# LOOKING BEHIND THE BARS

Leaflet for European NGOs to support their access for monitoring purposes to facilities where asylum-seekers and irregular migrants are detained

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**The objective of this short leaflet, published by the Hungarian Helsinki Committee, is to support non-governmental organisations' attempts to gain systematic access to detention facilities where asylum-seekers and irregular migrants are held. The document presents the main legal grounds which human rights and refugee rights organisations can refer to when requesting access to these sites for both monitoring and legal assistance purposes, together with a list of practical ideas for the conclusion of transparent cooperation agreements between NGOs and state authorities that carry out immigration detention.**

# I. INTRODUCTION

Regular civilian monitoring of detention is **indispensable for ensuring the avoidance of arbitrariness, ill-treatment and inhuman conditions.** As the detention of irregular migrants and, in some regions, of asylum-seekers is becoming a frequent or even dominant practice, the need for regular civilian oversight of immigration jails, asylum-seekers' detention centres, transit zones and other similar sites is more pertinent than ever in Europe. National OPCAT mechanisms, National Human Rights Institutions, ombudspersons, prosecutors and other state-affiliated entities do useful work all over the continent in monitoring detention conditions. Nevertheless, their capacities are limited, their monitoring reports are often not made public and they **cannot substitute independent civilian actors.** The presence of a national OPCAT mechanism should not justify the denial of access to human rights NGOs wanting to conduct regular human rights monitoring.

Several charity and faith-based organisations carry out important humanitarian work (such as the provision of clothes and other non-food items, donations, etc.) at these detention facilities, while some specialised NGOs are allowed to provide medical, psycho-therapeutic or psycho-social care. These are extremely valuable services, yet they do not substitute the work of legally focused human rights organisations. Charity organisations and specialised service-providing NGOs usually do not have the mandate to monitor and report on detention conditions, or to seek redress against human rights violations occurring in detention.

Monitoring the administrative detention of asylum-seekers and irregular migrants is **particularly challenging compared to the monitoring of police jails and prisons:**

- As all detainees are foreigners, often coming from geographically distant locations, this endeavour requires good **language and intercultural communication skills**, as well as the frequent use of interpreters;
- Most detainees – unlike in the penitentiary system – **do not understand why they are detained** (not having committed a crime) and do not know the date of their release. This exacerbates stress and uncertainty, and may also significantly reduce detainees' willingness to disclose detailed information about their conditions, or any ill-treatment or abuse suffered;
- European states increasingly resort to ***de facto* or borderline types of detention**, which – while qualifying as deprivation of liberty and even detention – may not be officially considered as such by state authorities. This often leads to reduced safeguards, and to limited or no external oversight.[1]

All these factors demonstrate the **need for independent, non-governmental human rights organisations with legal expertise to regularly monitor detention facilities** where asylum-seekers and irregular migrants are held. At the same time, actual access is scarce or even non-existent in various European states, and there appears to be limited awareness of EU Member States' obligations in this respect. This leaflet summarises the legal grounds on which this situation can be challenged.

1 See more on borderline or de facto detention in: Minos Mouzourakis, Kris Pollet et al., *Boundaries of Liberty – Asylum and de facto detention in Europe*, European Council on Refugees and Exiles (ECRE), 31 December 2017.

# II. EU LAW

With regard to immigration (alien policing, pre-deportation, etc.) detention, Article 16 of the **Return Directive** stipulates that

> *1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners. […]*
> *4. Relevant and competent national, international and **non-governmental organisations and bodies shall have the possibility to visit detention facilities**, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. **Such visits may be subject to authorisation.***[2]

The Return Directive therefore includes a **clear and general obligation upon member states to allow NGOs access to immigration detention facilities**. While the Directive allows Member States to require preliminary authorisation for these visits, this, in the ordinary reading of the provision, cannot overwrite the explicit obligation ("shall") to allow access, as stipulated in the first sentence of Paragraph 4.

The recast **Reception Conditions Directive** also includes provisions that constitute grounds for NGOs' access to detention facilities where asylum-seekers are held. Article 10 (3) stipulates that

> *Member States shall ensure that persons representing the United Nations High Commissioner for Refugees (UNHCR) have the possibility to communicate with and **visit applicants** in conditions that **respect privacy**. That possibility **shall also apply to an organisation which is working** on the territory of the Member State concerned **on behalf of UNHCR** pursuant to an agreement with that Member State.*[3]

With regard to asylum-seekers detained in **transit zones**, Article 8 (2) of the r**ecast Asylum Procedures Directive** contains an important safeguard:

> *Member States shall ensure that **organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones**, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, **provided that access is not thereby severely restricted or rendered impossible**.*

Article 18 (2) of the recast Reception Conditions Directive adduces general safeguards, applicable both in detention and at open reception centres:

> *2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, […] Member States shall ensure that: […]*
> (b) applicants ha*ve the possibility of **communicating** with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and **non-governmental organisations and bodies**;*
> *(c) family members, legal advisers or counsellors, persons representing UNHCR and **relevant non-governmental organisations** recognised by the Member State concerned are **granted access in order to assist the applicants**. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.*[4]

2 *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, Art. 16 (1) and (4), emphases added – Note that these particular provisions are left unchanged in the recast proposal of the Return Directive by the European Commission, as to its version known at the time of writing (*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)*, COM(2018) 634 final, 12 September 2018)

3 *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, Art. 10 (3), emphases added

4 Emphases added

Article 10 and 11 do not include any norm that would "overwrite" these safeguards. On the contrary, the above-quoted provision of Article 10 (3) further strengthens the general safeguards in the particular context of detention.

In brief:

| | Member States' positive obligations | Possible limitations |
|---|---|---|
| **Immigration detention (of non-asylum-seeker foreigners or rejected asylum-seekers)** | • Relevant and competent NGOs shall be allowed to visit detention facilities | • Actual visits may be subject to a particular authorisation process<br>• The actual meaning and content of a "visit" is not defined |
| **Detained asylum-seekers (general)** | • NGOs shall be allowed to visit and communicate with detainees in conditions respecting privacy | • The specific provision only applies to NGOs working on behalf of the UNHCR<br>• Right can be limited on grounds of security<br>• The actual meaning and content of a "visit" is not defined, the "target" of the visit is an individual, not the detention site itself |
| **Asylum-seekers detained in transit zones** | • NGOs shall be allowed to have effective access to detainees | • Right can be limited (but not completely voided) on grounds of security<br>• The actual meaning and content of "access" is not defined, the "target" of such a visit is an individual, not the detention site itself |

An additional challenge is that these safeguards are usually **not explicitly transposed** into the national laws of Member States. Therefore, NGOs aiming at gaining access to these detention sites will often have to make reference to the **direct effect, under specific circumstances, of EU directives**.

EU directives, unlike regulations, are not directly applicable. For a directive to take effect at national level, Member States must transpose it to their national legislation. Nevertheless, as confirmed by the consequent jurisprudence of the EU Court of Justice, i**ndividuals may directly rely on non-transposed or not correctly transposed provisions from a directive in domestic procedures**, in connection with contested state action (or inaction),[5] under certain circumstances.

Already in its landmark 1974 *Van Duyn* judgment, the Court emphasised that directives have a binding effect, even if they are not directly applicable like regulations, making reference to Article 189 of the Treaty establishing the European Economic Community. The Court then ruled as follows:

> *If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article[6] can never have similar effects.* ***It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.*** *Article 177 [of the EEC Treaty], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.*[7]

The Court repeatedly confirmed this position in its subsequent jurisprudence.[8] In the 1979 *Ratti* judgment, the Court further adduced that in order for national courts to be able to rely directly on a non-transposed provision from a directive against non-complying national law the **transposition deadline must have already passed** and the obligation in question shall be **"unconditional and sufficiently precise"**.[9] In this judgment, the Court also set an important safeguard which stipulates that

5 The so-called "direct vertical effect" of EU law, as referred to in literature
6 Directives or decisions
7 *Yvonne van Duyn v Home Office*, Case 41-74, Judgment of 4 December 1974, Paragraph 12
8 *Cf. Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, Case 51-76, Judgment of 1 February 1977, Paragraphs 21-23; *Criminal proceedings against Tullio Ratti*, Case 148/78, Judgment of 5 April 1979, Paragraphs 19-21; *Ursula Becker v Finanzamt Münster-Innenstadt*, Case 8/81, Judgment of 19 January 1982, Paragraphs 21-23; M. H. *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84, Judgment of the Court of 26 February 1986, Paragraph 47
9 *Criminal proceedings against Tullio Ratti*, Case 148/78, Judgment of 5 April 1979, Paragraph 24 and 23 respectively

*[…] a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.*[10]

The Court succinctly summarised the essential of its long line of jurisprudence in the 1982 Becker judgment:

*[…] wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.*[11]

In the 1984 von Colson judgment, the European Court of Justice further emphasised the importance of relying on directives when applying national law, regardless of whether a given provision was explicitly transposed into domestic legislation. This judgment stipulated the overarching **duty of consistent interpretation**, which applies even when the conditions for direct effect (unconditional and sufficiently precise rule) are not met:

*[…] the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the [EEC] Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [the directive in question], national courts are required to interpret their n**ational law in the light of the wording and the purpose of the directive** in order to achieve the result referred to in the third paragraph of Article 189 [of the EEC Treaty].*[12]

In addition, in the 1993 Wagner *Miret* judgment the Court deemed it necessary to underline that

*The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directive concerned.*[13]

These standards can be summarised as follows:

| | | |
|---|---|---|
| **Directives are binding on Member States**[14] | **Individuals can rely on non-transposed provisions in domestic court procedures, if…** | • the transposition deadline has passed and<br>• the obligation in question is unconditional and sufficiently precise |
| | **National courts shall interpret national law in light of the wording and the purpose of relevant directives** | • …regardless of whether the domestic provision in focus is from before or after the directive |

In summary, **based on the consistent and long-standing jurisprudence of the EU Court of Justice, civil society actors have good grounds to argue that the previously quoted provisions from the Return Directive and the recast Reception Conditions Directive have direct vertical effect on a Member State**, even if that particular Member State has not transposed them into its domestic legislation. The mandatory language ("shall") of the Directives, as well as the clear recommendations by EU bodies quoted in Chapter III.1 can serve as valid arguments to demonstrate that the EU law provisions in question are "unconditional and sufficiently precise".

10 *Criminal proceedings against Tullio Ratti*, Case 148/78, Judgment of 5 April 1979, Paragraph 22 (repeated verbatim in *Ursula Becker v Finanzamt Münster-Innenstadt*, Case 8/81, Judgment of 19 January 1982, Paragraph 24)

11 *Ursula Becker v Finanzamt Münster-Innenstadt*, Case 8/81, Judgment of 19 January 1982, Paragraph 25 (repeated verbatim in *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84, Judgment of the Court of 26 February 1986, Paragraph 46; in *A. Foster and others v British Gas plc.*, Case C-188/89, Judgment of 12 July 1990, Paragraph 16; *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined cases C-6/90 and C-9/90, Judgment of 19 November 1991, Paragraph 11)

12 *Von Colson and Kamann v Land Nordrhein-Westfalen*, Case 14/83, Judgment of the Court of 10 April 1984, Paragraph 26 (repeated verbatim in *Marleasing v Comercial Internacional de Alimentación*, Case C-106/89, Judgment of 13 November 1990, Paragraph 8, further confirmed in *Teodoro Wagner Miret v Fondo de Garantía Salarial*, Case C-334/92, Judgment of 16 December 1993, Paragraph 20 and *Paola Faccini Dori v Recreb Srl.*, Case C-91/92, Judgment of 14 July 1994, Paragraph 26)

13 *Teodoro Wagner Miret v Fondo de Garantía Salarial*, Case C-334/92, Judgment of 16 December 1993, Paragraph 21

14 Article 288 of the Treaty on the Functioning of the European Union, previously Article 249 of the same treaty and originally Article 189 of the Treaty establishing the European Economic Community

# III. INTERNATIONAL SOFT LAW AND RECOMMENDATIONS

Given the incompleteness of the EU law framework regarding NGOs' access to immigration detention for monitoring purposes, soft law recommendations play a crucial role in guiding states on how to apply in practice the EU law provisions in question. This chapter includes a non-exhaustive list of useful recommendations that can be referred to by NGOs in support of their attempts to establish monitoring activities in detention centres for migrants and/or asylum-seekers.[15]

## III.1 European Union

Answer given by Commissioner Cecilia Malmström on behalf of the European Commission to written question no. E-002523/13 by Members of the European Parliament, 13 May 2013:

> *Article 16 (4) of the Return Directive 2008/115/EC enshrined in law a right of relevant and competent national, international and non-governmental organisations and bodies to visit pre-removal detention facilities. Such visits may be subject to authorisation.*
> *The objective of Article 16 (4) is to allow NGOs to control the status of pre-removal detention of third-country nationals and its conformity to human rights independently of a concrete invitation from detainees. The right of Member States under Article 16 (4) to make these visits 'subject to authorisation' is a procedural requirement, which must be applied by Member States in accordance with the "effet utile" of the directive.* ***Member States' repeated refusal to visit detention facilities without objective justification would therefore undermine NGOs right enshrined in Article 16 (4) and could be considered as an infringement.***

European Parliament Report on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008 (2008/2235(INI)) Committee on Civil Liberties, Justice and Home Affairs, Para 29:

> *[The European Parliament] Calls on the Member States to ensure that asylum seekers and irregular migrants have access to aid – from actors independent of the national authorities – in defending their rights, including during detention;* ***calls on the Member States to guarantee civil society a legal right of access to places of detention for foreign nationals without any legal or administrative obstacles;***

These two recommendations further confirm the direct effect of the EU law provisions quoted in the previous chapter, regardless of whether or not these particular rules have been transposed into national law.

Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, 9 April 2001:

> *In its actions against torture the European Union will urge third countries[16] to take, inter alia, the following measures:*
> *[…]*
> *Allow domestic visiting mechanisms*
> ***– allow visits by suitably qualified representatives of civil society to places where persons deprived of their liberty are held.***

15 All emphases added
16 This recommendation, in explicit terms, refers only to third countries. However, the formulation of the standard suggests that it is a general norm. Also, it would be absurd to argue that such a basic human rights standard would not apply within the EU, only outside.

## III.2 Council of Europe

Council of Europe Committee for the Prevention of Torture, The CPT standards, 8 March 2011, CPT/Inf/E (2002) 1 – Rev. 2010, Para. 89:

> *Independent monitoring of detention facilities for irregular migrants is an important element in the prevention of ill-treatment and, more generally, of ensuring satisfactory conditions of detention.* ***To be fully effective, monitoring visits should be both frequent and unannounced.*** *Further, monitoring bodies should be empowered to interview irregular migrants in private and should examine all issues related to their treatment (material conditions of detention, custody records and other documentation, the exercise of detained persons' rights, health care, etc.).*

Verbatim repeated also in the Council of Europe Standards and Guidelines in the Field of Human Rights Protection of Irregular Migrants, 2011, Para 10.

Council of Europe Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 10, Para. 5:

> *National authorities should ensure that the persons detained in these facilities*[17] *have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover,* ***the functioning of these facilities should be regularly monitored, including by recognised independent monitors.***

## III.3 United Nations

UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guideline 10, Para. 66:

> *To ensure systems of immigration detention comply with international legal principles, it is important that immigration detention centres are open to scrutiny and monitoring by independent national and international institutions and bodies. This could include regular visits to detainees, respecting principles of confidentiality and privacy, or unannounced inspection visits. In line with treaty obligations, and relevant international protection standards, access by UNHCR and other relevant international and regional bodies with mandates related to detention or humane treatment needs to be made possible.* ***Access to civil society actors and NGOs for monitoring purposes should also be facilitated, as appropriate.*** *Independent and transparent evaluation and monitoring are likewise important facets of any alternative programme.*

Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, Para. 39 (e)

> *Regular inspections of places of detention especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture.* ***Independent non-governmental organisations should be authorised to have full access to all places of detention,*** *including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees. T****he team should also report publicly on its findings.*** *[…]*

Report of the Working Group on Arbitrary Detention Addendum Mission to Hungary, Addendum, UN Human Rights Council, 27th session, A/HRC/27/48/Add.4, 3 July 2014, Para. 42:

> *Regarding institutions that assist in the protection against arbitrary deprivation of liberty, the Working Group […] also considers it a* ***good practice to allow civil society organizations to visit detention facilities for monitoring purposes*** *and to speak with detainees who require legal assistance.*

17 Facilities designed to detain irregular migrants pending removal (cf. Guideline 10, Para 1).

## III.4 Organisation for Security and Co-operation in Europe (OSCE)

OSCE Office for Democratic Institutions and Human Rights, Association for the Prevention of Torture, Monitoring places of detention: a practical guide for NGOs, December 2002, pp. 11, 24 and 26:

> *Transparency and public control of the administration form part of any system based on the principles of democracy and rule of law. This is especially true in the case of monitoring the power of the State to deprive people of their liberty. Monitoring at the national level the treatment and conditions of detention of persons deprived of their liberty through unannounced and regular visits is one of the most effective means to prevent torture and ill-treatment. Such monitoring should not be limited to national independent institutions, but* ***non-governmental organisations (NGOs) should also be able to have access to places where persons are deprived of their liberty.*** *[…]*
> *Why should non-governmental organisations be encouraged to become involved in monitoring conditions of detention, given that different types of control are already provided and, in theory, implemented at the national level? The main reasons are as follows:*
>
> - *Inspections/monitoring by the State of its own organs is necessary but, by definition, not independent;*
> - *External control systems are not always effective, or are not frequent enough to fulfil their fundamental role as a regulating mechanism;*
> - *The inspections are sometimes superficial; formal or bureaucratic aspects are given precedence over questions relating to the organisation and handling of the persons detained, which are more difficult to examine and more delicate to treat;*
> - *The checks carried out by international bodies, while necessary, do not have the requisite character of permanence. […]*
>
> *As long as their action is governed by the principles of independence, competence, and ethics and their authorities grant them minimum guarantees to carry out their work under acceptable conditions,* ***national NGOs possess strong advantages enabling them to make a constructive contribution to the protection of persons deprived of their liberty.***
>
> *Their main advantages can be summarised as follows:*
>
> *A permanent presence*
> - *Protection of persons deprived of their liberty is a continuous process which must be pursued regardless of the country's social and political situation;*
> - *National NGOs are in the best position to develop activities which are rooted in continuity;*
> - *They potentially have the capacity to act and react rapidly – for instance, if serious incidents occur in detention facilities.*
>
> *Knowledge of the environment*
> - *They possess, or have ready access to, the social, political, and legal know-how to set up and run monitoring programmes to places of detention;*
> - *They have, or can establish, developed networks of social contacts which enable them to follow closely the evolution of detention-related problems;*
> - *They are in a position to identify the best communication strategies for alerting the authorities, the national media, and society in general to the problems linked to and resulting from the deprivation of liberty.*

OSCE Supplementary Meeting on Inhuman Treatment, Vienna, 27 March 2000:[18]

> ***NGOs should be trained, encouraged and permitted to monitor places of detention*** *including pre-trial detention.*

OSCE Supplementary Human Dimension Meeting on Prison Reform, Vienna, 8-9 July 2002, Final Report. p. 9:

> ***OSCE participating States are encouraged to allow for comprehensive civil society monitoring of all places of custody.***
> *OSCE participating States should consider providing for a firm legal basis for NGO monitoring places of custody, including pre-trial facilities and police detention facilities. In the absence of a clear legal basis authorities should use their discretionary powers to allow for civil society monitoring.*

18 Quoted on p. 27 of the previously quoted OSCE-APT Manual (see hyperlink above), no specific link to this document could be retrieved.

# IV. ESTABLISHING THE PROPER FRAMEWORK: A COOPERATION AGREEMENT

In order to ensure that the EU law provisions described in Chapter II are actually applied in practice and in line with the recommendations presented in Chapter III, **NGOs are advised to conclude a formal cooperation agreement with the competent authority.** Such agreements may have various positive impacts:

- It ensures a **clear, sustainable framework** for the monitoring activities (instead of a purely *ad hoc* framework);
- It clarifies the **rights and obligations** of both sides (the authority and the monitors), which will help avoid confusion and misunderstandings later;
- It confirms that this is a **mutually beneficial, cooperative exercise:** while monitoring may reveal human rights violations occurring in detention, in the long run it helps the competent authority to proactively avoid such violations and reduce the hardships caused by detention;
- It can be particularly useful in light of the provision in the Return Directive,[19] according to which monitoring visits may be **subject to authorisation**, by clarifying in a transparent manner the authorisation process.

It is important to **clarify *before* concluding the cooperation agreement** the following:

- Which is the **competent authority**? Often, the authority that orders the administrative detention of migrants is different from the one operating the detention facilities. In such a case, the latter will be the competent authority for the purposes of detention monitoring.
- Should it be a **bi- or tripartite agreement**? Regarding facilities where asylum-seekers are (also) detained, involving the UNHCR as a third party to the agreement may be necessary, particularly since the recast Reception Condition Directive refers to NGOs working on behalf of the UNHCR.
- What **capacities** are available for monitoring? Are they sustainable? Concluding a cooperation agreement and not "using" it because of capacity shortage conveys a very negative message and should be avoided.

Two relevant practical manuals can be particularly helpful both in drafting the agreement and in designing a monitoring project:

- OSCE Office for Democratic Institutions and Human Rights, Association for the Prevention of Torture, *Monitoring places of detention: a practical guide for NGOs*, December 2002 (hereinafter: OSCE manual);
- UNHCR, Association for the Prevention of Torture, International Detention Coalition, *Monitoring Immigration Detention – A practical manual*, 2014 (hereinafter: UNHCR manual).

The content, length and style of the cooperation agreement will, of course, depend on a range of factors. The following check-list, which includes the main questions to clarify in the cooperation agreement, may in any case provide useful guidance when drafting the document.

19 See Chapter II (and also Chapter III.1 for the European Commission's explanatory comments on this provision)

| | | |
|---|---|---|
| Preamble | Reference to **legal grounds** in EU law and to soft law recommendations | Source: See Chapters II and III of this publication |
| | The definition of **"monitoring"** | Source: UNHCR manual, p. 209; OSCE manual, p. 17 |
| | The **purpose** of monitoring – a list of objectives that all parties to the agreement commit to | Source: UNHCR manual, pp. 21-22; OSCE manual, p. 20 |
| Monitoring teams | **Who** can be part of the monitoring team? Any **requirements** regarding specific training or professional background, etc.? | Good practice: The framework should allow for **multifunctional** monitoring teams with a flexible composition (e.g. including medical doctors, psychologists, interpreters, etc. too, not only lawyers). |
| | Minimum and maximum **size** of the monitoring team | Good practice: Monitoring is team work; it requires ideally a **minimum of 2 or 3 persons.** On the other hand, excessively large groups can be difficult to manage and may more easily cause disruptions in detention centres' daily operations. In case of a larger facility holding hundreds of detainees, visits by 2 or 3 monitoring teams at the same time can be a solution. |
| | Do monitors need to obtain special **authorisation** by the competent authority? | Good practice: If such an authorisation is required, the process of obtaining it should be **fast and simple**, and the agreement should include the **model authorisation** as annex. |
| Place & Time | **Which detention facilities** are covered by this agreement? | Good practice: Detention facilities are opened and closed on a regular basis. The framework should specify **types of facilities**, rather than individual detention sites. This will keep the agreement valid for a longer period of time. |
| | In what **timeframe** can monitoring visits can be conducted? | Good practice: The timeframe should be as wide as possible. However, it should **respect and not disproportionately disrupt the daily routine of detention facilities** – especially if they take place on a regular basis. For example, allowing monitoring visits during office hours on weekdays can be a reasonable compromise. |
| Access to facilities | Does the monitoring visit have to be **announced** in advance? Is there a **clearance** procedure for monitors? | Good practice: Monitoring visits are much more effective if they are **unannounced.** This is the optimal arrangement through which monitors can examine the actual daily situation at the detention facilities. If a prior announcement is indispensable, the technical modalities should be kept as simple as possible (e.g. a simple e-mail to a specific e-mail address) and the deadline as close as possible to the date of the visit. For example, **announcement one or two working days before the day of the visit** can be a good compromise. |
| | What is the **entrance** procedure? What identification or other **documents** do monitors need to enter the facility? | Good practice: The **names of the monitoring team members** should be specified on the prior announcement letter, and their personal identity documents can be requested upon entry to the facility. This is to the benefit of both parties, contributing to the security of the detention facility, as well as ensuring a safeguard against the misuse of the cooperation framework by other actors. |
| | What **objects/equipment** are monitors entitled to bring in? | Good practice: Monitoring visits should **not jeopardise the security of either the detainees or the monitors**, therefore restrictions on bringing in weapons or sharp objects are reasonable. However, monitors should be able to carry everything that is indispensable to successfully carry out the monitoring visit. This includes equipment for taking notes (pen, paper, laptop or tablet), information materials, mobile phone, thermometer, tape-measure and – especially if visits are expected to take more than an hour – water and a small snack. |

| | | |
|---|---|---|
| During the visit | Which **areas** of the detention facility can monitors enter? | Good practice: One of the main objectives of monitoring is to assess the **living conditions** of detainees. This requires access to all areas where they spend their time and perform basic daily activities. For effective monitoring, monitors should have access to cells/rooms, community areas, bathrooms, canteens, medical wards and open-air areas as well. Monitors should also be able to see detainees in **solitary confinement, medical isolation cells** or in any cell where they are placed as a **disciplinary measure**. The agreement should clarify the exact conditions under which access to a particular area can be restricted for particular security reasons. |
| | How can monitors **communicate** with detainees, ensuring the necessary level of confidentiality? | Good practice: Stipulating that guards should **"see but not hear"** monitors while they are carrying out the visit (i.e. observing the team from a greater distance) strikes a reasonable balance between confidentiality and security concerns. |
| | How and where can the medical component of the monitoring team carry out **medical examinations**? | Good practice: Medical examinations are crucial for the proper documentation of ill-treatment or the negative consequences of detention in particular cases. The **medical ward** of the detention facility (or, if none exists, a smaller room with a closable door, a chair, a desk and a bed) should be made available for this purpose. It is helpful to explicitly emphasise the possibility of an on-site medical examination by the monitoring team in the agreement. |
| | How can monitors make **copies** of relevant documents? | Good practice: Monitors should be allowed to use their **mobile phones** during the monitoring visits, and they should also be able to make photocopies of crucial documents (within reasonable quantity limits, of course) with the permission of the detainee. |
| | Can monitors **register** sound and/or images? | Good practice: Monitors should be allowed to use their **mobile phones and/or a camera**. It is also important to stipulate that photos can only be taken with the clear **consent** of the person in the picture. Also, in order to preserve a sustainable cooperation framework, the agreement may need to clarify how and when these photos can be used in public communication. |
| | How can monitors consult the individual **case file** of particular detainees? | Good practice: If the case file is available on-site, then monitors should be able to view it with the permission of the detainees. |
| After the visit | Should monitors give **immediate feed-back** to the management of the detention facility? | Good practice: It is useful to **report about summary findings** and, if relevant, any emergency situation (e.g. ill-treatment allegations or health issues) to the duty officer immediately after the monitoring visit. This enables the management to address urgent issues without delay (the monitoring report may only be shared weeks later), as well as to share their views on the matter. |
| | By when and in what format should the monitoring team submit its **report**? | Good practice: Monitoring visits should always result in a **written report**. 15 days is a reasonable deadline for submitting a monitoring report. |
| | By when and in what format should the competent authority **react** to the findings? | Good practice: The competent authority should always **react in a written format**. 15 days is a reasonable deadline for this. |
| | In what format can the monitoring report be **published**? | Good practice: All monitoring reports should be **public**, but at the same time with due respect to the **privacy** of the individuals concerned. If the report includes concrete names and personal or otherwise sensitive data, those should be omitted from the published version. To preserve a sustainable cooperation framework and to ensure the proper **balance**, monitoring reports should be published together with the authority's response (but clearly distinguishing between the two documents). |
| Framework | Cooperation **time-frame** | Good practice: To strengthen the permanent character of the monitoring activity (rather than reducing it to a project-like, temporary initiative), an **open-ended** cooperation framework is recommended. |
| | Should the 2 or 3 entities involved complete the cooperation on monitoring with **additional activities**? | Good practice: Partners should have periodical (e.g. once or twice a year) **high-level meetings**, where they can discuss overall experiences from the monitoring process, give feedback to each other and adopt strategic measures if necessary. Joint **training** activities can also be mutually beneficial. |