

Arbitrary detention of women and children for immigration-related purposes

SUMMARY

An unprecedented mass movement of asylum-seekers and migrants of all ages started in 2014, and has continued throughout 2015 and into 2016. Fleeing armed conflicts, mass killings, persecution and pervasive sexual and gender-based violence (SGBV), these persons seek protection under the 1951 Refugee Convention, its subsequent Protocol and other international instruments. In times of such instability, women and girls are particularly at risk of gender-based violence, including sexual violence. Between January and November 2015, Europe witnessed more than 950 000 asylum-seeker and migrant arrivals via the Mediterranean Sea. With record numbers of asylum-seekers worldwide, the head of the UN Refugee Agency (UNHCR), Filippo Grandi, has urged greater efforts to find solutions. The UNHCR has pointed out that in recent years, detention facilities are increasingly being used to host migrants and asylum-seekers, including by countries with good human rights records. If used, detention must be lawful and clearly shown to be necessary, reasonable and proportional. Detention conditions must uphold human dignity and international standards.

The journeys that migrants and asylum-seekers take can be dangerous, and they often face high levels of violence, extortion and exploitation, including multiple forms of SGBV – such as human trafficking, psychological manipulation, physical violence or rape. Women and girls are particularly at risk of SGBV during the journey. Situations of vulnerability such as the impact of the journey and experiences of migrants prior to their confinement, which are often physically and psychologically trying, and during which they could have been exposed to diverse forms of abuse and violence need to be addressed. In addition, the effect of confinement in detention centres, particularly if prolonged, needs to be addressed. All these factors require a coordinated and effective protection response.



In this briefing:

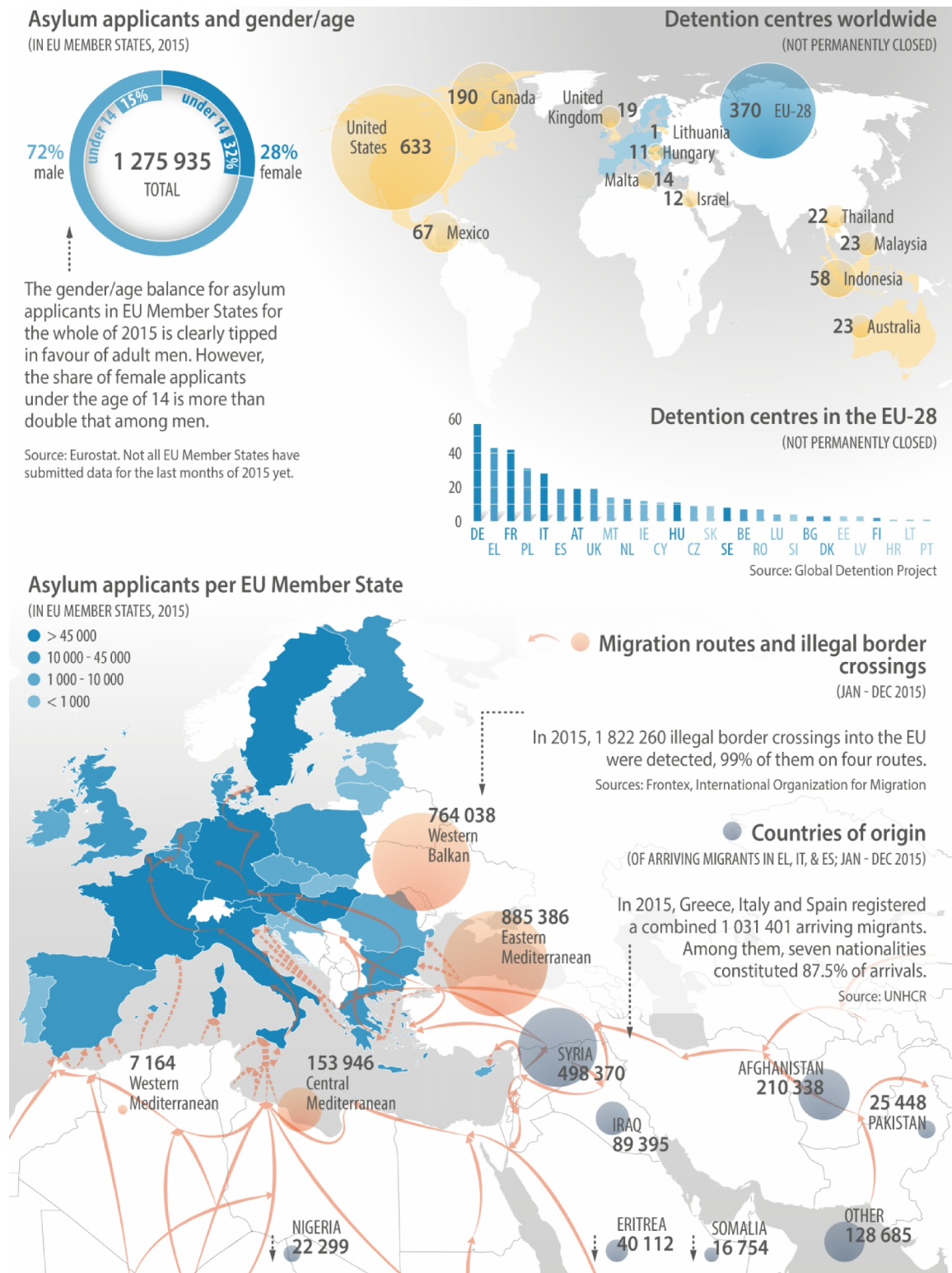
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Setting the background

Currently, there are some 60 million people displaced around the world as a result of conflicts from South Sudan to Syria. More than [950 000 persons](#) reached the EU via the Mediterranean Sea between January 1 and the end of November 2015, which is a significant increase over previous years. Nevertheless, refugees in Europe constitute [less than 10%](#) of the world's current refugee population. Over 80% of those taking the dangerous journey originate from countries beset by war or generalised violence, or struggling under repressive governments, such as Syria, Eritrea, Somalia, Afghanistan, and Iraq. Countries of destination, such as the [EU-28](#), [Australia](#) and [Canada](#), amongst others, continue to emphasise the importance of preventing departures and combating smuggling, through a coordinated approach based on access to protection and respect for human rights. Governments, humanitarian actors, EU institutions and agencies, and civil society organisations are still [struggling to find the right response](#), in particular to prevent and respond to the danger, exploitation and multiple forms of violence women and girls face not only during their journeys, but also in the receiving countries' hosting centres, as has happened in a number of cases.

Worldwide, [immigration-related detention](#) has become an established policy apparatus based on dedicated facilities and burgeoning institutional bureaucracies. Though international law states that the use of detention should be the exception and not the norm, the detention of migrants has become routine, rather than an exceptional response to the irregular entry or stay of asylum-seekers and migrants, in a [number of countries](#) around the world. The detention of foreigners is closely associated with two [policy concerns](#) of the countries [involved](#): first, the treatment of asylum-seekers who have been rejected either after full consideration of their applications or on formal grounds; second, the treatment of foreigners staying irregularly in the territory of those countries. Should due process not be followed and if detention conditions do not meet [international standards](#), then **detention becomes arbitrary**. Thousands of persons are subjected to arbitrary detention each year.

The vulnerable situation in which certain persons, such as women and children, can find themselves due to the serious challenges faced during their journey as well as due to detention, calls for greater awareness on behalf of authorities and also for more gender-sensitive policies as well as specialised care in the centres themselves. Single women travelling alone or with children, pregnant and lactating women, adolescent girls, unaccompanied children, early-married children – sometimes themselves with new-born babies – persons with disabilities and elderly persons, are particularly vulnerable. The United Nations Refugee Agency (UNHCR), the UN Population Fund (UNFPA), and the Women's Refugee Commission (WRC) are concerned about the [grave risks](#) facing asylum-seekers and migrant women and girls on the move. As of 15 January 2016, [over 55%](#) of those arriving in the EU via Greece are women and children, as compared to only 27% in June 2015. The humanitarian response across the eastern Mediterranean and Western Balkans routes prioritises the mainstreaming and prevention of sexual and gender-based violence (SGBV) in all humanitarian activities.

Figure 1: Migration routes towards Europe, main countries of origin and detention centres

Data Sources:

[Eurostat](#) (asylum applicants)

[IOM](#) (routes)

[Frontex](#) (routes)

[UNHCR](#) (countries of origin)

[Global Detention Project](#) (centres)

[UNHCR](#) (refugees)

NB: Processing such a massive influx of people is a challenge and detention centres are the solution that many governments have found. A number of reception centres for migrants and asylum-seekers may be used as closed centres in the first instance, but as the asylum procedures advance, they could also be converted into semi-closed and/or open centres.

International legal framework for immigration-related detention

The fundamental principle enshrined in the [Universal Declaration of Human Rights](#) (UDHR) is that everybody, everywhere, at all times, is entitled to the full range of human rights, which are universal and indivisible. Human rights are guaranteed *prima facie* to all persons, including migrants present in a country, irrespective of their legal status or length of stay, and they are to be applied without discrimination.

In 2014, the UNHCR, concerned about the growing use of immigration detention, published a [Global Strategy – Beyond Detention 2014-2019](#), which aims to support governments in making the detention of [asylum-seekers](#) exceptional rather than a routine practice. The UNHCR has identified a [number of countries](#) to work with initially, in order to review detention practices and strengthen alternatives to detention, including [Canada](#), [Hungary](#), [Indonesia](#), [Israel](#), [Lithuania](#), [Malaysia](#), [Malta](#), [Mexico](#), [Thailand](#), the [UK](#), the [USA](#) and [Zambia](#). The UNHCR plans to expand this group over the coming five years. The EU seeks to complement the work of the UNHCR on this issue. The EU is committed to promoting values throughout the world, as outlined in its [Strategic Framework and Action Plan on Human Rights and Democracy](#). At EU level, the revised [EU action plan on human rights and democracy](#), adopted on 20 July 2015, includes in Action 24(e) the following aims: 'Support improved access to justice and health for migrants in countries of origin and transit; promote improved conditions of detention for detained migrants and alternatives to the use of detention for irregular migrants in third countries; pay particular attention in this regard to vulnerable migrants including unaccompanied minors.'

According to a [report](#) by the EU's Fundamental Rights Agency (FRA), a number of governments view detention as a means for dissuading irregular migrants from applying for asylum in their territories. The purposes of detention ought to be clearly defined in legislation and/or regulations. In the context of the detention of asylum-seekers, there are three purposes for which it may be necessary, which are generally in line with international law: public order, public health or national security.

The UNHCR [emphasises](#) that **detention should be a measure of last resort**. Should detention be used at all, it [must be lawful and clearly shown](#) to be '**necessary, reasonable and proportional**'. Researchers, policy-makers and non-governmental organisations have [expressed concern](#) at the stigmatisation of foreigners, which accompanies and is expressed in their detention. Asylum-seekers are systematically (and not just in exceptional circumstances) placed in detention facilities in different countries – including countries with a good human rights record – owing to their illegal entry or presence. [Article 31](#) of the 1951 Refugee Convention [specifically provides for the non-penalisation of refugees](#) (and asylum-seekers) [coming directly](#) from a territory where their life and freedom was threatened in the sense of [Article 1](#), even if they enter or have entered irregularly, provided they present themselves without delay to the authorities, and show good cause for their illegal entry or presence.¹ It follows therefore that restrictions on movement are not to be applied to such refugees (or asylum-seekers) other than those which are necessary, and that such restrictions can only be applied until their status is regularised or they gain admission to another country. [Article 26](#) of the 1951 Refugee Convention further provides for the freedom of movement and choice of residence for asylum-seekers and refugees who are lawfully in a country's territory. Taken together, the right to seek asylum, the right to non-penalisation for irregular entry or stay (provided certain conditions are fulfilled) and the

rights to liberty and security of the person and freedom of movement, mean that the detention of asylum-seekers should be an exceptional measure, with liberty being the default position.

When does detention become arbitrary?

Since detention in itself, if lawful, is not a violation of human rights, international law has progressively endeavoured to define [the limits beyond which detention](#), whether [administrative](#) or judicial, would become arbitrary. The question of when detention is or becomes arbitrary is not definitively answered in the international instruments. The UDHR is, however, explicit on this matter: 'No one shall be subjected to arbitrary arrest, detention or exile' (Article 9); and this is complemented by, 'Everyone has the right to seek and to enjoy in other countries asylum from persecution' (Article 14(1)).

In addition to [UDHR](#) Article 9, Article 9(1) of the [International Covenant on Civil and Political Rights](#) (ICCPR) states that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'² When determining the [mandate of the Working Group on Arbitrary Detention](#), the UN's Commission on Human Rights (later renamed UN Human Rights Council) used a pragmatic criterion: while it did not define the term 'arbitrary', it considered as arbitrary those deprivations of liberty which for one reason or another are contrary to relevant international provisions laid down in the UDHR or in the relevant international instruments ratified by states.³

The UNHCR is campaigning for governments to consider alternatives to detention for people seeking international protection, as **seeking asylum is not a criminal act**. Should detention be deemed necessary with no alternative possible, then the [UNHCR guidelines](#) on detention establish that indefinite and mandatory forms of detention are prohibited under international law.

Action 24(e) of the 2015 [EU action plan on human rights and democracy](#) builds upon and consolidates further the action set out in the EU action plan on human rights and democracy of 25 June 2012, which, in its Article 14(d), had mandated the European Commission and the European External Action Service (EEAS): 'In line with the Communication on the [Global Approach to Migration and Mobility \(GAMM\)](#), [to] develop a joint framework between the Commission and EEAS for raising issues of statelessness and arbitrary detention of migrants with third countries.' To this end, a clear understanding of the exceptional circumstances in which detention may be justified and of what renders detention arbitrary, is of paramount importance.

Due process to avoid arbitrariness in detention

One complicating feature of detention of foreigners is the intersection of administrative and criminal law. Irregular migrants are usually held in **administrative detention**.⁴ The legislation of a considerable number of countries provides that migrants who are the subject of judicial proceedings have the right to free legal counsel and interpretation, while the costs of these services (or of one of them) must be borne by the migrant in administrative proceedings. The right to judicial or administrative review of the lawfulness of detention, as well as the rights to appeal against the detention/deportation decision/order, or to apply for bail or other non-custodial measures, [are not always guaranteed in cases of administrative detention](#).

In a number of cases, such reviews or appeals may be initiated only at the migrant's request. In such cases, lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficulty in accessing relevant files, lack of access to free legal counsel, lack of access to interpreters and of information in a language migrants can understand on their right to instruct and retain counsel, as well as the type of facilities in which migrants are held, can prevent them from exercising this right in practice. In the absence of lawyers and interpreters, migrants often feel intimidated and obliged to sign papers without understanding their content. Migrants and asylum-seekers are sometimes detained at airport transit zones and other points of entry under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies, before being returned to their countries. The difficulty or impossibility of reaching any outside assistance impedes the exercise of the rights of the persons concerned to challenge the lawfulness of the detention and deportation decisions and to apply for asylum, even in the presence of legitimate claims. Detention in inadequate conditions can last for [prolonged periods](#). Should detention be unlawful, [Article 9\(5\) ICCPR](#) provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.

Procedural safeguards

[Article 9\(3\) and \(4\) ICCPR](#) imposes procedural safeguards around arrest or detention, requiring anyone arrested to be promptly informed of the charges against them and to be brought promptly before a judge. Article 9(3) also restricts the use of pre-trial detention, and requires it to be imposed only in exceptional circumstances. Article 9(4) calls for any deprivation of liberty prior to court proceedings to be for as short a period of time as possible. The **necessity, reasonableness and proportionality** of detention are to be judged **in each individual case, initially as well as over time**. The **need to detain** the individual is to be assessed in light of the purpose of the detention and its **overall reasonableness** in all circumstances, the latter requiring an assessment of any special needs or considerations in the individual's case. The **general principle of proportionality** requires that a balance be struck between the importance of respecting the rights to liberty and security of the person and freedom of movement, and the public policy objectives of limiting or denying these rights.

As emphasised by the [UNHCR's guidelines on detention](#), amongst others, the procedural guarantees [essential](#) to safeguarding immigration detention against arbitrariness include:⁵

- Any asylum-seeker or immigrant in detention **must be brought promptly before a judicial or other authority**;
- The asylum-seeker and their representative should have the right to attend these reviews;
- The ground for custody must be based on criteria of legality, i.e. established as law by a duly empowered authority;
- A maximum period should be set by law and the custody may in no case be unlimited or of excessive length;
- 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;
- States must place asylum-seekers and immigrants in premises separate from persons imprisoned under criminal law; and,
- The UNHCR, the ICRC and, where appropriate, non-governmental organisations must be granted access to places of custody.⁶

These procedural safeguards apply irrespective of status as an asylum-seeker or other migrant, and whether the person is entering or being removed from a county's territory.⁷ The **burden of proof to establish lawfulness** of the detention rests on the government in question.

Conditions in detention upholding dignity of migrants and international standards to prevent arbitrariness

To avoid arbitrariness and unlawfulness of immigration-related detention, minimum (or better) conditions of detention need to be respected in order to ensure a treatment upholding dignity and international standards. [Article 10\(1\) ICCPR](#) requires anyone deprived of liberty to be treated with dignity and humanity. This applies also to those detained for immigration purposes. The right complements the Article 7 prohibition of torture and cruel, inhuman or degrading treatment. The article also imposes specific obligations in relation to criminal justice, requiring prisoners in pre-trial detention to be separated from convicted prisoners, and children to be separated from adults. This implies the [absolute prohibition](#) of torture or cruel, inhuman or degrading treatment or punishment, as well as the right for migrants to be kept in conditions that take into account their status and needs. The UNHCR's revised guidelines on applicable criteria and standards relating to the detention of asylum-seekers, together with other UN provisions,⁸ all provide an extensive [list of guarantees](#) for the protection of the human dignity of persons, including migrants deprived of their liberty. Despite their non-binding nature, they reflect internationally recognised principles.⁹

Minimum conditions of detention according to the [UNHCR guidelines](#) on detention:

- Detention for immigration-related reasons **should not be punitive** in nature. **Detention can only lawfully be in places officially recognised as places of detention.** Detention in police cells is not appropriate;
- Detainees' **names and the location** of their detention, as well as the names of persons responsible for their detention, **need to be kept in registers readily available and accessible** to those concerned, respecting, as necessary, issues of confidentiality;
- In **co-sex facilities**, men and women should be segregated unless they are within the same family unit;
- **Children** should also be separated from adults unless these are relatives;
- **Accommodation for families** ought to be provided;
- **Appropriate medical treatment** must be provided where needed, including psychological counselling;
- Migrants in detention needing **medical attention should be transferred to appropriate facilities** or treated on site where such facilities exist as promptly as possible after arrival. Medical follow-up needs to continue at regular intervals where necessary;
- Detainees for immigration purposes should be able to make **regular contact** 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 ensured.
- The opportunity to conduct some form of **physical exercise through daily indoor and outdoor recreational activities** needs to be available;
- Activities tailored to women and children, and which take account of cultural factors, are also needed;
- The **right to practice one's religion** needs to be observed;
- **Basic necessities** such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, are to be provided. Privacy in showers and toilets needs to be ensured;
- Food of **nutritional value suitable to age, health, and cultural/religious background**, is to be provided;

- **Special diets for pregnant or breastfeeding women** should be available;
- Facilities in which the food is prepared and eaten need to respect basic rules on **sanitation and cleanliness**;
- Detainees for immigration purpose should have access to **reading materials and timely information** where possible;
- **Migrants in detention should have access to education** and/or vocational training, as appropriate to the length of their stay;
- **Children**, regardless of their status or length of stay, **have a right to access at least primary education**. Children should preferably be educated off-site in local schools. The frequent transfer of asylum-seekers from one detention facility to another should be avoided;
- **A non-discriminatory complaints mechanism (or grievance procedure) needs to be in place**. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages;
- All **staff working with detainees should receive proper training**;
- States need to ensure that they can **effectively oversee** the activities of private contractors;
- **Children born in detention need to be registered immediately** after birth, in line with international standards, and to be issued birth certificates.

Vulnerable persons, and the specific situation of women and children

The definitions of '**categories of vulnerable persons**' in many texts are overly limited. Vulnerable groups include, amongst others: victims of torture, trauma or other serious forms of physical, psychological or sexual violence; children and unaccompanied minors; older persons or persons with disabilities; pregnant women; and, lone parents with children. **Some categories of vulnerable persons** do not fit into the existing pre-defined categories (transsexuals, people with drug or alcohol addictions). However, **vulnerability is not a static condition**. It can also **evolve and develop over time**, as in cases of extended detention.

Women and girls as vulnerable persons

In a [European Parliament study](#) carried out by Steps Consulting, it was found that in addition to trauma experienced in the country of origin, two other factors need to be taken into account, as they can significantly contribute towards the aggravation of the vulnerability of women and girls:

- **The impact of the journey and experiences of the migrants prior to their confinement** which are often physically and psychologically trying, and during which they could have been exposed to diverse forms of abuse and violence (human trafficking, psychological manipulation, physical violence, rape); and,
- **The pathogenic nature of confinement in detention centres**, which has been [identified as having harmful consequences](#) on the psychological state of foreign nationals.

Many women and girls may have already been exposed to various forms of [sexual and gender-based violence](#) (SGBV) either in their country of origin, first country of asylum or during their journey to and in Europe. Some are forced to engage in transactional sex to 'pay for' travel documents or their journey. Many of them are so reluctant to delay their journey and that of their families that they refuse to report SGBV crimes or seek medical attention. Deprived of their family or community to protect them, many women and girls travelling on their own [are entirely exposed](#); even those travelling with family are often vulnerable to abuse. Often they do not report crimes and thus do not

receive the support they need. Some women [have been reported](#) even to have married out of desperation.

The challenge of addressing the needs of women and girls as vulnerable persons

According to a [UNFPA study](#), a number of centres in which many asylum-seeker and migrant women and girls are accommodated are not set up to prevent or respond to SGBV. Women and girls are not getting the protection they need, even though they are entitled to it. There [appears to be a lack](#) not only of prevention and response services to SGBV, but also of all services that respond specifically to the needs of women and girls, such as separate distribution lines for food, separate washing facilities, and separate accommodation for specific groups, including single women, female-headed households and families. Additionally, many female asylum-seekers and migrants [are unaware](#) of their rights. Challenges are also observed in the availability of dedicated and trained government and humanitarian staff able to promptly identify persons at risk and those in need of special attention and prioritisation. Police personnel in charge of security and of organising the flow of refugees and migrants into transit centres [are not equipped to identify, prioritise and respond to protection risks](#).¹⁰ Detention increases anxiety, fear and frustrations, and can further exacerbate such traumatic experiences. It frequently takes place in facilities and conditions that do not meet human rights standards. The sometimes limited access that the UNHCR and/or its partners have to places of immigration detention, and their limited capacity to carry out systematic monitoring of these places, are a particular source of concern.

Women are often accompanied by children; those who are pregnant during the journey may give birth in a detention centre, and could also be under-age brides and therefore be considered as minors. It is therefore important also to look at the specific situation of children and minors in detention and their specific requirements.

Children and minors in detention

The UN [Committee on the Rights of the Child](#) – the body of 18 independent experts that monitors implementation of the UN [Convention on the Rights of the Child \(CRC\)](#) by its state parties – has consistently and clearly stated that a child's best interests should supersede other considerations of the state, including immigration control. The CRC states that everyone under the age of 18 (the definition of a child), regardless of gender, origin, religion or possible disabilities, needs special care and protection, because children are often the most vulnerable. The situation of children and unaccompanied minors (including separated children and orphans) and the detention issue are covered, though not exclusively, by Articles 3, 12 and 37 of the CRC.

[Article 3 CRC](#) calls for the best interests of the child to be a primary consideration in all actions taken by public or private bodies. [Article 12 CRC](#) provides for the right of the child who is capable of forming and expressing his or her own views to be heard in any proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. [Article 37\(b\) CRC](#) says: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'. [Article 37\(c\) CRC](#) states that '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'. According to the CRC, 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. The CRC also states that children must be 'protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs' of their parents, legal guardians, or family members'.

Detention of children is particularly serious due to the devastating effect it may have on their physical, emotional and psychological development, even if they are not separated from their families. [Human rights organisations](#), in accordance with [international law](#), emphasise that children should, in principle, not be detained at all. Depriving children of their freedom can have a particularly harmful impact on them, and lead to the onset of psychological disorders in the short or long term. Children held in detention are at risk of post-traumatic stress disorder, and may exhibit such symptoms as insomnia, nightmares and bed-wetting.¹¹ In countries where accompanied minors are not detained but the authorities may still choose to detain one parent, the family's unity is not preserved. Within families in detention, the risk of 'deparentalisation', with parents losing their authority over their children, was also reported. As far as families with children are concerned, stakeholders in the field believe that alternatives to accommodation in collective centres, especially in cases where the duration of stay is long, should be prioritised. An additional concern in relation to the care provided for unaccompanied minors is that all support is cut off as soon as minors turn 18 years old.

The UNHCR calls for all [child-appropriate alternatives to detention](#) – such as release to other family or relatives with residence in the country of asylum, foster care, supervised independent living, or residential homes – to be considered. A joint report by the UN Child Agency (Unicef) and UNHCR, [Safe and Sound, What states can do to ensure respect for the best interests of unaccompanied and separated children in Europe](#), describes the **best interests assessment (BIA)** as a simple and ongoing procedure for making decisions about what immediate actions are in an individual child's best interests. According to Unicef and the UNHCR, a [BIA must take place prior to a decision](#) to detain a child, and should identify the immediate actions to be taken in his or her best interest. The report points out that, should detention be deemed justified, a child should be placed in a unit which addresses their needs and takes into account their age, gender, as well as any physical and mental trauma or disability they may be suffering from. Solitary confinement of any duration and for any purpose should be prohibited. **The underlying approach should be 'care' and not 'detention'.** To ensure the best interest of children/minors, UNHCR makes the following recommendations:

- **Legal and policy frameworks ensure that children are not detained**, except in exceptional circumstances, as a measure of last resort, for a legitimate purpose and for the shortest possible period.
- **The best interest of the child** prevails: prioritisation of asylum processing and/or family tracing/reunification; access to age-appropriate information (e.g. picture books) on asylum procedures (including how to contact UNHCR); guardians and/or legal representatives for children are appointed, in particular when unaccompanied or separated.
- **Alternative reception/care arrangements (including for families) are available and appropriate**: examples include foster care, community supervision/support/case-worker (or coach), age appropriate open reception centres with proper supervision, etc.
- **Child-sensitive screening and referral procedures are in place** in order to refer them to relevant child protection institutions or organisations without delay and ensure they receive necessary services and assistance (e.g. through Best Interests Assessment or Determination Procedures and care arrangements).

- **Immediate release of children from detention** and their placement in other forms of appropriate accommodation is coordinated amongst national agencies and, as appropriate, with the UNHCR.

The European Parliament

On 28 January 2016, the Parliament's Women's Rights and Gender Equality Committee (FEMM) voted on an [own-initiative report](#) drafted by Mary Honeyball (S&D, UK) on this topic, which will also be the subject of events to mark International Women's Day 2016 in Brussels. The report highlights that women and girls fleeing conflicts and war face various forms of gender-based violence in their journey to a host country, as well as multiple forms of discrimination due to widespread prejudices. The report is due to be debated in plenary in March 2016.

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Endnotes

¹ Guy S. Goodwin-Gill (2001) – [Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection](#), Paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations.

² The European Court of Human Rights (ECtHR) and the European Convention of Human Rights (ECHR) shed further light on when detention becomes arbitrary. The ECHR specifies in Article 5(1) that 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.' Unless these conditions are met, the individual's detention will be unlawful under the ECHR. In addition, the ECtHR, in its interpretation of Article 5 (1) states that: 'any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness'.

- ³ UNHCR [Resolution 1991/42](#), as clarified by UNHCR [Resolution 1997/50](#)). Resolution 1997/50 considers that deprivation of liberty is not arbitrary if it results from a final decision taken by a domestic judicial instance and which is (a) in accordance with domestic law; and (b) in accordance with other relevant international standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned.
- ⁴ Administrative detention is without the sanction of criminal law. An [increasing number of countries](#) have adopted laws which criminalise undocumented entry and presence on the territory; foreigners who are found in such positions are detained, charged, convicted and sentenced to further detention on the basis of criminal law.
- ⁵ Alice Edwards (2011) – [Back to basics: the right to Liberty and security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, UNHCR, Division of International Protection](#), p. 24.
- ⁶ Michael Fordham QC, Justine N Stefanelli, Sophie Eser (2013) – [Immigration Detention and the Rule of Law, Safeguarding Principles](#), The British Institute of International and Comparative Law, London.
- ⁷ Alice Edwards (2011), op. cit., p.38.
- ⁸ See also Article 17 paras 3 and 7 of the [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) (which has not been signed or ratified by any EU state).
- ⁹ See also report [E/CN.4/2003/85](#) of the Special Rapporteur on Migrants.
- ¹⁰ The Istanbul Convention, the first legally binding instrument which 'creates a comprehensive legal framework and approach to combat violence against women', characterizes violence against women as a violation of human rights and a form of discrimination (Art. 3(a)) and calls upon countries to exercise due diligence when preventing violence, protecting victims and prosecuting perpetrators (Art. 5). The Convention also contains a definition of gender in Article 3(c). Moreover, the Convention establishes a series of offences characterised as violence against women. States which ratify the Convention must criminalise several offences, including: psychological violence (Art. 33); physical violence (Art. 35); sexual violence, including rape, explicitly covering all engagement in non-consensual acts of a sexual nature with a person (Art. 36), forced marriage (Art. 37); female genital mutilation (Art. 38). The Convention states that sexual harassment must be subject to 'criminal or other legal sanction' (Art. 40).
- ¹¹ Juan E. Méndez (2015) – Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 28th session of the Human Rights Council, United Nations General Assembly of 5 March 2015, p. 7.

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eprs@ep.europa.eu

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