



Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies

Acknowledgements

This report was written by Marta Gionco, Advocacy Officer and Michele LeVoy, Director of PICUM, the Platform for International Cooperation on Undocumented Migrants.

Information and input provided by PICUM members and other organisations working with people affected by migration detention was of immense value in writing this briefing. In particular, each country profile has been written in close collaboration with organisations from that country. We would like to thank them for their inestimable support and extend our special thanks to:

- Belgium: [Vluchtelingenwerk Vlaanderen](#), [Myria](#), [JRS Belgium](#) & [Plate-forme Mineurs en exil](#)
- Greece: [AITIMA](#) & [Human Rights 360°](#)
- The Netherlands: [Stichting LOS](#)
- Spain: [Andalucía Acoge](#) & [Fundación Cepaim](#)
- United Kingdom: [FLEX - Focus on Labour Exploitation](#) & [Bail for Immigration Detainees](#)

We would also like to thank White & Case for their *pro bono* research on migration enforcement and individuals' vulnerability, which constituted the basis of the legal analysis of the ECtHR jurisprudence in this report, Josexto Ordoñez for his legal insights on immigration detention in Spain and the European Network on Statelessness for their research and feedback on stateless persons in detention. This briefing was made possible thanks to the efforts of PICUM trainees Karin Åberg, who conducted initial interviews with members, and Saskia Basa, who assisted in finalising the report.

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This report has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication does not necessarily reflect the official position of the European Commission

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Acronyms

BID	Bail for Immigration Detainees
CIE	Centro de Internamiento de Extranjeros (Immigration Detention Centre - Spain)
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Committee on the Rights of the Child
CSO	Civil Society Organisation
EATDN	European Alternatives to Detention Network
EC	European Commission
ECtHR	European Court of Human Rights
EU	European Union
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IDC	International Detention Coalition
IRC	Immigration Removal Centre (UK)
JRS	Jesuit Refugee Service
LGBTI	Lesbian, gay, bisexual, transgender and intersex
NGO	Non-governmental organisation
PICUM	Platform for International Cooperation on Undocumented Migrants
SDP	Statelessness Determination Process
UK	United Kingdom
UN	United Nations
UNHCR	United Nations Higher Commission for Refugees
UNICEF	United Nations Children's Fund

Executive Summary

Every year, more than 100,000 people are detained for migration control purposes in the European Union.¹

Immigration detention places individuals' lives on hold, as people do not know when, or if, they will ever be released.² It has a severe impact on mental health, with studies indicating higher incidence of anxiety, depression and post-traumatic stress disorder than among the rest of the population,³ and an average of very high levels of depression in four out of every five detainees.⁴ Moreover, detention is often characterised by insufficient or inadequate access to information and interpreters, violation of procedural safeguards, lack of access to medical care, and isolation, which further place individuals in a situation of vulnerability.⁵ Therefore, detention is always a harmful practice, whose negative impact broadly exceeds its purposed objectives.

The harmful impact of immigration detention is further exacerbated when it adds to pre-existing factors that already put detainees in a situation of vulnerability, including poor physical or mental health conditions, disabilities, past experiences of trauma, or age.

This report analyses states' legal obligations in relation to immigration detention and vulnerability, and draws concrete recommendations on how to ensure that migration policies refrain from creating or exacerbating situations of vulnerability. It is based on the analysis of the international and European legal framework and a comparative analysis of the law and practice in five European countries: Belgium, Greece, the Netherlands, Spain and the United Kingdom.

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- 1 Global Detention Project, Country profiles - Europe, available [here](#).
 - 2 PICUM (2020), "Removed. Stories of hardship and resilience in facing deportation and its aftermath", available [here](#).
 - 3 M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason and C. (2018) "The impact of immigration detention on mental health: a systematic review" in BMC Psychiatry, available [here](#).
 - 4 M. Bosworth and B. Kellezi, (2012) "Quality of Life in Detention: Result from the Questionnaire Data Collected in IRC Yarl's Wood, IRC Tinsley House, and IRC Brook House, August 2010 – June 2011" Centre for Criminology University of Oxford, available [here](#).
 - 5 Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, para. 15, available [here](#).

Key findings:

International and European legal framework

- States have a positive obligation to protect individuals in situations of vulnerability. Under international law, individuals in situations of vulnerability should not be detained.⁶ Specific safeguards also apply to the following individuals in situations of vulnerability: children,⁷ victims of torture,⁸ victims of trafficking in human beings,⁹ women in detention,¹⁰ pregnant women,¹¹ lesbian, gay, bisexual, transgender and gender-diverse persons,¹² people living with a mental illness,¹³ people with disabilities¹⁴ and stateless people.¹⁵
- Under EU law, the 2008 Return Directive¹⁶ establishes an obligation to pay “particular attention” to individuals in situation of vulnerability. While the standards it sets are lower than in the Reception Condition Directive,¹⁷ it can be argued that, under EU law, the level of protection granted to people in a vulnerable situation and detained for immigration purposes should be the same whatever the reasons for their detention. Therefore, the standards set by the Reception Condition Directive should also apply to detainees under the Return Directive.¹⁸

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- 6 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#).
 - 7 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).
 - 8 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
 - 9 Office of the High Commissioner for Human Rights (2003) “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, guideline 2.6 and 6.1, available [here](#).
 - 10 Committee on the Elimination of Discrimination against Women (5 December 2008) “General Recommendation No. 26 on women migrant workers” CEDAW/C/2009/WP.1/R, available [here](#); Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
 - 11 United Nations Higher Commission for Refugees (1999) “UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers”, available [here](#).
 - 12 Special Rapporteur on the human rights of migrants (15 April 2019) “The impact of migration on migrant women and girls: a gender perspective”, A/HRC/41/38, available [here](#).
 - 13 Human Rights Committee (13 November 2002) “C. v. Australia” CCPR/C/76/D/900/1999, available [here](#).
 - 14 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#); United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations”, principle 8(3), available [here](#).
 - 15 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
 - 16 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, Article 15, available [here](#). The same provision is maintained in Article 18 of the proposed Recast EU Returns Directive, available [here](#).
 - 17 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast), Article 11(1), available [here](#).
 - 18 I. Majcher (2019) “The European Union Returns Directive and its Compatibility with International Human Rights Law”, Leiden, The Netherlands: Brill, p. 518, available [here](#).

Definition of vulnerability

- Despite the increasing references to the term “vulnerability” in migration and refugee law,¹⁹ there is no commonly agreed definition of vulnerability in international and EU law.²⁰ Most legal frameworks, including the EU Return Directive and the member states analysed in this report, adopt a “group-based” approach to vulnerability, which only looks at pre-existing personal factors of vulnerability. In most cases, this list is exhaustive, therefore factors which are not explicitly mentioned by the legal framework are not considered.
- A group-based approach to vulnerability is fundamentally incomplete because it ignores the impact of external factors which can create

a situation of vulnerability even in absence of pre-existing personal factors of vulnerability. To strike a balance between the risks of a checklist approach and a more comprehensive, but more difficult to operationalise, definition of vulnerability, it is key to ensure that the decision is taken at the individual level, and that the list is non-exhaustive and allows to take into consideration different factors on a case-by-case basis.²¹ Furthermore, the process is key: the right to be heard, as well as the involvement of a multidisciplinary team at least in the assessment phase, are important safeguards that contribute to the adequate identification of different factors of vulnerability.

Vulnerability screening and assessment procedures

- In **the Netherlands, Spain** and **Greece**, there are no standard vulnerability screenings or assessment practices. In practice, vulnerabilities can be raised by migrants, their lawyers or medical professionals, but there is no official procedure prior or during detention. In **Belgium** and in the **United Kingdom**, where some forms of screening procedures exist, people who are identified as vulnerable are frequently still detained as the outcome of the screening is balanced against migration control purposes. As a consequence, individuals who are identified as vulnerable are still frequently detained.
- Factors of vulnerability frequently need to be raised by lawyers, NGOs and medical personnel. For this reason, access to legal and medical aid, NGOs services and interpretation is key to ensure their timely identification. In practice, however, these rights are not always effective, due to lack of funding, the remote locations of the detention centres, and/or insufficient staffing. Services are particularly lacking in the context of de facto detention centres, such as in police stations in **Greece**.

19 I. Atak, D. Nakache, E. Guild, F. Crépeau (2018). “Migrants in vulnerable situations and the Global Compact for Safe Orderly and Regular Migration.” Legal Studies Research Paper No. 273/2018, Queen Mary University of London.

20 C. Hruschka, and L. Leboeuf (2019) “Vulnerability: A Buzzword or a Standard for Migration Governance?” Population & Policy Compact 20, available [here](#).

21 Amnesty International the Netherlands, Médecins du Monde the Netherlands and LOS Foundation – Immigration Detention Hotline (2016) “To confine or to protect? Vulnerable people in immigration detention”, available [here](#).

- The frequent lack of interpretation while accessing services (including legal aid and health care) and in the decision-making processes further hinders the identification of vulnerabilities.
- In the five countries analysed by this report, civil society organisations have access to detention centres, but often face difficulties or

administrative burdens to exercise this right. Access is often granted only based on a bilateral agreement between the CSO and the authorities. Moreover, access to detention centres does not equate with the right to set up official structured monitoring systems, which are often lacking in practice.

Specific groups

- In the EU Return Directive, as well as the national legislation of **Belgium, Spain** and **the Netherlands**, mental health issues are not included in the definition of vulnerability, despite broad evidence of the high incidence of mental health issues in immigration detention,²² and the lack of adequate support in the countries analysed. In **Belgium** and **Spain**, individuals living with mental health issues are sometimes placed in solitary confinement within the immigration detention system, which is also used as a punitive measure. Furthermore, mental health issues are often too easily dismissed, leading to further deterioration of individuals' conditions while in detention. In 2020, 51% of the immigration detainees in the Brook House centre in the **United Kingdom** were considered at risk of suicide.²³
- Stateless people are particularly at risk of prolonged and arbitrary detention. In the five countries analysed by this report, statelessness is not considered as a factor of vulnerability in detention decisions. Furthermore, all of these countries fail to impose an obligation to identify a country of removal prior to the decision to detain. This can lead to an imposition of a detention order despite the lack of reasonable prospect of removal, thus making their detention arbitrary under European²⁴ and international²⁵ law.
- Despite the broad evidence of the negative impact of immigration detention on children,²⁶ and consensus at the UN level that detaining children based on the children's or their parents' migration status is always a human rights violation and is never in the best interests of

22 S. Shaw (2016) "Review into the Welfare in Detention of Vulnerable Persons A report to the Home Office", p. 175, available [here](#); Jesuit Refugee Service - Europe (2010), "Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union", p. 92, available [here](#).

23 The Guardian (13 November 2020) "Asylum seekers crossing Channel face 'inhumane treatment', observers say", available [here](#).

24 EU Return Directive, Article 15(4), available [here](#).

25 UN Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", para. 27, available [here](#).

26 Australian Human Rights Commission (2014) "The forgotten children: National Inquiry into Children in Immigration Detention", available [here](#); M. Cohen, K. Hui, C. Jimenez on behalf of 2002 individual and 34 organisational signatories (12 July 2018) "End immigration detention: an open letter", the Lancet, available [here](#); A. Lorek, K. Ehntholt et al (2009) "The mental and physical health difficulties of children held within a British immigration detention center: a pilot study", available [here](#).

a child,²⁷ child detention remains widely used across the EU.²⁸ Alternatives to detention are underused and applied for only a small number of individuals or families.²⁹

- Children are detained in all five countries analysed in the report. This includes:
 - » Unaccompanied children whose ages are contested (**Belgium, Greece, Spain**);
 - » Children who are suspected of a crime or failed to comply with reporting duties (**Netherlands**);
 - » Children detained in police stations under the Greek “protective custody” system³⁰ – a practice deemed unlawful by the European Court of Human Rights.³¹
 - Gender-specific needs and vulnerabilities are often overlooked in detention centres. Women face particular obstacles which can exacerbate vulnerabilities in detention.
 - » In **Greece**, women can be held for long periods in police stations and deprived of access to basic hygiene products.
 - » In the **United Kingdom**, many women denounced pervasive sexual harassment. Insufficient female staff in detention centres has also been reported, meaning that health screenings and searches are often done by male medical professionals or guards,
- in some cases causing further delays until female staff is available.
- » In **Belgium**, some women are held in mixed centres where they are outnumbered by the male population, thus creating discomfort among some.
- Often excluded from group-based definitions of vulnerability, men in detention also face specific vulnerabilities, often linked to their young age, experiences of trauma and abuses, and their migratory journey. In some countries, detention centres for men are more densely populated, leading to higher risks of conflict with the staff and poorer conditions.
 - Transgender, intersex and gender non-conforming persons in detention regularly experience discrimination and are vulnerable to a number of harms including physical and sexual violence, solitary confinement as well as verbal and psychological abuse. In the absence of gender recognition and gender responsive policies, transgender, intersex and gender non-conforming persons are often misclassified and detained in facilities according to their sex assigned at birth rather than their self-determined gender identity.³²

27 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).

28 The EU-funded evaluation of the implementation of the Returns’ Directive found that 17 EU countries reportedly detain unaccompanied children (15 member states, and 2 Schengen Associated Countries) and 19 countries detain families with children. The evaluation notes that some of these countries detain unaccompanied children only occasionally in practice (Austria, Czech Republic, Lithuania, Luxembourg, Malta, Slovenia and Sweden). 11 countries reported that they do not detain unaccompanied children in practice and 8 reported that they do not detain families with children. Matrix & ICMPD, Evaluation on the application of the Return Directive (2008/115/EC), Final Report, European Commission – DG Home Affairs, Luxembourg: Publications Office of the European Union, 22 October 2013, available [here](#); c.f. PICUM, Child Immigration Detention in the EU, available [here](#).

29 A. Bloomfield, E. Tsourdi, J. Pétin, P. de Bruycker (ed.), Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation, January 2015, available [here](#); c.f. PICUM, Child Immigration Detention in the EU, available [here](#).

30 Human Rights Watch (14 April 2020) “Greece: Free Unaccompanied Migrant Children”, available [here](#).

31 H.A. and others v. Greece- App no 19951/16 (28 February 2019, ECtHR), available [here](#).

32 International Detention Coalition (2016) “LGBTI Persons in Immigration Detention”, available [here](#).

Introduction

Across the European Union, more than 100,000 people are detained each year³³ solely because of their migratory status. Immigration detention is imposed, often for repeated or prolonged periods, with the more or less explicit purpose of deterring irregular migration and facilitating and speeding up deportations – despite broad evidence on both its harmfulness and ineffectiveness.³⁴ The harm this causes and its impact on individuals' lives is too often disregarded by policies which exclusively focus on increasing return rates at any cost.

The harmful impact of immigration detention is further exacerbated when it adds to pre-existing factors that already put detainees in a situation of vulnerability. The climate of deprivation stemming from immigration detention can trigger past traumas, lead to deteriorating medical conditions and exacerbate existing vulnerabilities. Mental health symptoms frequently worsen when individuals have been exposed to traumatic experiences prior to their detention.³⁵

A study conducted by the Jesuit Refugee Survey through more than 680 one-on-one interviews shows that even short periods of detention increase individuals' position of vulnerability.³⁶ However, detention of people in situations of vulnerability remains a common practice in most European countries. This includes children, families, people who suffered torture, violence or trafficking in human beings, people with mental and physical health problems, and people with disabilities. This also includes many individuals who developed mental

health problems, including anxiety, depression and post-traumatic stress disorder, as a consequence of detention itself.

This report aims at analysing states' legal obligations in relation to immigration detention and vulnerability. It draws concrete recommendations on how to ensure that migration policies refrain from creating or exacerbating situations of vulnerability. It is based on the comparative analysis of the law and practice in five European countries: Belgium, Greece, the Netherlands, Spain and the United Kingdom.

The first chapter will look at immigration detention more broadly, and explain why detention is always harmful, disproportionate and ineffective, independent of individuals' pre-existing situations of vulnerability. Secondly, the report will address different aspects of vulnerability screenings, including the definition and the procedures. Thirdly, it will focus on child detention and clarify why this should be addressed as a separate issue. Each section will include a brief analysis of the relevant international and EU law and jurisprudence, followed by the national level practice in the five countries analysed.

33 Global Detention Project, Country profiles - Europe, available [here](#).

34 K. Eisele (2019) "The proposed Return Directive (recast) – Substitute Impact Assessment" EPRS, European Parliament, p. 115, available [here](#).

35 The Royal College of Psychiatrists (2016) "Position statement on detention of people with mental disorders in immigration removal centres in England", available [here](#).

36 The Devas Project (2010) "Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union", Jesuit Refugee Service – Europe, available [here](#).

I. Detention is always harmful, disproportionate and ineffective

Several studies indicate that detention places individuals in a situation of vulnerability for a number of reasons, including insufficient or inadequate access to information and interpreters, violation of procedural safeguards, lack of access to medical care and isolation.³⁷ Furthermore, detention has a severe impact on mental health, with studies indicating higher incidence of anxiety, depression and post-traumatic stress disorder than among the rest of the population,³⁸ and an average of very high levels of depression in four out of every five detainees.³⁹

Therefore, detention is always a harmful practice, whose negative impact broadly exceeds its purported objectives.

In addition, there is no evidence that longer periods of detention lead to higher return rates:

- The Italian Senate Commission for Human Rights found that if a migrant's identity was not verified in the first 45 days, longer detention periods proved unhelpful.⁴⁰
- The United Kingdom Home Office reported that less than 40 per cent of migrants who were detained for more than six months were returned.⁴¹
- In Greece, the number of detainees strongly increased from 2018 to 2019 (from 32,718 to 58,597, with a total increase of 25,879 – however, the number of deportations dropped by 2,908 in the same period.⁴²
- Eurostat data from 2017 further show the lack of correlation between member States' maximum detention periods and return rates [see figure 1]: for instance, Spain's return rate was 37 per cent with a maximum detention period of 60 days, while the Czech Republic allows for detention up to 183 days, but has a return rate of 11 per cent.⁴³
- These findings were confirmed by the European Implementation Assessment of the 2008 Return Directive, which found that most of the removals take place during initial periods of detention.⁴⁴

37 Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, para. 15, available [here](#).

38 M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason and C. Katona (2018) "The impact of immigration detention on mental health: a systematic review" in BMC Psychiatry, available [here](#).

39 M. Bosworth and B. Kellezi (2012) "Quality of Life in Detention: Result from the Questionnaire Data Collected in IRC Yarl's Wood, IRC Tinsley House, and IRC Brook House, August 2010 – June 2011" Centre for Criminology University of Oxford, available [here](#).

40 Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani (2014) "Rapporto sui Centri di Identificazione ed Espulsione in Italia", available [here](#).

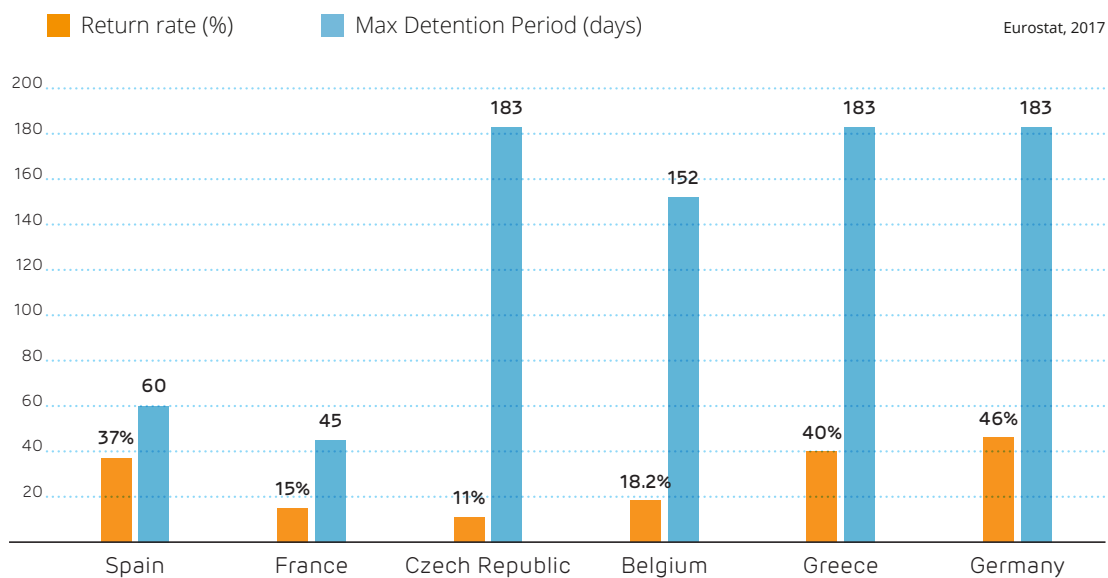
41 UK Home Office National Statistics (1 December 2016) "Immigration Statistics July to September 2016", available [here](#).

42 Asylum Information Database (2019) "Country Report: Greece" Greek Council for Refugees, European Council for Refugees and Exiles, p. 177, available [here](#).

43 "[I]n 2017, Spain (60 days maximum detention period) had a return rate of 37.2 %, 15 and France (45 days, although a change was introduced in 2018), of 15 %. Among Member States with maximum periods of detention matching the maximum permitted by the Directive (6 months plus 12 months), for example, the Czech Republic had a return rate of 11.2 %, Belgium of 18.2 %, Greece of 39.5 %, and Germany of 46.3 %.". See EU Parliament (2019), "Recasting the Return Directive", available [here](#).

44 European Parliamentary Research Service (June 2020) "The Return Directive 2008/115/EC; European Implementation Assessment" p. 109, available [here](#).

Figure 1: the lack of evidence between longer detention periods and return rates



For all these reasons, there is growing consensus, including at the international level, that detention for immigration control purposes can violate human rights law and should be progressively ended.⁴⁵ Rights-based alternatives to detention should always be prioritised.⁴⁶ This call is further supported by increasing evidence of the effectiveness of

community-based alternatives to detention, which actively engage migrants in immigration procedures and can achieve high results in terms of engagement and compliance while ensuring that migrants' rights are respected throughout the procedures.⁴⁷

45 UN Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", available [here](#); I. Majcher, M. Flynn, M. Grange (2020) "Immigration Detention in the European Union" Springer, p. 6; Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, para. 72, available [here](#).

46 Resolution adopted by the General Assembly on 19 December 2018, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, para. 29, available [here](#); United Nations Network on Migration "COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?", available [here](#); Council of Europe – Steering Committee for Human Rights (7 December 2017) "Human Rights and Migration: Legal and practical aspects of effective alternatives to detention in the context of migration", available [here](#); Council of Europe – Steering Committee for Human Rights (16 October 2019) "Practical Guidance on Alternatives to Immigration Detention: Fostering Effective Results", available [here](#).

47 Council of Europe – Steering Committee for Human Rights (7 December 2017) "Human Rights and Migration: Legal and practical aspects of effective alternatives to detention in the context of migration", available [here](#); PICUM (2020) "Implementing case management based alternatives to detention in Europe", available [here](#); E. Ohtani, European Programme for Integration and Migration - EPIM (2020) "Alternatives to Detention: building a culture of cooperation – Evaluation of two-year engagement-based alternatives to immigration detention pilot projects in Bulgaria, Cyprus and Poland", available [here](#). See, inter alia, United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations", principle 8(2), available [here](#).

II. Defining vulnerability

A. The legal framework

The international framework

In the past decades, the term “vulnerability” has been increasingly used in migration and refugee law, with references to migrants’ situation of vulnerability appearing no less than fifteen times in the 2016 United Nations New York Declaration,⁴⁸ which was a precursor to the adoption of the UN Global Compact for Safe, Orderly and Regular Migration in 2018.⁴⁹ Despite the widespread use of the term “vulnerability”, in international and EU law, there is no commonly agreed definition of vulnerability which applies to the field of migration and asylum, nor to the human rights sector more broadly.⁵⁰

A 2012 Report of the former UN Special Rapporteur on the human rights of migrants, François Crépeau, found that “migrants who are detained find themselves in an especially vulnerable situation,”⁵¹ thus highlighting the inherent vulnerability of all immigration detainees. In his report, the UN Special Rapporteur further includes “victims of torture, unaccompanied older persons, persons with a

mental or physical disability, and persons living with HIV/AIDS” as particularly vulnerable categories in this context.⁵²

In addition, specific categories of people in situations of vulnerability derive rights from different bodies of international law, such as the Convention on the Elimination of All Forms of Discrimination Against Women,⁵³ the Convention on the Rights of the Child,⁵⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁵ and the Convention on the Rights of Persons with Disabilities.⁵⁶ In particular:

- **Children:** UN experts agree that detaining children based on the children's or their parents' migration status is always a human rights violation and is never in the best interests of a child.⁵⁷

48 General Assembly (2016) “New York Declaration for Refugees and Migrants”, available [here](#)

49 I. Atak, D. Nakache, E. Guild, F. Crépeau (2018). “Migrants in vulnerable situations and the Global Compact for Safe Orderly and Regular Migration.” Legal Studies Research Paper No. 273/2018, Queen Mary University of London.

50 C. Hruschka, and L. Leboeuf (2019) “Vulnerability: A Buzzword or a Standard for Migration Governance?” Population & Policy Compact 20, available [here](#).

51 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, para. 15, available [here](#).

52 Ibid, para. 43.

53 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981), available [here](#).

54 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), available [here](#).

55 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), available [here](#).

56 Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly (adopted 24 January 2007, entered into force 3 May 2008), available [here](#).

57 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).

- **Victims of torture:** the former UN Special Rapporteur on the human rights of migrants, François Crépeau, underlined that “victims of torture are already psychologically vulnerable due to the trauma they have experienced and detention of victims of torture may in itself amount to inhuman and degrading treatment.”⁵⁸
- **Victims of trafficking in human beings:** according to the Recommended Principles and Guidelines on Human Rights and Human Trafficking,⁵⁹ victims of trafficking in human beings should not “in any circumstances, be held in immigration detention or other forms of custody.”⁶⁰
- **Women in detention:** women in detention centres are particularly vulnerable to sexual, gender-based violence and discrimination, especially in the context of male-dominated detention centres.⁶¹
- **Pregnant women:** according to the Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants⁶² and to the Principles and Guidelines on migrants in vulnerable situations, adopted by the Global Migration Group Working Group on Migration, Human Rights and Gender,⁶³ pregnant women should not be detained.⁶⁴ According to the UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, the detention of pregnant women in their final months and nursing mothers should be avoided.⁶⁵
- **Lesbian, gay, bisexual, transgender and gender-diverse persons:** as highlighted by the former UN Special Rapporteur on the human rights of migrants, François Crépeau, LGBTI people in detention “can be exposed to social isolation and be subjected to physical and sexual violence, because they are usually held with men.”⁶⁶ For this reason, it is recommended that their detention should be avoided.⁶⁷

58 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).

59 Office of the High Commissioner for Human Rights (2003) “Recommended Principles and Guidelines on Human Rights and Human Trafficking, guideline 2.6 and 6.1, available [here](#).”

60 Ibid.

61 Committee on the Elimination of Discrimination against Women (5 December 2008) “General Recommendation No. 26 on women migrant workers” CEDAW/C/2009/WP.1/R, available [here](#); Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).

62 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#).

63 The group includes ILO, IOM, OHCHR, UNESCO, UNHCR, UNICEF, UNODC, UNU, UN Women and WHO.

64 Pregnant women are also protected under the United Nations Higher Commission for Refugees (1999) “UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers”, available [here](#). However, these Guidelines only refer to pregnant women in their final months.

65 United Nations Higher Commission for Refugees (1999) “UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers”, available [here](#).

66 Special Rapporteur on the human rights of migrants (15 April 2019) “The impact of migration on migrant women and girls: a gender perspective”, A/HRC/41/38, available [here](#).

67 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#); United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations”, principle 8(3), available [here](#).

- **People living with a mental illness:** in its General Comment on Article 9, the Human Rights Committee further underlined that “decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.”⁶⁸ In *C. v. Australia*, the Human Rights Committee found that the protracted detention of an applicant which caused the insurgency of a psychiatric illness amounted to ill-treatment under Article 7 of the ICCPR.⁶⁹
- **People with disabilities:** as reported by the former Special Rapporteur on the rights of persons with disabilities “persons with disabilities are significantly overrepresented in mainstream settings of deprivation of liberty, such as prisons and immigration detention centres.”⁷⁰ This is contrary to the recommendations of the Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants⁷¹ and to the Principles and Guidelines on migrants in vulnerable situations, adopted by the Global Migration Group Working Group on Migration, Human Rights and Gender, which state that persons with disabilities should not be detained.
- **Stateless people:** because of their exclusion from consular or diplomatic protection, their frequent lack of documents and the absence of a country to which they can return, stateless persons are a group particularly vulnerable to the risk of prolonged detention.⁷² The Principles and Guidelines on migrants in vulnerable situations, adopted by the Global Migration Group Working Group on Migration, Human Rights and Gender underline that detention of stateless persons should be avoided.

68 Human Rights Committee (16 December 2014) “General comment No. 35 - Article 9 (Liberty and security of person)” CCPR/C/GC/35, available [here](#).

69 Human Rights Committee (13 November 2002) “*C. v. Australia*” CCPR/C/76/D/900/1999, available [here](#).

70 Special Rapporteur on the rights of persons with disabilities (11 January 2019) “Rights of persons with disabilities - Report of the Special Rapporteur on the rights of persons with disabilities” A/HRC/40/54, available [here](#).

71 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#).

72 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).

The EU legal framework

In EU secondary law, vulnerability is defined according to the individuals' belonging to a specific group, largely referring to pre-existing individual histories (e.g. due to pregnancy, disabilities or illnesses).

Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter Return Directive),⁷³ which sets out common standards and procedures on returns in the EU, including pre-return detention, provides a closed list of groups of vulnerable persons, which includes:

*"minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence."*⁷⁴

However, the Return Handbook, developed by the European Commission to provide guidance on the implementation of the Return Directive, adds that:

*"The need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, not limited to the categories of vulnerable persons expressly enumerated in Article 3(9). The Commission recommends that Member States should also pay attention to other situations of special vulnerability, such as those mentioned in the asylum acquis: being a victim of human trafficking or of female genital mutilation, being a person with serious illness or with mental disorders."*⁷⁵

In the context of the asylum procedures, the recast Reception Conditions Directive⁷⁶ and the Qualifications Directive⁷⁷ adopt similar definitions of vulnerability, which however further include "victims of human trafficking, persons with serious illnesses, persons with mental disorders". In these two instruments, the list is non-exhaustive.

73 At the moment of the publication of this report, the Return Directive is in the process of being recast. While the Commission's proposal does not make any change to Article 16(3), the Council partial approach suggest amending the definition a non-closed list. It is noteworthy that in her draft report on the Return Directive, the LIBE Rapporteur proposes to amend the definition of vulnerability and adopt an intersectional approach which considers "factors and circumstances at an individual, community, household, structural or situational level that increase the risk of, and exposure to, such violence, exploitation, abuse, or rights violations" (Article 3) and stating that detention may only be applied "provided it would not disproportionately harm the person concerned. The absence of disproportionate harm shall be assessed through a vulnerability test prior to or immediately after detention." (Article 18(1)).

74 Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter EU Return Directive), Article 3 (9), available [here](#).

75 Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks (27 September 2017), C(2017) 6505, Annex I, p. 12-13, available [here](#).

76 Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), available [here](#).

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

National Legal Framework

In **Belgium**, there is no specific definition of vulnerabilities applying to migration detention. Although the Foreigners' Act⁷⁸ (Article 1(12)) does specify certain vulnerable groups such as children, persons with disabilities, elderly people, pregnant women or victims of torture, sexual, psychological or physical violence, no specific provision addresses the situation of these people with regard to migration detention.⁷⁹

In **Greece**, Article 58 in Law 4636/2019 defines vulnerable categories of migrants as:

*"minors, unaccompanied or not, direct relatives of shipwreck victims (parents and siblings), persons with disabilities, the elderly, pregnant women, single-parent families with minors, victims of trafficking, people with serious illnesses, people with mental and emotional disabilities and people who have suffered torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of genital mutilation."*⁸⁰

Postpartum women and persons with post-traumatic stress disorder are no longer considered as vulnerable categories, although this was provided in the previous Law 4375/2016.

The **Netherlands** directly transposed the closed list definition of the EU Return Directive, without adding nor removing any category.

Similarly, **Spain** transposed the definition of the Return Directive in the Asylum Law⁸¹ (Article 46) and in the Regulation governing detention centres (CIE Regulation, Article 1 (4)).⁸² However, the definition was not transposed in the Immigration Law⁸³ nor its implementing regulation. Therefore, since regulations do not have the same force as a law, there is no definition of vulnerability by law within the immigration detention context.

In the **United Kingdom**, policy on 'Adults at Risk in Immigration Detention' developed in 2016⁸⁴ lists a number of conditions and experiences that may render a person 'vulnerable', including:

*"suffering from a mental health condition or impairment; having been a victim of torture; having been a victim of sexual or gender-based violence, including female genital mutilation; having been a victim of human trafficking or modern slavery; suffering from post-traumatic stress disorder (which may or may not be related to one of the above experiences); being pregnant; suffering from a serious physical disability; suffering from other serious physical health conditions or illnesses; being aged 70 or over; being a transsexual or intersex person."*⁸⁵

However, the list is not exhaustive and other conditions can also be considered.

78 Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, available [here](#).

79 Global Detention Project (2020) "Immigration Detention in Belgium: Covid-19 puts the breaks on an expanding detention system", available [here](#).

80 President of the Hellenic Republic (1 November 2019) "Law No. 4636/2019 Government Gazette 169 / A / 1-11-2019 On International Protection and other provisions. ", Article 58(1), available [here](#) (in Greek).

81 Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria, available [here](#).

82 Boletín Oficial del Estado (15 March 2014) "Real Decreto 162/2014, de 14 de marzo, por el que se aprueba el reglamento de funcionamiento y régimen interior de los centros de internamiento de extranjeros", available [here](#).

83 Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, available [here](#).

84 Parts of this policy are currently being reviewed through a closed-door process and the content of the negotiations has not been made publicly available. Civil society organisations are concerned that the new proposals could make it more difficult for detainees to have their vulnerability recognised and to be considered for bail.

85 UK Home Office (2018) "Immigration Act 2016: Guidance on adults at risk in immigration detention", available [here](#).

Detention of people living with mental health issues

When examining the Home Office policies affecting the welfare of immigration detainees in the United Kingdom, independent expert Stephan Shaw, former Prisons and Probation Ombudsman for England and Wales, wrote: ***“No issue caused me more concern during the course of this review than mental health.”***⁸⁶

Individuals with mental health issues are excluded by the definition of the Return Directive and in the national level legislation in Belgium, Spain and the Netherlands. Moreover, even when the definition of vulnerability includes mental health issues, this does not usually lead to the release of people living with poor mental health. As a consequence, people living with mental health issues can be – and in practice are – detained in all of the countries analysed in this report.

Findings confirm that immigration detention has a negative impact on detainees’ mental health, which increases the longer detention continues.⁸⁷ The Jesuit Refugee Service (JRS) study “Becoming Vulnerable in Detention” (Devas project) found that in detention “persons with pre-existing physical and mental conditions often fare worse, and otherwise healthy persons find that their overall health deteriorates.”⁸⁸ Furthermore, 87 per cent of detainees interviewed by the Devas project in the European Union said that psychological assistance was not available to them.⁸⁹

In **Belgium**, according to an internal note from 2 July 2012, the Aliens Office has found that migrants with medical or psychosocial problems, unadjusted behaviour or mental or physical disabilities should preferably not be detained and that their removal has no priority. Nonetheless, the most common practice is that when a detainee is suffering from mental health issues, they are given medication or placed in solitary confinement. NGOs report frequently encountering people with significant mental or physical health issues in detention centres.

In **Greece**, article 2(3) of Law 4686/2020 removed persons with post-traumatic stress disorder from the list of vulnerable categories.⁹⁰ Moreover, availability of mental health services for detainees is affected by the large number of detained people and lack of staff. Psychologists and psychiatrists are often unavailable, and detainees rarely get the care and assistance that they require and in a language they can understand.

86 S. Shaw (2016) “Review into the Welfare in Detention of Vulnerable Persons A report to the Home Office”, p. 175, available [here](#).

87 P. Young, M.S. Gordon (2016) “Mental Health Screening in Immigration Detention: A Fresh Look at Australian Government Data”, *Australasian Psychology*, available [here](#). See also: Hocking, D. C., Kennedy, G. A., & Sundram, S. (2015) Mental disorders in asylum seekers: The role of the refugee determination process and employment. *Journal of Nervous and Mental Disease* 203(1), 28-32.; S. Sundram, D. Hocking (2014) The Cost Of Hope: Mental Health Consequences Of Seeking Asylum In Australia *Australian And New Zealand Journal Of Psychiatry* 48, 93-93.

88 The Devas Project (2010) “Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union”, Jesuit Refugee Service – Europe, p. 92, available [here](#).

89 The Devas Project (2010) “Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union”, Jesuit Refugee Service – Europe, p. 9, available [here](#).

90 Law 4686/2020 Improvement of the migration legislation, amendment of L. 4636/2019 (A’ 169), 4375/2016 (A’ 51), 4251/2014 (A’ 80) and other provisions, available [here](#).

In the **Netherlands**, many detainees are suffering from complex psychological and/or physical health issues. An appointment with a specialist requires long waiting times and requests to see psychologists are often not taken seriously by the authorities.

In **Spain**, detainees suffering from mental health issues are frequently placed in solitary confinement. The Spanish Ombudsman reported in 2018 that none of the detention centres visited offered psychological assistance, hindering the identification of mental health issues that emerge or worsen as a consequence of detention.⁹¹ Psychological assistance was still not available a year later, when the Spanish Ombudsman visited the four main detention centres in the country (Barcelona, Madrid, Murcia and Valencia).⁹²

In the **United Kingdom**, people with mental health issues may be released under the Rule 35-procedure, which will be further analysed in the following chapter. However, under this procedure protection concerns are often outweighed by immigration enforcement purposes. Moreover, NGOs report that mental health issues such as post-traumatic stress disorder are often not taken seriously and dismissed as overreaction. For instance, the NGO Bail for Immigration Detainees reports the case of a man whose mental health severely deteriorated due to detention. After an attempted suicide, he was placed in solitary confinement. In their written Adults at Risk response, the Home Office stated: “you are the origin of this decline and [...] the increased isolation that you feel is an unintended consequence of your current behaviour”.⁹³

Dismissal of mental health concerns and the ensuing detention of people living with mental health issues can lead to deteriorating mental health conditions, with long term effects. 393 suicide attempts were reported in detention centres in the United Kingdom throughout 2015, with a total of 2,957 detainees being placed on suicide watch, including 11 children.⁹⁴ Dramatic instances of mental health deterioration have also been reported at Brook House Immigration centre, a location where people arriving by sea are taken while awaiting removal flights leaving from the nearby Gatwick airport.⁹⁵ As recently revealed, the majority of detainees held in this centre showed signs of severe distress, with 51 per cent deemed at risk of suicide in October 2020.⁹⁶ Out of a total population of 80 detainees, 44 acts of self-harm were recorded.⁹⁷

91 Defensor del Pueblo (2018) “Informe anual 2017: Mecanismo Nacional de Prevención” p. 101, available [here](#).

92 Defensor del Pueblo (2019) “Informe Anual 2018: Mecanismo Nacional de Prevención”, p.71, available [here](#).

93 Bail for Immigration Detainees (2018) “Adults at Risk: the on-going struggle for vulnerable adults in detention: an evaluation of the ‘Adults at Risk’ policy in practice”, p. 2, available [here](#).

94 No Deportations (2016) “IRCs ‘Self Harm (Attempted Suicide) and Those on ‘Self-Harm Watch’ (At Risk of Suicide) 2015”, available [here](#).

95 The Guardian (13 November 2020) “Asylum seekers crossing Channel face ‘inhumane treatment’, observers say”, available [here](#).

96 Ibid.

97 Ibid.

B. The limits of a group-based approach to vulnerability

As analysed in the previous section, most legal frameworks adopt a “group-based” approach to vulnerability, which only looks at pre-existing personal factors of vulnerability. In most cases, this list is exhaustive, therefore factors which are not explicitly mentioned by the legal framework will not be considered. For example, in the EU Return Directive, as well as the national legislation of Belgium, Spain and the Netherlands, mental health issues are not considered.

A “group-based” approach is fundamentally incomplete because it ignores the impact of external factors, which can create a situation of vulnerability even in absence of pre-existing personal factors of vulnerability – and outside of the categories mentioned above. Indeed, many migrants are in a situation of vulnerability specifically because of external factors, including, in many cases, migration policies themselves.⁹⁸

In 2010, the Jesuit Refugee Service (JRS) Europe in partnership with NGOs in 23 European Union countries carried out an investigation (the Devas project) to analyse how “pre-existing vulnerable groups cope with detention, and the way in which detention can enable vulnerability in persons who do not otherwise possess officially recognised vulnerabilities and special needs,”⁹⁹ through the collection of 685 one-on-one interviews with detainees. The report analyses the conditions of detention and the impact of detention on individuals’ nutrition and sleep, self-perception and its interaction with pre-existing special needs.¹⁰⁰ It concludes that detention can enable vulnerability in persons who

do not otherwise possess officially recognised vulnerabilities, and that it has a common negative effect upon the persons who experience it.

The report stresses that:

“existing criteria for “vulnerability” often focus on persons with presumptive special needs – parents with children, unaccompanied minors and trauma victims – without a holistic assessment of how that person may actually be vulnerable to the environment of detention. As a consequence, detention centres are often unable to identify persons who are particularly affected by detention if they do not possess such officially recognised special needs. Personal factors alone cannot adequately determine one’s level of vulnerability in detention: social and environmental factors must also be assessed, along with the way in which these factors interact with one another.”¹⁰¹

To address this gap, the report proposes an intersectional understanding of vulnerability, which looks at “a concentric circle of personal (internal), social and environment (external) factors that may strengthen or weaken an individual’s personal condition.”¹⁰² Personal factors can include, for instance, physical and mental health, language skills and past trauma. Social factors relate to the individual’s existing social network, and environmental factors are “the sum of the determinants that exist in the individual’s larger environment but that the individual cannot control nor influence, and which may still increase or lessen his or her level of vulnerability to detention.”¹⁰³

98 In particular, this risks to “discard the fact that the precariousness in which migrants find themselves is mostly constructed by states and other actors through policies and practices that are well documented”. See: I. Atak, D. Nakache, E. Guild, F. Crépeau (2018). “Migrants in vulnerable situations and the Global Compact for Safe Orderly and Regular Migration.” Legal Studies Research Paper No. 273/2018, Queen Mary University of London, available [here](#).

99 The Devas Project (2010) “Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union”, Jesuit Refugee Service – Europe, p. 3, available [here](#).

100 *Ibid.*

101 *Ibid.*, p. 105.

102 *Ibid.*, p. 11.

103 *Ibid.*, p. 12.

As the external context changes, vulnerability itself can also fluctuate over time.¹⁰⁴ For instance, research shows that the longer a person is detained,

the higher the risk of developing mental health issues,¹⁰⁵ which are themselves factors which increase individuals' vulnerability to harm.

C. Striking the balance: the importance of an individualised assessment

As analysed above, legal definitions of vulnerability based on an exhaustive list of personal (internal) characteristics risk excluding individuals whose pre-existing condition is not explicitly mentioned by the law, such as, in many cases, individuals with mental health conditions, as well as individuals who find themselves in a position of vulnerability due to social and environment (external) factors. For this reason, it is important to maintain a certain level of discretion to allow for the inclusion of further factors, which are to be assessed at the individual level.

However, in the process of carrying out vulnerability screening procedures, which will be further analysed below in Chapter 3, some forms of lists can still be helpful to guide the officials who are in charge of the process. To strike a balance between the risks of a check-list approach and a more comprehensive, but more difficult to operationalise, definition of vulnerability, it is key to ensure that the decision is taken at the individual level, and that the list is non-exhaustive and allows to take into consideration different factors on a case-by-case basis.

In their report "Becoming Vulnerable in Detention" mentioned above, JRS Europe calls for "a qualified identification system [...] *individually based and holistic*."¹⁰⁶ In 2016, a publication by Amnesty International, Doctors of the World and LOS Foundation – Detention Hotline on vulnerability in

detention in the Netherlands, called for a vulnerability test which "*focuses on the personal circumstances which make detention disproportionately burdensome and on the risk of physical or psychological harm by imprisonment*" and to "*use a broad definition of vulnerability and take into account circumstances that may amplify or cause vulnerability*."¹⁰⁷

Furthermore, the process is key: the individuals' right to be heard, as well as the involvement of a multidisciplinary team at least in the assessment phase, are important safeguards that contribute to the adequate identification of different factors of vulnerability.

A similar, holistic, approach has been recommended by the UNCHR and IDC Vulnerability Screening Tool, which provides guidance on the process of vulnerability assessment, which should look both at pre-existing determinants (such as age, health concern, protection needs) and at other factors which might not be captured by a "checklist" approach, such as social and environmental factors.¹⁰⁸ The tool, which includes practical procedural recommendations, notes that causes of vulnerability are overlapping, multifaceted and dynamic, and recognises that vulnerability is not fixed, but will change over time with changing circumstances.

104 M. Heikkilä et. al. (2016) "The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration", available [here](#).

105 P. Young, M.S. Gordon (2016) "Mental Health Screening in Immigration Detention: A Fresh Look at Australian Government Data", *Australasian Psychology*, available [here](#).

106 The Devas Project (2010) "Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union", Jesuit Refugee Service – Europe, p. 14, available [here](#).

107 Amnesty International the Netherlands, Médecins du Monde the Netherlands and LOS Foundation – Immigration Detention Hotline (2016) "To confine or to protect? Vulnerable people in immigration detention", p. 10, available [here](#).

108 UNHCR and International Detention Coalition (2016) Vulnerability Screening Tool, p.1, available [here](#).

III. Vulnerability screening and assessment

Screening versus assessment

Screening refers to the process of obtaining basic information and individual attributes, including individuals' identity, nationality, health status, vulnerability indicators.

The assessment phase uses the information acquired during the screening to evaluate the individuals' circumstances and vulnerabilities and make decisions on how to adequately address them.

Both phases might either occur at the same time and be conducted by the same person, or can take place consecutively and involve different actors, including case managers, immigration officers and members of the judiciary system.¹⁰⁹

A. Legal framework

International legal framework

At the international level, several soft law instruments clarify that people in a situation of vulnerability should never be detained. For instance, the Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants clarifies that:

*"Detention of migrants in other situations of vulnerability or at risk, such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes, must not take place."*¹¹⁰

Similarly, the Principles and Guidelines on migrants in vulnerable situations, adopted by the Global Migration Group (GMG) Working Group on Migration, Human Rights and Gender recommend states to:

*"Avoid the immigration detention of persons who have specific needs or who are particularly at risk of exploitation, abuse, sexual or gender-based violence, or other forms of violence. Such people include, inter alia, pregnant and nursing women, older persons, persons with disabilities, survivors of torture or trauma, migrants with particular physical or mental health needs, LGBTI individuals and stateless persons."*¹¹¹

109 International Detention Coalition (2015) "There Are Alternatives; A handbook for preventing unnecessary immigration detention (revised edition)", p. 35-36, available [here](#).

110 Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", para. 41, available [here](#).

111 United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) "Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations", principle 8(3), available [here](#).

As analysed in chapter 2.1, specific safeguards also apply to children,¹¹² victims of torture,¹¹³ victims of trafficking in human beings,¹¹⁴ women in detention,¹¹⁵ pregnant women,¹¹⁶ lesbian, gay, bisexual, transgender and gender-diverse persons,¹¹⁷ people living with a mental illness,¹¹⁸ people with disabilities¹¹⁹ and stateless people.¹²⁰

With the adoption of the UN Global Compact for Safe, Orderly and Regular Migration, to which 18 out of 27 EU Member States are signatories,¹²¹ governments further committed to “review relevant policies

and practices to ensure that they do not create, exacerbate or unintentionally increase vulnerabilities of migrants, including by applying a human rights-based, gender- and disability-responsive, as well as age- and child-sensitive approach,”¹²² and to “involve local authorities and relevant stakeholders in the identification, referral and assistance of migrants in a situation of vulnerability, including through agreements with national protection bodies, legal aid and service providers, as well as the engagement of mobile response teams, where they exist.”¹²³

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- 112 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).
- 113 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
- 114 Office of the High Commissioner for Human Rights (2003) “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, guideline 2.6 and 6.1, available [here](#).
- 115 Committee on the Elimination of Discrimination against Women (5 December 2008) “General Recommendation No. 26 on women migrant workers”, CEDAW/C/2009/WP.1/R, available [here](#); Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
- 116 United Nations Higher Commission for Refugees (1999) “UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers”, available [here](#).
- 117 Special Rapporteur on the human rights of migrants (15 April 2019) “The impact of migration on migrant women and girls: a gender perspective”, A/HRC/41/38, available [here](#).
- 118 Human Rights Committee (13 November 2002) “C. v. Australia” CCPR/C/76/D/900/1999, available [here](#).
- 119 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#); United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations”, principle 8(3), available [here](#).
- 120 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
- 121 Three EU Member States voted against the GCM (Czech Republic, Hungary and Poland), five abstained (Austria, Bulgaria, Italy, Latvia and Romania) and Slovakia did not attend this UN General Assembly meeting.
- 122 Global Compact for Safe, Orderly and Regular Migration (13 July 2018), Objective 7(a), available [here](#).
- 123 Ibid, Objective 7(k).

EU legal framework

Article 16(3) of the EU Return Directive, on “Conditions of detention”, establishes that:

“particular attention shall be paid to the situation of vulnerable persons [in immigration detention]. Emergency health care and essential treatment of illness shall be provided.”

Furthermore, Article 14(1)(d) on “Safeguards pending return” states that “Member States shall [...] ensure that [...] special needs of vulnerable persons are taken into account”.

The scope of this provision is further clarified by the Return Handbook which, besides expanding the definition of vulnerability as discussed in chapter 2.1, broadens the scope of the procedure, clarifying that:

*“the need to pay specific attention to the situation of vulnerable persons should not be limited to the situations expressly referred to by the Return Directive [...] Member States should pay attention to the needs of vulnerable persons in all stages of the return procedure”.*¹²⁴

Nonetheless, both the Return Directive and the Return Handbook fail to clarify what “particular attention” means in practice.¹²⁵

The interpretation of the scope of the Return Directive can be inferred, by analogy, from two other EU instruments in the field of migration and asylum. In particular, the Reception Conditions Directive¹²⁶

states that “the health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities” and that “where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.” The same standards apply to people detained under the Dublin Regulation, as set by Article 28(4) which refers to the Reception Conditions Directive.

Drawing from these instruments, it can be argued that, under EU law, the level of protection granted to people in a vulnerable situation and detained for immigration purposes should be the same regardless of the reasons why they are detained – therefore, the broader standards set by the Reception Condition Directive should also apply to detainees under the Return Directive.¹²⁷

In addition to the specific provisions addressing vulnerabilities, there is a clear obligation for states to assess the effectiveness of less coercive measures before applying detention.¹²⁸ As clarified by the European Commission, this entails an obligation for Member States to establish and implement effective alternatives to detention in their national legal systems.¹²⁹

As regards the decision-making procedure, the EU Return Directive clarifies that the decision to

124 European Commission (27 September 2017) “Annex to the Commission Recommendation establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks”, C(2017) 6505, Annex I, p. 12-13, available [here](#).

125 I. Majcher (2019) “The European Union Returns Directive and its Compatibility with International Human Rights Law”, Leiden, The Netherlands: Brill, p. 518, available [here](#).

126 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast), Article 11(1), available [here](#).

127 I. Majcher (2019) “The European Union Returns Directive and its Compatibility with International Human Rights Law”, Leiden, The Netherlands: Brill, p. 518, available [here](#).

128 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, Article 15, available [here](#). The same provision is maintained in Article 18 of the proposed Recast EU Returns Directive, available [here](#).

129 European Commission (27 September 2017) “Annex to the Commission Recommendation establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks”, C(2017) 6505, Annex I, p. 67, available [here](#). The Commission further clarifies that “A systematic horizontal coaching of all potential returnees, covering advice on possibilities for legal stay/asylum as well as on voluntary/enforced return from an early stage (and not only once forced removal decisions are taken) should be aimed at.”

detain an individual for immigration enforcement purposes may be taken by administrative or judicial authorities,¹³⁰ and should be reviewed at reasonable intervals of time either on application by the detainee or by the authorities themselves.

The Council of Europe,¹³¹ the Commissioner for Human Rights of the Council of Europe¹³² and the European Committee for the Prevention of Torture¹³³ have also highlighted the obligation to identify persons in a situation of vulnerability in immigration detention as soon as possible.¹³⁴

Focus on jurisprudence: European Court of Human Rights interpretations of vulnerability and immigration detention

The European Court of Human Rights (ECtHR) has also contributed to clearly define an obligation for member states to consider factors of vulnerability when deciding on a detention order, stating that, in light of the position of vulnerability of the detainee, even short periods of detention in inadequate conditions can amount to a violation of Article 3 of the European Convention on Human Rights on the prohibition of torture or to inhuman or degrading treatment or punishment.¹³⁵ In its jurisprudence, the ECtHR endorses a “group-based” approach to vulnerability, which looks at the individuals’ characteristics as belonging to a specific group in order to assess their vulnerability.¹³⁶

130 EU Return Directive, Article 15(2), available [here](#).

131 Council of Europe - Committee of Ministers (2003) “Recommendation of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers”, Rec(2003)5, para 12, available [here](#).

132 Council of Europe – Commissioner for Human Rights (2016) “Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following His Visit to Belgium from 14 to 18 September 2015”, para. 44, available [here](#).

133 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - CPT (March 2017) “Factsheet on Immigration Detention”, chapter 10, available [here](#).

134 Council of Europe - Committee of Ministers (2003) “Recommendation of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers”, Rec(2003)5, para 12, available [here](#); Council of Europe – Commissioner for Human Rights (2016) “Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following His Visit to Belgium from 14 to 18 September 2015”, para. 44, available [here](#); European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - CPT (March 2017) “Factsheet on Immigration Detention”, chapter 10, available [here](#).

135 I. Majcher (2019) “The European Union Returns Directive and its Compatibility with International Human Rights Law”, Leiden, The Netherlands: Brill, p. 522, available [here](#).

136 L. Peroni and A. Timmer (2013) “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law” Int'l J. Const. L. 1056, 1063, available [here](#).

When assessing whether inadequate access to medical care and the detention of individuals with health conditions amount to a violation of Article 3, the ECtHR adopted a case-by-case approach, looking at the medical condition of the applicant, the adequacy of the medical assistance provided in the detention centre, and the advisability of detention itself.¹³⁷

For instance, in *Sakir v. Greece*, the ECtHR found that the fact that the police had not sought to ascertain whether the applicants' state of health allowed him to be placed in detention, jointly with the detention conditions in an Athens police station, constituted a violation of Article 3 of the Convention.¹³⁸ In *Dybeku v. Albania*, the ECtHR clarified that states have an obligation to ensure adequate medical assistance and care in detention and to consider the lawfulness of continued detention in light of the detainee's health.¹³⁹ In *Rupa v. Romania*, the Court assessed that "the failure to provide an initial medical exam to ascertain whether the detainee's psychological condition allows his detention as well as subsequent [...] medical supervision may constitute [a violation of art. 3]".¹⁴⁰

In *Aden Ahmed v. Malta*, the Court assessed the detention, for fourteen months, of a woman of fragile health, who had undergone a miscarriage in detention, and found that the applicant's vulnerability, in conjunction with the condition and length of detention, amounted to degrading treatment.¹⁴¹ In the case of *Mahmundi v. Greece*, the Court decided that the detention of a woman in the eight months of pregnancy in overcrowded and unhygienic facilities amounted to a violation of Article 3.¹⁴²

137 *Yoh-Ekale Mwanje v. Belgium*, App no 10486/10 (ECtHR, 20 December 2011), para. 91, available [here](#). For further analysis, see I. Majcher (2019) "The European Union Returns Directive and its Compatibility with International Human Rights Law", Leiden, The Netherlands: Brill, p. 520, available [here](#).

138 *Sakir v. Greece*, App no 48475/09 (ECtHR, 24 March 2016), available [here](#).

139 *Dybeku v. Albania*, App no 48475/09, (ECtHR, 24 June 2016), para. 42, available [here](#).

140 I. Majcher (2019) "The European Union Returns Directive and its Compatibility with International Human Rights Law", Leiden, The Netherlands: Brill, p. 520, available [here](#).

141 *Aden Ahmed v. Malta*, App no 55352/12 (ECtHR, 9 December 2013), available [here](#).

142 *Mahmundi and others v. Greece*, App no 14902/10 (ECtHR, 24 October 2012), available [here](#).

B. National level practice

In **Belgium**, the vulnerability assessment procedure is not formalised or required but depends entirely on the individual officers involved and their agency. Present practice to identify vulnerability is limited to the completion of a form by the police which denotes basic characteristics of the individual in the detention decision process, such as is if the person is pregnant or injured. There is no systematic individual assessment of proportionality and necessity prior to or at the time of extension of detention, and it is unclear to what extent detention conditions are adjusted when a vulnerability is identified.¹⁴³

In practice, vulnerability assessments focus exclusively on whether the detention of a person may amount to inhuman or degrading treatment, and therefore a violation of Article 3 of the European Convention on Human Rights, in cases concerning elderly people, people with disabilities, people with mental illnesses and people with other serious illnesses. In these cases, detainees might be released.

In addition, medical staff can formulate an objection to the renewal of the detention order if a detainee is suffering from serious mental health issues. The decision however lies with the Aliens Office. In case the Aliens Office decides not to follow the advice of the first physician, a second physician can be appointed. If advice coincides with the first one, the person shall be released; if it differs, a third physician shall be appointed, whose advice is definitive.

Even in cases in which detainees are released because of their vulnerability, the procedure is not transparent nor formalised, and the release is often motivated with vague “administrative reasons”. NGOs report that this decision to release appears to be strongly connected to the possibility to return

someone. For example, pregnant women are often released at the end of the pregnancy, at about the same time as they would no longer be allowed to board a flight.

The decision to detain is taken by the minister or their delegate and is not automatically assessed by a judge. Contrary to criminal detention, which is subject to automatic regular reviews, review of immigration detention is not automatic, but needs to be solicited by the detainee’s lawyer before the *Chambre du Conseil*. However, the Chamber only assesses the lawfulness of detention but does not judge on whether detention is necessary and/or proportionate. The detention order is issued for the period of two months and can be renewed up to a maximum of five months, or eight months in case of threat to public order. Nevertheless, in some circumstances, such as the issuance of a new removal order due to lack of cooperation with the first removal attempt, previous periods of detention are not considered and people can be detained beyond this limit.

In **Greece**, the decision to detain is taken by the police. There is no official or formalised vulnerability screening or individualised assessment. Moreover, several individuals are detained in non-official centres, including police stations. Although the law provides for medical screening upon admission, this is not observed in non-official centres and in some pre-removal centres. A doctor or lawyer may come across information at a later stage and alert the authorities to a detainee’s vulnerability, but this identification mechanism relies entirely on the discretion and agency of service providers. Regular reviews exist in theory but are not implemented in practice.

143 NANSEN (2018) “Kwetsbaarheid in Detentie: verkennende bevindingen 2018”, available [here](#).

Law 4686/2020 and the marginalisation of alternatives to detention in Greece

In May 2020 and only a few months after the full implementation of Law 4636/2019, the Greek Parliament passed the Law 4686/2020,¹⁴⁴ fundamentally transforming the asylum and migration system in Greece. This new law reduces procedural safeguards in pre-return detention, including for individuals in a situation of vulnerability. Moreover, the law establishes administrative detention in view of return as the norm and limits the application of alternatives to detention only to exceptional cases.¹⁴⁵

In **the Netherlands**, there is no standard practice to screen and assess vulnerabilities prior to the decision to detain or during the period of detention and no vulnerable group is automatically excluded from detention.¹⁴⁶ In practice, the screening and assessment is implemented by a civil servant in absence of vulnerability assessment tools or lists of criteria. Upon entry into detention facilities, foreign nationals receive within the first 24 hours a medical test that is aimed at determining the necessary care arrangements while in detention. The test is also aimed at identifying vulnerabilities but does not assess whether release might be necessary. In 2019, the UN Human Rights Committee (HRC) noted an increase in the numbers of people held in immigration detention in the Netherlands, including persons with vulnerabilities.¹⁴⁷

Stichting LOS – The Immigration Detention Hotline¹⁴⁸ – reports having witnessed the detention of several individuals in situations of vulnerability, including children, elderly people,

people in wheelchairs, persons with mental disabilities, persons recovering from cancer surgeries, post-traumatic stress disorder, severe mental illnesses and drug addictions.

Moreover, when individuals are detained on repeated occasions, the so-called “clean slate” policy requires all previous information on the individual, including regarding their health conditions and other factors of vulnerability, to be erased from their file. While this was originally conceived as a protection measure, it also entails that individuals have to retell their story and explain past trauma or factors of vulnerability on repeated occasions.

In **Spain**, there is no official vulnerability screening and assessment. In practice, vulnerabilities are mainly raised by civil society organisations visiting the detention centres, or by lawyers.¹⁴⁹ In 2019, out of 282 detained persons visited by the organisation Pueblos Unidos, numerous vulnerable profiles were identified, including 13 persons who claimed to

144 Law 4686/2020 Improvement of the migration legislation, amendment of L. 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other provisions, available [here](#).

145 M. Paraskeva (2020) “Immigration Detention Becomes the Rule in New Greek Law”, available [here](#).

146 Global Detention Project (2020) “Immigration Detention in the Netherlands: Prioritising Returns in Europe and the Caribbean”, p. 6, available [here](#).

147 UN Human Rights Committee - HRC (22 August 2019) “Concluding Observations on the Fifth Periodic Report of the Netherlands”, CCPR/C/NLD/CO/5, p. 5, available [here](#).

148 Interview with Revijara Oosterhuis, Stichting LOS.

149 Servicio Jesuita a Migrantes – España (2020) “Diez años mirando a otro lado – Informe CIE 2019” available [here](#) (in Spanish); Global Detention Project (2019) “Country Report: Spain” Accem, European Council for Refugees and Exiles, p.102, available [here](#).

be minors, 11 seriously ill persons and 7 possible victims of human trafficking or gender-based violence.¹⁵⁰ The same year, Migra Stadium foundation visited 170 persons held in the CIE of Zona Franca in Barcelona and detected 63 vulnerable profiles, including 38 self-declared children, 2 persons with serious physical and mental health issues and 2 detainees who had attempted suicide.¹⁵¹

In the **United Kingdom**, a reform of the Immigration Act in 2016 introduced the 'Adults at Risk in Immigration Detention' policy, which includes guidance on vulnerability screening and assessment in detention centres.¹⁵² The policy introduces so called 'detention gatekeepers', who scrutinise all detentions proposed by the Immigration Enforcement's arresting team. Both the arresting team and the detention gatekeepers are part of the Immigration Enforcement Directorate within the Home Office. The gatekeepers do not meet the detainees face-to-face, but make their decision entirely based on the documents provided by the arresting team.

Factors of vulnerabilities might be raised by detainees themselves, by social workers, NGOs or medical practitioners, or there might be medical or professional evidence stating that the individual is at risk and that a period of detention would be likely to cause harm, for example, by increasing the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk. However, only medical or professional evidence is afforded significant weight in the decision-making process.

After the detainee's vulnerability has been asserted based on the evidence provided, the presumption against detention of vulnerable people is balanced against other factors, which include the length of detention, their compliance history and public protection concerns (which are usually assessed based on individuals' criminal history).¹⁵³ For instance, if it is assumed that a long period of detention is required before return can be implemented, it is more likely that a vulnerable person would be released. Furthermore, the detention gatekeepers can always be overruled by the United Kingdom Home Office. According to the United Kingdom Home Office Policy, the policy

*"[...] will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them."*¹⁵⁴

In practice, this policy is far from translating into the automatic release of people in situation of vulnerability. In 2017, 2,669 people were detained in the United Kingdom despite being considered vulnerable.¹⁵⁵ In 2018, out of all detainees who were recognized as vulnerable while in detention, 77.6 per cent remained in detention – with only 141 people not detained due to their vulnerability.¹⁵⁶

150 Servicio Jesuita a Migrantes – España (2020) "Diez años mirando a otro lado – Informe CIE 2019", p. 19, available [here](#) (in Spanish).

151 Ibid, p. 20.

152 UK Home Office (2018) "Immigration Act 2016: Guidance on adults at risk in immigration detention", available [here](#).

153 UK Home Office (2018) "Immigration Act 2016: Guidance on adults at risk in immigration detention", para. 14, available [here](#); Focus on Labour Exploitation - FLEX (2019) "Detaining Victims: Human Trafficking and the UK Immigration Detention System", p. 27, available [here](#).

154 UK Home Office (2018) "Immigration act 2016: Guidance on adults at risk in immigration detention", p. 5, available [here](#).

155 Labour Exploitation Advisory Group (2019) "Detaining Victims: Human Trafficking and the UK Immigration Detention System", p. 20, available [here](#).

156 Ibid, p. 21.

In addition to this policy, the “Rule 35-process”, which pre-dates the Adults at Risk-Policy and was laid down in the Detention Centre Rules 2001, requires doctors to notify the Home Office on any person whose health is likely to be injuriously affected by continued detention; who is suspected of having suicidal intentions; or who might be a victim of torture. Similar to the process under Adults at Risk, this does not lead to an automatic release but only to a re-evaluation or the decision to detain. In 2018, only an average of 22.7 per cent of reports filed by medical professionals resulted in a release, reaching as low as 13 per cent during the first quarter of the year.¹⁵⁷

Migrants who have previously served a prison sentence and are waiting to be expelled as a part of

their conviction are exempted from the automatic bail hearings as well as the entire vulnerability mechanism, which only applies to people held in Immigration Removal Centres (IRCs).

In its 2019 concluding observations on the United Kingdom, the Committee against Torture stated its concern for the routine detention of victims of torture for immigration purposes, and highlighted that: “the State party’s guidance for identifying whether a person being considered for immigration detention is an “adult at risk” 3 and rule 35 (3) of the Detention Centre Rules 2001 are largely ineffective at identifying victims of torture and have not resulted in the release from detention of the vast majority of those people who are at risk of suffering serious harm as a consequence of detention”.¹⁵⁸

Detention of stateless people

The Statelessness Index,¹⁵⁹ developed by the European Network on Statelessness, evaluates law, policy and practice on the protection of stateless persons and prevention of statelessness in 24 European countries against international and regional standards.

On the topic of detention, the Index assesses the measures states have in place to protect the rights of stateless persons and prevent arbitrary detention. Only six EU countries¹⁶⁰ have dedicated statelessness determination procedures (SDPs) in place to identify and determine who is stateless on their territory and grant them the rights and protection they are due under international law.¹⁶¹

157 UK Parliament Publications (21 March 2019) “Immigration detention – treatment of vulnerable adults in detention”, available [here](#).

158 Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (7 June 2019) “Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland”, CAT/C/GBR/CO/6, available [here](#).

159 Statelessness Index, available [here](#).

160 France, Hungary, Italy, Latvia, Luxembourg, Spain. c.f. Council of Europe (2019) “Analysis of current practices and challenges regarding the avoidance and reduction of statelessness in Europe”, para. 23, available [here](#).

161 The 1954 Convention Relating to the Status of Stateless Persons provides important minimum standards for the protection of stateless persons. Belgium, Greece, Spain, the United Kingdom and the Netherlands have acceded to the convention.

In **Belgium, Greece, the Netherlands, Spain** and the **United Kingdom**, statelessness is not considered as a factor of vulnerability in detention decisions. Furthermore, all of these countries fail to impose an obligation to identify a country of removal prior to the decision to detain. This can lead to an imposition of a detention order despite the lack of reasonable prospect of removal, thus making their detention arbitrary under European¹⁶² and international¹⁶³ law.

In **Belgium**, there is a judicial procedure to determine statelessness (SDP) and people whose statelessness has been formally recognised are usually not detained. However, stateless people are often detained several times before they succeed in being recognised by the courts as stateless.¹⁶⁴ Even then, this recognition does not result in a residence permit or any rights.

In **Greece**, statelessness is not considered juridically relevant in decisions to detain, there is no formal procedure to identify and determine statelessness, and stateless persons continue to be detained despite the absence of any reasonable prospect of removal.

In **the Netherlands**, although the law states that detention may only be imposed when there is a reasonable prospect of removal, it is not required to determine the country of removal before a decision to detain is issued, and there is no formal procedure to determine statelessness and grant protection under the 1954 Convention.¹⁶⁵

In **Spain**, despite having an SDP and stateless status, decisions to detain are issued without taking into account the particular protection needs of stateless people, and once in detention, stateless people are unable to apply for stateless status.¹⁶⁶

In the **United Kingdom** too, despite the existence of an SDP, statelessness is not explicitly considered as a factor of vulnerability and is not taken into account in decisions to detain. Furthermore, it is not legally required to identify a country of removal before detention and in practice stateless people who have either not applied for leave to remain as stateless persons or have been refused such leave are detained, at times for prolonged periods.¹⁶⁷

In addition to effective procedures to identify and determine statelessness, the European Network on Statelessness maintains that it is crucial that the risk of statelessness is regularly reassessed. Individuals can be at risk of becoming stateless while in detention due to their impossibility to return, when the country of origin does not recognise them as nationals.¹⁶⁸

162 EU Return Directive, Article 15(4), available [here](#).

163 UN Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", para. 27, available [here](#).

164 Statelessness Index, Country Profile: Belgium, available [here](#).

165 Statelessness Index, Country Profile: The Netherlands, available [here](#).

166 Statelessness Index, Country Profile: Spain, available [here](#).

167 Statelessness Index, Country Profile: United Kingdom, available [here](#).

168 European Network on Statelessness (2015) "Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners", p. 7, available [here](#).

The UNCHR and IDC Vulnerability Screening Tool

This tool, jointly produced by the UNHCR and the International Detention Coalition (IDC), provides in-depth guidance on the process of vulnerability screening and assessment, including on the necessary organisational settings and management systems.

The tool further includes recommendations on the steps to undertake once a person is identified as vulnerable, based on the presumption of liberty and the prioritisation of community-based placement and support options, open reception facilities and alternatives to detention. This tool can be adapted to the local needs and circumstances. For instance, in Cyprus, the Cyprus Refugee Council has developed a screening and assessment process based on the UNHCR/IDC's Vulnerability Screening Tool in the context of the development of case-management based alternatives to detention.¹⁶⁹

Why screening is not enough: the importance of assessment in the US administration

In the US, the automated Risk Assessment Tool underwent substantial changes under the Trump administration in 2017. Previously, the automated process, which was introduced in 2013, could lead to a recommendation to either "detain" or "release" migrants. In 2017, the automated tool has been modified to remove the "release" recommendation, which can now only be selected manually by ICE personnel. As a result of this change, the number of immigrants with no criminal history detained for immigration purposes tripled to more than 43,000 from 2016 to 2017.¹⁷⁰

169 E. Ohtani, European Programme for Integration and Migration - EPIM (2020) "Alternatives to Detention: building a culture of cooperation – Evaluation of two-year engagement-based alternatives to immigration detention pilot projects in Bulgaria, Cyprus and Poland", p. 8, available [here](#).

170 M. Rosenberg and R. Levinson (2018) "Trump's catch-and-detain policy snares many who have long called U.S. home", Reuters, available [here](#).

Good practices: piloting case management-based alternatives to detention in seven European countries

The “European Alternatives to Detention (ATD) Network” (EATDN) is a group of European NGOs which aims to reduce and end immigration detention by building evidence and momentum on engagement-based alternatives.¹⁷¹ Each of the pilot projects in seven European countries (**Belgium, Bulgaria, Cyprus, Greece, Italy, Poland**, and the **United Kingdom**) has developed a screening and assessment process to examine personal data, information about the person’s immigration history, vulnerabilities and community ties. Information obtained from the screening and assessment process informs the manner case management is delivered to the individuals, responding to their personal circumstances, needs as well as strengths.

82 per cent of the individuals who participated in the programme in **Bulgaria, Cyprus** and **Poland** were in situation of vulnerability.¹⁷² After two years of project, 99 per cent of the participants reported that the case management programme had a positive impact on their ability to participate in informed decision making and 96 per cent reported positive impact on their ability engage with the immigration procedures over time.

171 European Alternatives to Detention Network, available [here](#).

172 E. Ohtani, European Programme for Integration and Migration - EPIM (2020) “Alternatives to Detention: building a culture of cooperation – Evaluation of two-year engagement-based alternatives to immigration detention pilot projects in Bulgaria, Cyprus and Poland”, available [here](#).

IV. Insufficient access to legal aid, services and NGO access to detention centres

A. EU legal framework

As discussed above, factors of vulnerability often need to be raised by lawyers, NGOs and other visitors. Furthermore, regular presence of medical personnel in detention centres is key to immediately identify any factors of vulnerability related to mental and physical health as well as existing disabilities.

For this reason, access to legal and medical aid, NGOs' services and interpretation is pivotal to ensure the timely identification of factors of vulnerability.

With regard to the right to legal aid, the EU Return Directive establishes that:

*“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.”*¹⁷³

And that:

“Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to

*conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.”*¹⁷⁴

As regards NGOs' access to detention centres, the Directive establishes that:

*“Relevant and competent national, international and nongovernmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.”*¹⁷⁵

As analysed by Majcher, the final text agreed during the negotiations on the EU Returns Directive is weaker than the European Parliament's proposal, and the fact that NGOs might require authorisation before visiting detention centres risks to seriously undermine their monitoring role.¹⁷⁶ Moreover, this provision fails to comply with the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which require visits to be frequent and unannounced.¹⁷⁷

173 EU Return Directive, Recital 11, available [here](#).

174 EU Return Directive, Article 13.4, available [here](#).

175 EU Return Directive, Article 16(4), available [here](#).

176 I. Majcher (2019) “The European Union Returns Directive and its Compatibility with International Human Rights Law”, Leiden, The Netherlands: Brill, p. 526, available [here](#).

177 Council of Europe – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2009) “Safeguards for irregular migrants deprived of their liberty”, para 89, available [here](#).

The right to see a doctor is also weakly framed in the EU Return Directive, which only provides the right for “emergency health care and essential treatment of illness”¹⁷⁸ – contrary to international human rights law recognising the right to the

highest attainable standard of health¹⁷⁹ as well as equal access to preventative, curative and palliative health care, regardless of their legal status and documentation.¹⁸⁰

B. National level practice

Legal counsel and medical care

In **Belgium**, access to legal counsel is guaranteed by law. Nonetheless, the practical implementation of this right is weakened by a serious underfunding of legal support, due to which lawyers are compensated by the state up to one or two years later and for uncertain amounts; the remote location of detention centres; and the frequent lack of cooperation between the detention centres and lawyers. Vluchtelingenwerk Vlaanderen estimated that less than a quarter of detained migrants receive a visit from their lawyer.¹⁸¹ Moreover, detainees often have to wait for relatively long periods before a lawyer is appointed.

In **Greece**, access to legal aid for detainees in administrative detention is very limited in practice. Detainees are often unaware of the reasons and length of their detention. Furthermore, while according to the national legal framework migrants

should undergo a medical screening before detention, in practice, access to health professionals is often limited by the insufficient presence of medical personnel in detention centres and the lack of interpretation during medical visits. Medical care is almost absent in de facto detention centres.

In **the Netherlands**, many detainees are not informed of their rights and have difficulties accessing legal counsel. The Immigration Detention Hotline¹⁸² assists detainees in submitting complaints and throughout the procedures that follow. However, not all detainees are aware of this possibility, as they only receive information from other detainees or in certain cases by the detention officers. According to the Penitentiary Principles Act,¹⁸³ detainees have the right to file complaints to the Supervisory committee, denounce incidents such as mistreatment by guards or other detainees

178 EU Return Directive, Article 16(3), available [here](#).

179 International Covenant on Economic, Social and Cultural Rights -ICESCR (16 December 1966, entry into force 3 January 1976), art. 12, available [here](#).

180 UN Committee on Economic, Social and Cultural Rights (2 July 2009) “General Comment No. 20 Non-Discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)”, E/C.12/GC/20, available [here](#); UN Committee on the Elimination of Racial Discrimination (23 February-12 March 2004) “General Recommendation 30 Discrimination against non-citizens”, CERD/C/64/Misc.11/rev.3, available [here](#).

181 Vluchtelingenwerk Vlaanderen (2016) “Gesloten Centra voor Vreemdelingen in België: Een Stand van Zaken”, available [here](#).

182 Immigration Detention Hotline - Meldpunt Vreemdelingendetentie, available [here](#).

183 Penitentiary Principles Act (Penitentiaire beginselenwet) (18 July 1998), available [here](#).

and challenge decisions taken by the director or on their behalf.¹⁸⁴ However, the long delays in the assessment of complaints make this mechanism de facto ineffective, and very few detainees report seeing their situation improved after filing a complaint.

In **Spain**, the regulation that governs CIEs provides that detainees should have access to medical care, pharmaceutical assistance and other health-related provisions. Yet, in practice access to legal, medical, psychological and social support is restricted and discontinuous.¹⁸⁵

In the **United Kingdom**, cuts to legal aid introduced in 2013 removed all non-asylum immigration work from the scope of legal aid. Moreover, transfers of detainees between detention centres often hinder

detainees' access to legal advice.¹⁸⁶ According to a 2019 survey by Bail for Immigration Detainees (BID), almost a third of immigration detainees did not have a solicitor, and 29 per cent had lost their legal representative as a result of a transfer to another removal centre.¹⁸⁷ In theory, people held in IRCs can book a 30-minute appointment with a legal aid solicitor, yet according to Bail for Immigration Detainees, in 2019 only 42 per cent of detainees were taken as clients after the initial appointment and 50 per cent of those without a lawyer responded they did not have one because they could not afford it.¹⁸⁸ Access to legal aid is particularly critical considering that more than half of Home Office immigration decisions were overturned through an appeal procedure as of March 2019, bringing to light the poor quality of migration detention decisions.¹⁸⁹

NGO access to detention centres

Civil society organisations also face **problems when accessing detention centres**. In the five states analysed by this report, NGOs report having access to detention centres, but often facing difficulties or administrative burdens to exercise this right. Access is often granted only based on a bilateral agreement. Moreover, access to a detention centre does not equate with the right to set up official structured monitoring system, which is often lacking in practice.

In **Greece**, NGOs' right to access detention centres was severely curtailed by Law 4636/2019, which

excludes non-registered NGOs from the provision of any service or assistance in detention centres.¹⁹⁰

In **Spain**, NGO access to detention centres has improved since the CIE regulation was enacted and the Ministry of Interior and the Spanish Red Cross signed a contract in 2015.¹⁹¹ However, in December 2017, the Spanish Ombudsman reported that several provisions in the regulation had yet to be fully implemented, and recommended further measures to ensure the right of detainees to contact NGOs.¹⁹²

184 Ibid.

185 Asylum Information Database (2019) "Country Report: Spain", Accem, European Council for Refugees and Exiles, p. 101, available [here](#).

186 Global Detention Project (2016) "United Kingdom Immigration Detention Profile", p.15, available [here](#).

187 Bail for Immigration Detainees (2019) "Legal Advice Survey – Spring 2019", available [here](#).

188 Bail for Immigration Detainees (2019) "Legal Advice Survey – Spring 2019", available [here](#).

189 The Independent (13 June 2019) "More than half of immigration appeals are successful, figures show", available [here](#).

190 President of the Hellenic Republic (1 November 2019) "ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4636/2019, Περὶ Διεθνούς Προστασίας και άλλες διατάξεις", Article 47, available [here](#).

191 Asylum Information Database (2019) "Country Report: Spain" Accem, European Council for Refugees and Exiles, p. 102, available [here](#).

192 Asylum Information Database (2019) "Country Report: Spain" Accem, European Council for Refugees and Exiles, p. 102, available [here](#).

Ministerial Decision 3063/2020: shrinking the civic space for NGOs working on migration in Greece

The Ministerial Decision 3063/2020 issued on 14 April 2020 and the Ministerial Decision 10616/2020 of 9 September 2020 introduced new measures wherein all Greek or foreign NGOs as well as their members, staff and volunteers would have to register with the NGO Members Registry to work in the fields of asylum, migration or integration.

NGOs working in Greece have expressed concern that this policy will further shrink the already limited civil society space in the country. These concerns were confirmed by an Opinion of the expert council on NGO law of the Council of Europe, which found that “onerous registration and certification requirements, coupled with the wide discretions on the competent authorities to refuse to register or certify applicant NGOs”, will further restrict civil society space in Greece, and increase “significantly and disproportionately the control of the State over the work of NGOs in the field of asylum, migration and social inclusion.”¹⁹³

Language barriers

Language barriers represent another major issue when detainees are expected to raise factors of vulnerability on their own initiative.

In **Greece**, despite the legal obligation to provide information on the reasons for detention and rights to appeal in a language that is understood,¹⁹⁴ gaps in the provision of interpretation and a de facto lack of free legal aid severely restrict people’s ability to challenge detention orders.¹⁹⁵ Interpretation services are particularly scarce in police stations and pre-removal detention centres. Following his 2013 visit to Greece,

the former UN Special Rapporteur on the human rights of migrants found that detainees were often not provided with information in a language they understand, had limited access to legal assistance, and received little or no professional interpretation assistance.¹⁹⁶ In a recent visit in March 2020, the Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) reported that in all the centres visited there was an almost total absence of interpretation services, including translations of detention or deportation orders.¹⁹⁷

193 Council of Europe – Expert Council on NGO law (2 July 2020) “Opinion on the compatibility with European standards of recent and planned amendments to the Greek legislation on NGO registration”, available [here](#) and Council of Europe – Expert Council on NGO law (23 November 2020) “Addendum to the opinion on the compatibility with European standards of recent and planned amendments to the Greek legislation on NGO registration”, available [here](#).

194 Law 3386/2005, Article 76(3) and Law 3907/2011, Article 30(2).

195 Asylum Information Database (2019) “Country Report: Greece”, Greek Council for Refugees, European Council for Refugees and Exiles, p. 23, available [here](#).

196 Special Rapporteur on the human rights of migrants (2013) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/23/46/Add.4, available [here](#); Global Detention Project (2019) “Greece Immigration Detention”, available [here](#).

197 Council of Europe - European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (19 November 2020) “Report to the Greek Government of the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, p.12, available [here](#).

The Committee observed that authorities mainly rely on fellow detainees with basic Greek or English language skills to act as interpreters and routinely experience difficulties understanding detainees and identifying their needs.¹⁹⁸ Most detainees reported having signed documents in Greek for which no translation was provided, while being unaware of their content or implications.¹⁹⁹

In **Spain**, many detainees speak Arabic while the detention staff usually only speaks Spanish. Interpreters are only hired for the duration of a brief hearing before the investigative judge, but not when the detainees meet with doctors or lawyers. Furthermore, the reasons for detention need to be communicated to the detainee in writing, but it is not specified that this should be translated in a language that is understood. In practice, documents are usually provided only in Spanish.²⁰⁰

198 Ibid.

199 Ibid.

200 Statelessness Index, Country Profile: Spain, available [here](#).

V. Detention of children

Reports and medical studies demonstrate that immigration detention, even for short times and in relatively humane environments, has a negative impact on child development.²⁰¹ This can include behavioural dysregulation, post-traumatic stress, depression and suicidal thoughts, as well as physical symptoms (e.g. headaches, pains, new onset of bed wetting, coughing or wheezing) linked to the stress in the child, family and environment.²⁰²

Detention of families also contributes to impairing child development and creating a stressful situation for children and their families, with findings from medical research in the United Kingdom highlighting that all interviewed parents had symptoms of anxiety, and most had symptoms of depression with suicidal ideation.²⁰³

A. Legal framework

International legal framework

UN experts agree that detaining children based on the children's or their parents' migration status is always a human rights violation and is never in the best interests of a child.²⁰⁴ This applies both to unaccompanied and separated children, as well as to children with their families.²⁰⁵ In his 2018 annual report, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable

standard of physical and mental health highlighted that "for some [children], [detention] is the worst experience of their lives."²⁰⁶

With the adoption of the UN Global Compact on Safe, Orderly and Regular Migration, governments committed to ending child detention and promoting community-based care arrangements.²⁰⁷

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- 201 Australian Human Rights Commission (2014) "The forgotten children: National Inquiry into Children in Immigration Detention", available [here](#); M. Beder, M. Cohen, K. Hui, C. Jimenez on behalf of 2002 individual and 34 organisational signatories (12 July 2018) "End immigration detention: an open letter", the Lancet, available [here](#).
- 202 A. Lorek, K. Ehntholt et. al. (2009) "The mental and physical health difficulties of children held within a British immigration detention center: a pilot study", available [here](#).
- 203 Ibid.
- 204 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).
- 205 UN Secretary General, UN Independent Expert for the Global Study on Children Deprived of Liberty (2019) "Global Study on Children Deprived of Liberty: note/ by the Secretary-General", A/74/136, available [here](#); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (28 August 2013) "General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families", CMW/C/GC/2, available [here](#); Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, available [here](#); Special Rapporteur on the human rights of migrants, Felipe González Morales (20 July 2020) "Ending immigration detention of children and providing adequate care and reception for them", A/75/183, available [here](#).
- 206 Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (10 April 2018) "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" A/HRC/38/36, available [here](#).
- 207 Resolution adopted by the General Assembly on 19 December 2018, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, para. 29, available [here](#).

EU Legal Framework

The EU Returns Directive establishes the obligation for member states to take into due account the best interests of the child in the implementation of the Directive.²⁰⁸ Article 17 further sets that “unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.”

The Council of Europe Committee for the Prevention of Torture standards on immigration detention clearly asserted that “detention cannot be justified solely on the basis of the child being

unaccompanied or separated, or on their migratory or residence status, or lack thereof”.²⁰⁹ The Parliamentary Assembly and the Commissioner for Human Rights have further stated that unaccompanied children should not be detained.²¹⁰

In its jurisprudence, the European Court of Human Rights has also repeatedly found that child immigration detention can amount to torture and degrading treatment, arguing that the best interests of the child must always prevail.²¹¹

Data on immigration detention of children

In its 2019 Global study on children deprived of liberty, published on the thirtieth anniversary of the Convention on the Rights of the Child, Independent Expert Manfred Nowak found that, around the world, at least 330,000 children are detained for migration-related purposes per year, in at least 77 countries.²¹²

While in most countries there are no reliable statistics on the number of children in migration detention, the EU Fundamental Rights Agency highlights that EU member States which tend to detain children more often (i.e. France, Greece, Malta, Poland and Slovenia) witnessed an increase in child detention between 2018 and 2019.²¹³

208 EU Return Directive, Recital 22, Article 5, available [here](#).

209 Council of Europe – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2017) “Immigration Detention”, CPT/Inf(2017)3, p. 9, available [here](#).

210 Parliamentary Assembly of the Council of Europe (28 January 2010) “Resolution 1707 on detention of asylum seekers and irregular migrants in Europe”, paragraph 9.1.9, available [here](#); Parliamentary Assembly of the Council of Europe (3 October 2014) “Resolution 2020: the alternatives to immigration detention of children”, paragraph 3, available [here](#); Council of Europe - Commissioner for Human Rights (25 June 2010) “Positions on the rights of minor migrants in an irregular situation”, CommDH/PositionPaper (2010)6, available [here](#); Council of Europe – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2017) “Immigration Detention”, CPT/Inf(2017)3, p. 9, available [here](#).

211 See *Popov v. France* App no 39472/07 and 39474/07 (ECtHR, 19 January 2012), available [here](#); *Muskhadzhiyeva and others v. Belgium* App no 41442/07 (ECtHR 19 January 2010), available [here](#); *Kanagaratnam and others v. Belgium* App no 15297/09 (ECtHR 13 December 2011), available [here](#). See: European Court of Human Rights (January 2018) “Factsheet – Unaccompanied migrant minors in detention”, available [here](#); and European Court of Human Rights (April 2018) “Factsheet – Accompanied migrant minors in detention”, available [here](#).

212 UN Secretary General, UN Independent Expert for the Global Study on Children Deprived of Liberty (2019) “Global Study on Children Deprived of Liberty: note/ by the Secretary-General”, A/74/136, available [here](#).

213 European Union Agency for Fundamental Rights (2020) “Fundamental Rights Report 2020”, available [here](#).

B. National level practice

Despite the limitations set by the Return Directive, child detention is widely used across the EU²¹⁴ and alternatives to detention are underused and applied for only a small number of individuals or families.²¹⁵

In **Belgium**, Article 74/19 of the Aliens Act²¹⁶ forbids the detention of unaccompanied children, while detention of children with family is permitted by a law from 2011.²¹⁷ In 2008, however, Belgium had discontinued the practice of detaining children with families, after a condemnation by the European Court of Human Rights²¹⁸ and in anticipation of two further decisions²¹⁹ on the issue. In this period, the government developed the so-called “return houses”, a variety of accommodation quarters or “open family units” in which undocumented families or unaccompanied minors are housed while waiting to be returned and where one accompanying adult (parent or person with parental authority) must always be present.²²⁰

However, in October 2014 the government announced the plan to build a new detention

centre for children and families close to the Brussels Airport. In 2018, the centre was put into use, and child detention was reintroduced by Royal Decree.²²¹ A total of 20 children were detained between August 2018 and February 2019. Since the centre opened, several stakeholders have called for the permanent closure of detention centres for families and children. In 2018, Platform Minors in Exile, Caritas International Belgium, CIRÉ, Jesuit Refugee Service Belgium, Vluchtelingenwerk Vlaanderen and UNICEF Belgium launched a campaign asking the Belgian Federal Government to “immediately cease detention of children in closed centres.”²²² The campaign was joined by more than 325 civil society organisations.²²³

Furthermore, fifteen organisations seized the Council of State, obtaining the suspension of the Royal Decree on the grounds that the possibility to detain families with children for up to one month, and in circumstances where the children can be exposed to particularly loud noise due to its vicinity to the airport, can lead to irreversible damage.²²⁴

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- 214 The EU-funded evaluation of the implementation of the Returns’ Directive found that 17 EU countries reportedly detain unaccompanied children (15 member states, and 2 Schengen Associated Countries) and 19 countries detain families with children. The evaluation notes that some of these countries detain unaccompanied children only occasionally in practice (Austria, Czech Republic, Lithuania, Luxembourg, Malta, Slovenia and Sweden). 11 countries reported that they do not detain unaccompanied children in practice and 8 reported that they do not detain families with children. See: Matrix, ICMPD (2015) “Evaluation on the application of the Return Directive (2008/115/EC)”, available [here](#) c.f. PICUM(2019) “Child Immigration Detention in the EU”, available [here](#).
- 215 A. Bloomfield, E. Tsourdi, J. Pétin, P. de Bruycker (ed.) (January 2015) “Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation”, available [here](#); c.f. PICUM (2019) “Child Immigration Detention in the EU”, available [here](#).
- 216 Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 31 December 1980, available [here](#).
- 217 Loi insérant un article 74/9 dans la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, en ce qui concerne l'interdiction de détention d'enfants en centres fermés, 16 November 2011. Available [here](#).
- 218 Mubilanzila Mayeka and Kaniki Mitunga v Belgium (nr. 13178/03, 12.10.2006), available [here](#).
- 219 Muskhadzhiyeva a.o. v. Belgium (nr. 41442/07, 19.01.2010), available [here](#); Kanagaratnam and others v Belgium (nr. 15297/09, 13.12.2011), available [here](#).
- 220 For further analysis, see: Plate-forme Mineurs en exil (forthcoming in January 2021) «Les maisons de retour en Belgique: une alternative à la détention à part entière, efficace et respectueuse des droits de l'enfant? Décembre 2020 »; Plate-forme Mineurs en exil (2015) “Détention des enfants en famille en Belgique: Analyse de la théorie et de la pratique”, available [here](#).
- 221 Royal Decree of 22 July 2018, modifying the Royal Decree of 2 August 2002 which regulates the regime and conditions of the premises managed by the Foreigners’ Office, where a foreigner is detained. The 2018 Royal Decree was published on the Official Gazette (Moniteur Belge) on 1 August 2018.
- 222 You Don't Lock Up a Child. Period, available [here](#).
- 223 Ibid.
- 224 Kaelen, R. (2019) “Fighting against the detention of migrant children in Belgium”, available [here](#); Gangneux, E. (2019) “Lawyer’s voice: defending the rights of children in migration detention in Belgium through coordinated strategic litigation”, available [here](#).

As a consequence of the partial annulment of the Royal Decree by the Conseil d'Etat, since April 2019, migrant families with children cannot be detained in practice.²²⁵ Moreover, the Belgium Coalition programme²²⁶ agreed in September 2020 to commit to a general ban on child detention for migration purposes in the country, however, it remains unclear whether this will actually lead to legislative changes.

Furthermore, unaccompanied children who are apprehended in connection with irregular border crossings can still be detained whenever there is a doubt on the age of the person and while awaiting for the results of the medical age assessment procedure, for a maximum of three days renewable for other three days.²²⁷

In **Greece**, Law 4686/2020, adopted in May 2020, allows for the detention of children “only in extreme need, always guided by their best interests and if it is proved that alternatives and less restrictive measures cannot be applied.”²²⁸ In practice, however, many unaccompanied children are detained for

prolonged periods in police stations or pre-removal facilities in very poor conditions. The new law further removes the presumption of minority of those claiming to be under 18, thus allowing for their detention together with adults until a conclusion to the age assessment procedure is reached.²²⁹

In addition, Law 4686/2020 explicitly allows the detention (so-called “protective custody”) of unaccompanied children in police stations and pre-removal facilities. This form of *de facto* deprivation of liberty is regarded by Greek authorities as a precautionary administrative measure, and thus has no maximum time limit.²³⁰ According to the National Center for Social Solidarity, 331 children were in police custody awaiting transfer to a shelter on 31 March 2020, a sharp increase from the 180 children in this situation in January 2020.²³¹ Following increasing international pressure, the Migration and Asylum Minister of Greece Notis Mitarakis made an announcement in November 2020 stating the government’s intention to end the practice of “protective custody” for unaccompanied minors.²³²

Focus on jurisprudence: ‘Protective custody’ as a violation of the right to liberty

In *H.A. and others v. Greece*, the ECtHR found that the practice of detaining children in police stations under “protective custody” and the lack of time limits represents a violation of the right to liberty and security under Article 5(1)f of the European Convention on Human Rights. The Court further found that the lack of formal qualification as detention seriously undermines the right to an effective remedy.²³³

225 E. Gangneux (2019) “Lawyer’s voice: defending the rights of children in migration detention in Belgium through coordinated strategic litigation”, available [here](#).

226 Rapport des formateurs (30 September 2020) “Pour une Belgique prospère, solidaire et durable”, available [here](#).

227 See Plate-forme Mineurs en exil (2020) “Avis sur le projet de loi modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers en ce qui concerne l’interdiction de mettre des mineurs en détention (DOC 55 0892/001).» available [here](#).

228 Law 4686/2020 Improvement of the migration legislation, amendment of L. 4636/2019 (A’ 169), 4375/2016 (A’ 51), 4251/2014 (A’ 80) and other provisions, available [here](#).

229 M. Paraskeva (2020) “Immigration Detention Becomes the Rule in New Greek Law”, available [here](#).

230 Ibid.

231 Human Rights Watch (14 April 2020) “Greece: Free Unaccompanied Migrant Children”, available [here](#).

232 Human Rights Watch (19 November 2020) “Greece Commits to End “Protective” Child Detention”, available [here](#).

233 *H.A. and others v. Greece*- App no 19951/16 (28 February 2019, ECtHR), available [here](#).

In **the Netherlands**, detention of unaccompanied children is permitted if they are suspected or convicted of a crime, if they failed to comply with reporting duties or measures restricting their freedom, if there is a real risk of absconding or if removal can be carried out within 14 days, which is the maximum length of detention for children.²³⁴ Ten unaccompanied children were detained in the first six months of 2019.²³⁵

In **Spain**, when children are identified while in detention, they should be released and placed in protection institutions according to national regulation.²³⁶ However, PICUM members report that unaccompanied children are often detained together with adults, although their detention is forbidden by the national legal framework, because they do not undergo an age assessment procedure, or they are unable to prove their age. In some cases, children who refuse to undergo the age assessment procedure after producing evidence of their minority are considered to be adults by the Juvenile Public Prosecutor for the mere fact of refusing to undergo the additional procedure, and in complete disregard of the evidence they already produced (including certificates showing their age).

Moreover, lawyers and NGOs are frequently refused access to hearings before the Juvenile Public Prosecutor, which is in charge of deciding on whether someone is a minor or not, leading to the fact that children are often not provided sufficient assistance during the procedure.

In 2018, the Spanish Ombudsman identified 88 children in detention centres who were not identified as minors at points of access.²³⁷ In 2019 and thereafter, the UN Committee on the Rights of the Child has repeatedly raised concerns on the age assessment procedures in Spain, finding in particular that the lack of safeguards, the absence of a representative assisting the child and the “almost automatic dismissal” of the valid birth certificate provided by consular services could amount to breaches of the Convention of the Rights of the Child.²³⁸

In the **United Kingdom**, the Government announced in 2010 its intention to end detention of children for migration purposes.²³⁹ Measures that followed, including the closure of several pre-departure facilities, resulted in a sharp decline in the number of children in detention.²⁴⁰ However, in 2019, 73 children were detained by the Home Office for migration purposes.²⁴¹

234 Asylum Information Database (2019) “Country Report: Netherlands”, VluchtelingenWerk Nederland, European Council for Refugees and Exiles, p. 79, available [here](#).

235 Ibid.

236 Asylum Information Database (2019) “Country Report: Spain” Accem, European Council for Refugees and Exiles, p. 94, available [here](#).

237 Defensor del Pueblo (2019) “Informe Anual 2018 – Mecanismo Nacional de Prevención”, p.70, available [here](#).

238 Committee on the Rights of the Child (2019) “Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 16/2017”, CRC/C/81/D/16/2017, p. 13, available [here](#). See also: Committee on the Rights of the Child (28 September 2020) “Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 28/2017”, CRC/C/85/D/28/2017, available [here](#); Committee on the Rights of the Child (28 September 2020) “Dictamen aprobado por el Comité en relación con el Protocolo Facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de comunicaciones respecto a la comunicación núm. 26/2017”, CRC/C/85/D/26/2017, available [here](#); Committee on the Rights of the Child (28 September 2020) “Views adopted under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 40/2018”, CRC/C/85/D/40/2018, available [here](#).

239 Deputy Prime Minister Nick Clegg’s speech on child detention, delivered on 16 December 2010, available [here](#).

240 British Refugee Council (2020) “Detention of Children May 2020”, available [here](#).

241 The Migration Observatory (20 May 2020) “Immigration Detention in the UK”, available [here](#).

The gender dimension of detention

Despite a lack of gender-disaggregated data in the area of detention,²⁴² evidence shows that women face particular obstacles which can exacerbate vulnerabilities in detention.²⁴³ In interviews conducted by the Devas Project in the European Union, women aged between 18 and 24 reported they were exposed to physical and verbal abuse by staff and other detainees.²⁴⁴ 90 per cent of women within this age range expressed a need for better medical care.²⁴⁵ Findings also showed that negative health impacts associated with detention, in particular regarding mental health, disproportionately affect women and children.²⁴⁶

In **Belgium**, the only two provisions related to women in detention are the prohibition of deporting women after 28 weeks of pregnancy,²⁴⁷ and that women should not give birth inside a detention centre.²⁴⁸ In August 2019, a new detention centre for women opened in Holsbeek, with a capacity to host 28 women and where the majority of the staff is female – from social workers to medical personnel. However, some women are still detained in the Caricole mixed centre, where women and men share the same common rooms. As men detainees widely outnumber women detainees, some women reported feelings of discomfort in particular with regard to accessing the common areas.

In **Greece**, Law 4636/2019 states that women should be detained separate from men, unless they are members of their family or there is consent, while pregnant women should not be detained during pregnancy or the first six months after delivery.²⁴⁹ In practice, women are generally held separately from men in pre-removal centres and they are usually guarded by female police. Nevertheless, cases have been reported where women were held for long periods in police stations and deprived of access to basic hygiene products. Following serious incidents of sexual abuses in detention centres,²⁵⁰ in autumn 2020 all women detainees were moved to the Amygdaleza detention centre, where the conditions are however also quite poor, and have triggered in the past several incidents of attempted suicide.²⁵¹

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- 242 The unavailability of gender-disaggregated data on immigration detention reflects the more general inadequacy of data collection in this area. Nonetheless, Eurostat data indicates that four fifths (80.3%) of the people found to be irregularly in the European Union in 2019 were male. Source: Eurostat (2020) "Enforcement of immigration legislation statistics", available [here](#). See also Red Cross (2020) "Reducing the use of immigration detention: lessons from Bulgaria", available [here](#).
- 243 Organisation of American States (2020) "IACHR Expresses Its Concern Over Reports of Sterilizations and Surgical Interventions Without Consent in Migrant Detention Centers in the United States", available [here](#); Global Rights for Women (2020) "Violence Against Women and Girls in ICE Custody", available [here](#); The Texas tribune (2020) "ICE guards "systematically" sexually assault detainees in an El Paso detention center, lawyers say", available [here](#); The Conversation (2018) "How Canada's immigration detention system spurs violence against women", available [here](#); EuroMed Rights (2008) "Violence Against Migrant and Refugee Women in the Euromed Region" p.37-48, available [here](#); PICUM (2012) "Strategies to End Double Violence Against Undocumented Women Protecting Rights and Ensuring Justice" p. 23; E. Cox, T. Priest (2005) "Women in Immigration Detention more questions than answers".
- 244 The Devas Project (2010) "Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union", Jesuit Refugee Service – Europe, available [here](#).
- 245 Ibid.
- 246 Ibid, p. 9.
- 247 Service Public Federal Interieur (2009) "Circulaire relative à l'identification d'étrangers en séjour irrégulier", available [here](#).
- 248 Arrêté royal fixant le régime et les règles de fonctionnement applicables aux lieux situés sur le territoire belge, gérés par l'Office des étrangers, où un étranger est détenu, mis à la disposition du Gouvernement ou maintenu, en application des dispositions citées dans l'article 74/8, § 1er, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, available [here](#).
- 249 President of the Hellenic Republic (1 November 2019) "Law No. 4636/2019 Government Gazette 169 / A / 1-11-2019 On International Protection and other provisions. ", article 48 (4), available [here](#) (in Greek).
- 250 The Press Project (7 August 2020) "Καταγγελία για σεξουαλική κακοποίηση μετανάστριας από αστυνομικό στην Πέτρου Ράλλη", available [here](#).
- 251 To Mov (29 October 2020) "The detainees in Amygdaleza are in despair: one suicide attempt after another", available [here](#).

In **the Netherlands**, women are a minority among the total detainee population and families with children and pregnant women are held in separate facilities. In 2013, the State Secretary wrote that pregnant women in their last six weeks of pregnancy are entitled to a postponement of their return under Article 64 of the Aliens Act 2000, which lasts six weeks after the birth. During that period the women are considered to be regularly residing in the country and cannot be detained.

In the **United Kingdom**, an unannounced visit of the Her Majesty's (HM) Inspectorate of Prisons to women detention centre Yarl's Wood in 2015 found that 45 per cent of women felt unsafe in the detention centre.²⁵² Many women denounced pervasive sexual harassment. In addition, interviews conducted by Women for Refugee Women in 2012 and 2013 in the same detention centre revealed that 93 per cent of detained women interviewed felt depressed and more than 50 per cent had considered suicide. More than 85 per cent were victims of torture or sexual violence.²⁵³ The latest inspection of Yarl's Wood Immigration Removal Centre showed that conditions relatively improved; nevertheless, 28 pregnant women were detained in the six months prior to the inspection and the HM Chief Inspector of Prisons expressed concern that women who had been victim of torture continued to be detained.²⁵⁴ Insufficient female staff in detention centres has also been reported, meaning that health screenings and searches are often done by male medical professionals or guards, in some cases causing further delays until female staff is available. This often results in reduced access, substandard quality of care and limited availability of medication for women in detention, especially for pregnant women and women with complex, overlapping needs.²⁵⁵

Often excluded from group-based definitions of vulnerability, men in detention also face specific vulnerabilities, often linked to their young age, experiences of trauma and abuses, and their migratory journey.²⁵⁶ In some countries, detention centres for men are more densely populated, leading to higher risks of conflict with the staff and poorer conditions.

252 HM Chief Inspector of Prisons (2015) "Report on an Unannounced Inspection of Yarl's Wood Immigration Removal Centre", available [here](#).

253 Women for Refugee Women (2014) "Detained: Women asylum-seekers locked up in the UK", available [here](#).

254 HM Chief Inspector of Prisons (2017) "Report on an Unannounced Inspection of Yarl's Wood Immigration Removal Centre", available [here](#); Asylum Information Database (2019) "Country Report: United Kingdom" Refugee Council, European Council for Refugees and Exiles, available [here](#).

255 Global Detention Project (2016) "United Kingdom Immigration Detention Profile", p.14, available [here](#).

256 The Devas Project (2010) "Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union", Jesuit Refugee Service – Europe, available [here](#); Australian Parliament, Joint Select Committee on Australia's Immigration Detention Network (2012) "Final Report", para.5.18, available [here](#); InfoMigrants (2019) "Young male refugees struggle with disappointment and mental health issues", available [here](#); Movemen (2018) "Male refugees in Germany. Needs, Challenges, and Resources", available [here](#). See also: Fundamental Rights Agency (2017) "Current migration situation in the EU: Torture, trauma and its possible impact on drug use", p. 3, available [here](#) on the high incidence of victims of torture, rape or other sexual violence or abuse among male asylum seekers in Greece and Accem (2020) "La trata tiene también género masculino", available [here](#) for an analysis of the insufficient consideration of male victims of trafficking in human beings. Lastly, the results of interviews conducted by UNDP with 1970 individuals who migrated through irregular routes from Africa to Europe, originating from 39 African countries showed that, in Europe, "women reported lower levels of deprivation and were more successful in accessing a range of services. They were also in more settled accommodation than male respondents." Source: UNDP (2019) "Scaling Fences: Voices of Irregular African Migrants to Europe", p. 6, available [here](#).

Transgender, intersex and gender non-conforming persons in detention regularly experience discrimination and are vulnerable to a number of harms: physical and sexual violence, solitary confinement as well as verbal and psychological abuse. In the absence of gender recognition and gender responsive policies, transgender, intersex and gender non-conforming persons are often misclassified and detained in facilities according to their sex assigned at birth rather than their self-determined gender identity.²⁵⁷

Transgender women in particular are among the most vulnerable to physical and sexual abuse, especially when they are detained with men.²⁵⁸ In some cases, the exposure to these threats leads detainees to request being separated from the general population, while in other cases detention authorities forcibly subject transgender, intersex and gender non-conforming persons to 'administrative segregation', under conditions that are indistinguishable from solitary confinement.²⁵⁹ Although generally used as punitive measures, administrative segregation or solitary confinement are presented as a protective measure in these cases. However, reduced access to services, outdoors time, and social contact coupled with marginalisation and abuse, often lead to rapid mental health deterioration.²⁶⁰

Transgender, intersex and gender non-conforming persons also experience difficulties in accessing medical services, hormones or HIV treatment, which could have a negative impact on their health if discontinued.²⁶¹

257 International Detention Coalition (2016) "LGBTI Persons in Immigration Detention", available [here](#).

258 Forced Migration Review (2013) "Sexual Orientation and gender identity and the protection of forced migrants", Issue 42, p.47, available [here](#).

259 International Detention Coalition (2016) "LGBTI Persons in Immigration Detention", available [here](#).

260 Forced Migration Review (2013) "Sexual Orientation and gender identity and the protection of forced migrants", Issue 42, p.48, available [here](#).

261 Ibid.

Conclusion

The analysis above draws a clear picture of how vulnerabilities are too often overlooked in immigration detention decision making and practices. This results in situations in which individuals are detained while suffering from pre-existing (physical and mental) health diseases, being survivors of torture or ill-treatment, or despite their minor age. In these cases, even short periods of detention can be extremely harmful, leading to deterioration of their health, retriggering past traumatic experiences and negatively affecting their development.

In the five countries analysed in this report, situations of vulnerability are defined and interpreted differently. The lack of an inclusive definition of vulnerability often leaves out individuals who do not fit in the closed list of categories, and in particular those whose vulnerabilities are exacerbated as a consequence of detention itself. Mental illnesses, despite being an important factor affecting individuals' situations of vulnerability, are rarely included in the definition. Existing operational tools, such as the IDC / UNHCR Vulnerability Screening Tool, are rarely used to develop a screening and assessment process that officials can implement.

The **Netherlands**, **Spain** and **Greece** are characterised by the lack of standard vulnerability screening and assessment practices. In practice, vulnerabilities can be raised by migrants, their lawyers or medical professionals, but there is no official procedure prior to or during detention. In **Belgium** and in the **United Kingdom**, where some forms of screening procedures exist, vulnerability concerns can still be outweighed by migration control purposes.

Factors of vulnerability frequently need to be raised by lawyers, NGOs and medical personnel, who are trusted by migrants. For this reason, access to legal and medical aid, NGOs' services and interpretation is key to ensure the timely identification of factors of vulnerability. In practice, however, these rights are not always effective.

As analysed in this report, ensuring that individuals in situations of vulnerability are adequately protected is a positive obligation under international and EU law. To comply with this obligation, it is essential that a situation of vulnerability is adequately screened prior to any decision affecting their freedom of movement and right to liberty. The results of this individualised screening should guide any migration enforcement decision, based on the principles of proportionality, necessity and presumption against detention.²⁶² When necessary, these factors should also be considered to determine the provision of additional support and guidance, in order to ensure that individuals are able to meet their basic needs. This assessment should be regularly repeated and reviewed during the period of detention in light of potentially changing circumstances and to account for the impact of deprivation of liberty as a factor of vulnerability.

262 See International Detention Coalition (2015), "There Are Alternatives; A handbook for preventing unnecessary immigration detention (revised edition)", p. 16, available [here](#).

Recommendations

Defining vulnerability:

- Definitions of vulnerability should be based on an open-ended list, which takes into consideration the intersectional nature of vulnerability as well as vulnerabilities caused by detention itself.
- Mental health issues should be explicitly included in the definition of vulnerability, alongside physical health, age, gender, sexual orientation and gender identity, past experiences of trauma, torture or human trafficking, disability, statelessness, and any other protection needs.
- Vulnerability should always be determined and assessed on an individual basis.

Screening and assessment procedures:

- There should be a clear legal obligation to screen and assess individuals' vulnerability before a decision to detain is taken and before individuals are placed into situations of deprivation or restriction of liberty, to prevent the harmful effect that even short periods of detention can have on individuals in pre-existing situations of vulnerability.
- States should develop clear vulnerability screening and assessment procedures in close cooperation with civil society organisations and other stakeholders.
- Vulnerability screening and assessment procedures should be transparent. Each decision should be motivated in writing and made accessible to detainees and their lawyers.
- In the vulnerability screening phase, individuals should always be heard.
- Vulnerability assessments should be conducted by an independent and multidisciplinary panel.
- In some cases, factors of vulnerability can only be identified with time, and after a relationship of trust is established. Furthermore, detention itself might affect individuals' vulnerability, exacerbating existing vulnerabilities or creating new ones. For these reasons, vulnerability should be reassessed at regular time intervals.
- Alternatives to detention should be available and considered for each case, independent of individuals' vulnerability.
- States should collect data on vulnerability screening procedures and their outcomes, including how many individuals in a situation of vulnerability are released or detained.
- Individuals involved in the vulnerability screening and assessment procedures, as well as other individuals who come into contact with detainees, including detention officials, or who take decisions on detention, should be adequately and regularly trained on the identification and assessment of vulnerabilities and on the impact of detention on individuals' health.
- The screening and assessment procedures should take into consideration gender-specific needs, including by making available sufficient female staff to attend to the particular needs of the female detainee population, including cis and transgender women.

Access to legal aid and services:

- All communication, including with lawyers and medical staff, should be made through an interpreter whenever needed. Documents regarding the decision to detain should be translated in a language that is understood.
- Free access to legal aid should be available to challenge the detention order.
- Everyone should have access to medical screening before detention. Medical health care, including psychological support, should always be available.



PLATFORM FOR INTERNATIONAL COOPERATION ON
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