateless persons should be human, with respect shown at all times for the inherent dignity of the person. No detainees should be subject to torture, cruel, inhuman or degrading treatment or punishment ... (iii) Stateless persons in detention should be subject to treatment that is appropriate to the administrative purpose of their detention. Under no circumstances should stateless detainees be housed in the same facilities as remand prisoners or convicted prisoners serving criminal sentences. (iv) Immigration detention facilities should be designed and built in compliance with the principle that there is no punitive element to immigration detention. As such, detention centres should facilitate the living of a normal life to the greatest extent possible”.

### **SP19C. Conditions: Commentary.**

A wealth of materials and standards addresses this important safeguarding principle. Immigration detention will not be lawful unless the State can guarantee legally necessary conditions, including those which address special needs (SP4). Conditions need to be continually monitored, and inform automatic court-control (SP21), administrative review (SP22) and judicial review (SP23). Immigration detention should be distinctively non-penal, though in exceptional circumstances immigration detention may occur in a police station, prison or mental health institution, but only for very short period. As the ECtHR has explained, in order to avoid immigration detention

“being branded as arbitrary, the place and conditions of detention should be appropriate” (**Saadi v UK, ECtHR App.No. 13229/03 [2008] §74**). Appropriateness includes that the “conditions of detention ... must be compatible with the purposes of detention” (**Massoud v Malta, ECtHR App.No. 24340/08 [2010] §72**). Detention will be unlawful if conditions are unacceptable, as where courts have found “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, limited access to care” (**MSS v Belgium and Greece, ECtHR App.No. 30696/09 [2011] §162**); in holding centres without physical exercise, contact with the outside world or medical attention (**SD v Greece, ECtHR App.No. 53541/07 [2009]**); where an unaccompanied 5 year old child is held in an adult detention centre (**Mayeka v Belgium, ECtHR App.No. 13178/03 [2006]**); where children are detained with their mother in transit centres designed for adults (**Muskhadzhiyeva v Belgium, ECtHR App.No. 41442/07 [2010]**); or where asylum-seekers were detained for 3 months in an overcrowded police station basement (**Abdolkhani and Karimnia v Turkey (No.2), ECtHR App.No. 50213/08 [2010]**). Detaining children in a French detention centre in conditions which were unsuitable and unaddressed was both a violation of the right to freedom from inhuman and degrading treatment, and the right to liberty given the failure to pursue alternative solutions (**Popov v France, ECtHR App.No. 39472/07 [2012]**). The duty to act so as 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**).

The principled logic of detention which is unlawful, because of conditions of detention, is powerfully illustrated by cases about prosecutions of detainees. Here, the unacceptable nature of detention conditions can provide a defence, or ‘shield’. In a Greek case **Criminal Court of First Instance of Igoumenitsa, Case No.682/2012** fifteen immigration detainees were acquitted of a criminal offence in escaping from conditions of detention which were inhuman and degrading and violated ECHR Art 3, Art 8 (right to respect for private and family life), and Art 13 (right to an effective remedy). The conditions which put their life and health in extreme danger meant there

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was a defence of necessity. In an Italian case ***Tribunal of Crotona, Case No.1410/2012 of 12 December 2012 §7*** detainees' convictions of malicious mischief and resisting a public official, for damage done to the detention centre, were overturned. The conditions of detention justified their behaviour and gave them a 'legitimate defence'.

**SP20. CONTACT.** Detainees must always be able to communicate with the outside world, legal representatives and relevant agencies.

**See also SP24 Legal Representation.**

*“[[I]mmigration detainees should be entitled to maintain contact with the outside world during their detention, and in particular to have access to a telephone and to receive visits from relatives and representatives of relevant organisations.”*

**(European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards 2011, p.66)**

***International Covenant on Civil and Political Rights (1966), Art 7:*** “The protection of the detainee ... requires that prompt and regular access be given to ... lawyers and ... to family members”.

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art 17(5):*** “During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families”.

***UN Standard Minimum Rules for the Treatment of Prisoners (1977), Rule 37:*** “Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits”. ***Rule 38:*** “(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”. ***Rule 55:*** “There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services”.

**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”.

**UNHCR Detention Guidelines (2012), Guideline 8 (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”.

**UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986 (approved by the UN General Assembly by Resolution 41/124, 4 December 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 UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §75(i):** "... Representatives of UNHCR, ICRC, NGOs and churches should be allowed access to the place of custody".

**Report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2004/56, (2004) §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".

**WGAD Annual Report 1999, E/CN.4/2000/4/ Annex II, 28 December 1999 (Deliberation No. 5), Principle 10:** "The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody".

**European Convention on Human Rights (1950), Art 8(1):** "Everyone has the right to respect for his private and family life, ... and his correspondence".

**European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards 2011, p.71:** "detained irregular migrants should, from the very outset of their deprivation of liberty, enjoy three basic rights, in the same way as other categories of detained persons. These rights are: (1) to have access to a lawyer, (2) to have access to a medical doctor, and (3) to be able to inform a relative or third party of one's choice about the detention measure".

**European Committee for the Prevention of Torture (CPT), 12th General Report, 3 September 2002, CPT/Inf (2002) 15, §44:** "rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence".

**Council of Europe, 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. Moreover, the functioning of these

## *SP20. CONTACT*

facilities should be regularly monitored, including by recognised independent monitors”.

***Committee of Ministers Recommendation (2003)5, §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”.

***Committee of Ministers Recommendation (2006)2, §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”.

***Council of Europe (PACE), Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum, §9.2.8:*** “detainees shall be guaranteed effective access to the outside world (including access to lawyers, family, friends, the Office of the United Nations High Commissioner for Refugees (UNHCR), civil society, religious/spiritual representatives) and the right to receive frequent visits from the outside world”. ***§9.2.9:*** “detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge”. ***§9.2.15:*** “independent inspection and monitoring of detention centres and of conditions of detention shall take place”.

***EU Returns Directive 2008/115/EC, Art 21(1)(a):*** “Member States shall allow the UNHCR to have access to applicants for asylum, including those in detention and in airport or port transit zones”.

***Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 10(4):*** “Member States shall ensure that family members, legal advisers or counselors and persons representing non-governmental organizations recognised by the Member State concerned, have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access may only be imposed where, by virtue of national

law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely limited or rendered impossible”.

***Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle V:*** “Persons deprived of liberty shall have the right to ... communicate with their family”. ***Principle XVIII:*** “Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners. They shall have the right to be informed about the news of the outside world through means of communication, or any other form of contact with the outside, in accordance with the law”.

***Australian Human Rights and Equal Opportunity Commission Immigration Detention Guidelines (2000), §4.1:*** “Each immigration detainee should be entitled to enjoy contact at least weekly with his or her families, friends and the community. Contact can be facilitated through visits, correspondence and access to telephones. Communication with the outside world should not be denied for more than a matter of days”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention, (2012) Guideline 43(vii):*** “All stateless detainees should be allowed free and frequent access to: (i) their families, friends, communities and religious groups”.

#### **SP20C. Contact: Commentary.**

There is no good reason for denying, and every good reason for securing, that immigration detainees have contact with family, friends and their wider community, through visits and written and correspondence and telephone contact; together with access to UNHCR, consulates, and other NGOs. It is important that organisations such as UNHCR, the International Committee of the Red Cross and relevant NGOs should be able to visit immigration detention facilities, monitor the use and conditions of detention, and make contact with detainees.

No detainee should ever be 'incommunicado'. Those who are concerned with the welfare and interests of detainees must know where they are held. As has been explained, the "*rights of persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence*" (**European Committee for the Prevention of Torture (CPT), 12<sup>th</sup> General Report, 3 September 2002, CPT/Inf (2002) 15, §44**). The right to inform the consulate of the state of nationality is protected under international law (**Germany v USA (LaGrand Case), ICJ (2001) §4.07**).

It will be contrary to law to detain an individual without access to a telephone (**SD v Greece, ECtHR App.No. 53541/07 [2009] §51**). National legislation should make provision for appropriate contact and access arrangements (e.g. **Greece, Law 3907/2011, Art 31(2), (4)**). In the modern age, it is important that detainees should have access to the internet, including full and unrestricted access to sites which are relevant to making contact with family, UNHCR, NGOs and research appropriate to any challenge to their detention or any preparations relevant to advancing their immigration rights, together with the facilities for printing documents. All contact and access rights should be explained in the reasons (SP18).

**SP21. AUTOMATIC COURT-CONTROL.** Every detainee must promptly be brought before a court to impose conditions or order release.

See also SP23 Judicial Review.

*“Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.”*  
**(UN Working Group on Arbitrary Detention, Annual Report 1999 E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 3)**

***EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), p.44:*** “The right to judicial review of the detention order must be effectively available in all cases. This can best be achieved by requiring a judge to endorse each detention order, as many EU Member States already do”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 37(i):*** “Detention shall be ... subject to the prompt and effective control of a judicial authority”.

***WGAD Annual Report 2003, E/CN.4/2004/3, 15 December 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”.

***WGAD Annual Report 1997, E/CN.4/1998/44, 19 December 1997, §33(c):*** “Appeal and review procedures” should include “an automatic review by a judge after a specific period”.

***Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle VI:*** “Competent, independent, and impartial judges and tribunals shall be in charge of the periodic control of legality of acts of the public administration that affect, or could affect the rights, guarantees, or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty”.

SP21. AUTOMATIC COURT-CONTROL

**PACE Committee on Migration, Refugees and Population, Report on the detention of asylum seekers and irregular migrants in Europe (the Mendonça Report), 11 January 2010, Doc. 12105, Appendix 1, §12:** “the decision to detain [should] be made by a judicial authority”.

**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”.

**Council of Europe, 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”.

**Committee of Ministers Recommendation (2003)5, §5:** “If a maximum duration has not been provided for by law, the duration of the detention should form part of the review by the ... court”.

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 9(2):** “Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention conducted ex officio and/or on the request of the applicant. The review of the lawfulness of detention shall be decided on as speedily as possible from the beginning of detention in the case of the ex officio review ... To this end, Member States shall define in national law a period within which the ex officio review ... shall be conducted”.

**SP21C. Automatic Court-Control: Commentary.**

Amnesty International is among those who have powerfully advocated (**Amnesty International, Migration-Related Detention (2007), p.9**) that every immigration detention decision “*should be automatically and regularly reviewed as to its lawfulness, necessity and*

*appropriateness by means of a prompt, oral hearing by a court or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance*". This repeated and sustained call (e.g. **Amnesty International, The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers (2008), p.53; Amnesty International, Jailed Without Justice (2008) p.44**) convincingly identifies a basic safeguard: automatic judicial-control.

A comparison with *criminal* process is illuminating, here as elsewhere (SP17C). Human rights instruments often spell out 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*" (**International Covenant on Civil and Political Rights (1966), Art 9(3); European Convention on Human Rights (1950), Art 5(3); Arab Charter on Human Rights (revised – 2004), Art 14(5); American Convention on Human Rights (1969), Art 7(5)**). In that criminal context, it is recognised that "*Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of [a] guarantee ... intended to minimise the risk of arbitrariness [and] ... implied by the rule of law*" (**Brogan v UK, ECtHR App.No. 11209/84 [1988] §58**). That is surely no less true for immigration detention, hence indeed the basic requirement of judicial review (SP23). In criminal process, however, the guarantee must be "*prompt*" and "*automatic*" (**Aquilina v Malta, ECtHR GC App.No. 25642/94 [1999] §49**). It must have a "*strict time constraint*" to avoid "*a serious weakening of a procedural guarantee*" (**McKay v UK, ECtHR GC App.No. 543/03 [2006] §33**), to "*allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty*" (**Ladent v Poland, ECtHR App.No. 11036/03 [2008] §72**).

Express immigration detention provisions in human rights instruments, such as ECHR Art 5(1)(f), include "*no provision ... corresponding*" with this duty (**R (Lumba) v SSHD [2011] UKSC 12 §48**). But that cannot be the last word. Most 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 immigration detainees, subjected to executive detention and not accused of any

criminal offence, should have a *lesser* degree of protection than applies to criminal suspects. The principle of automatic referral to a judicial authority, increasingly acknowledged as an appropriate protection, stands as an unanswerable safeguard. It protects the individual, but also minimises the scope for compensation claims against the State (SP25C), for the process to be judicialised prospectively, rather than for lawfulness of detention to be addressed after the event.

Judicial referral should occur as quickly as possible after immigration detention is imposed. For an individual who was previously at liberty, that means promptly when they are first detained. For an individual who was previously serving a sentence of imprisonment (i.e. foreign national prisoners facing deportation), automatic referral to a court should take place promptly when the criminal sentence expires and the individual falls under authority (SP5) imposing immigration detention. The Court should take responsibility and control: secure that detention is not arbitrary (SP11); ensure adherence (SP6) to the prescribed rules (SP3); enquire as to the reasons (SP18) for detention; consider the purpose of the detention, testing its legitimacy (SP12) and its achievability (SP14); address the individual circumstances (SP7), the necessity of (SP13) and alternatives to (SP8) detention; evaluate any special needs (SP4); consider the conditions of detention (SP19), and ensure that the individual has received adequate reasons and has secured legal representation. The Court should consider the duration of detention (SP16), give directions for the ongoing detention of the individual, and specify a timetable within which the detention of the individual – if not released – should be considered further by the Court. Setting a release-by date is vital in humanely addressing the position of the individual (SP7C). The Court must therefore have the power, but also the function and responsibility, to order release or impose conditions: especially as to duration and the return date for the next automatic court review. Automatic court-control is the “*procedure for ordering and extending detention ... and setting time limits for such detention*”, to ensure “*adequate safeguards against arbitrariness*” (***Abdolkhani v Turkey, ECtHR App.No. 30471/08 [2009] §135***).

If detention is lawful, the Court should consider whether to direct release on bail, under suitable conditions. Where detention is itself

unjustified and unlawful, the Court should direct release. Automatic court-control puts the onus where it belongs: on the State authorities. The State must organise arrangements in which the individual's immigration detention will be considered promptly by a Court, before which the individual can appear, with the benefit of legal representation (SP24). The Court will ensure that executive (administrative) detention is not being routinely imposed (SP9), nor imposed as a penalising measure (SP10).

The detainee must automatically and regularly be brought back to the court supervising the immigration detention, in any case of protracted immigration detention. As recognized in the asylum context (***UNHCR's Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons (2013), Summary Conclusions, p.2***): *"Governments need to ensure ... independent review of decisions to detain ... Ideally, review of detention should be carried out periodically and automatically"*. As the EU Returns Directive puts it, where detention is *"ordered by administrative authorities"*, the onus is on the State to *"provide for a speedy judicial review"* or grant a right to take proceedings (***EU Returns Directive 2008/115/EC, Art 15(2)***); while any *"prolonged"* detention requires regular reviews at reasonable intervals under *"the supervision of a judicial authority"* (***Art 15(3)***). For example, Austrian legislation provides (***Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (2005 Aliens' Police Act – Fremdenpolizeigesetz 2005) Federal Law Gazette (FLG) I No. 100/2005 as Amended by FLG I No.157/2005 §§80.6 and 83.4***): *"If the alien is to be kept in detention pending deportation ... the appropriateness of such detention shall be reviewed by the Independent Administrative Review Board ... following the day on which the sixth month has been exceeded and, thereafter, every eight weeks"*, that automatic review being to *"establish if, at the time of its ruling, the requirements relevant for continuation of detention pending deportation are still met and if continuation of detention pending deportation is appropriate"*.

The cogency of the call for a prompt and proactive role by a supervising court is not limited to particular categories of immigration detainee. This is a vital safeguard. Its importance can be found

reflected in various instruments. South Africa's asylum legislation recognises it (**South Africa, Refugee Act No. 130 of 1998 §29(1)**): "No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge ... and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days". German law provides (**Basic Law, Federal Law Gazette I p.944, Art 104(2)**) 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"; and (**Aufenthaltsgesetz (Residence Act) 2004, Art 62(5)**) "the foreigner shall be brought before the court forthwith for a decision on the order for detention pending deportation". Other examples include Ukraine (**Constitution of Ukraine (1991), Art 29**: "No one shall be arrested or held in custody except under a substantiated court decision"), Netherlands (**Aliens Act 2000, Art 94.1 and 94.2**: the Court must be informed of the individual's detention within 28 days, and must hear the case within 14 days of receiving notice), and France (**Code de l'entrée et du séjour des étrangers et du droit d'asile Art L.552-1 & L.552-7**: a court order is required to extend detention beyond an initial period of 5 days). In Spain, for example, immigration on-entry detention of asylum-seekers must be referred to a judge within 72 hours (**Organic Law 4/2000 on the rights and freedoms of foreigners in Spain, Art 58**). In Denmark (**Aliens (Consolidation) Act (No. 685), 685 of 2003, 24 July 2003 §37(1)**), "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". In Estonia (**Obligation to Leave and Prohibition of Entry Act, RT I 1998, 98/99, 1575; consolidated text RT I 2001, 68, 407 §19(3)**) a person to be expelled is to be placed in an expulsion centre "on the basis of a judgment of an administrative court judge"; in Finland (**Aliens Act 301/2004 §124(2)**) "the District Court shall hear the matter no later than four days from the date when the alien was placed in detention". Italy (**Decreto Legislativo 286/1998, Art 13(5.2)**) requires validation of detention measures by a judicial authority, to address whether legal requirements are met and with power to modify or revoke the detention measure. In Switzerland (**Federal Act on Foreign Nationals of 16 December 2005, Art 80(2)**), "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". In the UK, automatic bail hearings were enacted by Parliament in 1999 (**Immigration and Asylum Act 1999 §§44–50**), so that "the Secretary of State must arrange a reference to the court" (**§45(1)**); but this provision was sadly never brought into force.*

Automatic judicial-control is an appropriate safeguard in the context of immigration detention. Such safeguards are more than voluntary best practice. They cry out for recognition as an essential requirement under the rule of law.

**SP22. ADMINISTRATIVE REVIEW.** The executive must regularly review the appropriateness and conditions of detention.

See also SP23 Judicial Review.

*“[D]ecisions regarding detention should be reviewed automatically at regular intervals.”*

**(Council of Europe Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum (2010), §9.2.10.)**

***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”.

***UNHCR, ExCom Conclusion No. 44 (XXXVII) – 1986 (approved by UN General Assembly by Resolution 41/124, 4 December 1986), §(e):*** “... detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review”.

***UNHCR Detention Guidelines (2012), Guideline 7, §47(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”.

***EU Returns Directive 2008/115/EC, Art 15(3):*** “In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 41:*** “Detention should be subject to automatic, regular and periodic review throughout the period of detention, before a judicial body independent of the detaining authorities. If at any stage, it is determined that the administrative purpose can be achieved without detaining the person, the person should be released ... or subject to a suitable and proportionate alternative to detention”.

**SP22C. Administrative review: Commentary.**

Materials which govern or guide the legal legitimacy of immigration detention frequently refer both to judicial review and to administrative review. Sometimes they are presented as alternatives, either of which is sufficient. In fact, a convincing case can be made for both as being necessary. That is the EU model under the Returns Directive where, in addition to judicial review (**EU Returns Directive 2008/115/EC, Art 15(2)(a)**), detention must also in every case also be “*reviewed at reasonable intervals of time*” (**Art 15(3)**). Administrative review at regular intervals gives the executive the discipline of readdressing whether it considers that there remains justification for continued detention and, if not, releasing the individual. This means there are dual controls: administrative and judicial. Both of these remain important. Automatic judicial-control (SP21) allows a court directly to authorise detention, but the law always looks to the executive to prove that justification for detention exists and remains. The executive needs to be proactive and disciplined. Administrative review should involve the making of written records of decision-making, which should promptly be available to detainees and their legal advisers. The prescribed rules (SP3) must identify the relevant authority (SP5) bearing the responsibility for conducting the automatic administrative detention reviews (SP22). There should also be safeguarding arrangements which ensure prompt notification to the relevant authorities of any change in circumstances: for example, as to the individual’s wellbeing and special needs (SP4) or the achievability (SP14) of the aim of the detention. Where any administrative review reveals that detention can no longer be justified in the case of an individual detainee (SP7), the detainee must promptly be released by the executive. Where a review reveals that conditions are inadequate (SP19), the necessary conditions must be provided promptly or the individual released. Belgian legislation, for example, makes express provision for the detention centre director to communicate any grounds for release, and the doctor attached to the detention centre to raise any health or mental health concerns (**Royal Decree on the access, stay, establishment and removal of foreigners, 2 August 2002**). As the Inter-American Commission on Human Rights has explained (**Case 9903 Rafael Ferrer-Mazorra et al v United States, Inter-American Commission on Human Rights, Report No. 51/01 [2001] §230**): “*Requiring reasonable periods of*

## SP22. ADMINISTRATIVE REVIEW

*review for continuing detentions is consistent with the principle of effectiveness”, and serves “to protect individuals against arbitrary detention by subjecting the responsible authority to immediate, regular and effective supervision”. In the UK, regular administrative reviews have been a key part of prescribed policy, to avoid arbitrary detention, and failure to carry out such a review means the detention is contrary to law (**R (Kambadzi) v SSHD [2011] UKSC 23 §42; Abdi v UK, ECtHR App.No. 27770/08 [2013] §69**).*

**SP23. JUDICIAL REVIEW.** A detainee has the right to have the lawfulness of detention reviewed by a court empowered to order release.

See also SP21 Automatic Court-Control, SP22 Administrative Review, SP24 Legal Representation.

*“Detainees must have the right to challenge the lawfulness of their detention, which must include the right to legal counsel and the power of the court to release the detained individual.”*

**(International Detention Coalition, Legal framework and standards relating to the detention of refugees, asylum seekers and migrants – A Guide (2011), Standard 8)**

***International Covenant on Civil and Political Rights (1966), Art 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”.

***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Art 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”.

***Convention on the Rights of the Child (1989), Art 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 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: Arbitrary Detention, 19 April 2004, E/CN.4/RES/2004/39, §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”.

**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”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §75(d):** “... Migrants and their lawyers should have full and complete access to the migrants’ files”.

**WGAD Annual Report 2003, E/CN.4/2004/3/Add.3, 15 December 2003, §75:** “Any person detained for reasons related to immigration should have an opportunity to request a court to rule on the legality of his or her detention before the expulsion order is enforced”.

**WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 8:** “Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant ... it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned”.

**European Convention on Human Rights (1950), Art 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”.

**Council of Europe, 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". **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".

**Council of Europe (PACE), Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum, §9.2.10**: "Detainees must be able periodically to challenge their detention before a court".

**Committee of Ministers Recommendation (2003)5, §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".

**EU Returns Directive 2008/115/EC, Art 15(2)**: "When detention has been ordered by administrative authorities, Member States shall: (b) ... grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings". **Art 15(3)**: "In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority".

**EU Asylum Procedures Directive 2005/85/EC, Art 18(2)**: "Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review". (**See also: Recast EU Asylum Procedures Directive [to enter into force mid-2015], Art 26(2)**).

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 9(2)**: "Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention conducted ex officio and/or on the request of the applicant ... In the case of a review on the request of the applicant, the lawfulness of the detention shall be subject to a review to be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law a period within which

### *SP23. JUDICIAL REVIEW*

the ex officio review and/or the review on request of the applicant shall be conducted”.

***American Convention on Human Rights (1969), Art 7(6)***: “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”.

***American Declaration of the Rights and Duties of Man (1948), Art XXV***: “Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody”.

***League of Arab States, Arab Charter on Human Rights (revised – 2004), Art 15(6)***: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”.

***Amnesty International, Migration-Related Detention (2007), p.9 §5***: “Each decision should be ... regularly reviewed as to its lawfulness, necessity and appropriateness by means of a prompt, oral hearing by a court or similar competent independent and impartial body”.

***EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), p.44***: “The right to judicial review of the detention order must be effectively available in all cases. This can best be achieved by requiring a judge to endorse each detention order ... Moreover, measures to alleviate practical barriers restricting access to judicial review procedure should be put in place ... Courts or tribunals reviewing the detention order must have the power and be adequately equipped to examine the lawfulness of detention. Reasonable deadlines should also be introduced to avoid protracted review proceedings without undermining their fairness”.

***The Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary Detention (2012), Guideline 37(i)***: “Detention shall be ordered by and/or be subject to the prompt and effective control of a judicial authority”.

**SP23C. Judicial review: Commentary.**

A large volume of material supports this fundamental protection: that all individuals in immigration detention must have the right to challenge their detention before an independent judicial body empowered to order release. Judicial review is an essential, inalienable safeguard under the rule of law, which protects against unlawfulness and abuse of power by the state. It confers a right on the individual to take the initiative and insist that the legality of detention be assessed by a Court. It can fit alongside automatic court-control which imposes the obligation on the State (SP21), just as ECHR Art 5(1)(c) and 5(4) fit together in a criminal case. It also fits alongside the duty of regular administrative review (SP22). Automatic court-control (SP21) is a judicial duty; administrative review (SP22) is an executive duty; judicial review (SP23) is an individual right of petition. They should operate in harmony, ensuring no gaps in safeguarding the individual under the rule of law.

The basic judicial review safeguard is that the detainee must have an *“effective remedy by which to contest the lawfulness and length of his detention”* (***Massoud v Malta, ECtHR App.No. 24340/08 [2010] §71***). That means there must be (***Kharchenko v Ukraine, ECtHR App.No. 40107/02 [2011] §100***) *“domestic judicial authorities competent to examine such cases and to order release”* and also *“a clear procedure”*. As the Supreme Court of Canada explained (***Charkaoui v Canada [2007] 1 SCR 350 §§90, 91***): *“Whether through habeas corpus or statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law”; “The lack of review for foreign nationals until 120 days after the reasonableness of the certificate has been judicially determined violates the guarantee against arbitrary detention ..., a guarantee which encompasses the right to prompt review of detention”*.

Detainees must be permitted to take proceedings to the judiciary at any time (***UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (1988), Principle 32(1)***) and must be granted disclosure including full access to their files (***Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30***

**December 2002, §75(d)**). Judicial review must be effective, speedy, accessible, with equality of arms and the court must be empowered to order release. The scope of the judicial review must extend (**A v UK, ECtHR GC App.No. 3455/05 [2009] §202**) to “*the procedural and substantive conditions which are essential for the ‘lawfulness’ of [the] deprivation of liberty*”. Further, the “*court review of the lawfulness of detention*” is “*not limited to mere compliance of the detention with domestic law*” but should extend to compatibility with any relevant human rights instrument (**Shams v Australia, UN Human Rights Committee, CCPR/C/90/D/1255/2004 (2007) §7.3**). “*The opportunity to initiate such proceedings 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**), and must allow “*a speedy decision*” (**Idalov v Russia, ECtHR GC App.No. 5826/03 [2012] §154**), at intervals which permit the court to address whether the deprivation of liberty has “*become ‘unlawful’ in the light of new factors which emerged subsequently to the decision on his initial placement in custody*” (**Khaydarov v Russia, ECtHR App.No. 21055/09 [2010] §138**). “*To constitute a real control mechanism in the face of unlawful and arbitrary detention, the judicial review must be carried out promptly and in such a way as to guarantee compliance with the law and the detainee’s effective enjoyment of his rights*” (**Vélez Looor v Panama, IACtHR [2010] §107**).

The right was violated where (**Yeloyev v Ukraine, ECtHR App.No. 17283/02 [2008] §65**), “*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)*”. The absence of an opportunity to seek effective judicial review was a violation of Article 5(4) in the context of French immigration detention of children (**Popov v France, ECtHR App.No. 39472/07 [2012]**). It was contrary to law for Belgium to fail to “*afford applicants a realistic possibility of using the remedy*” (**Čonka v Belgium, ECtHR App.No. 51564/99 [2002] §46**); for Finland to provide an appeal which did not secure that “*the legality of detention will be determined by a court*” (**Torres v Finland, UN Human Rights Committee, CCPR/C/38/D/291/1988 [1990] §7.2**); where the Greek courts did

not “separately examine the legality of the detention” (***SD v Greece, ECtHR App.No. 53541/07 [2009] §73***); where Bulgarian “orders for the detention of deportees were not amenable to judicial review” (***Raza v Bulgaria, ECtHR App.No. 31465/08 [2010] §77***); upon the Russian “authorities’ failure to review without a delay the lawfulness of the applicant’s detention” (***Embenyeli v Russia, ECtHR App.No. 42443/02 [2009] §67***); and where the Turkish authorities’ conduct of an “initial review by the administrative courts lasted two months and ten days ... [which] cannot be regarded as a ‘speedy’ reply to the applicant’s petition”. In a case where the reason for immigration detention includes considerations of national security the court must be “in a position to review whether the decisions to detain [the individual] and to keep him in detention were justified on national security grounds” (***Chahal v UK, ECtHR GC App.No. 22414/93 [1996] §130***). 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, in the case of children, absent “the ability of a court to order [the] child’s release if considered in its best interests” (***Bakhtiyari v Australia, CCPR/C/79/D/1069/2002 (6 November 2003), §§9.4–9.5***).

There is an important distinction between judicial review and bail. Judicial review can address the legality of detention. Bail has an important function, but it assumes the legality of detention (***R (Lumba) v SSHD [2011] UKSC 12 §118***) and then asks whether there is good reason to order release on conditions. Breach of those conditions has serious consequences for the individual. It is disastrous to impose conditions which the individual cannot realistically meet, especially if the default is later held against the individual in other ways. Bail is no substitute for release, where the individual ought not to be in detention in the first place.

**SP24. LEGAL REPRESENTATION.** Every detainee is entitled to prompt, continuing, adequate legal assistance; state-funded if unaffordable.

**See also SP20 Contact.**

*“Each immigration detainee is entitled to engage legal assistance ... and should be provided with adequate time and facilities to communicate and consult in private with those representatives.”*

**(Human Rights and Equal Opportunity Commission (Australia), Immigration Detention Guidelines (2000), §4.1)**

***International Covenant on Civil and Political Rights (1966), Art 7:*** “The protection of the detainee ... requires that prompt and regular access be given to ... lawyers”.

***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”.

**UNHCR Detention Guidelines (2012), Guideline 7 (ii):** “If faced with the prospect of being detained, as well as during detention, asylum seekers are entitled to the following minimum procedural guarantees: to be informed of the right to legal counsel. Free legal assistance should be provided where it is also available to national 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”.

**Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 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 UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, E/CN.4/2003/68, 2003, §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

## *SP24. LEGAL REPRESENTATION*

judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association”.

***Report of the UN 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”.

***WGAD Annual Report 1997, E/CN.4/1998/44, 19 December 1997, §33:*** “With reference to [asylum seekers whose detention is considered necessary by the authorities] the following issues require to be addressed: ... (e) Access to legal counseling 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”.

***WGAD Report (Visit to Argentina) E/CN.4/2004/3/Add.3, 23 December 2003, §70:*** “Access to a free or court-appointed defence lawyer or to one provided free of charge by a bar association or law faculty should be facilitated. Ownership of a property should not be an obstacle to the use of these services”.

***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”.

***European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); CPT Standards 2011, p.71:*** “detained irregular migrants should, from the very outset of their deprivation of liberty, enjoy ... basic rights, in the same way as other categories of detained persons. These rights are: (1) to have access to a lawyer”.

***Council of Europe, 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".

**Committee of Ministers Recommendation (2003)5, Rec 17**: "Detained asylum seekers should ... have the right to contact a legal counsellor or lawyer and to benefit from their assistance".

**Council of Europe (PACE), Resolution 1707(2010), 15 European rules governing minimum standards of conditions of detention for migrants and asylum, §9.2.8**: "detainees shall be guaranteed effective access to the outside world (including access to lawyers ...)". **§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".

**Recast EU Asylum Reception Conditions Directive [to enter into force mid-2015], Art 5**: "In cases of a review of the detention order provided for in paragraph 2, Member States shall ensure that asylum seekers have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant. Free legal assistance and representation shall be provided by suitable qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of asylum seekers". **Art 10(4)**: "Member States shall ensure that ... legal advisers or counselors and persons representing non-governmental organizations recognised by the Member State concerned, have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access may only be imposed where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely limited or rendered impossible".

**EU Returns Directive 2008/115/EC, Recital 11**: "A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary". **Art 13(3)**: "The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary,

## SP24. LEGAL REPRESENTATION

linguistic assistance”. **Art 16(2)**: “Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities”.

**Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle XVIII**: “Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with ... legal representatives”.

**Association for the Prevention of Torture, The Right of Access to Lawyers for Persons Deprived of Liberty (2010), p.8**: “It is necessary for the detainee to be permitted to meet his/her lawyer before being questioned by the authorities. The meeting must be private to ensure the maintenance of lawyer–client confidentiality, which is a cornerstone of many legal systems – particularly in criminal matters”.

**African (Banjul) Charter on Human and Peoples’ Rights (1981), Art 7(1)(c)**: “[Every individual shall have] the right to defense, including the right to be defended by counsel of his choice”.

### SP24C. Legal Representation: Commentary.

The UN Working Group on Arbitrary Detention rightly recognises that “*access to legal counselling and representation ... is of exceptional importance*” (**WGAD Annual Report 1997, E/CN.4/1998/44, 19 December 1997, §33(a)**). Adequate and competent legal representation is essential, for all immigration detainees. Where there is a language barrier to securing effective legal advice and assistance, the State must ensure that interpreters are provided. As with judicial review (SP23), there must be disclosure including access to the file. The ECHR enshrines the right to access to a lawyer in *criminal* cases but does not explicitly include immigration cases. Immigration detainees are surely no less worthy of this fundamental protection.

Access to a lawyer must be facilitated and not frustrated. Arrangements for the dispersal of asylum seekers have been criticised (**Concluding Observations of the UN Human Rights**

**Committee: UK 06/12/2001, CCPR/CO/73/UK, §16** for risking “adverse effects on their ability to obtain legal advice and upon the quality of that advice”. Belgium acted unlawfully (**Čonka v Belgium, ECtHR App.No. 51564/99 [2002]**) when information given prevented detainees from being able to contact a lawyer, and a lawyer was informed too late of the order to be able to react while no legal assistance was offered by the authorities. In **R (E) v SSHD [2006] EWHC 3208 (Admin)**, immigration detention was rendered unlawful because it was timed in a way that prevented legal advice being obtained, there being nothing in the circumstances of the case requiring such an urgent procedure. In the context of accelerated asylum procedures, it has cogently been advocated that all detainees “should be provided with a legal representative on the second day in detention at the latest” (**Detention Action, Fast Track to Despair: The Unnecessary Detention of Asylum Seekers (2011), p.39**). In the US, the Immigration Reform Bill 2013 included provision for a state-funded lawyer, at least for immigrants with certain special needs. Meanwhile, the UK in 2013 was proposing savage legal aid cuts threatening to remove effective access to justice and accountability under the rule of law, for any non-resident non-asylum seeker.

NGOs have exposed the problems of lack of legal representation, for example in Ukraine (**Human Rights Watch, Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine (2010), p.6**), where immigration detainees “have no consistent, predictable access to a judge or other authority or access to legal representation to enable them to challenge their detention”; and in the UK where (**Bail for Immigration Detainees, Briefing paper on access to immigration bail (2008), p.2**) for many immigration detainees “who are without the help of a lawyer, a bail hearing is not an accessible safeguard to end their detention”. In the Netherlands (**Rechtbank Haarlem, 19 August 2002, LJN: AE8447**) there is said to be a balancing test: the interests in keeping the border safe and preventing illegal entry must be weighed against the infringement of the right to legal representation of the alien. Belgian legislation is impressive in providing that (**Royal Decree on the access, stay, establishment and removal of foreigners, 2 August 2002, Arts 62–66**): “Each detainee is entitled to a lawyer paid for by the Belgian State. The director of the detention centre is responsible for informing the detainees of this possibility”.

**SP25. COMPENSATION.** Everyone unlawfully detained is entitled to adequate compensation reflecting the violation of their rights.

*“Anyone who has been the victim of arbitrary or unlawful ... detention shall be entitled to compensation.”*

**(Arab Charter on Human Rights (2004), Art 14(7))**

***Universal Declaration of Human Rights (1948), Art 8:*** “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

***International Covenant on Civil and Political Rights (1966), Art 9(5):*** “Anyone who has been the victim of unlawful ... detention shall have an enforceable right to compensation”.

***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”.

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

***European Convention on Human Rights (1950), Art 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”.

***American Convention on Human Rights (1969), Art 63(1):*** “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, ... that fair compensation be paid”.

**SP25C. Compensation: Commentary.**

The right to “*an effective remedy*” for violations of individual rights is a basic principle of human rights law (***Universal Declaration of Human Rights (1948), Art 8***). Where unlawful detention is continuing, the effective remedy which the right to liberty (SP1) requires is release. As to unlawful detention in the past, the effective remedy is a monetary award. Human rights instruments frequently spell this out in dealing with freedom deprivation of liberty. So, States Parties to the ICCPR who impose unlawful immigration detention are “*under an obligation to provide ... an effective remedy, including appropriate compensation*” (***D&E v Australia, CCPR/C/87/D/1050/2002 [2006] §9***). The monetary award is generally referred to as ‘compensation’, language which reflects that the rule of law is ‘compensating’ the individual for the ‘loss’ of liberty. But it may be appropriate to think more broadly, of financial redress to reflect the violation of rights and breach of basic safeguards.

The law cannot turn the clock back, to the time when safeguards should have been complied with (or the individual released). Compensation claims frequently face courts with the need to assess the position historically, for the purpose of assessing financial remedies. Those remedies will invariably impose financial burdens on state authorities. That may not be appetizing. But it is vitally important. A robust response must involve a meaningful remedy. The rule of law must give the message, to the individual and the State, that deprivation of liberty in breach of safeguarding principles is something which *matters*. In part, this is about incentivizing state compliance, and guarding against state authorities playing ‘fast and loose’. The State must not be able to carry on regardless, on the basis that it can subsequently pay a nominal or modest ticket. The law must signal the importance of discipline and compliance. Governmental default should not be rewarded with judicial passivity.

Compensation “*should include adequate compensation for the length of the detention*” (***A v Australia, CCPR/C/59/D/560/1993 [1997] §11***). It should address moral damages, for damage to reputation (***Muneer v Belgium, ECtHR App.No. 56005/10 [2013] §§89–90, 92***). Compensation is also appropriate wherever the individual’s rights are violated in detention, even if not in a way which is

directly relevant to the legality of the detention: in that situation, the right to which the compensation relates is not liberty, but whatever other rights have been violated. Compensation can include an additional component of 'exemplary' damages when detention is arbitrary (***Muuse v SSHD [2010] EWCA Civ 453***).

UK courts have held that 'nominal' (minimal) damages are appropriate if it is clear that, had the state complied with its legal duties, the individual would have been detained in any event (***R (Lumba) v SSHD [2011] UKSC 12 §95***). It is odd and unsatisfactory to characterise detention as unlawful, and yet to award nominal damages. If detention is unlawful, and so a violation of the basic rights of the individual, it is unfortunate for the law to give a 'nominal' monetary response, by reconstructing an alternative course of legally-compliant action. A better and more balanced solution, consistent with equality (SP2), would be a level of 'vindicatory' damages: such an approach has found favour in some quarters (***Lumba §217 Lady Hale, §195 Lord Walker; §180 Lord Hope***), and can be seen to fit alongside ECHR just satisfaction (***Abdi v UK, ECtHR App.No. 27770/08 [2013] §92***).

The burden of financial claims on state authorities is a significant factor in this field. It is doubly compelling, when put alongside the costly nature of immigration detention. The answer is that these are both *avoidable costs*. One of the great advantages of automatic judicial control (SP21) is that it deals, promptly and prospectively, with the legality of the detention. That protects the individual's liberty, and can protect the State from later compensation claims. In the context of immigration detention, applicable safeguarding standards under the rule of law matter, always. The principled way for a State to avoid paying compensation claims is to adhere to the other applicable safeguarding principles (SP1–SP24).

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### Background to the Report

The decision to detain an individual should be subjected to rigorous protection under the rule of law. Reputable studies suggest that States do not necessarily adopt rigorous protective standards, or comply with them when they have done so. Governments are traditionally accorded a high level of latitude by courts when it comes to the development of their immigration and asylum policy and practices. While it is the case that a number of domestic, international and European standards may inform State practice with regard to detention, States develop their own procedures, usually administrative in nature, governing the authority and decision to detain, as well as rules for treatment of detained individuals. There is considerable discrepancy<sup>1</sup> between domestic rules, regional and international standards, and between individual Council of Europe State practice.<sup>2</sup>

The subject of immigration detention has attracted the attention of numerous non-governmental bodies and human rights organizations in recent years. The UN and its agencies have also been especially active. For example, the UN Human Rights Council discussed immigration detention in two resolutions from October 2010, focusing in particular on the problem of arbitrary detention and the level of human rights protection afforded to migrants.<sup>3</sup> Prior to that, the UNHCR Executive Committee meeting in June 2010 featured immigration detention on the agenda for the first time and included it in the Committee's Note on International Protection, stating that to 'address unjustified detention, UNHCR advocates strongly for the use of effective alternatives to detention'.<sup>4</sup> In 2012

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<sup>1</sup> For example, the European Court of Human Rights in *Saadi v United Kingdom* held that Article 5 ECHR does not require a State to prove that detention is necessary, unlike the UN Human Rights Committee (*A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 [1997]), applying the International Covenant on Civil and Political Rights.

<sup>2</sup> See, e.g., *MSS v Belgium and Greece* [2011] ECHR 108; *Louled Massoud v Malta* [2010] ECHR 1197; *BA (R) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin).

<sup>3</sup> Human Rights Council, Resolutions 15/16, Human rights of migrants, and 15/18 Arbitrary detention, 15th session, October 2010.

<sup>4</sup> ExCom UNHCR, Note on international protection, 61st sess, 30 June 2010, §40. In November 2009 the UN Working Group on Arbitrary Detention decided to focus on the issue of alternatives to detention as one of its main priorities in 2010. See 'Report of the Working Group on Arbitrary Detention to the Human Rights Council', Geneva, January 2010 p.2)

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the UNHCR produced a set of revised guidelines applicable to the detention of asylum-seekers.<sup>5</sup>

Other initiatives have included the International Detention Coalition's guide aimed at preventing the arbitrary detention of immigrants and supporting the use of alternatives to detention.<sup>6</sup> The Equal Rights Trust also produced Guidelines to Protect Stateless Persons from Arbitrary Detention in 2012.<sup>7</sup> Unlawful practice in a variety of Council of Europe States has also been exposed in reports such as that produced by the Global Detention Project in October 2011 on Switzerland<sup>8</sup> or the Human Rights Watch report on the EU operation of FRONTEX in relation to ill-treatment of detainees in Greece.<sup>9</sup> In a similar vein, the EU Agency for Fundamental Rights published a report in 2010 on the detention of third country nationals in return procedures, which focuses on detention in the context of the EU Returns Directive (Directive 2008/115/EC) and emphasises that detention should only be considered as a final option.<sup>10</sup> There are many other similar sources.

There are a great deal of applicable international, regional and national legal standards relating to immigration detention that may apply simultaneously to the decision to detain an individual. Although there are some

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<sup>5</sup> The Guidelines are available at <<http://www.unhcr.org/refworld/docid/50348953b8.html>> [accessed 1 March 2013].

<sup>6</sup> International Detention Coalition, 'There are Alternatives: A handbook for preventing unnecessary immigration detention' (2011), available at: <[http://massivefishball.com/IDC\\_Handbook.pdf](http://massivefishball.com/IDC_Handbook.pdf)> [accessed 21 March 2013].

<sup>7</sup> (2012). The Equal Rights Trust Guidelines are available at: <<http://www.equal-rightstrust.org/ertdocumentbank/guidelines%20complete.pdf>> [accessed 21 March 2013].

<sup>8</sup>M Flynn and C Cannon for Global Detention Project, 'Immigration Detention in Switzerland: A Global Detention Project Special Report' (October 2011).

<sup>9</sup> Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece', September 2011.

<sup>10</sup> European Union Agency for Fundamental Rights, 'Detention of third-country nationals in return procedures' (November 2010) pp. 21–9. Other examples include: Amnesty International, 'Irregular Migrants and Asylum-Seekers: Alternatives to Immigration Detention', (April 2009); Parliamentary Assembly of the Council of Europe, 'The detention of asylum seekers and irregular migrants in Europe', (January 2010); Institute for Race Relations, 'Accelerated removals: a study of the human cost of EU deportation policies, 2009–2010', Briefing Paper No. 4 (October 2010); Jesuit Refugee Service (JRS), 'Becoming Vulnerable in Detention' (The DEVAS Project), June 2010; Association for the Prevention of Torture, 'Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty' (March 2010); JRS, common position on 'Administrative Detention of Asylum Seekers and Irregular Migrants in Europe (March 2008); Amnesty International, 'Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees' (November 2007).

examples where these standards coalesce, for the most part, they vary and are found in a variety of legally binding and non-binding texts. It is important to ensure that State policy adequately reflects international and regional obligations, respects the rule of law and protects individuals and their rights. Much of the work done at the UN level is intended to do exactly that, and some of the standards derived from the UN, as well as from the Council of Europe and the European Union, are legally binding on States. International and regional standards may offer only a minimum level of protection, especially where they are the result of a political negotiation process. Courts have the opportunity to further shape the law in light of human rights principles. However, this does not always mean that courts seize the opportunity to promote and protect human rights and the rule of law. The EU has some momentum towards greater protection of human rights in the context of asylum and immigration removals, but its efforts can be thwarted by a lack of political will. In any event, the EU has managed to design second phase instruments relating to asylum procedures and reception conditions that offer a stronger level of due process and human rights protection.

The need for consistency and clarity of legal principles is obvious. This Bingham Centre Report aims to identify a single set of standards to be applied to all instances where individuals are subject to immigration detention procedures. The Report is an independent evaluation of existing legal standards against a rule of law framework.

The Report and the study which informed it have been made possible by the financial assistance of the Nuffield Foundation, for which we are extremely grateful. Michael Fordham QC acted pro bono throughout.

### **The Bingham Centre for the Rule of Law**

The Bingham Centre for the Rule of Law was launched in December 2010, and is an independent research centre devoted to the study and promotion of the rule of law worldwide. It is the foremost institution of its kind in the world, specifically devoted to this important topic. The Centre is focused on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute of International and Comparative Law, a registered charity based in London,

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which was formally incorporated in 1958 and continues to pursue a mission first begun in 1895 to clarify and influence the development of the rule of law.

The maintenance and promotion of the rule of law is of fundamental importance for the human dignity and well-being of people everywhere, providing the foundations for a functioning economy and a civilised society. It is as important today as ever, as the world faces new challenges such as globalisation, terrorism, climate change, nuclear energy and resurgent fundamentalism. Its relevance extends across a wide range in the affairs of people and states; the laws of armed conflict; the laws outlawing corruption and governing constitutional affairs; the democratic process and free speech; energy and environmental rights; privacy rights; the respective roles and powers of the various arms of government and agencies at national and supra-national level and in human rights.

Lord Bingham identified the following eight principles<sup>11</sup> as the key elements of the rule of law:

- *The Accessibility of the Law* – The law must be accessible, and so far as possible, intelligible, clear and predictable;
- *Law not Discretion* – Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- *Equality Before the Law* – The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- *The Exercise of Power* – Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
- *Human Rights* – The law must afford adequate protection of fundamental human rights;
- *Dispute Resolution* – Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- *A Fair Trial* – Adjudicative procedures provided by the state should be fair; and
- *The Rule of Law in the International Legal Order* – The rule of law requires compliance by the state with its obligations in international law as in national law.

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<sup>11</sup> Tom Bingham, *The Rule of Law* (2010 Penguin Books), Chapters 3 to 10.

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Under the overall supervision by the Director of the Centre, Professor Sir Jeffrey Jowell KCMG QC, the Bingham Centre team was composed of: Michael Fordham QC of Blackstone Chambers (*Team Leader*), Justine Stefanelli, Maurice Wohl Research Fellow in European Law (*Project Manager*) and Sophie Eser, Research Fellow in Detention and the Rule of Law.

The project had an Advisory Panel composed of The Honourable Mr Justice Blake, President of the Upper Tribunal in the Immigration and Asylum Chamber in the UK, Professor Elspeth Guild of Queen Mary University of London and Kingsley Napley LLP and Professor Robert Thomas, University of Manchester.

In addition, research was facilitated by the valuable assistance of a number of talented interns located across Europe. We would like to extend our gratitude to the following individuals: Paula Atienza, Matthew Bodycombe, Alexis Cooke, Jasmine Fisher, Darren Harvey, Andrina Hayden, Veronika Minkova, Carolin Möller, Slavina Novoselska, Emma Luce Scali and Felix-Anselm van Lier.

Part of the study included several national reports that each provide an overview of immigration law and policy in a selection of Council of Europe States. The focus countries were selected according to their annual inflow rate of foreign nationals, according to statistics published by the Organisation for Economic Co-operation and Development.<sup>12</sup> We are extremely grateful to the following authors who volunteered their time and expertise to our study: Fanny Declercq (*Belgium*); Flor Tercero, Marie-Laure Basilien and Ounia Doukoré (*France*); Carolin Möller and Katharina Poth (*Germany*); Spyridon Darmanin (*Greece*); Dr Elena Consiglio (*Italy*); Alexandra Brand (*Netherlands*); Iago Bañobre (*Spain*); Begum Bulak (*Switzerland*); Alexis Cooke (*United Kingdom*); Andrii Mazurenko (*Ukraine*). The national reports are available on the website of the Bingham Centre at [www.binghamcentre.biicl.org/immigrationdetention/](http://www.binghamcentre.biicl.org/immigrationdetention/).

### Methodology

The study's core activities took place over a period of nine months. A first phase was desk-based research into existing laws and standards at international, regional and national level. Also at this time, the focus

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<sup>12</sup> The OECD statistics are available at <<http://www.oecd.org/dataoecd/30/5/48333589.xls>> [accessed 1 March 2013].

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countries were chosen, and national rapporteurs were identified. An initial draft was produced and the Bingham Centre sent a sample extract to over 20 people and organisations for comment, receiving responses from a number of the consultees. We would like to thank The AIRE Centre, Bail for Immigration Detainees, The Equal Rights Trust, Global Detention Project, Professor Guy Goodwin-Gill, Helen Bamber Foundation, Hungarian Helsinki Committee, International Detention Coalition, Medical Justice, and UNHCR London. The project's Advisory Panel also received various drafts. Illustrative sources from the national studies were also incorporated.

The Bingham Centre hosted a closed workshop on 1 May 2013 at (and after) which a number of 'stakeholders' were invited to offer their input and comment on the study as it then stood. We are very grateful that the following expert practitioners and NGO representatives were able to participate: Ms Julia Beirle, Jesuit Refugee Service, Germany; Ms Tatiana Bershachevskaya, UNHCR Moscow; Ms Halyna Bocheva, Hebrew Immigrant Aid Society Representative Office, Ukraine; Sir Stanley Burnton, Lord Justice of Appeal, UK; Mr Giorgos Dafnis, UNHCR Athens; Mr Amal de Chickera, The Equal Rights Trust, UK; Ms Laura Dubinsky, Doughty Street Chambers, UK; Dr Maria-Teresa Gil-Bazo, Newcastle University; Mr Alex Goodman, Medical Justice and Landmark Chambers, UK; Ms Chrysi Hatzi, Greek Ombudsman Human Rights Department; Mr Raza Husain QC, Matrix Chambers, UK; Mr Alexandros Konstantinou, Greek Council for Refugees; Mr Pierre Makhlof, Bail for Immigration Detainees, UK; Ms Cristina Manzanedo, Pueblos Unidos, Spain; Ms Alexandra Pamela McDowell, UNHCR, London; Ms Stephanie Motz, Advokatur Kanonengasse, Zurich, and Lamb Building Chambers; Dr Adeline Trude, Bail for Immigration Detainees, UK; Ms Olga Tsetlina, UNHCR IP Memorial and Semenyako, Grib and Partners; Mrs Céline Verbrouck, Altea Avocats and Human Rights League; and Mr Tristan Wibault, Belgisch Comité voor Hulp aan Vluchtelingen vzw. Each participant was given the opportunity to comment on the then draft Safeguarding Principles in advance, and to offer written and oral comments at the workshop. The Centre received a considerable amount of useful and important input both at the workshop and afterwards, which substantially influenced the final Safeguarding Principles and Commentary.

### **Structure**

The 25 Safeguarding Principles are listed by number and short title. Safeguarding Principles are supported by international, regional and national instruments, and the work of NGOs. The selection is not

comprehensive but does aim to be representative. International, regional and national sources are all used because each contributes to identify relevant standards.

The Report is the result of consideration of the international, regional, national and NGO standards and materials, viewed against the objective of promoting the rule of law. The Introduction to the Report explains the nature and function of the safeguarding principles and commentary, and attention is invited to it.

## **Resources**

A Bibliography has been produced to supplement the Study which reflects all of the resources cited in the Report. The Bibliography is accompanied by its own explanatory note, which is intended to identify the respective hierarchies within international and regional organisations, and the status of each of the resources. Internet hyperlinks have been provided for most of the items in the Bibliography, itself available on the website of the Bingham Centre.

## **Main Acronyms**

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ExCom	Executive Committee
GC	Grand Chamber
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
NGO	non-governmental organisation
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
PACE	Parliamentary Assembly, Council of Europe
UN	United Nations
UNHCR	United Nations Refugee Agency
WGAD	Working Group on Arbitrary Detention

## BIBLIOGRAPHY

*Alexis Cooke, Research Assistant (Bingham Centre)*

### Explanatory Note

Below is a bibliography of all the texts referred to in the Report. In order to demonstrate the overall hierarchy of the law, the structure of the bibliography is divided into the following sections: international legislation, policy and case law; regional legislation, policy and case law; national legislation, policy and case law; and 'other' (namely NGO publications and literature). Within these sections, the texts are ordered according to the organisation or country that published them. Some of the organisations covered in the international and regional sections are made up of a number of bodies which produce a range of documents with varying degrees of legal impact. Therefore, in these sections, the texts are arranged by the body that produced them and in an order that reflects the internal hierarchy of the organisation concerned. Beyond this, the texts are organised by date with the exception of case law and NGO publications, which are listed (where possible) alphabetically.

This explanatory note aims to ensure that the reader understands the following (where relevant): the scope and legally-binding nature of the texts; the relative position of these texts in relation to other texts produced by different bodies of the same organisation; and the relative position of these texts in relation to other texts produced by other organisations or countries. In order to enable this, most of those entities covered by the report will be addressed, with particular emphasis being given to those which have the most complex internal structures.

For the purposes of this bibliography, there is one main organisation at the international level that requires further explanation, namely the **United Nations** (UN). The UN is the most prominent international organisation, with 193 Member States at present. In order to pursue its core objectives, it issues various documents which can be classified as either 'binding' or 'non-binding'. On the one hand, UN **covenants, statutes, conventions and protocols** are all legally-binding on state parties (i.e. those that have ratified

or acceded to them). On the other hand, **declarations, resolutions** (with the exception of those adopted by the Security Council under Chapter VII of the UN Charter), **principles, guidelines, standard rules, reports and recommendations** have no binding legal effect, but can nonetheless have a significant impact on the conduct of the UN state parties.

The UN is composed of various bodies which sit in a complex, hierarchical structure. The UN Charter establishes six main organs, namely the **General Assembly**, the Security Council, the Economic and Social Council, the Trusteeship Council, the **International Court of Justice** and the Secretariat. In addition to this are several agencies, programmes and bodies which sit below the six main organs. For example, the **UN Human Rights Council** (which replaced the **UN Commission on Human Rights** in 2006), is a subsidiary body of the General Assembly, responsible for strengthening the promotion and protection of human rights, addressing situations of human rights violations, and making relevant recommendations. The Human Rights Council works with the so-called UN **Special Procedures**, namely independent human rights experts who serve (*inter alia*) as the following: special rapporteurs (e.g. the **Special Rapporteur on the Human Rights of Migrants**), special representatives, independent experts, and working groups (such as the **Working Group on Arbitrary Detention**). These UN Special Procedures have the mandate to monitor, examine, advise and report on thematic issues and/or human rights situations in specific countries. The Human Rights Council works with the UN Special Procedures alongside another UN agency, namely the **Office of the United Nations High Commissioner for Refugees**. The Office is mandated to lead and coordinate international action to protect refugees worldwide, the work programmes and budget for which are agreed biennially by its Executive Committee.

The UN Human Rights Council also presides over nine treaty bodies. Each of these treaty bodies is composed of an independent committee of experts mandated to monitor state parties' compliance with their treaty obligations. Relevant treaty bodies include: the **United Nations Human Rights Committee**, which monitors the implementation of the International Covenant on Civil and Political Rights; the UN **Committee Against Torture**, which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the **UN Committee on the Elimination of Racial Discrimination**, which monitors the implementation of Convention on the Elimination of All Forms of Racial Discrimination. The Office of the High Commissioner for Human Rights supports the work of the treaty bodies

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and assists them in harmonising their working methods and reporting requirements.

The report also makes reference to two documents produced during two separate **UN Congresses on the Prevention of Crime and the Treatment of Offenders**: the first is the Standard Minimum Rules for the Treatment of Prisoners and the second is the Basic Principles on the Role of Lawyers. These Congresses, which have been held every five years since 1955, are organised by the **UN Office on Drugs and Crime** and led by an Executive Director appointed directly by the UN Secretary-General.

Lastly is the **International Court of Justice** (ICJ). The ICJ is the principal judicial organ of the UN, established to settle legal disputes between States which have accepted its jurisdiction and give advisory opinions on legal questions referred to it by UN bodies or agencies. Although judgments of the ICJ are legally binding on the parties to the dispute, its advisory opinions are not. Instead, it is usually for the UN body or agency which requested the opinion to give effect to them in a manner of their choosing.

At the regional level there are two main organisations which require further explanation. The first is the **Council of Europe**. The Council of Europe produces legislation, policy guidance and case law, the most prominent being the **European Convention of Human Rights**. The Convention, which is legally binding on all 42 members of the Council of Europe, is upheld by the **European Court of Human Rights**, the judgments of which are also binding on the parties concerned.

The Council of Europe is made up of eight key institutions (the **Committee of Ministers**, the Secretary General (and its Secretariat), the Commissioner for Human Rights, the Conference of the International Non-governmental Organisations, the European Court of Human Rights, the Congress of Local and Regional Authorities, and the **Parliamentary Assembly**). These bodies can issue, *inter alia*, **decisions, recommendations, resolutions** and **codes of good practice**. Decisions of the Committee of Ministers are binding for all Member States of the Council of Europe. **Recommendations, resolutions** and **codes of good practice** issued by Council of Europe bodies are not legally binding but do have an important declaratory role.

The **Commissioner for Human Rights** is an independent and impartial institution of the Council of Europe. The Commissioner and his office are

mandated to promote the awareness of and respect for human rights by visiting Council Member States and issuing reports, opinions and recommendations evaluating the human rights situation in the country. Although not binding on the Member State concerned, these documents can have great political influence on future actions and decisions.

Also relevant is the Council of Europe's **Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**. This committee is composed of independent and impartial experts, the Secretariat of which forms part of the Council of Europe's Directorate General of Human Rights and Rule of Law – one of five Directorates in the Secretariat General.

The **European Union (EU)** is the second regional organisation requiring further explanation. EU legislation can be divided into two kinds: primary and secondary. **Primary legislation** consists mainly of the Treaties of the EU (such as the **Treaty on European Union** and the **Treaty on the Functioning of the European Union**), general principles established by the **Court of Justice of the European Union**, international agreements and, since the ratification of the Lisbon Treaty, **the Charter of Fundamental Rights of the European Union**. EU primary legislation prevails over all other law of the EU institutions and the Member States, as provided for in the doctrine of supremacy. **Secondary legislation** comprises partly of unilateral acts, which can be divided into two categories: (i) those listed in Article 288 TFEU (namely **regulations, directives, decisions, opinions and recommendations**); and (ii) those not listed in Article 288 TFEU (namely **communications, recommendations, and white and green papers**). Secondary legislation also includes binding international agreements between the EU and third parties, and inter-institutional agreements. **Regulations** are directly applicable and binding on all Member States and do not require further transposing legislation at the national level. **Directives** are also legally binding, but leave the specific details of implementation to the Member States. **Decisions** are legally binding only on those to whom they are addressed, and **recommendations** and **opinions** are not binding at all. Documents not listed in Article 288 TFEU are also not binding and are otherwise known as 'soft law'. This includes **Green papers**, which are discussion documents published by the European Commission; **White papers**, which contain proposals for Union action in a specific field; and **COM documents**, which include proposed legislation, reports and other communications. For the purpose of this bibliography, 'soft law' documents are listed under the section entitled 'non-binding acts', alongside other non-binding EU policy documents.

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The EU is composed of various institutions, the most pertinent of which for this report are the **Council of Ministers of the EU**, the **European Parliament**, the **European Commission** and the **Court of Justice of the EU**. The latter produces legally binding judgments on the parties concerned (be they private individuals, Member States or EU institutions). The same goes for preliminary rulings issued by the Court. In fact, any decision of the Court is binding not only on the national court from which the reference for preliminary ruling was made, but also on all of the national courts of the Member States. The Court also produces opinions which are written by the Court's Advocates General. These opinions do not bind the Court or the parties concerned by the dispute, but instead provide valuable guidance which is often followed. Lastly, the **EU Agency for Fundamental Rights** is tasked with monitoring the application of fundamental rights in EU Member States, particularly with reference to those rights listed in the above-mentioned Charter. Although it produces (non-binding) reports and provides expert assistance to EU institutions, Member States and candidate countries, it does not intervene in individual cases. Rather, the body is designed to produce analysis of broad issues and EU-wide trends.

Other regional organisations referenced in the bibliography include the **African Union** and the **League of Arab States**. The human rights charters of both these organisations are legally binding on the States that have ratified them. The **Organisation of American States** (OAS) is also referred to in the bibliography. Unlike the OAS **American Convention on Human Rights** which is binding on those States that have signed it, the OAS **American Declaration of the Rights and Duties of Man** is – in theory at least – not legally binding. The General Assembly of the OAS is the supreme body of the organisation and one of its subsidiary institutions is the **Inter-American Commission on Human Rights**. This commission is composed of seven members who are elected by the General Assembly and serve in an individual capacity. The Commission is responsible for the publication of **Resolution 1/08** which is binding on the OAS Member States. The Commission also works with the **Inter-American Court of Human Rights** in ensuring that the human rights standards imposed by the OAS are upheld. The decisions of the Court are binding on the parties to the dispute.

Next is the **national** legislation, policy documents and case law of individual countries. These countries have been selected on the basis of their relevance to the findings and recommendations of the report. The hierarchy of the law within these countries depends largely on their legal

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system. Note that UK case law includes decisions of the Privy Council in London, which sits as a final court of appeal in cases from countries such as Hong Kong and Trinidad and Tobago.

Lastly, the section entitled 'other' includes the publications of NGOs and general literature. These publications are not binding, but do provide a valuable source of data and a vital insight into the best (and worst) practices in the field of immigration detention.

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Immigration detention raises anxious concerns. This executive imprisonment, of ‘foreigners’, is widespread, and threatens to become routine. It can be the lot of the blameless, the unpopular, the vulnerable, the forgotten. In such contexts, the rule of law must always find its voice.

This report is a fresh look, drawing on legal instruments, promulgated standards, working illustrations and judicial observations. It includes ‘soft law’ sources and finds inspiration in the principled proactivity of non-governmental organisations.

The product: 25 Safeguarding Principles to promote the accountability of immigration detention under the rule of law.

**Michael Fordham** QC is a barrister in London specialising in public law and human rights, with over 20 years’ experience in immigration and asylum cases, acting for and against the UK Government and for intervener NGOs.

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