

Briefing Note on
THE NEW EU RECEPTION FRAMEWORK FOR ASYLUM SEEKERS: DETENTION AND
RESPONDING TO SPECIAL NEEDS

12 March 2015

The objective of this briefing note is to highlight the humanitarian concerns which can arise from the national implementation of the European Union (EU) recast Reception Directive. In particular, the note focusses on the detention of asylum seekers and the implementation of an adequate process to identify and address the special reception needs of vulnerable asylum seekers. It intends to assist Red Cross National Societies in the EU (EUNS) in monitoring and influencing corresponding national legislation.

State of play:

The recast Reception Directive was adopted in June 2013 and must be transposed into domestic law by 21 July 2015. Two new key features of the Directive are: a) a new exhaustive list governing permissible grounds for detaining asylum-seekers, and b) a mandatory assessment to identify and address the special reception needs of particularly vulnerable asylum-seekers.

Challenges:

Looking at the list of permissible grounds for detention, Member States continue to maintain considerable discretion to detain asylum-seekers.

Vulnerabilities might change over time, appear or be disclosed at a later stage, after initial arrival and assessment. Therefore, EUNS should underline the importance of monitoring, identifying and addressing special reception needs throughout the asylum process.

What can you do?

EUNS can play a role in monitoring transposition into domestic legislation and promote higher standards than those set out in the Directive. EUNS are encouraged to remind their respective governments that as a general rule, asylum-seekers should not be detained. In addition, EUNS are encouraged to monitor and support the implementation of a procedure to assess special reception needs. Depending on the context and capacities, EUNS may consider assisting their respective governments with this task and play a role in developing and implementing relevant programmes.

1. Implementing the recast Reception Directive

As part of the second phase of the Common European Asylum System, the EU adopted a recast Dublin Regulation¹ and a recast Reception Directive in 2013². Both documents introduced legislative changes to the reception framework for asylum seekers which will affect the domestic legislation of EU Member States. The Dublin Regulation took effect in January 2014 and is therefore already binding on EU Member States (except for Denmark, the UK and Ireland which opted out). The recast Reception Directive was adopted in June 2013 and must be transposed into domestic law by 21 July 2015.

The recast Reception Directive contains provisions on access to the labour market, education and vocational training, health care, and material aid, as well as provisions on the detention and special reception needs of asylum-seekers. Depending on the local context, EU Member States may have to amend and/or adapt current legislation to meet the prescribed minimum standards. Two new key features of the Directive are: a) a new exhaustive list governing permissible grounds for detaining asylum-seekers, and b) a mandatory assessment to identify and address the special reception needs of particularly vulnerable asylum-seekers.

a) Permissible grounds to detain asylum-seekers

The Reception Directive of 2003 lacked a clause which narrowly defined the permissible grounds for detention. Instead, it merely required detention to be 'necessary' in order to be applied. Detention was considered permissible for 'legal reasons' and 'public order'. As a result, EU Member States maintained significant discretion with regards to the detention of asylum-seekers. The recast Reception Directive clarifies that the detention of asylum seekers is subject **to the principle of necessity, based on an individual assessment, and only possible if other less coercive measures cannot be applied. It also introduces an exhaustive list of permissible grounds for detention (art. 8.3):**

- to determine or verify the applicant's identity or nationality;
- to determine the elements on which the asylum application is based, when they cannot be obtained in the absence of detention;
- to decide on the applicant's right to enter the territory;
- when the applicant is subject to a return procedure and there are grounds to believe that he/she is making the asylum application in order to delay or jeopardise the enforcement of the return procedure;
- when the protection of national security or public order requires it;
- in accordance with article 28 of the Dublin Regulation, for a transfer to another EU Member State and when there is a risk of absconding.

In addition, the Directive also provides essential safeguards to challenge detention. Specifically, article 9 stipulates access to free legal assistance and representation in cases of detention, as well as the right to obtain information in writing about the reason for detention and the procedures to challenge it.

With regard to minors, additional safeguards against detention have been introduced. Member States may only detain minors as a measure of last resort, and the minor's best interest must be a primary consideration. Specifically addressing unaccompanied minors, the Directive provides a basis for detention "*only in exceptional circumstances*" and requires Member States to make every effort "*to release the detained unaccompanied minor as soon as possible*" (art. 11.3).

The recast Reception Directive refers to transfers under the Dublin Regulation as one of the permissible grounds for detention. While asylum-seekers may not be detained for the sole reason of being subject to a transfer under the Dublin Regulation, detention for securing a transfer when there is a risk of absconding is

¹ [Regulation \(EU\) No 604/2013 \(Dublin Regulation\)](#)

² [Directive 2013/33/EU \(recast Reception Directive\)](#)

allowed. In such cases, detention is only permissible if this risk is based on an individual assessment, other less coercive means cannot be applied, and detention is proportional (art. 28). Detention must be as short as possible, not lasting longer than is necessary to fulfil the relevant administrative procedures.³

b) Identifying and addressing special reception needs

The previous version of the Reception Directive merely requested Member States to ‘take into account’ the specific situation of vulnerable people in relation to health care and material reception. Vulnerable people were entitled to “*necessary health care which shall include, at least, emergency care and essential treatment of illnesses*”. **The recast Reception Directive introduces an obligation to assess the special reception needs of vulnerable persons (art. 22).** Depending on individual circumstances and past experiences, people might present vulnerabilities which require additional attention, safeguards and services. These safeguards and services can include access to physical and mental health services, but they can also secure a safe environment for minors, families, elderly people, and victims of trafficking, and of physical and mental abuse.

For the purpose of this Directive an applicant with special reception needs is defined as: “*a vulnerable person [...] who is in need of special guarantees in order to benefit from their rights and comply with the obligations provided for in this Directive*”(art. 2). The following groups are identified as vulnerable:

minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation (art. 21)

EU Member States are required to initiate the assessment of special reception needs “*within a reasonable period of time*” after an application for protection has been lodged and address them accordingly. **In addition to this mandatory assessment, EU Member States are also required to monitor the applicant’s situation throughout the duration of the asylum procedure, addressing any special reception needs if they become evident at a later stage, after the initial assessment.**

2. Humanitarian challenges

Asylum-seekers who enter the EU have often experienced forced displacement, family separation, exploitation, torture and trauma, or sexual and gender-based violence. Given this predisposition to mental health concerns, detention can add to existing vulnerabilities. Similarly, a lack of, or inadequate assessment of special needs poses the risk of a deterioration in the mental or physical health of affected asylum-seekers. The link between prolonged detention and the deterioration of mental health has been evidenced by research.⁴ UNHCR highlighted that detention has been shown to cause mental health concerns, such as depression, trauma, psychological illnesses and aggression.⁵ UNHCR stated in its 2012 Detention Guidelines that “*detention of asylum-seekers should normally be avoided and a measure of last resort*”.⁶ The UN Refugee Convention further prohibits the penalisation of illegal entry.⁷ If the detention of asylum-seekers is applied, human rights law requires it to be subject to the principles of ‘necessity’ and

³ With regard to the length of detention for the purpose of a transfer, the Member State carrying out the transfer needs to lodge a request to the Member State responsible no later than one month after the asylum seeker has lodged his/her protection claim. The Member State responsible shall respond within two weeks. Finally, the Member State carrying out the procedure shall pursue the transfer within 6 weeks. Adding up these timeframes, detention for the purpose of a Dublin transfer must not exceed approximately 3 months (1 month + 2 weeks + 6 weeks).

⁴ Coffey, G.J. et al., “The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum”, *Social Science & Medicine*, Vol. 70, No. 12, pp 2070-2079.

⁵ UNHCR (2011), [Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Roundtable](#), p.4.

⁶ UNHCR (2012), [Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and Alternatives to Detention](#), p.6.

⁷ UN (1951), [Convention Relating to the Status of Refugees](#), Article 31.

'proportionality'.⁸ In other words, **authorities must not detain asylum-seekers if the means are not strictly necessary to pursue the objective. Both principles also require the demonstration that other less coercive measures cannot be applied.**⁹

While subject to a list of permissible grounds for detention referred to above, it is at the Member State's discretion whether to implement the recast Reception Directive in a way which makes the use of detention an exception, rather than a rule. During the negotiations for the recast Reception Directive, RCEU and 166 signatories appealed to the EU institutions to adopt standards which fully endorsed the presumption against the detention of asylum-seekers.¹⁰ Assessing the final version of the recast Reception Directive, RCEU expressed concerns that it still left too much room for Member States to standardise detention.¹¹ In particular, it allows for the detention of vulnerable persons, including children and unaccompanied minors. Furthermore, it is possible to detain asylum-seekers in prison accommodation. Despite the safeguard to detain asylum-seekers only for the shortest duration possible, the Directive does not provide a maximum duration for detention. While asylum-seekers must be granted access to free legal advice and have the right to challenge the grounds for detention upon request, there is no required automatic process which reviews initial detention orders.

The automatic and arbitrary detention of asylum-seekers upon entry and the detention of children and unaccompanied minors can be observed in several EU Member States.¹² Countries such as Hungary, Malta and Greece automatically detain asylum-seekers at their borders. In other Member States, the most common grounds invoked for detaining asylum seekers include: the need to establish the person's identity (17 countries), the risk of absconding (16 countries), the threat to national security and public order (15 countries), suspicion of abuse of the asylum procedure (11 countries), non-compliance with the alternatives to detention (9 countries), destroyed or forged identity documents (8 countries), and reason to believe that the person will commit a criminal offence (7 countries).¹³ A study carried out by the Swedish Red Cross aimed at scrutinising detention decisions reveals that a truly individualised assessment is rarely applied. After analysing 953 detention decisions, it found that overall the principle of proportionality is inadequately applied by decision making bodies.¹⁴ It also found that the legal and factual grounds for an authority to deprive a person of liberty tend not to be spelt out in detention decisions, thus preventing adequate means to contest such decisions.

With regard to detention, children and unaccompanied minors enjoy additional safeguards that are set out in the Convention on the Rights of the Child (CRC). The CRC stipulates that the detention of children should be a measure of last resort, and its duration as short as possible.¹⁵ All efforts, including the prioritisation of asylum processing, should be made to allow for children's immediate release from detention and their placement in other appropriate forms of accommodation. In its Detention Guidelines, UNHCR clarifies that "*unaccompanied minors or separated children should not be detained*".¹⁶ If detained, children should be separated from adults unless they are relatives.

Responding to special reception needs and facilitating access to relevant services requires a thorough needs assessment which must be conducted as early as possible. The assessment and recognition of special reception needs is of high importance, as it enables authorities to link affected asylum-seekers with services to reduce their vulnerabilities, and triggers additional safeguards. While one of the safeguards

⁸ OHCHR (1966), [International Covenant on Civil and Political Rights](#), Article 9.

⁹ UNHCR (2012), Detention Guidelines, p.21.

¹⁰ [Joint Appeal to EU Institutions – Ensure Respect for Asylum Seekers' Right to Liberty in Recast Reception Conditions Directive and Dublin Regulation](#).

¹¹ RC EU (2013), [Letter of the RC EU Office on the revised Directive laying down minimum standards for the reception of asylum seekers](#).

¹² Refer to AIDA for detention practice of selected EU countries, available at <http://www.asylumineurope.org/>

¹³ Refer to European Migration Network (EMN), '[The Use of Detention and Alternatives to Detention in The Context of Immigration Policies](#)' (2014) for national statistics on the use of detention in the EU.

¹⁴ Swedish Red Cross, [Detention under scrutiny - A study of the due process for detained asylum seekers](#)

¹⁵ OHCHR (1989), [Convention on the Rights of the Child \(CRC\)](#), Article 5, 22 and 37.

¹⁶ UNHCR, Detention Guidelines, p.36

included in the recast Reception Directive is access to appropriate health services, such as specialist psychologist care for torture and trauma victims (art. 25), special reception needs also have to be considered for accommodation in transit zones at airports and accommodation centres (18.1 a)-b)). With regard to detention, the assessment and identification of people with special reception needs requires their health to be of primary concern to authorities. The Directive prescribes such an assessment and obligates EU Member States to address the special reception needs identified. However, there is no need to establish a specific administrative procedure to conduct the assessment. It can thus be part of an existing national procedure.

In practice, access to specialised treatment for victims of torture and trauma who are seeking international protection is limited and remains a concern. While countries such as Bulgaria do not provide such treatment at all, access to specialised treatment for victims of torture and trauma remains limited in countries such as the UK and the Netherlands.¹⁷ Together with six European organisations, the NGO *Parcours d'Exile* conducted the PROTECT project to facilitate the identification of the special needs of asylum-seekers.¹⁸ After assessing that only a few Member States had implemented a procedure for identifying vulnerable asylum-seekers with special needs in law and/or practice, PROTECT developed a simple questionnaire to evaluate potential psychological vulnerabilities. This tool intends to support social workers, volunteers or immigration officials in the first screening of asylum-seekers, and eventually, in addressing the vulnerabilities identified.

3. EUNS' responses to the specific needs of asylum seekers

Several National Societies have developed activities to address the needs of asylum seekers in detention, including the Malta Red Cross and the Finnish Red Cross:

Malta Red Cross: Strengthening the protection of asylum-seekers in detention

In 2008, the project “Strengthening Protection of Asylum Seekers”, co-financed by the European Refugee Fund, was implemented by the Jesuit Refugee Services Malta, UNHCR and the Malta Red Cross. The project aimed to enhance the protection of asylum seekers through the provision of information and legal assistance; the training of lawyers and law students in refugee law; the facilitation of networking and information sharing among lawyers working in the field; and the provision of training and support to Detention Service and NGO personnel working with asylum seekers. The Malta Red Cross now provides a telephone service to carry out regular RFL tracing for detainees, offer Psycho Social Support and refer vulnerable cases to appropriate services and organisations.

Finnish Red Cross: Assistance to asylum seekers in detention

Finnish Red Cross volunteers visit and monitor the Pasila police detention facilities where asylum seekers are often detained due to lack of spaces in the usual detention unit. It is the opinion of the Finnish Red Cross that the police detention facilities are definitively not appropriate for detention. In particular, its main concerns are that migrant detainees can be kept in strict solitary confinement in the same way as suspected criminals. The fact that this is a high security detention facility exceeds the restrictions set out in the Alien Act and thus breaches detainees' basic rights in an unnecessary and non-proportional manner. Persons detained under the Alien Act often have earlier traumatic experiences, very possibly as a result of their treatment by public authorities. Holding them in prison conditions has severe psychological impacts and may cause their previous experiences to resurface, resulting in the deterioration of their psychological health. Together with the stress caused by past experiences, uncertainty about the future, not fully understanding the

¹⁷ Asylum Information Database (AIDA), available at <http://www.asylumineurope.org/>

¹⁸ Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment (PROTECT), available at <http://protect-able.eu/presentation/>

situation, and possible worry about the family, mental instability or aggression are likely outcomes and definitely not surprising.

Joint project: mental health care for asylum-seekers in the EU

In 2008-2009 a joint Red Cross project focused on mental health care for asylum-seekers in the EU, particularly for victims of torture and trauma, persons with missing family members, and the elderly and frail. In cooperation with RCEU, the Bulgarian RC, Belgian RC, French RC and British RC, the Austrian RC led an initiative to facilitate exchange and foster knowledge on the mental health needs of asylum-seekers in reception centres.¹⁹ The project highlighted the importance of earlier and more effective methods for detecting mental health difficulties. As part of this study, research revealed that only a few Member States conducted a systematic assessment of the mental health problems of asylum-seekers upon their arrival. One of the possible consequences is that more complex, long term treatment is needed to address the concerns identified, with the risk of not being as effective as early intervention measures. As a result, the project recommended that government authorities conduct a psychosocial assessment of all new asylum-seekers entering the asylum system. Several National Societies, including the Belgian Red Cross French Community and the Swiss Red Cross, have taken stock of the absence of adequate treatment for this particularly vulnerable group and have developed activities to address the specific psychological and psychiatric needs of asylum seekers.

Belgian Red Cross: Identifying and treating the psychological disorders of asylum seekers

Between 2006 and 2009, the Belgian Red Cross French Community implemented a project to detect the psychosocial conditions of asylum seekers accommodated in reception centres at an early stage. The project was based on the findings of a 2002 study on the psychosocial and therapeutically needs of asylum seekers.²⁰ Aiming to respond to the needs of both the residents and staff of reception centres, 480 social workers (from the Red Cross and other organisations) completed a 2-day training on early detection of psychosocial and psycho-therapeutic needs. Emphasis was placed on preventing acute conditions and hospitalisation. An information sheet was also developed for reception centre personnel on how to best respond to residents' psychosocial and therapeutic needs, as well as on how to prevent staff "burn-out". In addition, the Belgian Red Cross French Community operates a reception centre named CARDA in Yvoir, Belgium, which provides specialised psychological support to asylum-seekers with psychological illnesses. Asylum-seekers accommodated in reception centres in Belgium can be hosted by the CARDA centre during crisis periods or for psychological treatment. The centre works in cooperation with psychiatric hospitals and refers cases that are in need of further treatment to these institutions.

Swiss Red Cross: "Ambulatorium" for victims of war and torture

Following a study from 1991 which found that 25% of refugees in Switzerland were victims of systematic violence, in 1995 the Swiss Red Cross set up the first clinic in Switzerland dedicated to providing support to people suffering from trauma relating to torture and/or war. Beneficiaries include asylum-seekers, refugees, victims of trafficking, undocumented migrants and unaccompanied minors. The team of the "[Ambulatorium](#)" is composed of psychologists, psychotherapists, psychiatrists, medical doctors, nurses and social workers. Together, they provide holistic treatments and specific therapies for individuals, families and groups. The Ambulatorium

¹⁹ Austrian Red Cross (2009), Mental Health Care for Asylum Seekers in the European Union: Addressing the Needs of Specifically Vulnerable Groups. [Project Recommendations](#), and [Guidance Notes](#).

²⁰ Croix-Rouge de Belgique (2002), [Evaluation de l'assistance psychosociale et thérapeutique auprès des demandeurs d'asile](#). Updated version Croix-Rouge de Belgique (2012), [Assistance psychosociale et thérapeutique des demandeurs d'asile](#).

also works on public relations to raise awareness among the general population and authorities on these issues. The centre leads a country-wide network of medical institutions called “[support for torture victims](#)” with a view to exchanging experiences. Based on its extensive experience of dealing with victims of trauma, the Swiss Red Cross also developed a [brochure](#) for individuals that have experienced trauma and their families which presents the services available to them and a list of relevant contacts.

4. Next steps and recommended action

EU Member States have until July 2015 to implement the provisions laid out in the recast Reception Directive. In this context, EUNS can play a role in monitoring transposition into domestic legislation. Based on the shortcomings identified above, and depending on existing domestic legislation, EUNS have a responsibility to promote higher standards than those set out in the Directive.

a) Grounds to detain asylum-seekers

Looking at the list of permissible grounds for detention, Member States continue to maintain considerable discretion to detain asylum-seekers. In particular, it is not clear how the ground for detention based on ‘a significant risk of absconding’, as per the Dublin Regulation, is to be assessed. Similarly, the ground to detain asylum-seekers based on establishing or verifying an applicant’s identity or nationality virtually allows Member States to detain every asylum-seeker who arrives without travel documents. Considering that asylum-seekers often flee from countries where the state itself constitutes the actor of persecution, it is impossible for them to obtain travel and/or identity documents from that same public authority. In these cases, there is consequently a risk of systematic detention. As part of its ‘Contribution to the Post Stockholm Agenda’, RCEU called for detention only to be applied as a last resort. It also called for a review of current detention practices to determine whether they are necessary and proportional.²¹

- Given the identified concerns, EUNS are encouraged to remind their respective governments that as a general rule, asylum-seekers should not be detained.
- If detention is implemented, it must be subject to the principle of necessity and proportionality, it must be for the shortest duration possible, and it must be subject to review.
- Asylum-seekers should not be penalised for the sole reason of seeking asylum.
- Children and unaccompanied minors should not be detained.”

b) Identifying and addressing special reception needs

In addition, EUNS are encouraged to monitor and support the implementation of a procedure to assess special reception needs. To minimise and reduce vulnerabilities, such an assessment should be conducted as soon as possible after an application for asylum has been lodged. In local contexts where an initial assessment of special reception is lacking or insufficient, EUNS need to be particularly wary of the development and/or establishment of a mechanism to identify special reception needs. They should also pay specific attention not only to psychological vulnerabilities, but also to physical vulnerabilities, and vulnerabilities linked to age, gender and culture.

- Vulnerabilities might change over time, appear or be disclosed at a later stage, after initial arrival and assessment. Therefore, EUNS should underline the importance of monitoring, identifying and addressing special reception needs throughout the asylum process.
- In local contexts where a mechanism is in place, EUNS may need to evaluate the mechanism and provide feedback.
- Depending on the context and capacities, EUNS may consider assisting their respective governments with this task and play a role in developing and implementing relevant programmes.

²¹ RC EU (2014), [Contribution to the European Commission's Consultation on the Post Stockholm Agenda](#), p.3.

5. Further resources

Asylum Information Database (AIDA), available at <http://www.asylumineurope.org/>

Austrian Red Cross (2009), [Mental Health Care for Asylum Seekers in the European Union: Addressing the Needs of Specifically Vulnerable Groups](#).

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European Migration Network (2014), ['The Use of Detention and Alternatives to Detention in the Context of Immigration Policies'](#)

IFRC and UNODC (2014), *Combatting violence against migrants*, Factsheet.

Latvian Centre for Human Rights (2010), [Steps to Freedom. Monitoring Detention and Promoting Alternatives to Detention of Asylum Seekers in Latvia, Lithuania, Estonia, Slovakia and the Czech Republic](#).

[Process of Recognition and Orientation of Torture Victims in European Countries to Facilitate Care and Treatment](#) (PROTECT).

UNHCR (2011), [Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Roundtable \(Detention Guidelines\)](#).

UNHCR (2012), [Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-seekers and Alternatives to Detention](#)