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The needless and harmful detention of illegally staying third country nationals

Effective alternatives to detention in the European Union

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ABSTRACT

Every year, thousands of irregular migrants receive a return decision in all EU member states. Most of them are detained in order to enforce the removal. However, only a small amount of them are finally return to their country of origin or country of transit. Legal, administrative and humanitarian impediments prevent the effective return of many irregular migrants: they are unreturnable. In spite of being unreturnable, many of them face long periods in immigration detention and some of them are even detained several times, causing huge mental damages and disrupting their lives. International standards consider alternatives to detention the best option to carry out an effective removal whilst protecting the fundamental rights of irregular migrants. Nevertheless, the practice shows that most of EU countries use immigration detention systematically without considering alternatives. Considering the specific situation of unreturnable third country nationals (), this fact hampers the enjoyment of their human rights. This thesis revises the causes of unreturnability and goes through the legal framework of immigration detention. Moreover, it reviews the practice concerning the detention of irregular migrants in EU member states, which goes against legal standards in several cases. The last part of the thesis explains the alternatives to detention as well as further regularisation mechanisms that the EU member states should envisage whilst dealing with unreturnable TCNs to protect their human rights.

Key words: unreturnable TCNs, immigration detention, alternatives to detention, EU, return procedure

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INTRODUCTION

The Treaty of Amsterdam, signed in 1997 and made effective in 1999, gave the European Union migration and asylum competences. The EU migration policy has three pillars: regular migration, asylum and irregular migration. In the area of asylum, the EU is the responsible to regulate all aspects of asylum and has harmonised all the EU member states legislation. In the area of migration, the EU is gaining increasing competences in controlling both legal and irregular migration. For example, apart from having a common policy on readmissions and returns, the EU regulates the entry and stay of third country nationals, including the high skilled workers. However, some migration competences are still in member states' hands, as the situation of unreturnable third country nationals (TCNS), which is a national competence.

Despite Europe being considered as the continent of fundamental rights and solidarity, irregular migration is treated at the EU level from a law enforcement and security perspective. This position has been criticised by many NGOs and also some EU institutions, as the EESC. Those organisations consider that the issue of irregular migration should be dealt from a human rights perspective, as irregular migrants are not a threat to the EU and its citizens, and most of them try to reach Europe because they are fleeing from a war or a country where they have no opportunities for them and their families.

Since 2015, the European Commission has put the focus on the return of irregular migrants.¹ According to the IOM, more than one million people arrived to Europe in 2015, mainly from Africa and the Middle East. They arrived mostly to Greece, but also to Italy, Spain and Malta. The total number of arrivals in 2015 was from three to four times higher than in 2014, which made people talk about a "migration crisis".² That same year, more than 1.255.000 applied for asylum for the first time in an EU member state,³ but only around 300.000 applications were granted. The applicants who have not been

¹ European Commission, *Fact Sheet: State of the Union 2018: Stronger EU rules on return – Questions and Answers* (European Commission, September 2018)

² Jonathan Clayton and Hereward Holland, *Over one million sea arrivals reach Europe in 2015* (UNHCR, 30 December 2015)

³ Eurostat, Asylum statistics <https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 30 June 2019

granted the refugee status then become irregular migrants and, therefore, should return to their country of origin or transit according to EU law.

In 2016, for example, 493.785 irregular migrants received a return decision and were asked to leave the EU, but only 226.150 of them were effectively returned. This corresponds to a 45.8% effective return rate. In 2017, 516.115 irregular migrants were asked to leave, but only 188.905 finally returned. The return rate decreased and reached a 36.6%.⁴ The difference between the return decision and the number of effective returns is called the deportation gap and it is what worries the European Commission.

If not all the irregular migrants who receive a return order are returned it is because the phenomenon of the unreturnable TCNs. Even if it is difficult to say how many unreturnable TCNs there are in Europe, we can say that there are more or less 300.000 per year, considering the return rates and the number of return decisions.⁵

Unreturnable TCNs are in a very vulnerable situation because, as consequence of their specific situation, they often face long periods of detention. According to EU law, member states have to issue a return decision to all irregular migrants present in their territory, giving them time for voluntary return. If the period of voluntary return passes, the state has to enforce the removal. For this purpose, immigration detention is often used. Despite the existence of a limited period of detention, unreturnable TCNs face the longer periods in detention because of the impediments for their removal. In the last years, the European Commission, in order to reach a higher return rate, has been asking member states to increase the detention period in order to return more irregular migrants. However, numerous studies show that more detention does not always lead to more returns.⁶ This is caused because of the existence of unreturnable TCNs.

Considering that the situation of unreturnable TCNs, and especially their detention, is not highly discussed, I would like with this thesis to acknowledge the situations they face

⁴ European Commission (n 1)

⁵ Fabian Lutz, Non-removable returnees under European Union Law, Status Quo and Possible Developments (EMN Seminar, 22-23 March 2017) 1 <http://www.emn.lv/wp-content/uploads/1.Lutz_non-removables-EMN-seminar-handout.pdf> accessed 22 June 2019

⁶ International Detention Coalition, *IDC Submission Draft General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights*

and show the discrepancies between the law and the practice as well as look for better and more effective practice that would ensure the respect of the human rights of unreturnable TCNs. For this, I will define and go through the impediments to removal that provoke unreturnability. In the second part of the thesis, I will review the legal framework at the UN, European and EU level on immigration detention in order to see if the legal standards are followed in practice by the EU member states, which would correspond to the third part of the thesis. Finally, in the last part, I will make recommendations to the EU member states and to the European Union that would ensure that the human rights of unreturnable TCNs are fulfilled at the EU level.

Being the topic of this thesis the immigration detention of unreturnable TCNs in Europe, I would like to specify that the thesis is not going to deal in depth with certain related topics as the detention conditions or the process itself of removal of irregular migrants. It is neither going to be an in-depth study on the immigration detention of specifically vulnerable groups, as children.

Concerning the methodology, I will go through EU migration law and its mechanisms which deal with immigration detention and the return of illegally staying TCNs. I will also consider international and regional human rights mechanisms and, to a fewer extent, I will revise national law.

I will also consider case law from the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ).

Finally, I will analyse the EU member states' practice on the detention of irregular migrants and I will make recommendations on good practices based on reports and pilot projects from international, regional and national NGOs and organisations, and the direct contact on the phone and email with representatives from those organisations.

Definition of terms

Asylum seekers "An asylum seeker is an individual who is seeking international protection. In countries with individualised procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she has

submitted it. Not every asylum seeker will ultimately be recognised as a refugee, but every refugee is initially an asylum seeker.”⁷

Irregular migrants An irregular migrant is a migrant who does not have the right to stay in the country where he/she is because he/she does not comply with some aspect of immigration law and rules.⁸ Most of the irregular migrants present in the EU have entered the EU regularly and have become irregular afterwards. This can happen because the expiration of a visa.⁹

Unreturnable third country national (TCN) An unreturnable TCN is an irregular migrant who cannot be returned because of administrative legal or humanitarian impediments. The causes of unreturnability are explained in the first part of the thesis. Apart from “unreturnable” TCN, the term “non-removable” can also be used.

Immigration detention The immigration detention is the restriction of freedom of movement through confinement that is ordered by an administrative or judicial authority

Alternatives to detention “An alternative to detention is any policy, practice or legislation that allows asylum seekers and migrants to live in the community with freedom of movement, in respect of their right to liberty and security of person, while they undertake to resolve their migration status and/or while awaiting removal from the territory.”¹⁰

⁷ Amnesty International, *What is the difference between a refugee and an asylum seeker?*, (Amnesty International, 24 January 2019 <<https://www.amnesty.org.au/refugee-and-an-asylum-seeker-difference/>> accessed 4 July 2019

⁸ Migrant’s Rights Network, *Irregular Migrants: the urgent need of a new approach*, (MRN, May 2009) 4
<https://www.migrantsrights.org.uk/downloads/policy_reports/irregularmigrants_fullbooklet.pdf> accessed 4 July 2019

⁹ OHCHR, *Differentiation between regular and irregular*
<<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/RegularAndIrregular.pdf>> accessed 4 July 2019

¹⁰ Jesuit Refugee Service Europe, *JRS Europe Policy Position on Alternatives to Detention* (JRS Europe, 4 October 2012) 3
<https://jrseurope.org/assets/Publications/File/jrs%20europe%20policy%20position%20on%20alternatives%20to%20detention_2012.pdf> accessed 4 July 2019

PART I – UNRETURNABLE THIRD COUNTRY NATIONAL: DEFINITION AND CAUSES

Non-returnable migrants are irregular migrants who cannot (yet) be returned to their country of origin or a transit country due to legal, humanitarian or practical issues. According to the EU migration policy, every irregular migrant present in a member state should be returned, but practice has shown that returning every undocumented migrant is impossible. The main particularity of non-returnable migrants is that national authorities acknowledge their presence in the country, but despite being in an irregular situation, they tolerate their presence as they cannot be returned. This shows the lack of effectiveness of the EU Return Policy, whose main instrument is the Return Directive.¹¹

At the European Union level, the Return Directive plays a central role in the issue of unreturnability. The Directive “sets out common standards for returning illegally staying third country nationals, in accordance with fundamental rights”.¹² The Article 6 establishes that member states have to issue a removal decision to any third country national staying illegally on their territory. Moreover, it only offers two options to member states concerning irregular migrants: removal or regularisation. Nevertheless, the regularisation cannot be taken as an obligation for member states. Yet, Article 9 establishes a mechanism of postponement of the removal for different motives.

Despite establishing the postponement mechanism, the Return Directive does not go further and does not grant any right to those unreturnable TCNs: the consequences are not regulated by EU legislation, and fall under the scope of national law. Unreturnable TCNs are irregular migrants living between legality and illegality. The same phenomenon in the EU has therefore as many different responses as EU member states exist. Some states grant temporary regular status or residence permit and work permit, whilst others do not grant any status. The protection of unreturnable TCNs is therefore a lottery.¹³ This indeterminate status can last forever: it lasts until the impediments of

¹¹ Benedita Menezes Queiroz, *Non-removable migrants in Europe: an atypical migration status?* (European Public Law, vol. 24, issue 2, 281-309, 2 June 2018)

¹² Directive 2008/115/EC of the European Parliaments and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (2008)

¹³ Benedita Menezes Queiroz (n 11)

removal disappear, if they do. Some unreturnable TCNs find themselves living for long years in a legal limbo.¹⁴

We can therefore say that the combination of EU law and the case law of the ECtHR are responsible of the non-removability of migrants by, first, rejecting the refugee status and second, impeding the removal of the irregular migrants and not providing regularisation of status or specific protection. It could be argued that there is the need to harmonise the status of unreturnable TCNs across the EU in order to comply with human rights obligations.

As mentioned previously, there are different causes of unreturnability that I will explain in depth:

- Administrative impediments
- Statelessness
- Legal and human rights-based impediments
- Practical impediments

1. Administrative impediments

In order to enforce a removal decision of an irregular migrant or rejected asylum seeker, the person who is going to be returned needs to have documents proving identity and country of origin. A lack of those documents and impossibility to have new ones can delay or make the removal impossible, making the migrant unreturnable.

Many rejected asylum seekers and third country nationals who entered Europe illegally do not have a valid identification document. In most of the cases, they lost their documents during the long journey trying to reach Europe. It often happens that some migrants destroy their own documents in order to avoid removal or it is even the smuggler who takes their documents so they cannot be identified. Some migrants might also lie about their identity and country of origin because of fear to be returned to their

¹⁴ Maaike Vanderbruggen and others, *Point of no return: The futile detention of unreturnable migrants* (Flemish Refugee Action, January 2014) 50

real country of origin, and others might have fake identification documents as they needed to lie about their identity in order to leave their country.¹⁵

Without an identification document, a migrant cannot be returned because the document is needed in order to get a passport or, at least, a temporary travel document. In most of the cases, European authorities blame migrants for their lack of identification documents and lack of cooperation, but the reality is generally very different.

NGOs from different European countries made a research concerning unreturnable TCNs and published the report “Point of no return: The futile detention of unreturnable TCNs. They interviewed almost 40 unreturnable TCNs present in their countries and the results showed that their situation of unreturnability was not fault of their lack of cooperation. Some embassies of migrants’ countries of origin deny a passport or travel document if the migrant does not have an identification document and they do not provide it themselves. In the case of a migrant who was interviewed for the report, he was asked to go to his country of origin to get the identification document to get the passport by the embassy after, but of course, without a passport it is impossible to do. Moreover, in many cases embassies will ask for unrealistic proof of nationality, making it very hard for migrants to prove their nationality: sometimes, even after presentation of birth certificate, the embassy has refused to provide an identity document. This is a common practice because many embassies do not want European states to carry on forced removals: embassies only cooperate if their nationals want to return in a voluntary way. Moreover, embassies tend not to be transparent in their procedures, and other reasons can be behind the lack of cooperation with the return of one of their nationals. For example, they might want to avoid the return of a person whose parents are not from the same nationality, as was seen during the interviews. Embassies are asked to provide identification documents during the return procedure when the migrant is in pre-removal detention. As detention is limited in time, many embassies do

¹⁵ Michala Clante Bendixen, *Asylum Camp Limbo, A report about obstacles to deportation* (Refugees Welcome/The Committee for Underground Refugees Denmark, 2011) 19
<http://refugeeswelcome.dk/media/1085/asylumcamplimbo_web2.pdf> accessed 15 April 2019

not provide the documents within the period requested, and the removal becomes impossible to enforce.¹⁶

In order to avoid these situations and enhance the cooperation with third countries, the EU and its member states are giving a strong priority to the signature of Readmission Agreements. The European Commission defines them as:

“agreements between the EU and/or member states with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence in the territories of the third country or one of the EU member states, and to facilitate the transit of such persons in a spirit of cooperation.”¹⁷

Several NGOs have criticised those cooperation agreements with countries as Sudan or Eritrea because they condition the EU development aid or foreign relations to their cooperation with returns. Considering that all of those countries are not safe countries, it can be argued that human rights of migrants are in danger with this EU policy.

As mentioned previously, some European states grant temporary residence permits to unreturnable TCNs, but not all migrants are in the same position to get them. When a migrant is unreturnable because of administrative impediments, states rarely provide temporary residence permits because they accuse migrants of being responsible of their unreturnability. They accuse them of lack of cooperation. It can be argued that, by not providing residence permits (and therefore, right to work), states are trying to push migrants to cooperate with immigration authorities. As S. Rosenberg and S. Koppes say in their article, states combine duty with rights, “if a person cooperates with the return process, *then* he/she may be granted stay and welfare support”.¹⁸ Nevertheless, as

¹⁶ Maaïke Vanderbruggen and others (n 14) 12

¹⁷ European Commission, Migration and Home Affairs, *Readmission Agreement – Definition* <https://ec.europa.eu/home-affairs/content/readmission-agreement-0_en> accessed 16 April 2019

¹⁸ Sieglinde Roseberger and Sabine Koppes, *Claiming control: cooperation with return as a condition for social benefits in Austria and the Netherlands* (Comp Migr Stud, 2018) 2 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6132690/>> accessed 17 April 2019

explained in the previous paragraph, in most of the cases the lack of cooperation does not come from migrants but from the embassies of their countries of origin.

2. Statelessness

Stateless persons have a very specific legal situation. The 1954 Convention relating to the Status of Stateless Persons defines them in its Article 1(1) as “a person who is not considered as a national by any State under the operation of its law”.¹⁹ This makes them to be extremely vulnerable, as they are often denied basic rights as access to healthcare, education, right to work, etc. in the country where they reside.

The Article 1(1) applies in the contexts of migration and non-migration, as a stateless person might have never left the country where she was born. Nevertheless, stateless persons who fall under the scope of the 1951 Geneva Convention and are considered refugees are entitled to the protection established in that instrument, which is of higher degree than the one established in the Convention relating to the Status of Stateless Persons.²⁰

As we have seen previously, in the context of migration, the issue of nationality and statelessness arises at different moments, also at the return procedures, which is the focus in this chapter. As stateless persons often do not have any identity or travel document that normally nationals possess and, in general, do not have a legal residence permit, they might be treated as undocumented migrants by the immigration enforcement authorities. Nevertheless, their situation is different, as they cannot be returned to their country of origin, as they do not have documents to prove their nationality.

The UNHCR highlights the necessity of states to establish effective statelessness and status determination procedures to verify identity and nationality. During this process,

¹⁹ UNGA, *Convention relating to the Status of Stateless Persons* (1954) <https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf> accessed 20 April 2019

²⁰ UNHCR, *Handbook on Protection of Stateless Persons Under the 1954 Convention Relating to the Status of Stateless Persons* (2014) 45 <<https://www.unhcr.org/en-us/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html>> accessed 20 April 2019

states cannot remove a person to a third country pending the outcome. In states where these determination procedures do not exist; removal is also forbidden since the moment the person raises a statelessness claim in any context. Moreover, the UNHCR defends that states should protect persons awaiting the determination procedure outcome from arbitrary detention, an issue which is going to be dealt later on in this thesis.

According to UNHCR, return is possible in very specific situations: when the stateless person is capable to acquire or reacquire nationality in a simple and rapid procedure or when the person enjoys permanent residence status in a country where she has lived before.

Being in situation of statelessness is specifically common for recognised minorities like Kurds and Roma people, whose countries of origin refuse to give an identification document, which impedes removal.

3. Legal and human rights' based impediments

3.1. Principle of non-refoulement

The non-refoulement is a well-established principle in international law. In international human rights law, it is the prohibition of removal of a person to a country where there are substantial grounds to believe that she would be at risk of suffering torture, ill treatment or other serious violations of human rights. This principle is included in various international treaties as the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or the 1951 Refugee Convention.²¹ I will focus here on the Article 3 of the European Convention of Human Rights (ECHR), as it is the main human rights treaty in Europe.

First of all, it is important to mention that the ECHR does not include the prohibition of refoulement nor any specific provision for asylum seekers, but it has been the European Court of Human Rights (ECtHR) which has protected rejected asylum seekers and

²¹ OHCHR, *The principle of non-refoulement under international human rights law* (2018) 1 <<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed 2 May 2019

irregular migrants from refoulement through the interpretation of the Article 3 ECHR.²² This is the most relevant provision and the most used one concerning expulsion of asylum seekers.

It was in 1989 when, for the first time, the ECtHR established the extraterritorial effect of the Article 3 ECHR in the case *Soering v. UK*. Mr. Soering, a German national, was accused of murder in the USA whom asked Soering to be extradited to the USA in order to be judged after having fled to the UK. The ECtHR considered that there were substantial grounds to believe that the person could face a real risk of being subjected to torture or inhuman treatment, and therefore, the UK would breach Article 3 ECHR if Mr. Soering was extradited, as he would be sentenced to death and go to the death row.²³ Two years later, the Court confirmed that the return to the country of origin of an asylum seeker could also be a violation of Article 3. In *Chahal vs. UK*, the return of Mr. Chahal, a rejected asylum seeker, to India would be a violation of Article 3 as there was a real risk that he would be subjected to treatment contrary to that article.²⁴

Following the case *Chahal vs. UK*, the ECtHR confirmed the absolute nature of the Article 3 ECHR in the case *Saadi vs. Italy*. Even if Mr. Saadi could be a threat to the Italian national security, the ECtHR reaffirmed the prohibition to extradite any person who would suffer from bad treatment that amounts to ill-treatment and torture.²⁵

Yet, is the 1951 Refugee Convention not protecting them from non-refoulement?

The 1951 Refugee Convention prevents the return of refugees, but many asylum seekers are not granted the refugee status nor subsidiary protection, as there are restrictive conditions to fulfil in order to be granted international protection. According to the 1951 Refugee Convention, a refugee is a person who:

²² Jelena Ristik, *The Right to Asylum and the Principle of Non Refoulement Under the European Convention on Human Rights* (European Scientific Journal, edition Vol.13, No.2, 108-120, October 2017) 109 <<http://eujournal.org/index.php/esj/article/view/10048/9538>> accessed 2 May 2019

²³ *Soering v United Kingdom* (1989) 11 EHRR 439

²⁴ *Chahal v United Kingdom* (1996) 23 EHRR 413

²⁵ *Saadi v Italy* (2008) 47 EHRR 17

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”²⁶

A refugee is therefore a person who has the fear to be individually persecuted because of very specific concerns. Many asylum seekers are not covered by the Convention as they do not fall inside the definition given as they are asking protection for other reasons. Moreover, refugee status will not be granted to serious criminals and will be withdrawn to refugees who have been proved to be a serious danger for the receiving community. By losing the refugee status, they are also losing the protection of the principle of non-refoulement granted by the 1951 Refugee Convention.

In the European Union, the Directive 2011/95/EU (recast) recognises both refugees and “persons eligible for subsidiary protection”. They are defined as:

“third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”²⁷

The Article 15, for example, defines serious harm as “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. Proving the individual threat being difficult, some states could deny the subsidiary protection to many third country nationals asking for it.

²⁶ UNGA, *Convention and Protocol relating to the status of Refugees* (1951 and 1967) <<https://www.unhcr.org/3b66c2aa10>> accessed 3 May 2019

²⁷ Directive 2011/95/EU of the European Parliament and of 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) (2011)

On the other hand, as mentioned previously, the Article 3 ECHR is an absolute right which protects every person who is under the jurisdiction of a Contracting Party of the ECHR, including rejected asylum seekers and criminals. In that sense, we could say that the protection from return of the ECHR is wider than the one of the 1951 Refugee Convention.²⁸ Moreover, whilst refugee status and subsidiary protection are only granted if there is an individual threat, the Court recognises that “exposing an individual to a situation of general violence of exceptional intensity may be sufficient to conclude that the person will face ill-treatment simply on account of his or her presence in the area in question”.²⁹

Nevertheless, there is an important difference between refugees or third country nationals that have been granted subsidiary protection and third country nationals who cannot be returned according to Article 3 ECHR. Whilst the 1951 Refugee Convention grants certain rights to the refugees, the Article 3 ECHR only prevents people from being returned, but does not grant any further right. Those people, non-returnable migrants, are protected from being returned and from suffering ill-treatment situations, but they remain in Europe in a legal limbo. The ECHR Contracting Parties acknowledge the presence of the third country national, but it is not their obligation to ensure their access to healthcare, education or shelter. Some states, in some situations, might grant some kind of protection, and can even, in the best case, regularise the situation of the third country national that cannot be returned.

3.2. Private and family life

Article 8 ECHR states that “Everyone has the right to respect for his private and family life, his home and his correspondence”. Some limitations to the right to respect for

²⁸ Pablo Gómez-Escolar Arias, *Access to social rights of non-removable TCNs in the European Union: Destitute in the limbo of toleration* (Master, European Inter-Universitary Centre of Human Rights and Democratisation, 2018) 13

<<https://repository.gchumanrights.org/bitstream/handle/20.500.11825/853/Gomez%20Escolar%20Arias.pdf?sequence=1&isAllowed=y>> accessed on 14 May 2019

²⁹ *Sufi and Elmi v UK* (2012) 54 EHRR 9

private and family life are allowed when it comes to national security, public safety and prevention of disorder and protection of other's rights.³⁰

In the context of migration, the Article 8 ECHR has been invoked in order to ensure the entry to a European state of a migrant's family member and to avoid removal from a member state of an irregular migrant. Returning an irregular migrant can violate Article 8 ECHR because it provokes the separation of the migrant from his/her family members staying legally in the member state.³¹

In the context of removal of a third country national illegally staying in a European state, there are two different ways of interpreting the Article 8 ECHR.

The first interpretation is in relation with the Article 3 ECHR. As the prohibition of torture and ill treatment is an absolute right and therefore cannot be derogated in any circumstance, there is a "threshold of severity" that needs to be reached in order to consider that an act is a violation of Article 3. Nevertheless, as the threshold is very high, the Court considers that some treatments that do not violate Article 3 cannot be tolerated in a democratic society, so the jurisprudence of the Court has created the notion of "moral and physical integrity", which needs to be protected under the right to respect for private life, Article 8 ECHR. Nevertheless, in general, when the return would entail a risk to physical integrity, the ECtHR invokes Article 3 ECHR instead of Article 8 ECHR.

The second interpretation is the one mentioned above: the violation of family life because of separation of members of the same family. The ECtHR prohibits the removal of undocumented migrants who have family ties; yet, who is considered "member of the family"? A. Desmond highlighted in an article the different interpretation of "family member" in cases concerning migration and non-migration. Whilst the definition of family member in a non-migration context is broader and also concerns grandparents

³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR) art. 8

³¹ Alan Desmond, *The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?* (European Journal of International Law, Vol. 29, Iss. 1, 261-279, February 2018) 262 <<https://academic.oup.com/ejil/article/29/1/261/4993230>> accessed 5 May 2019

and grandchildren, in the migration context family ties only include parents and minor children – or dependents-, which means that there is the need to have direct family ties.³² However, in the case *Maslov vs. Austria*, the ECtHR accepted the relationship of young adults with their parents if the young adults did not have their own family, which makes the protection from removal broader.

Apart from the right to family life, Article 8 ECHR also protects the private life of people under the Contracting Parties' jurisdiction. In general, judges invoke the protection of private life when the third country national has been in the host country for a long period of time, has had an education, a job, and social ties there. Therefore, there is no need to have a family to avoid removal. The right to private life was first invoked by the ECtHR in the case *C vs. Belgium* as the Court was considering if there was a violation of Article 8 ECHR because of the social ties and previous employment and education of C. in Belgium and not because of family ties. In this case, the Court sentenced that there was no violation of Article 8 ECHR, but it was an important precedent. It was in 2003 when, for the first time, the Grand Chamber ruled in the *Slivenko* case that the removal of a family from Latvia to Russia was a violation of their right to private life. As the whole family was returned to Russia, it was not a violation of their right to a family life, but a violation of their right to private life considering they had their "network of personal, social and economic relations" in Latvia. Nevertheless, the Court tends to recognise as settled migrants, and therefore protect them from removal under Article 8 ECHR, mostly regular migrants. The Court defends its position by arguing that a precarious immigration status provokes that the migrant will have less ties with the host country.³³

The ECtHR has also taken into account the right to private life in cases where the migrant had committed an offence and had been in jail. In the case *A.A. vs. United Kingdom*, the Court sentenced that returning the Nigerian citizens would breach his right to private life as he had been living in the United Kingdom for a long period of time and had arrived as a minor.

³² *ibid.*

³³ Sylvie Da Lomba, *Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR* (Laws 2017, December 2017) 4

Moreover, even if this is not a cause of unreturnability, I believe that it is important to mention that in the case *B.B. vs France*, there was a separate opinion by the Mr. Cabral Barreto, the Portuguese judge, who stated that in order not to breach Article 8 ECHR not only the removal from B.B. should be stopped, but also France should grant a residence permit in order to allow access to employment and social benefits. Nevertheless, this was only a separate opinion and the Court's sentence did not include it: the Court considered that not removing B.B. was enough not to breach Article 8 ECHR.³⁴

3.3. Medical reasons

Some third country nationals illegally staying in the EU cannot be returned to their country of origin because of their medical condition. In those cases, the ECtHR has invoked both Article 3 ECHR and Article 8 ECHR. In some countries, undocumented migrants who could not be returned because of medical reasons are granted some kind of protection and are granted temporary residence. However, this does not always happen, and undocumented migrants can end up in a legal limbo, with no status recognition.

The Court considered in the case of *D. vs United Kingdom* that returning D. to St Kitts and Nevis would amount to violation of Article 3 ECHR. D. was suffering from AIDS, and his country of origin did not have the adequate treatment that he needed. Therefore, returning him to St Kitts and Nevis would deny him the access to a quality treatment in the UK and would amount to ill treatment. Nevertheless, it is important to highlight that the Court considered that the removal would breach Article 3 ECHR because the illness of D. was in a very critical stage.³⁵ For the judgement, the Court took into account the exceptional circumstances of this case as "his removal would expose him to a real risk of dying under the most distressing circumstances and would amount to inhuman treatment". For example, in the case *N. vs United Kingdom*, the Court resolved that the removal of N. would not breach Article 3 ECHR because the applicant was seriously ill

³⁴ Nuala Mole, *Asylum and the European Convention on Human Rights* (International Journal of Refugee Law, Vol. 21, Iss. 3, pages 645-649, October 2009)

³⁵ *D v United Kingdom* (1997) 24 EHRR 423

but did not reach the level of critical condition needed to consider that the removal would cause a situation that amounts to ill treatment.

After this case, there was the conception of the existence of a protection gap concerning the removal of ill people to their country of origin, especially because the “critical conditions” that could be considered ill treatment were not clear.

In the Paposhvili case, the Court tried to clarify and widen the term “exceptional circumstances” and overcome the protection gap. Whilst Belgium wanted to remove Mr. Paposhvili, a Georgian citizen, he wanted to stay in the country as he had chronic lymphocytic leukemia and was being treated in Belgium. When the Grand Chamber judged the case Mr. Paposhvili had already died, but the Grand Chamber delivered that in case of removal without having assessed the impact of his return, Belgium would have breached Article 3 ECHR. The Court defined violation of Article 3 ECHR in a case of removal as “the absence of appropriate treatment in the receiving country or the lack of access to such treatment, exposes the individual to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy”.³⁶

Other undocumented migrants cannot be returned because their medical condition impedes them to travel. In general, doctors in detention centres try to avoid the recognition of this status because people that request not to be returned on the basis of not being fit to fly are those who have not been granted protection through Article 3 ECHR. Nevertheless, it can happen that a person is not ill enough to consider that she will be victim of ill treatment if she is returned but she cannot travel.³⁷

4. Specific States’ decisions for specific groups

Apart from the restrictions to removal that have been mentioned previously and are based in international human rights law, some states have decided not to return specific groups of people. For example, in some states as Spain and the Netherlands, women victims of gender-based violence are not returned to their country of origin. In the

³⁶ Chloe Spaven, Article 3 Health Cases – A new approach (Wilson Solicitors, 21 April 2017) <<https://www.wilsonlp.co.uk/article-3-health-cases-new-approach/>> accessed 9 May 2019

³⁷ Maaike Vanderbruggen and others (n 14) 47

Netherlands, victims and witnesses of human trafficking who have reported to the police will not be returned and could be granted a temporary residence permit. In Spain, pregnant women are also not returned during the pregnancy as it could endanger the pregnancy and the woman's health.³⁸

5. Practical impediments

Even when a removal decision has been issued and there are no humanitarian or legal impediments for the return, some practical issues can impede temporarily the enforcement of the return. For example, if there are no available tickets to the migrant's country of origin or if there is not a direct route to the country of origin and a third state does not allow an irregular migrant in one of its airports.³⁹

³⁸ DLA Piper and OHCHR, *Admission and Stay based on Human Rights and Humanitarian Grounds: A Mapping of National Practice* (December 2018) 17 and 22
<https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DLA_Piper_Study.pdf>
accessed 10 May 2019

³⁹ Maaike Vanderbruggen and others (n 14) 24

PART II – LEGAL FRAMEWORK OF THE DETENTION OF IRREGULAR MIGRANTS

The deprivation of liberty, or detention, is regulated by several international human rights treaties, especially in the criminal context. Yet, administrative detention is also used in the migration context in order to identify irregular migrants, assess international protection claims, or facilitate the deportation or removal process.

It is acknowledged that immigration detention is less regulated in law than criminal detention, which makes migrants more vulnerable to arbitrariness. The lack of regulation also leaves migrants with less safeguards and remedies if cases of abuse happen during the deprivation of liberty. In some cases, the immigration detention is directly illegal, and in others, it can be considered arbitrary as due process is not ensured, the detention is not subject to judicial review, etc.⁴⁰

In many cases, immigration detention is used as the first resort, without the realisation of an individual assessment included in the law. Detention of migrants is not directly illegal, but it has to follow strict rules of necessity, proportionality and non-discrimination.⁴¹ Undocumented migrants are not criminals: they are not in detention because they have committed a crime. They have committed an administrative fault: not having the right immigration status.

In the second part of the thesis, I will go through the main international and European treaties and non-binding documents that regulate detention, focusing on the administrative detention of migrants in the process of removal to the country of origin.

1. United Nations level

1.1. International Covenant on Civil and Political Rights (ICCPR) Article 9

Article 9 ICCPR, following the right to liberty recognised in the Universal Declaration of Human Rights, also recognises and protects the liberty and security of person. This is a very important right both for individuals but also for the society as a whole because a violation to the right of liberty and security will surely imply the violation of other human

⁴⁰ OHCHR, *Administrative Detention of Migrants*

<<https://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>> Accessed 10 May 2019

⁴¹ International Detention Coalition (n 6) 11

rights. Article 9 applies to “everyone”; we can therefore interpret that it includes refugees, asylum seekers and migrants in the jurisdiction of a Contracting party of the ICCPR.

The right to liberty and security of person is not absolute and it is recognised that detention is justified in some occasions and therefore requires it not to be arbitrary and with respect to the law. In this context, “arbitrariness” is not always equal to “against the law”, as “arbitrariness” has to do with elements as necessity and proportionality, very important in the context of immigration detention especially. According to the interpretation of Article 9 ICCPR, if the justification of detention is not periodically re-evaluated, we could talk about arbitrary detention.

The ICCPR does not establish a list of reasons admitting the detention of a person. It only establishes that it is permissible in the case of a criminal case and forbidden “on grounds of inability to fulfil a contractual obligation”.⁴² Yet, it establishes that any form of detention has to be established by law in order not to be arbitrary.

The provisions concerning deprivation of liberty in the ICCPR are very generic and do not mention specifically nor immigration detention in general, nor pre-removal detention in particular.

1.2. UN Human Rights Council General Comment No. 8 and No. 35

In June 1982, the Human Rights Council (HRC) released its General Comment No. 8 in order to give an interpretation of the Article 9 of the ICCPR. Despite the narrow interpretation given to Article 9 ICCPR until then, the HRC considered here that most of the provisions contained in this article should also be applied in cases of deprivation of liberty for immigration control purposes, amongst other cases. For example, it considered that in all immigration detention cases there is the right to control by a court the legality of the detention, and in cases where it is found that there is a violation of the Covenant, the person involved has the right to receive an effective remedy.⁴³

⁴² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR)

⁴³ UN Human Rights Committee, ICCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons) (30 June 1982)

The HRC released a new general comment on the right to liberty and security of person in 2014, which replaced General Comment No. 8. General Comment No. 35 highlights that by “everyone”, Article 9 referred also to “aliens, refugees and asylum seekers, stateless persons, migrant workers”. In this General Comment, the HRC explains more in depth its interpretation of arbitrary detention in the context of migration. First, the HRC mentions that the detention has to be “reasonable, necessary, proportionate and reassessed [periodically]”. Therefore, states have to indicate criteria of reasonability and necessity in their domestic law. Moreover, the HRC considers that the decision of detention has to be taken in a case by case approach, and that there should never be rules on broad categories of people. Following with the idea of necessity and proportionality, the decision “must take into account less invasive means of achieving the same ends”, which means that detention should not be systematic; detention should always be the last resort, the last option available to fulfil with the objectives.

Concerning the specific topic of this thesis, the detention of unreturnable TCNs, the HRC is clear as stating that “the inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention”. Therefore, for the HRC, detention in order to enforce a removal should stop at the moment when the authorities realise the impossibility of the removal.

1.3. Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention (WGAD) was created in 1991 by the former Human Rights Commission with the mandate to investigate cases of alleged arbitrary detention, conduct field visits and publish deliberations on issues of general nature.⁴⁴ Since 1997, the WGAD also considers the situation of irregular migrants and asylum seekers in detention. In July 2018, it published the revised deliberation N° 5, concerning immigration detention. The WGAD reminded that administrative immigration detention must always be used as an exceptional measure of last resort and for the shortest time possible. In its annual report published in February 2009, and therefore, evaluating the situation in 2008, the WGAD stated:

⁴⁴ OHCHR, *Working Group on Arbitrary Detention*

<<https://www.ohchr.org/en/issues/detention/pages/wgadindex.aspx>> accessed 30 May 2019

“The Working Group has also publicly expressed, together with other mandate holders of special procedures, its concern regarding a law-making initiative of a regional organization comprising mainly receiving countries which would allow concerned States to detain immigrants who are in an irregular situation for a period of time of up to 18 months, pending removal. It would also be permitted to detain unaccompanied children, victims of human trafficking, and other vulnerable groups.”⁴⁵

Considering the dates and the data included in the sentence, it can be argued that the WGAD is referring to the EU Return Directive (mentioned in the following parts of the thesis) and that it considers that establishing a time limit of 18 months detention is very high considering its administrative nature.

Moreover, the same report also acknowledges the situation of lack of cooperation from consular representations to provide identity documents of migrants. In those situations, as the impossibility to remove an irregular migrant does not fall within their sphere of action, the WGAD advocates to include provisions that render that detention unlawful.

In the revised deliberation N° 5, the WGAD also highlighted the need to establish effective alternatives to detention to ensure that detention is an exceptional measure and that the principles of necessity and proportionality are followed. Acknowledging that immigration detention is necessary in some cases, the WGAD defends that detention is “necessary” when it is the only way to achieve the intended purpose and there are no less coercive measures.⁴⁶ Therefore, in the context of removal, Governments are obliged to resort to alternatives to detention when “the chances of removal within a reasonable delay are remote”.⁴⁷

Australia detains asylum seekers in a regular basis. For example, a stateless man was held in detention for 9 years without charges and trial. According to the WGAD, Australia

⁴⁵ Human Rights Council, A/HRC/10/21 *Report of the Working Group on Arbitrary Detention, Detention of immigrants in irregular situation* (16 February 2009) p. 23

⁴⁶ Human Rights Council, A/HRC/39/45 *Report of the Working Group on Arbitrary Detention, Revised deliberation N° 5* (2 July 2018)

⁴⁷ Working Group on Arbitrary Detention, Opinion No. 45/2006, UN Doc A/HRC/7/4/Add. 1 (16 January 2008)

breached international human rights laws and it has asked the state to change their laws.⁴⁸

1.4. Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Safe, Orderly and Regular Migration (GCM) is a non-binding text signed in December 2018. Despite the reluctance of some countries to sign it, as the USA, Austria or Hungary, the text has been signed by most of the UN member states. Acknowledging the increase of migratory movements in the last five years, the text highlights the need of good governance and international cooperation in the context of migration. Almost every country is a country of origin, transit or destination, and therefore cooperation is needed in order to get the most positive outcomes of migration. Moreover, states need to ensure that they protect the human rights and dignity of all migrants irrespectively of their migratory status at every stage of the migration process by reducing the departures from countries of origin, reducing the vulnerabilities during transit, ensuring dignified treatment in host communities, etc.⁴⁹

Amongst the 23 objectives included in the GCM, objective 13 deals directly with detention of migrants as it states that the “Use immigration detention [should be used] only as a measure of last resort and work towards alternatives”. The GCM insists in the need of ensuring that immigration detention is not arbitrary and follows the principles of necessity, proportionality and individual assessment of the cases. GCM signatory states also commit to ensure that the detention of migrants is as short as possible and that non-custodial alternatives are used in first place. The GCM reiterates the principle already existing in international law that immigration detention has to be used only as the last resort. Moreover, in the provision c) of the objective 13, states commit to revise

⁴⁸ OHCHR, *30 Articles on the 30 articles: The Universal Declaration of Human Right at 70: Still Working to ensure freedom, equality and dignity for all – Article 9: Freedom from Arbitrary Detention (OHCHR) 2*
<<https://www.standup4humanrights.org/layout/files/30on30/UDHR70-30on30-article9-eng.pdf>> accessed 15 May 2019

⁴⁹ Joanna Apap, Daniela Adorna Diaz and Gonzalo Urbina Trevino, *A Global Compact on Migration – Placing human rights at the heart of migration management* (European Parliamentary Research Service, January 2019)
<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614638/EPRS_BRI\(2017\)614638_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614638/EPRS_BRI(2017)614638_EN.pdf)> accessed 15 May 2019

relevant legislation and practices to ensure that immigration detention is not promoted as a deterrent, which is especially important in the case of unreturnable TCNs who might be detained long periods of time because of this. States also commit in this text to ensure that migrants in detention have access to justice and they get regular information in a language they understand.⁵⁰

In spite of not being a binding treaty, the GCM is still very important because it is the first international cooperation framework signed to share responsibilities in the context of migrants' protection. Concerning the detention of migrants, it is of great value that the text reaffirms that detention needs to be the last resort and states should always privilege alternatives to detention, as there are less coercive and permit to protect the dignity of migrants.

Despite the reiteration provisions already present in international law, some states refused to sign the GCM especially because of the provision on immigration detention as a last resort. This is the case of Australia, whose migration policy includes immigration detention as first resort, going against international law. Australia detains migrants offshore in order to prevent their irregular entry in the country, a practice that goes against provisions included in international treaties.⁵¹

Even if it is not binding, it has the potential to have legal implications in the near future if governments decide to follow the requirements included there and judicial powers decide to take the GCM as example of obligations.

2. Council of Europe level

2.1. European Convention on Human Rights Article 5 and ECtHR case law

The European Convention on Human Rights (ECHR) includes, as many regional human right treaties, a provision which prohibits the arbitrary deprivation of liberty of person,

⁵⁰ UNGA, *Global Compact for Safe, Orderly and Regular Migration, Intergovernmentally negotiated and agreed outcome* (UN, 13 July 2018) <https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf> accessed 2 June 2019

⁵¹ Fanny Tittel-Mosser, *The Global Compact's controversy (2/4): Migrants' detention*, Future Citizen Institute (Future Citizen Institute, 8 January 2019) <<https://www.ifuturecitizen.com/post/the-global-compact-s-controversy-2-4-migrants-detention>> accessed 2 June 2019

its Article 5. Concerning the arbitrary detention of asylum seekers and irregular migrants, the Article 5.1. ECHR states:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

Therefore, the ECtHR recognises that not all restrictions of liberty of third country nationals staying illegally in Europe amount to deprivation of liberty. Nevertheless, they can amount to deprivation of liberty depending on the length, the intensity, the accumulation of restrictions or the nature.⁵² In the case *Engel and Others vs. The Netherlands*, the ECtHR stated that: “In order to establish whether this is so [violation of Article 5 ECHR], account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.”⁵³

In spite of both situations being in the same provision, 5.1.(f), detention to prevent an unauthorised entry and detention in order to enforce a deportation are regulated in a different way according to the ECtHR. In the case *M.S.S vs Belgium and Greece*, the ECtHR found a violation of Article 5 because of the prolonged detention of M.S.S., who could not be deported according to the non-refoulement principle.⁵⁴ M.S.S. was an asylum seeker in Belgium and according to the Dublin regulation was transferred to Greece, as it was the country of arrival in the EU. However, the ECtHR judges considered that transferring a person to Greece could be a risk of serious breach of fundamental rights included in the Charter of Fundamental Rights because of the overcrowding

⁵² Yannis Ktistajis, *Protecting migrants under the European Convention on Human Rights and the European Social Charter, A handbook for legal practitioners* (Council of Europe Publishing, February 2013) 23 <<https://rm.coe.int/168007ff59>> accessed 3 June 2019

⁵³ *Engel and Others v The Netherlands* (1976) 1 EHRR 647

⁵⁴ *MSS v Belgium and Greece* (2011) 53 EHRR 2

situation in the Greek camps.⁵⁵ Deprivations of liberty to ensure removal of a third country national are only justified as long as the deportation process is in progress. In the case of *Longa Yonkey vs. Latvia*, even if the applicant, after several denied asylum applications, was returned to a country of transit, the ECtHR established that there was violation of Article 5 at some periods of the detention because during those periods the standards of the ECHR were not met and there was no national legislation supporting the detention. Therefore, detention preceding removal should always be the last resort. As judged in the case *Rahimi vs. Greece*,⁵⁶ an unaccompanied minor who was detained during two days, Greece had violated Article 5 ECHR not because of the length of detention, but because detention was applied automatically, which breaches the ECHR. First, there is the need to examine if there are less coercive measures that could ensure the effective removal of the person. Moreover, in cases involving minors, the best interest of the child should always be taken into consideration.

The right to information included in Article 5.2 ECHR concerns both criminal detention and immigration detention. Apart from the right to be informed on the reason of the detention and the right to challenge it, Article 5.2 also obliges states to inform migrants about their right to judicial review and procedural steps. Moreover, the information needs to be given promptly. In the context of migration, it does not mean that it has to be given at the same moment of the arrest, but it needs to be given in the following hours, as stated in the case *Saadi vs. Italy*.

Considering that migrants during pre-removal detention have not committed any crime and are under administrative detention, their detention should not be punitive in nature and there are several safeguards to protect them.⁵⁷ Safeguards against arbitrary detention also include the length of the detention. The ECHR does not include a time limit for the detention. Therefore, in order to consider that the length of detention

⁵⁵ European Commission, CASE OF M.S.S. v. Belgium and Greece, Application no. 30696/09 (EC, 22 September 2011) <https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/case-mss-v-belgium-and-greece-application-no-3069609_en> accessed 4 June 2019

⁵⁶ *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011)

⁵⁷ European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security* (April 2019) 28 <https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> accessed 3 June 2019

makes of it an arbitrary detention there is the need to assess the particular circumstances of each case.⁵⁸ In every case, the length of the detention has to be reasonable for the purpose pursued.

2.2. Other European standards

The Parliamentary Assembly of the Council of Europe (PACE) has been concerned in the last years about the detention of asylum seekers and irregular migrants and has, therefore, approved several reports and recommendations on the issue. In 2010, the PACE approved a report⁵⁹ by Ms. Ana Catarina Mendonça concerning the detention of irregular migrants and asylum seekers. She highlights that international standards exist concerning the detention of aliens, but they are not always applied in the most accurate way and member states end up implementing only the minimum standards, which provokes shortcomings in the protection of migrants. The rapporteur reminded that immigration detention is only lawful in case of prevention of irregular entry or with view to deportation and she insisted in the fact that the state is always obliged to consider alternatives to detention. The report includes 10 guiding principles in the Appendix 1 of the report.

The rapporteur notes that, considering that the ECtHR only considers lawful pre-removal detention when the removal is practically enforceable and imminent, the time limit of 18 months set up for detention by the EU Return Directive is excessive. This matter is going to be discussed in more detail further in this thesis, and therefore nothing else is going to be added here. Moreover, the specific situation of unreturnable TCNs is mentioned in the paragraph 10 of the report:

“a person is granted interim measures from the Court suspending their removal until further notice it would not be legally possible to take action with a view to removal

⁵⁸ Yannis Ktistajis (n 52) 27

⁵⁹ Parliamentary Assembly, Council of Europe, *The detention of asylum seekers and irregular migrants in Europe* (PACE, 11 January 2010) <<http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xMjQzNSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJlZi1XRc1BVC1YTUwyUERGLnhzbA=&xsltparams=ZmlsZWlkPTEyNDM1>> accessed 4 June 2019

(even up to one or two years down the line). Quite simply, in such cases, removal can in no way be considered “imminent”.”

The reports, resolutions and recommendations of the Parliamentary Assembly are not binding. Nevertheless, it is important that the Parliamentary Assembly, composed by national parliamentarians, acknowledges and talks about this situation. However, unreturnable TCNs keep being detained in Europe, as will be discussed in the Part III of the thesis.

Following the procedures of the Parliamentary Assembly, apart from the report, the PACE also approved recommendations for the Council of Ministers,⁶⁰ which included the preparation of “European rules on minimum standards of conditions of detention of irregular migrants and asylum seekers” and the set-up of a “consultation body to examine further the 10 guiding principles on the circumstances in which the detention of asylum seekers and irregular migrants is legally permissible”.

In the reply to the Recommendation,⁶¹ the Committee of Ministers recalled the existence of provisions concerning the pre-removal detention in the “Twenty guidelines on forced return”.

In May 2005, the Committee of Ministers (CoM) of the Council of Europe adopted twenty Guidelines on forced return as a practical tool for governments, which could use them in order to draft laws and regulation and implement them. Taking into account that member states are allowed to return illegally staying third country nationals, the CoM established those guidelines, which include provisions on pre-removal detention,

⁶⁰ Parliamentary Assembly, Council of Europe, *Recommendation N° 1900 (2010) on Detention of asylum seekers and irregular migrants in Europe* (PACE, 11 January 2010) <<http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xNzgxNSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJlZi1XRc1BVC1YTUwyUERGLnhzbA=&xsltparams=ZmlsZWlkPTE3ODE1>> accessed 4 June 2019

⁶¹ Committee of Ministers, Council of Europe, *Reply to Recommendation N° 1900 (2010)* <<http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xMjYzOSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJlZi1XRc1BVC1YTUwyUERGLnhzbA=&xsltparams=ZmlsZWlkPTEyNjM5>> accessed 4 June 2019

to protect the fundamental rights of migrants in detention. However, those guidelines do not add obligations to member states: some provisions recall already existing obligations and other provisions are recommendations for member states, but not obligations.

The Guidelines remind that depriving a person of his/her liberty in order to enforce a removal is only lawful as the last resort, when non-custodial measures cannot ensure the effective removal and that there is an obligation to release the person when there is no real prospect of removal: “Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible.”

3. European Union level

3.1. EU Charter of Fundamental Rights

The Article 6 of the EU Charter of Fundamental Rights ensures the same rights included in Article 5 ECHR, having the same meaning and scope, as stated in the Article 52 (3) of the Charter. Provision 1(f) ECHR accepts “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition” when it is done in accordance with a procedure prescribed by law.

3.2. EU Return Directive and European Court of Justice case law

The 2008 Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, also called Return Directive (RD), sets common standards and procedures for the return of third country nationals residing illegally in an EU member state.⁶² The RD is the only legal text which deals with irregular migrants. Other treaties as the International Convention on the Protection of the Rights of All Migrant Workers and Their Families only protect the rights of legally residing migrants.

⁶² The Return Directive has been signed by 30 states, which include all EU member states except the United Kingdom and Ireland, and also Sweden, Norway, Iceland and Liechtenstein.

The RD has two main objectives: setting common standards for the return of illegally staying third country nationals, which will make the return process more efficient at the EU level, and protecting the fundamental rights of undocumented migrants during the return procedure (Article 1 RD).⁶³ In spite of underlining that the return procedures need to be in line with the EU Charter of Fundamental Rights and the European Convention on Human Rights, mentions to migrants' human rights are very vague in the text and are mainly in the introductory part.

The Article 6 poses an obligation to all member states to issue a return decision to every irregular migrant in their territory. In order to enforce the removal, states are allowed to provide time for a voluntary return (Article 7) and, if the return has not been carried out voluntarily in the time required, states shall use coercive measures to carry out the removal (Article 8).

Immigration detention is contemplated in the Article 15 of the RD in order to prepare and/or carry out the removal process when there is a risk of absconding and when it is not possible to implement less coercive measures as alternatives to detention instead. Moreover, it highlights that "detention shall only be maintained as long as removal arrangements are in progress and executed with due diligence" and that "when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately". Concerning the length of the detention, the RD only allows a detention period of six months, which can be increased to 18 months in total if there is a lack of cooperation from the undocumented migrant or if there are delays in obtaining the necessary documentations.

The first case brought to the European Court of Justice (ECJ) concerning the RD was the case of Said Shamilov Kadzoev (case Kadzoev) in 2009.⁶⁴ Mr. Kadzoev, a man from Chechenia and irregularly staying in Bulgaria was detained by law enforcement authorities because the lack of identification documents made impossible his removal.

⁶³ Directive 2008/115/EC (n 12)

⁶⁴ Case C-357/09 Said Shamilovich Kadzoev (2009)

As there were difficulties in getting those documents from Russia and meanwhile Mr. Kadzoev had applied for the refugee status, which was denied, the detention was getting longer. The Bulgarian Court decided to ask to the ECJ which periods were contemplated in the maximum period of detention established by the RD, especially if the period while asylum application is pending should also be counted in that time. As Mr. Kadzoev was in prison before the RD came out, the Court also asked if that pre-RD detention should be accounted in the total amount of detention time. The Bulgarian Court also asked about the interpretation of the provision stating that detention is only lawful if removal is “reasonably possible”. The ECJ replied stating that periods spent in detention as an asylum seeker did not count in the context of the RD, because there is another legal instrument to deal with that, but detention periods before the approval of the RD did count, as the RD should be interpreted in the maximum human rights protective way possible. Concerning the prospect of removal, it needs to be realistic, which is not the case if the receiving country was unlikely to accept the individual in a reasonable period of time. According to the replies of the ECJ, Mr. Kadzoev must be realised. Nevertheless, the ECJ did not establish if Bulgaria should give the individual a temporary residence permit or any other protection status: Mr. Kadzoev became an unreturnable TCN in Bulgaria with no right to work, access to healthcare, etc.⁶⁵

El Dridi, an Algerian citizen, illegally staying in Italy received in 2010 an order to leave the territory which he did not comply with. The Italian authorities sentenced him to a prison sentence of one year which would be followed by immediate expulsion, as the Italian law stated. Mr. El Dridi brought the case to the ECJ⁶⁶ considering that Italy was breaching the Return Directive. The RD allows the detention of migrants, but it has to be for as short period as possible and only to ensure the removal, whilst the procedures are taking place. As the Italian government was not making efforts to enforce the return decision, the ECJ judged that Italy was breaching the RD, as it was not following the principle of proportionality and, moreover, the jail sentence was impeding the removal

⁶⁵ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2015)

⁶⁶ Case C-61/11 Hassen El Dridi (2011)

of El Dridi. After the decision of the ECJ, several states including Italy had to change their immigration laws.⁶⁷

Nevertheless, many scholars have argued that the responses from the ECJ in those cases are disappointing and make a minimal interpretation of the RD. The ECJ could have used this opportunity to better protect human rights of third country nationals staying illegally in Europe.⁶⁸ The ECJ neither tried in the Kadzoev case to put a solution to the situation of unreturnable TCNs, who are allowed to stay in Europe because they cannot be returned but are not recognised any right. The ECJ interpreted the RD but national judges are the ones that have to find a solution for the situation of unreturnable TCNs. The Kadzoev case concerned judicial issues but also political issues; it was more than a simple interpretation of the RD but the ECJ missed an opportunity and prioritised the margin of appreciation of states.⁶⁹

Despite the provisions included in the RD concerning a maximum length of detention and requisites to consider it lawful, the RD has not been without criticism. First, the maximum length of detention of 18 months is considered very long following a human rights-based approach for many scholars, especially considering that irregular migrants in the removal procedure have, in general, not committed any crime and are in administrative detention. Moreover, as explained in the first part of the thesis, the fact that many irregular migrants do not obtain identification documents from their embassies is in many cases not because of their lack of cooperation but because of issues outside their control. After the signature of the RD, some states increased the permitted length of pre-removal detention in their territory. For example, France increased the legal pre-removal detention from 30 days to 45 days, and Italy, from two months to 90

⁶⁷ Margot Dickson, *Case Watch: A European Victory for Immigrant's Rights* (Open Society Justice Initiative, 19 May 2011) <<https://www.justiceinitiative.org/voices/case-watch-european-victory-immigrants-rights>> accessed on 1 June 2019

⁶⁸ Jean-François Amédéo, *La Cour de Justice de l'Union Européenne et la rétention des étrangers en situation irrégulière dans le cadre de la Directive Retour* (Revue trimestrielle des droits de l'Homme, Année 21, n°84, 2010) 893-915

⁶⁹ Fabienne Kauff-Gazin, *Pas de rétention sans procédure d'éloignement et pas d'expulsion sans réadmission : comment le droit européen engendre des situations insolubles : A propos de l'affaire Kadzoev rendue par la CJEU* (L'Europe des Libertés, 10^e année, janvier 2010)

days.⁷⁰ Second, as stated in the RD, detention should be the last resort and should only happen in case of risk of absconding. Unfortunately, it is very easy for member states to claim the existence of a risk of absconding as it is not defined well enough. Therefore, most of the EU member states use detention as the first resort when it comes to removal of irregular migrants, without considering other less restrictive measures.⁷¹ Third, the RD only allows pre-removal detention when it is necessary in order to enforce the removal; when there are no prospects of removal, detention is not justified anymore. Nevertheless, there are many examples of irregular migrants who have been detained for long periods of time when there were no prospects of removal.⁷² Even if the RD includes several human rights guarantees, many EU member states do not apply them in practice.

3.3. Proposal for a new version of the Return Directive

The European Commission has been worried about the number of irregular migrants present in the EU especially since 2015, when, during the so called “migratory crisis”, thousands of irregular migrants arrived to Europe. Since then, the removal of irregular migrants has been a top priority for the Commission, which saw worryingly that the “return rate”⁷³ in 2015 was only a 36%.⁷⁴ After the Malta Summit in February 2017, the Commission made several recommendations to member states on how to effectively increase return procedures.⁷⁵ Some of the recommendations have been seen by the civil

⁷⁰ Maria Giovanna Manieri and Michele LeVoy, *PICUM Position Paper on EU Return Directive* (PICUM, April 2015)

<https://picum.org/Documents/Publi/2015/ReturnDirective_EN.pdf> accessed 20 May 2019

⁷¹ Alan Desmond, *The development of a Common EU Migration Policy and the Rights of Irregular Migrants: a progressive narrative?*, (Human Rights Law Review 16, 2016)

⁷² Cristina Manzanedo, Ángel Campos, Daniel Izuzquiza and José María Trillo-Figueroa, CIE Informe 2013, Criminalizados, Internados, Expulsados (Pueblos Unidos, March 2014) 26 <https://www.entreculturas.org/files/documentos/estudios_e_informes/InformeCIE2013.pdf?download> accessed on 20 May 2019

⁷³ The “return rate” is the percentage of people returned of the total amount of third country nationals staying illegally in Europe who have received a return decision

⁷⁴ Jerome Phelps, *Will more and longer detention solve the “migration crisis”?* (PICUM, 28 March 2017) <<https://picum.org/24169/>> accessed 21 May 2019

⁷⁵ European Commission, *Press release: European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy* (EC, 2 March 2017) <http://europa.eu/rapid/press-release_IP-17-350_en.htm> accessed on 22 May 2019

society as a clear call from the Commission to member states to increase the number of migrants detained as well as the length of the immigration detention, setting a minimum time of detention. The idea behind those recommendations is that the Commission believes that more detention will mean more returns and that higher detention periods will deter irregular migrants to come to the EU. There is little proof to support those ideas and a huge risk of going against the human dignity of migrants.⁷⁶

In September 2018, the European Commission published the proposal of a new Return Directive to the European Parliament and the European Council. The new version uses the 2008 Return Directive and make some changes and adds new parts to it.⁷⁷ Concerning pre-removal detention, some changes would worryingly undermine the human rights of irregular migrants in the return procedure, including non-returnable migrants, as the European Union Agency for Fundamental Rights has already insisted in an opinion issued in January 2019.⁷⁸ First, the new proposal deletes two important words in the following sentences:

“Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may ~~only~~ keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when [...]” (Article 18)

“The use of detention for the purpose of removal should be ~~limited~~ and subject to the principle of proportionality with regard to the means used and objectives pursued.”

(Recital 27)

Deleting these two words is undermining an important principle concerning pre-removal detention: its use only as last resort because of its interference to liberty, especially

⁷⁶ Jerome Phelps (n 74)

⁷⁷ Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) - A contribution from the European Commission to the Leaders’ meeting in Salzburg on 19-20 September 2018 <https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-returning-illegally-staying-third-country-nationals-directive-634_en.pdf> accessed on 23 May 2019

⁷⁸ European Union Agency for Fundamental Rights, *The recast Return Directive and its fundamental rights implications - Opinion of the European Union Agency for Fundamental Rights* (FRA, 10 January 2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-recast-return-directive-01-2019_en.pdf> accessed on 23 May 2019

considering that irregular migrants have not committed any crime. Second, the new proposal of the RD includes an open-ended list of criteria for the determination of the risk of absconding, which expands undoubtedly the context of the risk of absconding. Member states can add more situations that they consider as being risks of absconding, but they cannot restrict the list proposed by the European Commission. The list of criteria on the risk of absconding includes third country nationals who entered the EU illegally, who lack of identity documents or who use forged ones. Recommending pre-removal detention in those cases would be using systematically pre-removal detention for every irregular migrant who entered illegally the EU. As explained in the first part of the thesis, many irregular migrants were forced by their smugglers to get rid of their identity documents. In third place, the proposal includes a minimum period of detention of three months. Considering that the maximum legal length of pre-removal detention in some EU member states is shorter than the minimum period proposed by the EC, it can be argued that it is a retrogression on the rights of irregular migrants in the return process. It has been proved in different studies that more detention does not obligatory led to more effective return.⁷⁹

⁷⁹ Ibid.

PART III – EU MEMBER STATES’ PRACTICE CONCERNING THE DETENTION OF UNRETURNABLE TCNS

Deprivation of liberty is a serious right restriction, as it often entails the deprivation of other human rights. Despite acknowledging that it is needed in some criminal cases, immigration detention has been found to be very harmful and its effectiveness has been contested many times. The return rate at the EU level shows that detention is not an effective mechanism to ensure the removal of irregular migrants. In France in 2018, for example, only 40% of people placed in immigration detention centres were removed, 16% to an EU member state and 24% to a country outside EU.⁸⁰

Despite the existing legal framework, the EU member states’ practice concerning the detention of unreturnable TCNs can differ from the existing legal standards. Moreover, some EU member states are not bound to all existing legal instruments concerning the detention of TCNs, which undermines the protection from arbitrary detention. For example, the UK has not signed the Return Directive. It is also possible that some provisions included in legal instruments are not as human rights compliant as they should be. Some NGOs, for example, believe that the detention length limit established in the EU Return Directive is very high and is very harmful for detained migrants.

1. Detention of people from countries in war or dangerous situations

In France, La Cimade carries out every year a report concerning immigration detention in the country. In the 2018 report, La Cimade found that people from “not-safe” countries as Afghanistan, Iraq, Sudan, Eritrea or Syria were placed in immigration detention. According to the principle of non-refoulement, people that could face ill-treatment if they are returned to their country of origin should not be returned there. However, it has been found that migrants from those countries are detained in France in order to be returned to another EU country (Italy or Hungary, for example) from where they could be returned to their country of origin, because they do not respect the asylum law. Sometimes, these migrants are returned directly from France. Nevertheless,

⁸⁰ La Cimade, *Centres et locaux de rétention administrative – 2018 Rapport* (La Cimade, Juin 2019) 18 <https://www.lacimade.org/wp-content/uploads/2019/06/La_Cimade_Rapport_Retention_2018.pdf> accessed 15 June 2019

60% of them have been released from immigration detention by a judge, who has sanctioned the return procedures started by France. Most of the times, the release was sanctioned because it was not possible to arrange the return in the legal delay of 45 days.⁸¹

Aiming at increasing the number of returns, Sweden also detains people from countries as Afghanistan for immigration purposes. In order to ensure that the removals are enforced, Sweden has opened liaison offices there and has adopted a bilateral understanding on readmission with the country. Despite not being the subject of this thesis, it is questionable if Afghanistan is a safe country to return a person.⁸²

2. Lack of vulnerabilities assessment

In the last year, Spain has increased the removal rate of irregular migrants. Taking into account that it is hard, and almost impossible, to return migrants from sub-Saharan countries, the Spanish authorities have decided to reduce the number of sub-Saharan migrants placed in detention centres and increase the number of Moroccans and Algerians. During the last year, 67% of the migrants in detention centres were from Morocco and Algeria.⁸³ People from these two nationalities are easier to return because Spain has readmission agreements with both countries. In spite of being a good approach not to place in immigration detention people whose removal is going to be impossible, some NGOs are denouncing that the treatment to Moroccans and Algerians is discriminatory because they are directly placed in pre-removal detention and an effective assessment of needs is not done previously. Some of the Moroccan and Algerian migrants might be entitled to ask for subsidiary protection but the return process is done as fast as possible to ensure the removal.

⁸¹ Ibid..

⁸² Global Detention Project, *Sweden Immigration Detention Profile* (GDP, July 2018) <<https://www.globaldetentionproject.org/countries/europe/sweden>> accessed on 25 June 2019

⁸³ Servicio Jesuita a Migrantes, *Informe CIE 2018 - Discriminación de Origen* (SJM-E, 2019) 20 <<https://sjme.org/wp-content/uploads/2019/06/Informe-CIE-2018-SJM.pdf>> accessed on 25 June 2019

3. Lack of effective assessment of alternatives to detention

Despite several legal instruments including provisions stating that detention should only be the last resort, practice shows that in several countries the assessment of the availability and effectiveness of alternatives to detention is not done systematically to every person in the return procedure.

The Global Detention Project has found this practice in Sweden. In spite of recognising that using alternatives to detention as surrender of documents and regular reporting is more effective than detention because it is cheaper and it implies less burden to the authorities, the Swedish Migration Agency does not assess systematically if detention is necessary or alternatives to detention would be effective.⁸⁴ The Swedish Red Cross has observed that detention decisions do not explain why the authorities have chosen detention over alternatives, which could be used as proof of arbitrary detention.

The 1998 Law on Foreigners in the Republic of Bulgaria includes provisions mentioning alternatives to detention as release on bail and bi-weekly reporting to the authorities. However, these alternatives are not used in practice and in 2018, the Human Rights Committee recommended Bulgaria to develop them.⁸⁵

In spite of being presented as a good example in the management of migration and asylum issues, Germany is discussing new laws concerning these issues. The “Orderly Return Bill”, which has already been passed by the Government and is going to be discussed in Parliament, includes new provisions, being one of them the expansion of the use of detention. International standards set, as seen previously, that detention is a measure of last resort and that alternatives need to be prioritised. This new law will make it easier for the authorities to detain migrants instead of using alternatives. In order not to be arbitrary, detention would be lawful in case of risk of absconding, which the authorities needed to prove. With the new law, it would be the migrant who would need to prove that the risk does not exist. Moreover, it includes a list of indicators that would prove the existence of the risk of absconding, for example, having paid “a certain

⁸⁴ Global Detention Project (n 82)

⁸⁵ Global Detention Project, *Bulgaria Immigration Detention Profile* (GDP, April 2019)

<<https://www.globaldetentionproject.org/countries/europe/bulgaria>> accessed on 25 June 2019

amount of money” to arrive in the country, which is a very common practice because it does not specify to what extent. With the new law, detention would become the first resort used to enforce removals.⁸⁶

In Cyprus, the European Council on Refugees and Exiles (ECRE) has found that all the detention orders to carry out removal that they have reviewed for their database mention that an individual assessment has been done to check if less coercive measures can be effective. However, none of those orders include reasons or facts that can justify the decision of the detention. It can be argued that Cyprus does not conduct regular individual assessments in order to avoid detention.⁸⁷

The Global Detention Project found out that there are no provisions in the Latvian legislation that oblige the immigration authorities to consider alternatives to detention. Alternatives are included in the legislation, and are sometimes applied, especially in cases where humanitarian grounds apply. However, alternatives to detention are not assessed systematically and authorities still resort to detention in the first place. In 2014, only 55 people were afforded alternatives to detention in Latvia.⁸⁸

4. Detention without perspectives of return

In Spain, the NGO Karibu released a report in 2018 concerning the visits they did during 2017 to migrants in the detention centre of Aluche (Madrid). They chose to put the focus in 180 sub-Saharan people – mainly from Guinea Conakry, Gambia and the Ivory Coast – detained in that centre, because they are the most difficult ones to return to their countries of origin, compared to people with other nationalities, as Moroccans and Algerians. In average, those migrants spent 35 days in immigration detention, whilst the general average in the same centre was of 25 days. Moreover, 14 of them spent the

⁸⁶ Karl Kopp, *Op-ed: Detention, Insecurity, Rights Deprivation – The Legal Crackdown on Asylum Seekers in Germany* (ECRE, 19 April 2019) <<https://www.ecre.org/detention-insecurity-rights-deprivation-the-legal-crackdown-on-asylum-seekers-in-germany/>> accessed on 27 June 2019

⁸⁷ Cyprus Refugee Council, *Grounds for Detention – Cyprus* (Asylum information Database) <<https://www.asylumineurope.org/reports/country/cyprus/grounds-detention>> accessed on 28 June 2019

⁸⁸ Global Detention Project, *Latvia Immigration Detention Profile* (GDP, May 2019) <<https://www.globaldetentionproject.org/countries/europe/latvia>> accessed on 2 July 2019

maximum legal time of immigration detain in Spain of 60 days, and still, 10 of them could not be documented during that period. From those 180 migrants visited, 172 were released because their removal was impossible; 85% of the cases were caused by the impossibility to get identity documents. During the year 2017 in Spain, 61% of the migrants held in immigration detention were released, even before the deadline of legal detention because of the impossibility to be returned.

In Bulgaria there is also a huge difference in the length of detention depending on the nationality of the TCN. A study from the Bulgarian Helsinki Committee has showed that whilst TCN from Afghanistan, Algeria or Indonesia spend in average 3.8 months in detention, the average for the rest of nationalities is 19 days. The dangerous situation in some countries or the lack of readmission agreements with some states can impede the removal of TCNs in EU member states, making their detention futile.⁸⁹

La Cimade found that in many cases of immigration detention there were no realistic prospects for removal. The French NGOs are afraid that the new law that increases the legal length of detention to 90 days is only going to achieve that migrants are going to stay longer in detention even if they cannot be returned, whilst the effectiveness of the detention is going to remain the same.⁹⁰

In Cyprus, migrants are also often detained even if there is no real prospect for removal. One of the reasons for immigration detention is the lack of permission to stay in Cyprus, even if the person has already been detained before and return was not possible because of the nationality of the person. According to KISA, this happens especially to people from Iran.⁹¹

⁸⁹ Global Detention Project (n 85)

⁹⁰ La Cimade (n 80) 24

⁹¹ KISA, *Detention conditions and Juridical overview on detention & deportation mechanisms in Cyprus* (KISA, January 2014) Part III <https://kisa.org.cy/wp-content/uploads/2014/03/Detention_Return_Report_23.03.2014_English.pdf> accessed on 3 July 2019

5. Increase of the maximum time in immigration detention and increase of vulnerabilities

Despite Return Directive's limit of six months detention, that could be increased to 18 in some cases, states can choose an inferior maximum legal length of detention. During the last years, some countries have increased the length of immigration detention in law or in practice.

In January 2019, the new asylum and immigration law of the 10 September 2018⁹² entered into force in France. This law doubles the permissible length of detention, which rises from 45 days to 90 days. In France, the number of people detained for more than 30 days was 2468 in 2016 and 4432 in 2018; it almost doubled.⁹³ Moreover, the maximum time of detention has been increasing in France since 1981. Whilst the maximum permitted time of detention was 7 days in 1981, it increased in 2003 from 12 to 32 days, and in 2011, to 45. According to the French authorities, this is done to increase the returns, because they considered that 32 days were not enough for consulates and embassies to provide the documents needed to carry out the procedure effectively. However, according to 2016 data, 46% of the procedures were done before the 45 days, and an increase of time in detention would only achieve a 3% more of returns.⁹⁴ The rest of cases could not be achieved even with more time in detention: there are cases of unreturnable TCNs.⁹⁵

In two years, from 2015 to 2017, Sweden has almost doubled the maximum length of legal immigration detention: it has increased from 18 to 31 days. Between the same years, in Bulgaria, average detention length increased from 25 to 59 days. However, the Committee on the Prevention of Torture (CPT) recommended Bulgaria to reduce the length of detention as it carried out a report and interviewed migrants in detention centres who stated that they had been detained for more than one year.⁹⁶

⁹² *Loi n° 2018-778 du 10 septembre 2018 pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie* (FR)

⁹³ La Cimade (n 80) 15

⁹⁴ *Ibid.* 24

⁹⁵ *Ibid.* 24

⁹⁶ Global Detention Project (n 85)

The United Kingdom has not signed the EU Return Directive and therefore is not bound by its provision. Because of this, UK does not have a maximum length of immigration detention in its legislation, being the only country in Europe with no time limit included in law. Nevertheless, only 35% of migrants in immigration detention spend more than 28 days in detention centres, and only 1% spends one year or longer. However, the uncertainty of how long they will be detained is also harmful for migrants in immigration detention. This is why NGOs dealing with migration issues ask for the set-up of a maximum length of immigration detention, which they believe should be of 28 days.⁹⁷

In Cyprus, despite the provisions of the Return Directive, KISA has found cases of migrants who have been detained for more than 18 months. However, it is hard for them to contest this fact because they do not receive the right information and they often do not have access to a lawyer.⁹⁸

Several studies have shown that immigration detention has a very harmful effect in asylum seekers and migrants' mental health. The possible exposure to violence in the detention centres and the social exclusion felt once detained have a very big effect in a population that has already suffered previously by fleeing conflicts, being trafficked to arrive to Europe, etc. Immigration detention adds more stress to migrants and increases the options to develop of mental health issues.⁹⁹ Moreover, for vulnerable migrants who already had mental issues immigration detention would be specifically harmful. The main mental health issues faced by migrants who have been detained are affective disorders, anxiety disorders and post-traumatic stress disorder. The consequences of these issues include self-harm actions as attempted hanging and suicides.¹⁰⁰

⁹⁷ Dr Stephanie J. Silverman and Dr Melanie Griffiths, *Immigration Detention in the UK* (The Migratory Observatory at the University of Oxford, 29 May 2019)

<<https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>> accessed on 6 July 2019

⁹⁸ KISA (n 91) Part III

⁹⁹ M. von Werthern and others, *The impact of immigration detention on mental health: a systematic review* (BMC Psychiatry, 6 December 2018) 2

<<https://bmcp psychiatry.biomedcentral.com/track/pdf/10.1186/s12888-018-1945-y>> accessed on 5 July 2019

¹⁰⁰ Ibid. p.10

According to a study carried out in the UK, the length of detention is an important factor in the development of mental health issues. The longer the detention, the easier it is to suffer from mental health issues. However, the experts agree that even “short”¹⁰¹ periods of detention have consequences in mental health. The symptoms have been found to prevail in the long term, for more than three years after the release, which has an impact in the daily life of the migrant and his/her capacity to behave with other people.¹⁰²

Apart from the mental health issues that a prolonged detention provokes, it is not proved that an increase of the limit length of detention would increase the return rate. According to the numbers collected by Migreurop, the entry into force of the EU Return Directive, which increased the limit length of immigration detention in some countries, did not entail an increase in the return rate.¹⁰³ Moreover, longer detention would increase the costs related to it.

6. Repeated detention and disruption of lives

Last year in France, some of the migrants who were released from detention had already been in detention previously with no perspective to be returned. Repeated detention is done in the country without an effective assessment which could avoid unnecessary detention if it is clear that it is not going to enforce removal. La Cimade states in its 2018 report that this situation is caused by the ask of regional governments to increase returns. For example, in the detention centre of Rennes, in 2018, 16% of migrants detained had already been detained before. In 80% of the cases, they were not returned neither the second time because it was not possible. Detention and repeated detention are used a way to criminalise migration.¹⁰⁴

¹⁰¹ Experts consider “short” periods of detention 15.5 days.

¹⁰² M. von Werthern and others (n 99) 11

¹⁰³ Migreurop, *The hidden face of immigration detention camps in Europe* (Migreurop, 14 October 2014) 2C <<http://www.migreurop.org/IMG/pdf/hiddenfaceimmigrationcamps-okweb.pdf>> accessed on 4 July 2019

¹⁰⁴ La Cimade (n 80)

France is not the only EU member state which enables repeated detention. Spain also re-detains unreturnable TCNs because when they are released from the detention centres, they do not receive any document stating their situation.¹⁰⁵

The Cypriot NGO KISA released a report after they carried out interviews with migrants placed in detention centres. They found out that it was common that migrants who have been released because of a Supreme Court decision are detained again on the same grounds.¹⁰⁶

In Latvia, when migrants are released from detention centres because their removal was impossible before the expiration of the legal length, they are not given any status so their condition of unreturnability is not acknowledged and they can be re-detained at any time. The European Commission against Racism and Intolerance (ECRI) already recommended Latvia not to detain migrants who could not be removed. However, as of May 2019, this still happens in the country.¹⁰⁷

Long periods of detention, and especially repeated detention, have huge consequences for migrants' lives. In many cases, immigration detention entails being disconnected from family and friends. Detention centres, which are very similar to prisons, have strict rules. Family and friends have limited time for visits, which are restrained to some specific days per week and are often very short. Moreover, visits are not conducted in an intimate space and are controlled by guards. In some detention centres, migrants are not allowed to have a mobile phone with them and access to Internet is restricted and controlled. When migrants suffer from repeated detention, they feel disconnected from their family and friends, especially when they have kids.¹⁰⁸

¹⁰⁵ Raúl Bocanegra, *España expulsó en los últimos diez años a 189.540 personas y quiso echar a otras 373.175* (Público, 23 Abril 2018) <<https://www.publico.es/sociedad/espana-expulso-ultimos-diez-anos-189540-personas-quiso-echar-373175.html>> accessed on 1 July 2019

¹⁰⁶ KISA (n 91) Part III

¹⁰⁷ Global Detention Project, *Country report, Immigration detention in Latvia, Giving "Accommodation a whole new meaning"* (GDP, May 2019)

¹⁰⁸ Migreurop (n 103) 4B

Despite not being allowed to work in many cases, unreturnable TCNs need to do so illegally in order to survive. Being detained several times in a short period of time adds more instability to their lives because they cannot keep the same job for long.

7. Lack of judicial review of the detention

Article 6 ECHR states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.¹⁰⁹ EU member states should therefore establish mechanisms for migrants in immigration detention centres to contest the detention. The legality of the detention should be reviewed automatically and by request of the migrant.

La Cimade has found that in France there are more and more cases of people staying in detention for the longest period allowed, and in many cases, there is not an individualised review of the case. In the detention centre of Palaiseau (France), some migrants had to wait several weeks until the return procedure started. This is illegal, because according to the law, the procedure has to start in the shortest delays. This is specifically harmful for the migrants who are helping the authorities in the return process and are giving their identity documents, because they do not understand the delay. Sometimes, detention gets longer because migrants’ travel documents expired before the authorities organised the travel back or because there are no flights available, provoking more harm.¹¹⁰

In Hungary, immigration detention cannot be appealed and the main existing legal remedy is the judicial review of the immigration detention. This is done in the first place by a court during the first 72 hours of detention, and then, every 60 days if the detention is still ongoing. Considering EU law, the judicial revision should take into account the proportionality and necessity of the detention, taking into account that immigration detention should always be the last resort. Nevertheless, it has been observed that Hungarian courts fail at protecting migrants’ rights, as they fail to do an individualised assessment and they conduct the judicial review as a mere formality. For example, the

¹⁰⁹ European Convention on Human Rights (n 30) art. 6

¹¹⁰ La Cimade (n 80)

Hungarian Supreme Court published a survey from 2011 and 2012 where it was showed that from 5000 detention decisions, courts only discontinued three of them.¹¹¹

The situation is similar in the Netherlands, where the right to access judicial review is very different in immigration detention and penal detention. Even if the examination of the immigration detention can be done by the Migration Chamber at the administrative district court, it rarely happened before the first month of the detention, and sometimes it is even done after six weeks of detention.¹¹²

These situations happen regularly because migrants do not receive all the information concerning their return procedure and they do not know the rights they are intitled to. In some countries, access to a lawyer or even to the assistance of an NGO is very complicated for migrants in detention. When migrants do not speak the language of the country and there are no interpreters, violations of their rights increase.

8. Release from detention without rights and impossibility to obtain a temporary residence permit

When the removal of a migrant is impossible to carry, the immigration authorities release the person. However, the status that the unreturnable TCN is granted depends on the EU member state where the person has been detained.

Sweden had been seen as the most human rights based Scandinavian country in terms of immigration control. However, its practices have been getting less human rights centred since 2015, due to the increase of arrivals of asylum seekers. In 2016, Sweden passed new legislation that limited the provision of temporary residence permits for irregular migrants as well as restricted the right to family reunification.¹¹³

In Spain, there are paths for regularisation in cases of humanitarian grounds. However, unreturnable TCNs who are unreturnable because of lack of readmission agreement with the country of origin, lack of cooperation from the embassy or lack of documents

¹¹¹ Global Detention Project, *Hungary Immigration Detention Profile* (GDP, September 2016) <<https://www.globaldetentionproject.org/countries/europe/hungary>> accessed on 4 July 2019

¹¹² Global Detention Project, *Netherlands Immigration Detention Profile* (GDP, November 2016) <<https://www.globaldetentionproject.org/countries/europe/netherlands>> accessed on 5 July 2019

¹¹³ Global Detention Project (n 82)

that prove the nationality are not grounds to obtain that kind of permit. Unreturnable TCNs, once released from the immigration detention centres, are in a legal limbo with access to minimum rights. Different Spanish NGOs have denounced that preventing unreturnable TCNs from getting temporary residence permits is letting them without their fundamental rights and at risk of social inclusion. According to these NGOs it is also common to find cases of homelessness and destitution amongst unreturnable TCNs who have not been granted further status.¹¹⁴

Concerning the rights granted when there has been a postponement of the removal order, there are big differences between the EU member states. First, it is important to acknowledge that not all migrants whose removal has been postponed receive a status. In some countries, unreturnable TCNs are in a legal limbo; they are not return and are allowed to stay but have no further right. In others, they obtain a status with basic rights.

In most of the cases, states only provide emergency healthcare, as it is the minimum obligation following the EU Return Directive. However, some states as Denmark and the Netherlands provide basic healthcare, which covers broader issues.¹¹⁵ In relation with the right to work, most of the EU member state do not grant it to TCNs pending return. Some countries as Germany grant it after one year of postponement and others, as Sweden, if the migrant cooperates with the removal.¹¹⁶

As it can be seen, the rights granted when a removal decision is postponed depend on the EU member state where the unreturnable TCN is.

¹¹⁴ Fundación Abogacía Española, *Inmigrantes que no pueden ser expulsados de España y pasan por los CIE “una y otra vez”* (Fundación Abogacía Española, 20 January 2014) <<https://www.abogacia.es/2014/01/20/inmigrantes-que-no-pueden-ser-expulsados-de-espana-pasan-por-los-cie-una-y-otra-vez/>> accessed on 6 July 2019

¹¹⁵ Mathilde Heegaard Bausager, Johanne Köpflø Møller and Solon Ardittis, *Study on the situation of third country nationals pending return/removal in the EU Member States and the Schengen Associated Countries HOME/2010/RFX/PR/1001* (European Commission, 11 March 2013) 39 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_en.pdf> accessed on 6 July 2019

¹¹⁶ *Ibid.* 41

PART IV – ALTERNATIVES TO DETENTION FOR UNRETURNABLE TCNs

As reviewed in the second part of the thesis, most of the international and regional treaties dealing with immigration detention prioritise alternatives to detention and highlight that immigration detention should be the last resort, used only when least coercive measures are not effective. Nevertheless, as seen in the third part, in the EU member states alternatives to detention are in practice not considered in the first place.

The situation of unreturnable TCNs concerning pre-removal detention is very specific because they cannot be return, and therefore the detention cannot fulfil its objective of facilitating the irregular migrant's removal. However, states can argue that unreturnability does not last forever. If the embassy of the country of origin of the irregular migrant decides to cooperate and provides the identity and travel documents, if the health conditions impeding return cease to be important enough to impede the removal, if there is suddenly an available flight to return the migrant, the unreturnable TCN in question is no longer unreturnable. States can argue that detention is useful if those conditions become true. However, as seen in the previous part of the thesis, detaining unreturnable TCNs causes huge damages on migrants and disrupts their lives. This is important especially because it has been proved that many migrants stay unreturnable for their whole lives. Because of these specificities, using alternatives to detention is even more important for unreturnable TCNs, who can be detained for longer periods and several times in their lives.

In first place, it is important to say that alternatives *to* detention should not be established in a way that would make of them alternative *forms* of detention. Second, in order to be effective, alternatives to detention need to fulfil three premises: alternatives to detention need to ensure the compliance with the migration requirements (for example, return), the compliance with fundamental rights of migrants and to be cost effective. And finally, there is not a "one size fits all" solution concerning alternatives to detention. Some kind of alternatives to detention can be more effective for a certain group of irregular migrants and not for another group and some countries might need different alternatives to detention to others (for example, taking into account the number of arrivals of irregular people per year). In some cases, more than one option of alternative to detention can be used.

1. Alternatives to detention pending resolution

When a migrant is in a pre-removal procedure, he/she has been found to be illegally staying in the EU territory or has been caught entering illegally the EU territory and has been issued a return decision. In most of the cases, they are put in detention in order to fulfil the procedure and implement the removal avoiding the risk of absconding. Nevertheless, different pilot projects have found that there are more effective ways to engage migrants in the return procedure and avoid absconding and increase cooperation. Resolving a migration issue whilst using a community-based strategy is an effective option which respects fundamental rights.

1.1. Screening and assessment

In the first place, when a person is found in an irregular situation in an EU member state or entering irregularly, it is very important to conduct a good screening and assessment. Screening, which should be done at the very first moment, consists in understanding the circumstances of the person. This means, knowing the identity, nationality, migratory status and vulnerabilities of the person.¹¹⁷ This is especially important for irregular migrants who are unreturnable, as they might be held in detention for long periods if their specific situation is not well determined.

1.1.1. Nationality assessment

Getting to know the nationality of the migrant is very important when it comes to countries of origin that do not have Readmission Agreements with the EU or the member state where the migrant is. If it has been shown that irregular migrants from a specific country are never returned because that country does not cooperate and does not facilitate identity documents and travel documents, this should be assessed in the very first stage of the process, so it is easier to evaluate which are the best decisions that should be taken in order to comply with the migration requirements. In Spain, it has been found that the number of removals from detention centres has increased since mid-2018. The cause behind this is that Spain realised that it was very hard, not to say impossible, to remove migrants from sub-Saharan countries. Therefore, migration

¹¹⁷ Steering Committee for Human Rights (CDDH), *Legal and practical aspects of effective alternatives to detention in the context of migration* (Council of Europe, 7 December 2017) 94

authorities have decided to avoid the immigration detention of irregular migrants from some sub-Saharan countries, as it is shown to be ineffective and causes unnecessary pain.¹¹⁸

1.1.2. Statelessness determination procedure

In 2015, there were around 722.000 stateless persons in the OSCE area.¹¹⁹ Without nationality and valid identity documents, they encounter many obstacles as they are denied many rights in the country where they live, which undermines their human rights. In the context of migration, stateless people can be detained in order to be removed for very long periods of time due to their lack of documents. In order to avoid this unnecessary pain, EU member states need to address statelessness and create and implement statelessness determination procedures. The condition of statelessness does not compulsory mean that the stateless person is never going to be returned: some people who go through the statelessness determination procedure can have a realistic prospect of admission or readmission in another country if they acquire or reacquire a nationality.¹²⁰ Therefore, according to the UNHCR, the determination of statelessness is as important as the determination of other vulnerabilities (human trafficking, women who suffered gender-based violence, etc.).

The statelessness determination procedure should be present in different already existing administrative procedures, as naturalisation applications or refugee determination procedures. However, I will focus in the pre-removal context. Here, having statelessness determination procedures is in the interest of the stateless person in order to avoid unnecessary detention, but also of the state, which avoids further unnecessary administrative procedures that will not achieve the objective of the

¹¹⁸ María Martín, *Interior bate récords de expulsiones desde los CIE* (El País, 6 June 2019) <https://elpais.com/politica/2019/06/02/actualidad/1559507111_004291.html> accessed 21 June 2019

¹¹⁹ OSCE and UNHCR, *Handbook on Statelessness in the OSCE Area International Standards and Good Practices* (Organization for Security and Co-operation in Europe, 28 February 2017) 9 <<https://www.osce.org/handbook/statelessness-in-the-OSCE-area?download=true>> accessed on 15 June 2019

¹²⁰ UNHCR (n 20)

removal and avoids to spend money on the detention of a person who is unreturnable in most of the cases.¹²¹

The Handbook on Statelessness published in 2017 by the OSCE in collaboration with the UNHCR acknowledges that very few states have stateless determination procedures in place. Moldova, which is considered as a good example by the OSCE, grants the right to stay to a person who is going through the process of statelessness determination and he/she could only be returned in case of being a threat to national security and public order.

During this procedure, that should not last more than six months ideally, the administration of the host country should assess both the facts and the laws. There is the need to gather as much information from the migrant and all documents possible (ID, birth certificate, civil register, marriage certificates, school grades, etc.). Moreover, in order to assess statelessness cases, the host country also needs to gather as much information possible of the country under consideration, especially information concerning nationality laws and its implementation in practice. This task could require experts on the topic, so training of administration officials is very important in order to do a good assessment. These officials would need to gather that information directly from the state in question or from non-state bodies which have huge expertise on the topic.

In order to carry out an effective statelessness determination procedure, the applicant needs to provide the administration with as much documentation as possible. Taking into account the nature of statelessness, this is sometimes difficult because the person lacks of many documents. In those situations, the administration needs to take into consideration the testimony given by the applicant. Moreover, it is of huge importance to ensure that the applicant trusts the procedure, so he/she gives all the information he/she has. Considering that many people might be afraid of the procedure, giving as much information as possible in a language the understand is of outmost importance.

¹²¹ OSCE and UNHCR (n 119)

Only if the applicant understands everything and trusts the procedure, he/she will cooperate in all instances.¹²²

1.2. Building trust

In spite of being included in several legal instruments concerning immigration detention, alternatives to detention are rarely used in EU member states. The main argument used by states is that some migrants do not cooperate with the migration procedure and that there is a risk of absconding. First, it is important to mention that lack of cooperation and risk of absconding are rarely defined by the state. What is exactly lack of cooperation? Having forged documents because the smuggler took the original ones? Lying about the country of origin because the migrant is afraid because he/she was persecuted? Assessing the risk of absconding is also difficult and is not done in most of the cases.

In order to reduce the risk of absconding and increase both cooperation with the migratory authorities and voluntary returns, pilot projects have found that there is the need to build trust between the irregular migrant and the migratory procedures. If migrants understand the procedures and trust that the result (even if it is that they have to return to their countries of origin) is fair, cooperation is going to be higher and migrants are going to accept and comply voluntarily with the results in a higher degree.¹²³

The first step to build trust amongst migrants is to ensure access to information. Irregular migrants should receive as much accurate information as possible concerning the migration procedures, their rights and duties and the consequences if they do not comply with them. It has been proved that the more migrants know about what they are going through, the more they trust the procedure and cooperate with it. In many cases, migrants have received wrong information from their smugglers and are afraid to cooperate with migration authorities. Reversing this situation is of outmost importance. Moreover, in order to be effective, the information needs to be given in a language that they understand and has to be as clear as possible.

¹²² UNHCR (n 120)

¹²³ Steering Committee for Human Rights (CDDH) (n 117) 97

Irregular migrants who have received a return decision should also be able to receive legal assistance through the whole migration process. In order to be effective, the provision of legal assistance should be automatic, even if migrants do not ask for it, and free of charge. It can be provided by the migration authorities, but also by NGOs, legal aid clinics or local communities with expertise. Nevertheless, the government needs to ensure that the provision of legal aid starts at the very beginning of the procedure, when the irregular migrant is found to be illegally in the territory, and lasts until the last moment. Considering that EU member states rely on immigration detention stating that many unreturnable TCNs are so because they do not cooperate with the authorities, it is important to mention that the provision of legal aid, as the access to information, has been proven to increase cooperation with authorities and voluntary return rates. By understanding the procedures they are going through and realising that they are going through all the possible options to stay legally in a EU member state, irregular migrants that receive a return order are more likely to comply with it.¹²⁴

The provision of case management services has also been proven to be beneficial in most of migration procedures as it increases cooperation and reduces absconding. Moreover, it can be argued that it is even more important in the case of unreturnable TCNs (when the unreturnability is known or in order to find out the situation). The case managers or social workers ensure that the procedure is done in an individualised manner, needed in order to ensure that there is an effective determination of vulnerabilities. The provision of individualised case management of the migration procedure also ensures the engagement of migrants with the process.

Apart from protecting the fundamental rights of migrants, all the measures mentioned to build trust in the migration procedure are beneficial for states. Most EU member states rely on immigration detention to enforce removal of irregular migrants. Apart from being an expensive¹²⁵ and a very coercive measure, return rates are very low, which makes of immigration detention an ineffective measure for the purpose of returning irregular migrants. In order to enhance cooperation with migration

¹²⁴ Jesuit Refugee Service Europe (n 10)

¹²⁵ In the Netherlands, according to the International Detention Coalition, the cost of immigration detention is 6.000Eur per migrant per month

procedures and avoid absconding, several pilot projects have shown that provision of legal assistance, access to information and case management of the migration procedure are needed.

Any kind of alternative to detention (more or less coercive) needs to ensure that the basic needs of the migrant in the return procedure are covered. First, ensuring access to basic needs is a matter of human rights; nevertheless, only if the basic needs are covered the migrant is going to be able to comply with the migration procedure. If basic needs are not covered, the risk of absconding increases and the cooperation rate with authorities is reduced as the procedure is not seen as legitimate.

The results of different pilot projects have shown that there are limitations to the case management procedure. Nevertheless, in most of the cases the migrant did not engage with the case manager because of past experiences or structural issues in the migration system. For example, some migrants did not engage with their case managers because they had already experienced long periods of detention (and were released because of the impossibility of the return) and they do not trust the migration authorities anymore. Other migrants did not engage because they were receiving the wrong information or because they could not support themselves and therefore, they could not engage effectively with their case managers.¹²⁶ In order to be effective, case management needs a structured migration system and migration authorities that believe in that procedure instead of immigration detention.

1.3. Alternatives to detention

During the screening and assessment procedures, immigration detention can and should be avoided. It can be avoided because it has been proven that immigration detention is very expensive and the return rate is very low and there are therefore no benefits for states in using detention instead of alternatives to detention. It should be avoided because it causes unnecessary harm. Some migrants that are held in detention arrived

¹²⁶ Eiri Ohtani, Alternatives to detention from theory to practice – Evaluation of three engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland (European Programme for Integration and Migration, July 2018)
<https://www.epim.info/wp-content/uploads/2018/10/ATD-Evaluation-Report_FINAL.pdf>
accessed 19 June 2019

legally to an EU member state but their visa expired without the opportunity to legalise their stay, and have been living for a long time in the same country.

Following the idea of an early engagement and a good screening and assessment, the choice of the type of alternative to detention has to be assessed individually depending on the individual circumstances of the irregular migrant. Moreover, more than several alternatives might be needed.

Taking into account that in order to keep engaged in the migration procedure migrants need to have their basic needs covered, irregular migrants that just entered illegally an EU member states should be placed in open centres managed by the authorities or NGOs. Compared to the traditional detention centres, the open centres do not impede the persons to leave them. Accompanied with case management, the option of open centres can ensure the right to freedom of movement of irregular migrants whilst ensuring an effective migration procedure.¹²⁷ As mentioned previously and in order to engage with the case manager, the open centres should provide the basic needs as food and clothing. Moreover, they should include spaces where case managers and lawyers can work with the migrants in their cases. In order to ensure that irregular migrants in open centres do not abscond, they might be asked to register with the authorities. If they do not have identity documents, authorities will provide new identification documents where their identity and the reason why they are allowed to stay temporarily in the territory would be indicated. Furthermore, even if they have their own documents, in order to avoid absconding, irregular migrants might be asked to get them to the authorities and get in return those new identity documents. This measure should not be taken systematically and should be well studied before doing it. Moreover, to ensure the effectivity of this measure it is important to inform and train all the authorities (health services, police, etc.) so irregular migrants are trusted. Considering

¹²⁷ Robyn Sampson, Vivienne Chew, Grant Mitchell, and Lucy Bowring, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*, (International Detention Coalition, 2015) <<https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf>> accessed on 19 June 2019

that very advanced technology modern biometrics exist, there is not a high the risk of having fake documents.¹²⁸

In the case of irregular migrants that have been found to be illegally in the territory and have received a return order but have family and community ties, less intrusive alternatives to detention are available as they have the means to provide themselves with their basic needs. Irregular migrants in the return procedure can be asked to designate a residence, which can be an open centre, the house of a family member or a guarantor. In a broader sense, the designated residence can be a region of the country where the irregular migrant needs to live. In some cases, this measure might include the obligation of the migrant to sleep in the designated residence. In that case, if the person needs to be at a time in some specific house, the authorities might call to ensure that the person is there. Moreover, whilst case management is provided, regular reporting to the police authorities or to a representative of the community are options that have been found to be effective while at the same time protect the human rights of the person. The definition of “regular” in this context can vary, as it has to be assessed in each case how often the reporting needs to be done. It is important to take into account that, as alternative to detention, this measure is implemented to ensure freedom of movement, and therefore, the reporting cannot be as strict as to breach it. As to avoid long journeys to the place of reporting and spending money on it, telephone reporting should also be available if the case manager considers that it could be a good option.¹²⁹

In some specific cases, residential accommodation should be provided, especially for families with minors or people with vulnerabilities (people that have suffered human trafficking, women victims of gender base violence, etc.). These accommodations are temporary residences that allow to people keep their ties with the community. Taking into account the high options of being unreturnable, keeping those ties is very important because it is what is going to ensure that migrants are not excluded from society and are integrated in it.¹³⁰

¹²⁸ Steering Committee for Human Rights (CDDH) (n 117) 103

¹²⁹ Ibid. 110

¹³⁰ Ibid. 107

As mentioned previously, EU member states consider that many unreturnable TCNs are so because of their lack of cooperation. This is difficult to prove, because it is difficult to define lack of cooperation. Nevertheless, there are alternatives to detention that take into account this situation and are more effective than detention in order to remove a person from the EU territory. Return counselling allows irregular migrants to know and understand the voluntary return programmes of the country where they are. Many EU member states, through the IOM office, implement programme with pre-departure, transit and post-return assistance, which includes in some cases monetary incentives for return. This measure needs to be accompanied by some kind of accommodation or residence system, as open facilities with counsellors to help in the departure procedure.¹³¹ Return counselling as an alternative to detention is only going to work if there has been case management since the beginning of the procedure. If case management is only established after the return decision has been given, the chances of absconding increase because the irregular migrants might not trust the system.

Concerning the risk of absconding, this is also a difficult term to define and certify for immigration authorities. Nevertheless, immigration detention is used systematically because of this risk. Alternatives to detention also take into account this risk and if, after a good screening and assessment, a real risk of absconding is found, an alternative to detention can be used: the electronic tagging. Combined with case management and designated residence or open centre accommodation, it becomes a more effective solution than detention. However, this solution should only be used when less restrictive measures are not available or would not be effective as it can cause distress in the person who has to wear it because of being tracked at all times.¹³²

2. Tolerated stay permit: postponement status

After the assessment and screening, that should not be done in detention as explained just before in the thesis but by using alternatives to detention, when cases of unreturnable TCNs are found, there is the need to establish further mechanisms to ensure that unreturnable TCNs can stay in the EU member state where they are with full

¹³¹ Robyn Sampson, Vivienne Chew, Grant Mitchell, and Lucy Bowring (n 127)

¹³² Jesuit Refugee Service Europe (n 10)

respect of their human rights. As seen in Part III, unreturnable TCNs are allowed to stay in the EU because they cannot be returned but the rights granted to them in many EU member states are not enough for them to live in dignity. The Return Directive Article 14 (1) ensures some rights for irregular migrants whose return has been postponed. Those rights include family unity, emergency healthcare and access to education for minors. Nevertheless, member states are not obliged to provide right to work, a broader right to access healthcare or right to accommodation. Without those rights, unreturnable TCNs are set to live in a legal limbo and without dignity and protection of human rights. The Return Directive ensures only a formal tolerated status, which corresponds to a low protection of unreturnable TCNs, but states are not obliged to provide a temporary residence permit to unreturnable TCNs.¹³³

The decision of granting unreturnable TCNs temporary residence permits or keeping them in a legal limbo is not a technical decision but a political decision. As Charles Gosme explains, there are reluctances between the EU member states to enable the EU have the competences on the issue of unreturnability because there are very different positions in the European Council, being the left wing position more in favour of a human rights approach to the issue and the right wing position more in favour of a securitisation and border control approach. During the Return Directive's negotiations, the European Commission tried to close the gap between the principle of non-refoulement and regularisation, but the European Council rejected some provisions of the proposal. We can say that not closing the legal limbo of unreturnable TCNs was a political choice.¹³⁴

One of the main arguments for member states to deny unreturnable TCNs with tolerated status or postponement status is that it could prevent them from voluntarily returning or cooperating with the authorities with the return in order to stay. However, a

¹³³ Maaïke Vanderbruggen and others, *Point of no return: The futile detention of unreturnable migrants – Factsheet: Unreturnable migrants in detention in EU law and policy* (Flemish Refugee Action, January 2014) <http://pointofnoreturn.eu/wp-content/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf> accessed on 25 June 2019

¹³⁴ Charles Gosme, *Limbo spaces between illegal and legal stay: resulting from EU management of non-removable third country nationals* (PhD, Institut d'Études Politiques de Paris, 19 November 2014)

postponement status that ensures migrants' human rights at the same time as it ensures return is possible. In Germany, for example, the tolerated stay permit, called *Aussetzung der Abschiebung* and known as *Duldung*, does not eliminate the return order but it ensures the enjoyment of some rights to unreturnable TCNs until the removal is possible.¹³⁵ However, as the rights enjoyed are not the same as for regular migrants and German citizens, this kind of postponement status should have a limit in time. This limit of time should be discussed and chosen after a research on after how much time as an unreturnable TCN in the territory it is almost sure that the unreturnability is going to last very long, or forever. This time limit could be set in around six months. In Germany, some people have been living with the *Duldung* for over ten years.

In some member states, the municipalities are the ones that ensure some kind of protection for unreturnable TCNs by their registration in the municipality lists.

The tolerated stay permit needs to include rights which enable unreturnable TCNs to be integrated in the community and live in dignity. Accommodation (if needed) or a small stipend to cover basic needs, need to be provided to ensure the life in dignity of unreturnable TCNs. Moreover, ensuring those rights is of paramount importance in order to avoid their marginalisation. Without right to work or access to social benefits, unreturnable TCNs cannot support themselves and can be obliged to find other ways to survive, leading to their criminalisation and ghettoization. Not only this violates their human rights, but this is also dangerous for the host community. Some EU member states do not seem to be keen on following this idea; they consider that a hostile environment will push unreturnable TCNs to leave voluntarily the country. Considering the situation of most of the countries of origin of migrants who come to Europe, it is questionable if they would even consider going back. Furthermore, granting little rights to unreturnable TCNs can increase the negative image that some EU citizen have towards migrants, that can increase racism and violence against them.¹³⁶ It can be

¹³⁵ Handbook Germany, *Tolerated Stay ("Duldung")* (Handbook Germany)

<<https://handbookgermany.de/en/rights-laws/asylum/duldung.html>> accessed on 1 July 2019

¹³⁶ European Commission, Directorate B, CONTACT GROUP "Return Directive"

(2008/115/EC), *Brainstorming on best practices in relation to "non-removable returnees"* (European Commission, 21 March 2013)

argued that the policies of member states that only grant minimum rights to unreturnable TCNs only achieve one thing: undermining their fundamental rights.

Moreover, member states that grant official postponements of return to unreturnable TCNs require cooperation from the person in the process. In spite of being an understandable demand from the state, it is important to ensure, as mentioned previously, an effective case management service. Otherwise, TCNs staying irregularly in the territory might not trust the system and not cooperate, afraid of an unfair resolution of their case. If they are unreturnable for a long period, their lack of trust would prevent them from access to rights.

3. Temporary Residence Permits

When the impossibility of removal lengthens, it is necessary to consider further residence permits that ensure that the unreturnable TCN can have a dignified life and integrate in the host community. A study of the European Commission found that only half of the EU member states have specific provisions for unreturnable TCNs to obtain legal stay.¹³⁷ However, this does not ensure that all the unreturnable TCNs have access to them in practice.¹³⁸ Residence permits need to be ensured in law but also in practice in order to be effective.

The Return Directive includes a provision allowing member states to grant temporary permits. Its article 6(4) states that:

“Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third country national staying illegally on their territory”¹³⁹

3.1. Humanitarian reasons

EU member states should create a specific path to obtain a residence permit for unreturnable TCNs, especially for TCNs in vulnerable situations, as victims of human trafficking or victims of gender base violence, but also for unreturnable TCNs whose

¹³⁷ Mathilde Heegaard Bausager, Johanne Köpfler Møller and Solon Ardittis (n 115)

¹³⁸ Ibid.

¹³⁹ Directive 2008/115/EC (n 12)

illness impedes to travel and after a considerable period of time. It can be considered that cases where embassies do not cooperate in documenting one of their nationals in order to return them should be treated as regularisation on humanitarian grounds because the causes of unreturnability are outside the scope of the person.

Some EU member states already include these kind of residence permits in their legislation. However, practice shows that in most of the cases, the burden to get them is very high, which impedes to fulfil the objective of their creation: protection of unreturnable TCNs and recognition of their rights. In the Netherlands, for example, there is a residence permit based on the inability to leave the territory due to “no-fault of your own” (meaning, the unreturnable TCN). Having this kind of procedure is very positive; however, a small amount of people who ask for it receive it in the end because the prerequisites are hard to achieve.¹⁴⁰ For example, unreturnable TCNs have to show proof that they are not impeding the return and that the embassy is denying them a passport or travel documents. Embassies of some countries do not provide this kind of proof, which impedes unreturnable TCNs to get the residence permit. These kinds of barriers should be acknowledged by the immigration authorities and study the applications in a case-by-case manner.

Residence permits should also ensure that unreturnable TCNs have the right to work, recognising that it is the best way to support themselves and integrate in the host community. Considering that their removal has been proved to be impossible in the forthcoming time, what differentiates the tolerated status with the residence permit is the right to work, as the residence permit is longer. In Germany, under the *Duldung*, some unreturnable TCNs can be allowed to work. However, they can only take a job when there are not EU citizens or legal TCNs capable to do it. Under the temporary residence permits, this criterion should disappear and recognised unreturnable TCNs should be able to access jobs in an equal footage to the rest of candidates.

¹⁴⁰ Annelieke Beversluis, Merle-Marei Lage, Katharina von Schack and Josha Polak, *Forced to leave but nowhere to return to: Rights of non-returnable stateless Palestinians in the Netherlands* (Migration Law Clinic, University of Amsterdam, April 2016) <https://migrationlawclinic.files.wordpress.com/2016/04/mlc_report-stateless-palestinians_final-april-20162.pdf> accessed on 5 July 2019

Temporary residence permits should also enable the access to social benefits in cases of need, as well as full access to healthcare and education.

3.2. Good integration in the community

Some unreturnable TCNs might have been living for long periods of time in an EU member state, both legally or irregularly. As mentioned previously, most of the unreturnable TCNs have become irregular because their visa or residence permits expired and they could not renew them. Those people have usually strong ties with the community. These circumstances should be taken into account when granting temporary residence permits.

In EU member states where unreturnable TCNs can obtain those permits, they have to fulfil a list of criteria. For example, they might be asked to have no criminal records.¹⁴¹ Despite being an understandable criterion, it should be assessed in a flexible and individualised way. Many unreturnable TCNs, because of their lack of work permit, have been forced to work in the black market, for example, selling fake clothes or DVDs on the streets. If they are caught by the police, they can be subject to a fine and this can be included in their files. This should not be an argument to exclude them from getting a temporary residence permit, as it was the own system which forced them into working illegally.

It is also frequent that unreturnable TCNs are asked to prove previous employment in the EU member state where they are in order to prove their integration in the host community. Considering that they were in an irregular situation with no work permit, any sort of previous employment had been carried in an illegal form. This means that there is not a contract that proves the relationship between the employer and the employee. The only way to prove it is through denouncing the employer, which might be difficult for some unreturnable TCNs as they are in a situation of inferiority. Moreover, it is most of the time very hard to have had long jobs. These kinds of criteria can difficult the obtention of the temporary residence permit, impeding the

¹⁴¹ Handbook Germany (n 135)

unreturnable TCNs to access rights. It is therefore important that petitions are assessed individually, understanding the individual circumstances of the person.

Right to work should also be ensured in this context both in law but also in practice. Some practical barriers have been found in countries that enable unreturnable TCNs to work. These include the language barrier and the lack of education proof.¹⁴² Good integration in the community can only be reached if the state provides language courses to unreturnable TCNs.

Temporary residence permits are a solution to the legal limbo of unreturnable TCNs as they enable them to access rights. Nevertheless, practice shows that many unreturnable TCNs who have been granted a temporary residence permit go back to the legal limbo when the temporary residence permit expires and no further solutions are given.¹⁴³ Temporary residence permits are only useful if after their expiration the person can be returned or another kind of permit is ensured after.

4. Permanent regularisation

According to the Special Rapporteur on the Human Rights of Migrants, the creation of regularisation procedures for irregular migrants is a good alternative based in human rights to prevent migrant's criminalisation and penalisation.¹⁴⁴

Regularisation programmes target a specific group of irregular migrants in the territory, as are unreturnable TCNs.¹⁴⁵ In spite of returns being the first measure chosen by the EU to fight against irregular migration, it is not effective with unreturnable TCNs.

Many EU member states consider that resorting to regularisation programmes and granting permanent residence permits to unreturnable TCNs will provoke a "call effect" resulting in more arrivals. However, there is little proof that regularisation programmes

¹⁴² Paul Schoukens and Siemen Buttiens, *Social protection of non-removable rejected asylum-seekers in the EU: a legal assessment* (European Journal of Social Security, 24 November 2017) <https://journals.sagepub.com/doi/full/10.1177/1388262717744708#_i15> accessed 7 July 2019

¹⁴³ Maaïke Vanderbruggen and others (n 14) 79

¹⁴⁴ UNGA, RES 65/212 (1 April 2011) Protection of migrants

¹⁴⁵ Claire McGovern, *EU Regularisation Programmes: An Effective Tool to Manage "Irregular Migration"?* (United Nations University, 30 August 2014) <<https://ourworld.unu.edu/en/eu-regularization-programmes-an-effective-tool-to-manage-irregular-migration>> accessed 8 July 2019

stimulate migration flows.¹⁴⁶ Regularisation programmes can be carried out in a case-by-case form in order to ensure that some criteria are met by the applicants. These criteria can include the absence of criminal offences, which poses some problems, as explained previously.

Impediments to removal can last forever, and it would be detrimental to grant only temporary residence permits. Unreturnable TCNs, despite having temporary permits, are often stressed because their permit might not be renewed. Moreover, being temporary permits, it is difficult to have an economic stability if job contracts can only be temporary. Either because the country of origin is still not safe or simply because the embassy till does not cooperate, a permanent residence permit should be granted after five years in the country.¹⁴⁷ It is the best pragmatic solution for long term unreturnable TCNs.

Moreover, regularisation should be possible even if the unreturnable TCN has entered the country illegally. Considering that every person is allowed to flee their country to seek asylum, entering a country illegally should not be penalised with the impossibility to legalise the administrative status of a person. Some political parties, especially from the extreme right spectrum, are asking for this provision to be implemented. However, this is not in line with human rights.

Unreturnable TCNs who are granted a permanent residence status become legal migrants and should have the same rights than the migrants who arrived legally to the country. Right to work, right to social benefits, right to education, etc. should be granted. Moreover, they must have the have access to further citizenship processes in the same grounds as other legal migrants.

¹⁴⁶ Albert Kraler, *Regularisation of Irregular Migrants in the European Union – National EMN Conference “Pathways out of irregularity”* (International Centre for Migration Policy Development, 10 October 2011) <https://www.udi.no/globalassets/global/european-migration-network_i/konferansefiler/kraler-regularisation-of-irregular-migrants-in-the-european-union.pdf> accessed on 8 July 2019

¹⁴⁷ Ian Gordon, Kathleen Scanlon, Tony Travers and Christine Whitehead, *Economic Impact on the London and UK economy of an earned regularisation of irregular migrants to the UK* (Greater London Authority, April 2009) 8

Regularising unreturnable TCNs would be beneficial for them but also for the host country. Once they are regularised, the cost of the administrative immigration control would be reduced and, at the same time, by entering legally the job market, they will become taxpayers, increasing the tax collection. Moreover, by seeing that there is a clear and fair way to regularisation, many irregular migrants might cooperate with the authorities in their immigration procedures.¹⁴⁸

Furthermore, there are a few arguments that prove that having a common criterion for regularisation would be a positive aspect for the EU. For example, it would avoid secondary movements, as unreturnable TCNs would not move between EU member states in order to find the one which gives them better opportunities. It would also fill a gap in EU migration law, as not all unreturnable TCNs are, at the moment, granted protection. Moreover, the EU presents itself and it is seen as a human rights protector. Unifying regularisation criteria would enhance this image as it would protect unreturnable TCNs.

¹⁴⁸ Ibid. 19

CONCLUSION

Since the “migration crisis” in 2015, the European Union and its member states have focused on their migration policies in the return of irregular migrants. In order to enforce the return, it has been seen that EU member states systematically use immigration detention despite the existing legislation which obliges states to prioritise alternatives to detention and use detention only in cases of last resort.

It can be argued that immigration detention is an ineffective method to enforce removal of TCNs illegally staying in an EU member state. The return rate, which has been around 40% during the last years, shows the existence of impediments to return more than one out of two TCNs who receive a return decision. Various reasons make impossible the return of some irregular migrants. On humanitarian grounds, some irregular migrants cannot be returned because it would breach the principle of non-refoulement, because the country of origin is not safe or because the person subject to removal is ill and would die in case of return because of lack of equipment to be treated. On administrative grounds, return can be impossible to carry if the embassy or consulate of the country of origin does not cooperate by providing identification and travel documents to one of their nationals, who might have lost the required documents during the journey to Europe. Despite blaming the TCNs for non-cooperation, it is very common for some embassies and consulates not to cooperate with European authorities without a Readmission Agreement with the EU or an EU member state, which would give them some advantages as visa liberalisation or economic funds. These impediments can be temporary or can be present for years, impeding the removal of an illegally staying third country national for his/her whole life.

In spite of the existence of these impediments, unreturnable TCNs are also subjected to pre-removal immigration detention. A review of the practice concerning detention of irregular migrants shows that there is a systematic lack of effective assessment of alternatives to detention and that, once placed in immigration detention, there is often a lack of judicial review to avoid an arbitrary detention. When released from detention due to the impossibility to enforce it, unreturnable TCNs find themselves in most of the cases in a legal limbo. They cannot be returned but they are rarely granted a status that

protects their rights. Moreover, the rights they will enjoy will depend on the member state where they are, as it is a state competence.

Concerning immigration detention, apart from being a very costly system, it entails severe fundamental rights violations for migrants placed in immigration detention, which is an administrative procedure, as they have not committed any crime. Deterrence from family and friends, mental health issues and loss of jobs are frequent consequences of repeated detention of unreturnable TCNs. Conditions in detention centres are also pernicious, as migrants are subject to a higher risk of suffering violence. The proportionality and necessity of detention in order to fulfil states' objectives in terms of migration can be called into question.

However, the European Commission has reiterated the necessity to detain irregular migrants to increase the return rate and has asked member states to exhaust the legal limits of detention. Whilst some studies show that more detention does not necessarily imply more return, some member states have passed laws that increase the legal immigration detention length. For example, France has passed a law that has increased the limit of immigration detention from 45 to 90 days from the 1st January 2019. Moreover, several EU member states have also increased the period of detention in practice. At the EU level, a new version of the Return Directive is being discussed. The Return Directive, which objective is to harmonise the removal procedure of illegally staying third country nationals, establishes the maximum length of detention. The new version would dangerously broaden detention and would make it the first resort by law.

The harmful effect of immigration detention is unnecessary because, as seen in this thesis, effective alternatives to detention exist. It is common for states to resort to immigration detention in order to avoid absconding and make migrants cooperate in their return process. However, alternatives to detention have been proved to be more effective on those issues. If the authorities provide a good assessment and screening of the vulnerabilities of migrants and follow policies that build trust around them, it will increase the cooperation rate and will decrease absconding. As states often argue that many unreturnable TCNs are so because they do not cooperate in their return procedure, these measures are even more important for this group of irregular migrants. Migrants need to be informed in a timely manner and in a language they

understand and need to have access to a lawyer in order to understand what they are going through.

Moreover, alternatives to detention are more effective. Several pilot projects carried out in Europe prove that alternatives are cheaper and they are human rights based. Whilst building trust with migrants through case management, different alternatives can be envisaged instead of detention: open centres, designated residence, regular reporting to authorities, electronic tagging... These less coercive measures should be envisaged while the authorities prepare the removal. Still, unreturnable TCNs cannot be returned and further mechanisms need to be envisaged. Unreturnable TCNs should be granted, as a minimum, tolerated status with accommodation, healthcare, social and education rights. During the time with this status, which should have a limit because of the vulnerabilities it carries, the return order is still valid and return could be enforced if the impediments disappear. After this limited short period of time, temporary residence permits with right to work should be provided in order to avoid criminalisation and marginalisation of migrants. In cases where the return is still impossible when the temporary residence permit expires, a permanent permit should be granted. Otherwise, the unreturnable TCN would be again in a legal limbo.

The European Commission's position on the use of immigration detention should be very different to the position it has now. If the new version of the Return Directive is accepted with the new wording, fundamental rights of irregular migrants, in general, and unreturnable TCNs, in particular, will be downgraded. Several projects have found more effective alternatives to detention: alternatives are cheaper, they help comply with the migration procedure requests and respect fundamental rights. Therefore, the European Union, as a human rights actor, should follow that path. Moreover, a harmonised legislation concerning unreturnable TCNs at the EU level would also protect them in a higher degree. Considering that European legislation does not allow the return of some TCNs illegally staying in the territory, it can be argued that Europe needs to protect their rights and impede that they end up in a legal limbo. The EU should ensure that member state not only do not detain irregular migrants but also put in place paths of regularisation -temporary and permanent- that protect unreturnable TCNs' rights.

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