

European rules for the administrative detention of migrants

*Written submission to the European Committee on
Legal Co-Operation of the Council of Europe*

JOINT SUBMISSION

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ABOUT THE IDC

The International Detention Coalition (IDC) is a unique global network of over 300 non-governmental organisations, faith-based groups, academics and practitioners in more than 70 countries that advocate for and provide direct services to refugees, asylum-seekers and migrants in administrative detention. We are the only international member organisation focused explicitly on immigration detention and alternatives to immigration detention. With an international Secretariat based in Melbourne, Australia, the IDC works globally through Regional Coordinators in Africa, the Americas, Asia-Pacific, Europe, and the Middle East & North Africa (MENA).

ABOUT THE ICJ

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists works for the legal protection of human rights and the promotion of the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

BACKGROUND

The following excerpt sets out the background to the present joint submission by the International Detention Coalition (IDC) and the International Commission of Jurists (ICJ) to the Council of Europe's European Committee on Legal Co-Operation on its current draft European rules for the administrative detention of migrants.¹

One of the recommendations in the 1st report of the Secretary General of the Council of Europe of the state of democracy, human rights and the rule of law in Europe (2014) is to codify European immigration detention rules. In this report the Secretary General highlights that national authorities should not use police stations or prisons as places for detention of irregular migrants or asylum seekers. These persons have not committed a crime, and authorities should take into account their vulnerability and needs. According to the Secretary General, authorities should not detain children or families with children. Also, the European Court of Human Rights found in numerous occasions that migrants' rights had been violated while being in detention.

This recommendation derived from similar calls made by the Commissioner, Parliamentary Assembly and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and is supported by the European Commission. Upon request of the Secretary General, a feasibility study has been completed which concludes that:

- The European Prison Rules are neither applicable to, nor adequate for the administrative detention of immigrants;*
- Other existing international instruments dealing with administrative detention of immigrants are 'scattered, inadequate, inconsistent and not effective' in so far as they concern this question;*
- There is uncertainty as to what extent instruments are applicable to certain situations involving immigrants or can be applied by analogy.*

Thus, in accordance with its terms of reference, the European Committee on Legal Co-operation (CDCJ) is carrying out a codifying exercise on a set of immigration detention rules based on existing international and regional human rights standards relating to the conditions of detention of migrants. The objective of the draft instrument is twofold:

- Protect migrants held in administrative detention by providing them with individual guarantees on the conditions of their administrative detention (i.e. detention not based on a criminal conviction);*
- Provide guidance to both national authorities responsible for the closed centres and persons working closely with migrants.*

The codification into a single and specific instrument offering a coherent and clear set of international rules on the conditions of detention of migrants would avoid the risk of diverging legal regimes and help build universally applicable standards.

The process to draft this codifying instrument started in May 2016. The European Committee on Legal Co-Operation launched a written consultation procedure to involve civil society and key actors in the elaboration process of this codifying instrument.

The European Committee on Legal Co-Operation of the Council of Europe would accordingly be grateful to receive all relevant observations related to this codifying instrument of European rules on the administrative detention of migrants. In light of the received comments, the Committee will finalise and approve the instrument before submitting it to the Committee of Ministers for adoption.

¹ For additional details, see <http://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants>, as well as the Report by the Secretary General of the Council of Europe, State of democracy, human rights and the rule of law in Europe (2014), available at <https://edoc.coe.int/en/fundamental-freedoms/5949-state-of-democracy-human-rights-and-the-rule-of-law-in-europe.html>.

INTRODUCTION

1. The International Detention Coalition (IDC) and the International Commission of Jurists (ICJ) welcome the opportunity to make the following submission to the Committee of Legal Co-operation (CDCJ) of the Council of Europe (CoE) in response to a request to “receive all relevant observations” related to a codifying exercise on a set of immigration detention rules based on existing international and regional human rights standards.

Immigration detention is a growing and particularly concerning practice

2. The use of immigration detention is a widespread and expanding feature of States’ immigration control policies worldwide, and represents a growing human rights challenge.² Although under international, including regional human rights law, immigration detention may be permissible in an individual case in a strictly limited set of circumstances, governments often make broad policy justifications for such detention that grossly overreach (and are clearly inconsistent with) the carefully circumscribed instances in which international standards allow for deprivation of liberty, including norms of legality, permissible grounds and length, necessity, proportionality, non-discrimination and individual assessment.
3. The growing use of immigration detention is often justified by States on grounds of national security or the desire to prevent irregular migration. This is despite the fact that there is no evidence that the increasing use of detention results in a decrease in irregular migration, or increased national security.³ Rather than the carefully circumscribed resort to immigration detention allowed under international law, States are instead increasingly using detention as a tool of migration management, with fewer procedural guarantees and with little regard, if any, for individual circumstances, age, protection needs or particular vulnerabilities.⁴

“There is a culture of using deprivation of liberty as the norm and not as an exceptional measure reserved for serious offences as required by international human rights standards.”

**Mr. Roberto Garretón,
Working Group on Arbitrary Detention**
4. As a result, immigration detention frequently constitutes and/or results in arbitrary detention.⁵ In some cases it is clearly unlawful, with no basis in law. In other cases, immigration detention is or becomes arbitrary, including because a) it is not or no longer carried out in pursuit of a legitimate State aim prescribed in national law; b) the vague or non-existent communication of the detention reasons; c) it results from a denial of access to international protection mechanisms, lawyers, and interpreters; d) little or no legal due process has been afforded; e) the formulaic or inexistent exploration of available alternatives to detention; f) limited or no independent review of the conditions or continued necessity of detention; and g) limited judicial control or meaningful avenues to challenge one’s detention in court.
5. Globally, immigration detention remains far less regulated, reviewed and monitored than other forms of administrative detention,⁶ let alone criminal detention, and while practices and material detention conditions vary widely among States, more often than not, refugees, asylum-seekers and migrants are detained in criminal prisons or in other punitive,

² International Detention Coalition, *There are alternatives: A handbook for preventing unnecessary immigration detention*, (2011), 10-12, available at <http://idcoalition.org/cap/handbook/>.

³ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, para. 8, A/HRC/23/46; See also, Sampson, R.; Mitchell, G., *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, Journal on Migration and Human Security, (2013); See also, International Detention Coalition (2015), *Briefing Paper: Does Detention Deter?*, available at <http://idcoalition.org/detentiondatabase/does-detention-deter/>.

⁴ See generally, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/23/46.

⁵ See generally, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, A/HRC/20/24.

⁶ UN High Commissioner for Refugees (UNHCR), *Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual*, 2014, p. 21, available at <http://www.refworld.org/docid/53706e354.html>.

prison-like settings inappropriate for administrative detention.⁷ Furthermore, immigration detention can last for months, or in some cases years, during which time detainees are often held in overcrowded and unhygienic conditions falling below international standards.⁸

6. In addition to violations of the right to liberty and security of person, many other human rights violations can and do occur in these circumstances, and the physical and psychological impacts of immigration detention are well documented.⁹ Individuals are particularly susceptible to violence and abuse in immigration detention facilities, and studies have shown that even very short periods of detention can have life-long mental and physical health impacts on children and others particularly unsuited to the detention environment.¹⁰

The international legal framework governing immigration detention

7. International law clearly provides, pursuant to the right to liberty and security of person, a strict prohibition on arbitrary arrest or detention. For present purposes, these obligations are found, most notably, in article 3 of the Universal Declaration of Human Rights (UDHR), article 9 of the International Covenant on Civil and Political Rights (ICCPR), and article 5 of the European Convention on Human Rights (ECHR).
8. The prohibition on arbitrary detention additionally forms part of customary international law and constitutes a *jus cogens* norm from which derogation is never possible.¹¹
9. International instruments do not always use the same terminology to refer to detention.¹² For this reason the former UN Commission on Human Rights encouraged use of the term “deprivation of liberty” in order to eliminate any differences in interpretation between the various terms.¹³ The United Nations Working Group on Arbitrary Detention (WGAD)¹⁴ has made clear that all forms of deprivation of liberty are “detention” for the purposes of determining whether someone is being arbitrarily detained.¹⁵
10. Deprivation of liberty is defined as: “Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”¹⁶
11. It is not always clear whether persons are *deprived of liberty* or merely subject to *restrictions on their liberty of movement*.¹⁷ The UN Human Rights Committee, which oversees State implementation of the ICCPR, has noted that deprivation of liberty “involves more severe restriction of motion within a narrower space than mere interference with liberty of movement.”¹⁸ However, as the European Court of Human Rights has pointed out in its consistent jurisprudence, the difference between deprivation of liberty and mere

⁷ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 31, A/HRC/20/24.

⁸ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 31, A/HRC/20/24.

⁹ See, e.g. Silove D, Steel Z, Watters C., *Policies of deterrence and the mental health of asylum seekers*, JAMA, (2000); Medecins Sans Frontieres, *The Impact of Detention on Migrants' Health*, Briefing Paper, (2010); Coffey G, et al, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, Social Science & Medicine 70 (2010).

¹⁰ See, e.g. International Detention Coalition, *Captured Childhood*, (2012), available at: <http://idcoalition.org/ccap/>.

¹¹ Human Rights Committee, *General Comment No. 35 on Article 9, Liberty and security of person*, CCPR/C/GC/35, 16 December 2014, para 66.

¹² The various international instruments may refer to “arrest”, “apprehension”, “detention”, “incarceration”, “prison”, “reclusion”, “custody”, “remand”, among others. See, <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

¹³ Resolution 1997/50

¹⁴ The UN Working Group on Arbitrary Detention is the only global body in the international human rights system with a specific mandate (granted by the former Commission on Human Rights and the Human Rights Council) to receive and examine cases of arbitrary deprivation of liberty. See, <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>.

¹⁵ UN Working Group on Arbitrary Detention (WGAD): *Report to the 22nd session of the UN Human Rights Council*, (A/HRC/22/44), para 57. See also WGAD’s “Basic Principles and Guidelines on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court”, see <http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/March2015/WGAD.CRP.1.2015.pdf>.

¹⁶ Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Art. 4(2).

¹⁷ While deprivation of liberty (“detention”) will engage the legal protections of ICCPR, Article 9; mere restrictions on liberty of movement will engage the legal protections of ICCPR, Article 12.

¹⁸ Human Rights Committee, *General Comment no. 35*, *op. cit.*, para 5.

restrictions on liberty of movement remains one of “degree and intensity, not one of nature or substance.”¹⁹

12. Detention begins at the moment of arrest and continues in time until the release of the individual.²⁰ Detention need not involve a formal arrest as defined under domestic law.²¹ Examples of detention include police custody, “arraigo”, remand or pre-trial detention, house arrest, custody on national security grounds, immigration detention, involuntary hospitalization, institutional custody of children, confinement to a restricted area of an airport, and involuntarily transportation.²²
13. Immigration detention includes the confinement of refugees, asylum seekers, stateless persons and other migrants—whether under the direct or *de facto* control of the State²³—in prisons, police stations, closed reception centres, dedicated immigration detention facilities, and other closed locations such as airports or shipping vessels.²⁴ It may also include situations where conditions or restrictions placed on a person’s liberty of movement are so intrusive that they amount to a *de facto* detention.²⁵
14. Whatever the name or qualification used by domestic authorities, deprivation of liberty will always engage the right to liberty and security of person of the individual concerned, including, depending on the country concerned, as provided for under Article 9 ICCPR and/or 5 ECHR.²⁶ By the same token, since the name or domestic qualification is not exclusively determinative, even persons held at facilities classified as “open centres”, “hot spots” or other “accommodation” must be considered deprived of their liberty whenever the restrictions imposed—whether individually or cumulatively—actually amount to detention.²⁷ The name given to the facilities where individuals are housed and the domestic characterization of the legal regime are not necessarily determinative. For example, holding people even for short periods of time at holding centres in international border zones, at airports, or other points of entry has been found to amount to deprivation of liberty.²⁸ Relevant factors to assess whether restrictions on liberty amount to deprivation of liberty under international human rights law include their domestic characterization and the legal regime pursuant to which they are imposed; the type of restrictions imposed; their duration; their effects on the individual; and the manner of implementation of the measure.²⁹
15. While generally immigration detention is not arbitrary *per se*, it will be arbitrary whenever it is not reasonably connected to the State’s legitimate aim of immigration control, reasonable, necessary and proportionate in light of the unique circumstances of each

¹⁹ ECtHR, *Guzzardi v Italy*, 6 November 1980, Series A no. 39, para. 92.

²⁰ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 13. The same 1964 study by the former Commission on Human Rights which defined “detention” also defined “arrest” as:

“the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him.”

UN Working Group on Arbitrary Detention (WGAD): *Report to the 22nd session of the UN Human Rights Council*, (A/HRC/22/44), para 53.

²¹ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 13.

²² Human Rights Committee, General Comment no. 35, *op. cit.*, para. 5.

²³ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 9. “When private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9.”

²⁴ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Detention of migrants in an irregular situation*, para. 34, A/HRC/20/24: “information received by the Special Rapporteur indicates that migrants are detained in a wide range of places.”

²⁵ UN Working Group on Arbitrary Detention (WGAD): *Report to the 22nd session of the UN Human Rights Council*, (A/HRC/22/44), para 59.

²⁶ *Amuur v. France*, ECtHR, Case No. 17/1995/523/609, Judgment of 20 May 1996, para. 42; *Nolan and K. v. Russia*, ECtHR, Application No. 2512/04, Judgment of 12 February 2009, paras.93-96; *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application No. 30471/08, Judgment of 22 September 2009, paras. 125-127; *Ashingdane v. United Kingdom*, ECtHR, Application No. 8225/78, Judgment of 28 March 1985, para. 42.

²⁷ *Abdolkhai and Karimnia v. Turkey*, ECtHR, *op. cit.*, para. 127, finding that detention at an accommodation centre, although not classified as detention in national law, did in fact amount to a deprivation of liberty.

²⁸ *Amuur v. France*, ECtHR, *op. cit.*; *The CPT Standards*, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1 - Rev. 2010, Strasbourg, December 2010 (“CPT Standards”), pages 53-54.

²⁹ *Engel and Others v. Netherlands*, ECtHR, Plenary, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1986, para. 59; *Guzzardi v. Italy*, ECtHR, Plenary, Application No.7367/76, Judgment of 6 November 1980, para. 92.

individual.³⁰ This has been interpreted to mean that any use of immigration detention must only be imposed if less-restrictive alternative measures have first been pursued and found to be insufficient to achieve the State's legitimate aim. Both the United Nations WGAD and the Special Rapporteur on the human rights of migrants, have stated that "administrative detention of migrants should be always the last resort according to the principle of proportionality,"³¹ noting the exceptional nature of this measure in the context of immigration enforcement.

16. Importantly, arbitrariness will also arise where there is no connection between the State's legitimate objective and the place of detention, conditions of detention, or treatment of the person within detention.³² This is because "the notion of 'arbitrariness' must not be equated with 'against the law' but must be interpreted more broadly to include such elements as inappropriateness, injustice, lack of predictability, and due process of law."³³ It is therefore possible for immigration detention to be based on a legitimate State objective, to be in conformity with national laws and procedures, and to *still be arbitrary* if the conditions or treatment of persons within immigration detention are inappropriate.³⁴
17. The European Court of Human Rights (ECtHR) has held that, in order to avoid arbitrariness, immigration detention must not only comply with national law, but must also *at a minimum*:
 - be carried out in good faith and not involve deception on the part of the authorities;
 - be closely connected to the purpose of preventing unauthorised entry of the person to the country or deportation;
 - the place and conditions of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to people who have fled from their own country, often in fear of their lives;
 - the length of the detention must not exceed that reasonably required for the purpose pursued.³⁵
18. Additionally, there are instances where the legitimate State interest in pursuing immigration control must give way to the rights of the individual. For example, in the case of children the CRC Committee has found that detaining children solely for the purposes of immigration control is inconsistent with their rights to liberty, family, and to have their best interests as a primary consideration in all actions affecting the child. Therefore, immigration detention of children solely for immigration control purposes will be arbitrary *per se*. Similarly, immigration detention of torture victims, while it may pursue the legitimate State aim of immigration control, may risk violating their right to rehabilitation, and even their right to be free from ill-treatment and therefore be inconsistent with the State duty to protect individuals from torture and ill-treatment. In those circumstances, such detention would similarly be arbitrary *per se*.

³⁰ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 18; 560/1993, A. v. Australia, CCPR, Communication No. 560/1993, Views of 30 April 1997, paras. 9.3-9.4; 794/1998, Jalloh v. Netherlands, CCPR, Communication No. 794/1998, Views of 15 April 2002, para. 8.2; 1557/2007, Nystrom v. Australia, paras. 7.2-7.3.

³¹ See, e.g. U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, paras. 50, 65, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008); U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, para. 59, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010).

³² COE, para. 32; *James, Wells and Lee v. the United Kingdom*, paras. 191-95; and *Saadi v. the United Kingdom*, ECtHR [GC], Application No. 13229/03, Judgment of 29 January 2008 paras. 68-74; 1629/2007, *Fardon v. Australia*, para. 7.4(a); Concluding observations, Belgium 2004, para. 18; Concluding observations, United Kingdom 2001, para. 16.

³³ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 12; 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.1; 305/1988, *Van Alphen v. The Netherlands*, para. 5.8.

³⁴ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 12; *Creanga v. Romania*, para. 84; *A. and Others v. the United Kingdom* [GC], para. 164.

³⁵ *Saadi v. United Kingdom*, ECtHR, *op. cit.*, para. 74.

GENERAL RECOMMENDATIONS

Prison rules are wholly inappropriate

19. Although there is a well-known and long-standing body of international principles that establish the minimum standards for detention in the context of penal law, there is as yet no such normative document specific to the obligations of States vis-à-vis the detention of migrants for administrative immigration detention. The existing penal standards provide an important reference point, but fail to account for the heightened duty of care which States owe persons in the context of migration management. In addition, as the Secretary General of the Council of Europe has pointed out, irregular migrants or asylum seekers have not committed a crime, and authorities should take into account their vulnerability and needs.³⁶ In this regard, existing penal detention standards are wholly insufficient. Furthermore, because these penal standards were adopted largely before the advent of the modern administrative immigration detention regime, there is a need to consider and reflect more up-to-date guidance from relevant migration experts.
20. As the CDCJ rightly pointed out, “*The European Prison Rules are neither applicable to, nor adequate for the administrative detention of immigrants.*” Therefore, the explicit footnoted references throughout the draft codifying instrument to the European Prison Rules are wholly inappropriate for the purposes of this codification process.
21. Gaps in the current normative framework can be acknowledged, but the CJ-DAM should be careful not to “fill” these gaps with references drawn from criminal law standards. Instead, these gaps can be addressed by codifying “*existing international and regional human rights standards relating to the conditions of detention of migrants*”, and by ensuring adequate consultation with a multiplicity of experts stakeholders, as well as migrants themselves (see below).

Inappropriate reliance on EU law for normative guidance

22. The current draft Rules also transpose standards derived from EU law without adaptation to existing international law standards, and, in particular, those of the Council of Europe.
23. The IDC and ICJ consider this approach misconceived since only 27 Member States of the Council of Europe are members of the European Union, and even fewer are bound by the EU *acquis* in this field. EU law standards can therefore be resorted to only as minimum standards, and only when relevant international, including regional, human rights law and standards do not provide for higher standards. In particular, EU law standards must always be implemented consistently with international human rights law and whenever they are in conflict with it, including notably with obligations under the ECHR and ICCPR, the latter should take precedence.³⁷
24. The IDC and ICJ therefore recommend that any reference to EU law in these draft Rules be carefully reconsidered in light of the existing obligations of Member States of the Council of Europe under international law, with only those EU regulations providing good practice examples or representing a *higher standard* of human rights protection being included in the draft Rules.

Further consultations are needed

25. In order to fill these gaps from “*existing international and regional human rights standards*”, as referred to in the Committee’s TOR (see above), it is important that the process be informed by the advice and input of international and regional experts who can ensure that the final document does not end up “cherry picking” some relevant norms, while unwittingly omitting others. Such an expert approach will help to ensure that the norms being codified are both relevant to the immigration detention context, provide the highest standards of protection, ensure that the human rights of migrants in detention are upheld and respected, and are as comprehensive as possible.
26. To this end, the process of codification should rely much more heavily upon the guidance of international experts. This expertise extends well beyond UNHCR and CPT, the institutions that have been most involved in the consultations process thus far. Additional targeted consultations should explicitly include, among others: the Office of the United Nations High Commissioner for Human Rights (OHCHR), the relevant Special Procedures of the UN

³⁶ See footnote 1.

³⁷ See, for example, article 53 ECHR and article 5 ICCPR.

Human Rights Council, including the Working Group on Arbitrary Detention, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on torture, the Special Rapporteur on trafficking; UN treaty bodies such as the Committee against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination Against Women, the Committee on the Rights of Persons with Disabilities, the Committee on Migrant Workers, and the Subcommittee on Prevention of Torture.

27. Further follow-up consultations should also be held with civil-society experts and migrants themselves.

SPECIFIC RECOMMENDATIONS

Preamble

28. The IDC and ICJ recommend the Preambular paragraphs be strengthened to better reflect the underlying human rights-based approach of this codification exercise, and the particular role of The Council of Europe as “the continent’s leading human rights organisation” with the stated aim to uphold and promote human rights, democracy and rule of law in Europe, including a special focus on the protection of minorities.³⁸ To this end, the Preamble should communicate that this project to codify detention standards, is grounded on States’ international human rights obligations to protect, respect, **promote and fulfil the human rights of all persons affected by immigration detention**.
29. The Preamble should also **express concern for** the increasing number of persons in administrative immigration detention in the Member States of the Council of Europe and note that such practices **represent a threat to the protection of human rights and to right to liberty and security of person, in particular**.
30. In light of the fact that all Member States of the Council of Europe are also members of the United Nations and have ratified the core UN human rights treaties, it is also crucial for the harmonised implementation of international law that the preamble refers to all relevant UN instruments. Specific references to international standards in the Preamble are too limited and not representative of the most authoritative or binding standards for Council of Europe member states. Instead, the Preamble should include a **general reference to all relevant standards and recommendations of the United Nations system, including from the General Assembly, Human Rights Council, human rights treaty bodies, special procedures, and UN agencies**.
31. Additional Preambular paragraphs could be added to reflect:
 - o due regard to the European Convention on Human Rights and the case law of the European Court of Human Rights;
 - o due regard to the work carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and in particular the standards it has developed in its general reports;
 - o due regard to the work carried out by the Subcommittee on Prevention of Torture and in particular the standards it has developed in its general reports;
 - o the primacy of the right to liberty and security of person, acknowledging that immigration detention always impinges on it and that this right enjoins States to resort to immigration detention only when strictly necessary, in strict compliance with their international law obligations, and for the shortest period of time possible;
 - o the reaffirmation that no one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law, and that at no time shall any person be deprived of their liberty arbitrarily;
 - o the inalienable right of those subject to immigration detention to be treated with humanity and respect for their mental and physical integrity and human dignity;
 - o noting that arbitrary detention gives rise to risks of torture or other ill-treatment, and that several of the procedural guarantees that secure the right to liberty and security of person serve to reduce the likelihood of such risks.

Title and General Provisions

32. For the reasons outlined above (see “International legal framework”), the IDC and ICJ recommend the title be changed to “**European Rules on Administrative Immigration Detention**”. The current draft envisions the rules to be referred to as the “European Rules for the Administrative Detention of Migrants”. However, such title does not accurately represent what is being codified and should therefore be changed. The draft Rules do not seek to codify rules for all administrative detention, but only for administrative immigration

³⁸ See, <http://www.coe.int/en/web/about-us/values>.

detention. Immigration detention must be distinguished from other forms of administrative detention, such as institutionalization, for example, which have different rules entirely. Additionally, the rules do not apply only to “migrants” but indeed to any person with respect to whom the authorities exercise (or intend to exercise) detention powers for the stated purpose of immigration control. This is an important distinction both for legal and practical reasons. Ultimately, the question is not the migration or residency status of the individual, but rather the stated legal basis on which a person is being detained.

33. The current definitions present in the draft are not grounded in existing norms and are at times inconsistent with existing international obligations. Because this is a codification exercise, the terms defined should **codify existing definitions** rather than invent or attempt to establish new definitions, and all definitions should be **cited to their proper source**. For these reasons, a number of definitions featured in the current draft should be deleted, while others that do not appear should be included.
34. The purported definitions of “**administrative detention**” and “**closed detention centre**” are particularly concerning as they do not adequately reflect international case-law, including from the European Court of Human Rights. Specifically, by attempting to restrict the definition of detention to “closed detention centres” or “places specifically designed for that purpose”, these definitions appear to limit the Rules’ applicability so as not to cover the very situations where immigration detention most often occurs and circumstances in which there is a real risk of arbitrary deprivation of liberty. It is well-established in the case-law of the ECtHR that, in order to determine whether a person has been deprived of liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.³⁹ This implies that deprivation of liberty may take different forms and happen in any place, regardless of the place being ‘closed’ or ‘specifically designed for that purpose’. The ECtHR has applied Article 5 ECHR to the holding of persons in places that are not closed⁴⁰ and the holding of migrants in places not specifically designed for detaining migrants.⁴¹ In other words, as recently clarified by the ECtHR “the classification of the applicants’ confinement in domestic law cannot alter the nature of the constraining measures imposed on them.”⁴² Similarly, the Rules do not adequately reflect the United Nations definition of deprivation of liberty included in Article 4 of the Optional Protocol to the Convention Against Torture:
 - o “Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”⁴³
35. The definition of “**migrant**” is also problematic. There is no authoritative definition of “migrant” under international law, and the current definition appears to attempt to restrict the term “migrant” to only those migrants who are in an irregular situation. However, attempts to do so may contradict well-established legal definitions such as “refugee”, “asylum seeker”, and “migrant worker”, among others. Furthermore, human rights guarantees within places of detention are applicable to *all persons within the place of detention* without any distinction as to their migration or residency status. It is therefore inappropriate to characterise these norms’ applicability as based on the supposed migration status of the **people being detained**, rather than on the purported **policy aim the detention pursues**. In addition, as stated above, this is a codification exercise, the terms defined should **codify existing definitions** rather than invent or attempt to establish new definitions, and all definitions should be **cited to their proper source**. For these reasons, the definition of the word migrant should be deleted and the term “**persons**” should substitute “migrants” throughout the draft codifying instrument.
36. Finally, with regards the definition of “**vulnerable person**”, while the rationale for providing such a definition might be laudable, for many of the same reasons we have mentioned above in respect of the purported definitions of “administrative detention”, “closed detention centre” and “migrant”, the IDC and ICJ recommend that the proposed definition of “vulnerable person” should be deleted. We urge instead that the issue of screening

³⁹ see *Amuur v. France*, 25 June 1996, § 42, Reports of Judgments and Decisions 1996-III, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012; ECtHR, *Khiaifia et al v. Italy*, 64; ECtHR, *Guzzardi v Italy*, §92, 93

⁴⁰ ECtHR, *Guzzardi v Italy*, §92, 93

⁴¹ ECtHR, *Amuur v France*; *Khiaifia et al v. Italy*.

⁴² see, mutatis mutandis, *Abdolkhani and Karimnia*, cited above, §§ 126-27

⁴³ Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), Art. 4(2).

procedures to ensure that vulnerable/at risk individuals be correctly identified prior to any decision as to whether they should be subject to immigration detention be considered comprehensively in the context of the targeted expert consultations we have called for above.⁴⁴

37. For the reasons discussed at length above regarding the definitions, the scope of applicability of these Rules should apply **to all persons held in administrative immigration detention**.

Basic Principles

38. At present, many of the principles in draft Part B are too specific to constitute basic principles, but instead provide more detailed guidance which better sit in subsequent Parts of the Rules, namely Part D on Detention Procedures.
39. Certain Basic Principles currently listed also conflict with or disregard existing norms of international law and should be redrafted.
40. For example, we draw particular attention to **para. B.1 on the right to liberty and detention as a last resort**, to point out that Article 5, paragraph 1(b) has not been interpreted to be a lawful grounds for immigration detention and should therefore be deleted. For detention to be lawful under Article 5 ECHR, an individual must not be unlawfully or arbitrarily detained.⁴⁵ Whilst Article 5(1)(f) exceptionally authorizes the detention of an asylum seeker or other immigrant “to prevent his effecting an unauthorised entry into the country or ... with a view to deportation or extradition”, such detention must be compatible with the overall purpose of Article 5, namely to safeguard the right to liberty and security and to ensure that “no-one should be dispossessed of his or her liberty in an arbitrary fashion”.⁴⁶ No other ground under ECHR provides for detention pursuant to the State legitimate interest of immigration control and therefore should not be referred to in these rules.
41. We also draw attention to **paras. B.14 - B.18 on the immigration detention of children** to point out that they disregard the very clear recommendations by the Committee on the Rights of the Child that the detention of unaccompanied children cannot be justified solely on the basis of the child’s migratory or residence status, or lack thereof,⁴⁷ and that no child—whether accompanied or unaccompanied—should ever be detained for reasons related to their or their parents’ migration status.⁴⁸ In this respect, immigration detention of children is in violation of State obligations under the Convention on the Rights of the Child. Therefore, such “principles” referring to child detention should be deleted and more explicit rules on the prohibition on the detention of children for reasons related to migration status should be reflected in Part D of the Rules.
42. At the same time, there are a number of basic principles which are missing and should be included in this Part. In particular, the IDC and the ICJ consider that the following principles should be codified:
 - **The primacy of human rights:** States shall respect, protect, promote and fulfill human rights wherever they exercise jurisdiction or effective control, including all actions or decisions regarding migration governance.⁴⁹

⁴⁴ See as reference material, Monitoring Immigration Detention, Practical manual produced jointly by the UN Refugee Agency (UNHCR), the APT and the International Detention Coalition (IDC), pp. 194-195 available at: <http://www.aptr.ch/en/resources/monitoring-immigration-detention-practical-manual/?cat=62>.

⁴⁵ *McKay v the United Kingdom* [GC], (No. 543/03) para 30; *Amuur v France* (No. 19776/920), para 50; *Chahal v the United Kingdom* (No. 22414/93), para 118; *Saadi v the United Kingdom* [GC], (No. 13229/03), para 66; *Al Husin v Bosnia and Herzegovina* (No. 3727/08), para 65; *Abdi v the United Kingdom* (No. 27770/08), para 68; *Azimov v Russia* (No. 67474/11); *Suso Musa v Malta* (No. 42337/12), para 93; and *Akram Karimov v Russia* (No. 62892/12), para 144.

⁴⁶ *Saadi v the United Kingdom* [GC], (No.13229/03, GC) paras 64-66. Indeed, this Court has held that arbitrary detention renders those subjected to it vulnerable, for instance, to inhuman or degrading treatment or punishment (Article 3). In *Muskhadzhiyeva and Others v Belgium* (No. 41442/07), this Court found that the conditions in which children were held in detention amounted to inhuman or degrading treatment, one of the factors that led to the Court determining that the detention was unlawful under the Convention.

⁴⁷ Committee on the Rights of the Child, *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/GC/2005/6, 1 September 2005, para. 61.

⁴⁸ Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, para 78, 28 September 2012.

⁴⁹ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*.

- **The right to liberty and security of person:** Everyone has the right to liberty and security of person, regardless of nationality or migration status.⁵⁰ No one shall be arbitrarily deprived of liberty. Detention must be a measure of last resort, and can be resorted to only when it is necessary and proportionate to achieve a legitimate aim, in accordance with a procedure prescribed by law. It should be ordered for the shortest period of time necessary to reach the aim of the detention.⁵¹ Mandatory detention of migrants is arbitrary *per se*, is incompatible with international human rights standards, and should be prohibited.⁵²
- **Right to be treated humanely and with dignity:** Everyone has the right to be treated with humanity and with respect for the inherent dignity of the human person.⁵³ This is a fundamental and universally applicable rule and cannot be dependent on the material resources available in the State.⁵⁴
- **Non-discrimination:** Everyone is entitled to enjoy their human rights without distinction or discrimination of any kind. Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation.⁵⁵
- **Freedom from torture and other ill-treatment** All persons shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment. No circumstances whatsoever may be invoked as a justification for torture or ill-treatment of persons deprived of their liberty.
- **Non-criminalisation and non-penalisation:** Irregular entry or stay should never be considered criminal offences as they are not crimes *per se* against persons, property or national security.⁵⁶ Irregular migrants are not criminals *per se* and should not be treated as such.⁵⁷ Criminalizing irregular entry or stay exceeds the legitimate aim of the State to manage migration and is not a legitimate grounds for the use of detention.⁵⁸ Persons should never become liable to criminal prosecution for the fact of having been the object of smuggling,⁵⁹ a victim of trafficking,⁶⁰ or for the sole reason of having made an application for asylum or any other form of international protection.⁶¹ Children should never be penalized or subject to punitive measures on the basis of their or their parents' migration status.⁶²
- **Persons in situations of particular vulnerability:** States have a positive obligation to protect persons who are particularly vulnerable to abuse and neglect within places of

⁵⁰ Human Rights Committee, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

⁵¹ See, WGAD, *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 10; WGAD, *Annual Report 1999*, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 "Situations regarding immigrants and asylum-seekers", Principle 7; WGAD, *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras 67 and 82.

⁵² Article 9.4 ICCPR. Nowak states that: "Mandatory detention systems seem to be incompatible with the right to habeas corpus", referring to Australian cases: Nowak, *UN Covenant on Civil and Political Rights Commentary*, 2nd Revised Edition, N.P. Engel Publisher, 2005 (Nowak, *ICCPR Commentary*), page 236.

⁵³ International Covenant on Civil and Political Rights, Article 10, paragraph 1.

⁵⁴ Human Rights Committee, General Comment No. 21 (1992) on humane treatment of persons deprived of their liberty.

⁵⁵ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*.

⁵⁶ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 13, A/HRC/20/24.

⁵⁷ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Detention of migrants in an irregular situation, para. 13, A/HRC/20/24.

⁵⁸ The UN Working Group on Arbitrary Detention A/HRC/7/4, para. 53.

⁵⁹ The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Article 5.

⁶⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 6.

⁶¹ 1951 Refugee Convention, art. 31.

⁶² Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, para 78, 28 September 2012. Note the recently adopted Resolution 2020 (2014) (Annex 17) in which the Parliamentary Assembly of the Council of Europe called on States to introduce and enforce laws banning the detention of children for immigration purposes, Resolution 2020 (2014), Assembly debate on 3 October 2014 (36th Sitting) (see Doc. 13597, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Tinatin Bokuchava). Text adopted by the Assembly on 3 October 2014 (36th Sitting); WGAD, *United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*, Principle 21.

detention.⁶³ As a general rule, persons in situations of particular vulnerability – including children, pregnant women, breastfeeding and nursing mothers, survivors of torture and trauma, trafficking victims, elderly persons, the disabled or those with physical or mental health needs – should not be placed in detention.

- **Child protection:** Children shall not be detained for reasons related to their or their parents' migration status.⁶⁴ Their best interests must be protected in accordance with the Convention on the Rights of the Child.⁶⁵ The detention of children solely for immigration purposes is arbitrary per se and shall therefore be prohibited.⁶⁶
- **Non-punitive conditions:** Places of detention shall have conditions that are tailored to the legitimate aims of the State and that cater to the particular needs of the individuals being detained.⁶⁷ Holding a detainee in a facility which is inappropriate in light of the grounds on which he or she is held will violate the right to liberty.⁶⁸ Detention for the purposes of administrative immigration detention shall never be punitive or criminal-like. Administrative immigration detainees shall not be held in ordinary prisons, police stations, nor co-mingled with criminal detainees.⁶⁹
- **The right to challenge one's detention:** Everyone has the right to challenge the lawfulness of detention before a competent, independent and impartial court or tribunal. Adequate time and facilities shall be guaranteed to enable the individual concerned to bring such challenges. This includes the right to have the lawfulness of detention, as well as of its conditions, subject to automatic and regular reviews before a competent, independent and impartial court of law.⁷⁰
- **Respect of the principle of legality:** Legislation shall not allow wide executive discretion in authorising or reviewing detention. Laws imposing deprivation of liberty must be accessible and precise.⁷¹ The law must provide time limits and clear procedures for imposing, reviewing and extending detention.⁷² There must be a clear record regarding the arrest or bringing into custody of the individual.⁷³
- **Monitoring and inspection:** All places of immigration detention shall be subject to regular government inspection and independent monitoring. Independent monitoring bodies shall have unrestricted access to all places of detention and their installations and facilities.⁷⁴

⁶³ Human Rights Committee, General Comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 3.

⁶⁴ Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, para 78, 28 September 2012.

⁶⁵ CRC, art. 3.1.

⁶⁷ WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, principles 1, 3 and 21; *The CPT Standards*, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1 - Rev. 2010, Strasbourg, December 2010 page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; *Guidelines on human rights protection in the context of accelerated asylum procedures*, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies (*European Guidelines on accelerated asylum procedures*, CMCE), Principle XI.7: "detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy."

⁶⁸ *Aerts v. Belgium*, ECtHR, Application No. 25357/94, Judgment of 30 July 1998, para. 46; *Mayeka and Mitunga v. Belgium*, ECtHR, Application no 13178/03, Judgment of 12 October 2006.

⁶⁹ *Concluding Observations on Ireland*, CCPR, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 21; See also, *Concluding Observations on Sweden*, CCPR, UN Doc. CCPR/C/SWE/CO/6, 2 April 2009, para. 17; *Concluding Observations on New Zealand*, CAT, UN Doc. CAT/C/NZL/CO/5, 14 May 2009, para. 6: "The Committee notes with concern that asylum-seekers and undocumented migrants continue to be detained in low security and correctional facilities."; *Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers*, ExCom, UNHCR, 37th Session, 1986, para. 10.

⁷⁰ *A. and Others v. United Kingdom*, , GC, Application No. 3455/05, Judgment of 19 February 2009, para. 202; *Chahal v. United Kingdom*, ECtHR, *op.cit.* paras. 127-130. See Human Rights Committee, General Comment no. 35, *op. cit.*, para. 45.

⁷¹ *Amuur v. France*, ECtHR, *op. cit.*, para 51

⁷² *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*

⁷³ *Tehrani and Others v. Turkey*, ECtHR, Applications Nos. 32940/08, 41626/08, 43616/08, Judgment of 13 April 2010..

⁷⁴ OPCAT, art. 14.1(c).

Legal Remedies⁷⁵

43. Current Part C of the draft Rules contains a number of important procedural rights which must be available in the context of **challenging the lawfulness of detention** once a person has already been detained. For this reason, this Part would be better placed at the end of the document, after the due process rights in Part D, and the subsequent standards around the conditions of immigration detention in Parts E-J, have been fully explored.
44. The IDC and the ICJ consider that, in order to effectively enjoy the right to challenge the lawfulness of detention, **every person in immigration detention is entitled the following:**
- A thorough and not only speedy judicial review by a court at the beginning of the detention and at automatically at regular intervals, of the lawfulness, necessity and proportionality and the conditions of detention;⁷⁶
 - To be heard by the judge deciding in the review and be present at the hearing;⁷⁷
 - To a lawyer in all phases of the deportation, entry and detention procedures, and not to mere legal representation and assistance;⁷⁸
 - Access to an interpreter, including translation of key documents to the detainee's case;⁷⁹
 - Free legal aid, if he or she cannot afford to pay for a lawyer, which in immigration detention, should be presumed until proven otherwise;⁸⁰
 - If detention is ordered by an administrative authority, a judge must authorize it at latest within 48 hours after having heard the detainee and assessed its lawfulness, necessity and proportionality as well as the conditions of detention and the integrity of the detainee;⁸¹
 - to be informed of all their rights and procedures to defend them in a language they understand, not that they are presumably supposed to understand;⁸² and
 - to be provided with compensation if it has been proven that his or her detention was unlawful.⁸³

⁷⁵ The titles of the sections refer to the Sections of the Draft Rules. In this particular section, the guarantees enlisted are rights under international law and not only legal remedies. See for reference, ICJ Principles on the Role of Judges and Lawyers in relation to Refugees and Migrants, available at <https://www.icj.org/rmprinciples/>.

⁷⁶ WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principles 1, 2, 6, 14 and 21; Human Rights Committee, General Comment no. 35, *op. cit.* para. 15 and 18; para. 47: S.K. v. Russia (no. 52722/15), UN Body of Principles, article 11.3 and 22, 33; *Bouamar v. Belgium*, ECtHR, Application No. 9106/80, Judgment of 29 February 1988.

⁷⁷ WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principles 11 and 21; *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 92; *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, Plenary, Applications Nos. 2832/66; 2835/66; 2899/66, Judgment of 18 June 1971, para. 73; *Winterwerp v. the Netherlands*, ECtHR, Application No. 6301/73, Judgment of 24 October 1979; *Kurt v. Turkey*, ECtHR, Case No. 15/1997/799/1002, Judgment of 25 May 1998, para.123; Human Rights Committee, General Comment no. 35, *op. cit.*, para. 42

⁷⁸ WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principles 9 and 21; *Concluding Observations on Australia*, CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern "at the State Party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right." See also, Article 17.2(d), Convention on the Protection of All Persons from Enforced Disappearance; WGAD, *Annual Report 1998*, *op. cit.*, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999*, *op. cit.*, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, Guideline XI.5 and 6. Human Rights Committee, General Comment no. 35, *op. cit.*, para. 46.

⁷⁹ WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principle 21.

⁸⁰ WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principles 9 and 21. *Suso Musa v. Malta*, ECtHR, Application No. 42337/12, Judgment of 23 July 2013, paras. 61. UN Body of Principles, principle 17.

⁸¹ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 33. While the paragraphs applies to detention on criminal charges, since immigration detention has no penological purposes, it should apply *de minimis* to immigration detention as well.

⁸² WGAD, United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court, Principles 7 and 21; *Lokpo and Toure v. Hungary*, ECtHR, Application No. 10816/10, Judgment of 20 September 2011, para. 24; *Nasrulloev v. Russia*, ECtHR, Application No. 656/06, Judgment of 11 October 2007, para. 77; *Chahal v. United Kingdom*, ECtHR, *op. cit.*, para. 118; *Saadi v. United Kingdom*, ECtHR, *op. cit.*, para. 74; *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, paras.131-135; *Amuur v. France*, ECtHR, *op. cit.*; *Soldatenko v. Ukraine*, ECtHR, Application No. 2440/07, Judgment of 23 October 2008. See also, WGAD, *Annual Report 1998*, *op. cit.*, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999*, *op. cit.*, Principles 1 and 8; WGAD, *Annual Report 2008*, *op. cit.*, paras. 67 and 82.

⁸³ Articles 5.5 ECHR, 9.5 ICCPR.

Detention Procedures

45. Current Part D of the draft Rules codifies the procedural rights which must be in place **prior to, or in the context of, the State decision to detain**. For this reason, it should precede Part C on Legal Remedies.
46. A number of the legal safeguards which are currently included under the heading of Basic Principles, more appropriately belong here. The IDC and ICJ stress that, as affirmed by the Human Rights Committee, “procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.”⁸⁴
47. These include, among others, that **every person in immigration detention is entitled the following:**
- Decisions to detain must be made on an individualised basis;⁸⁵
 - the need to consider alternatives to detention;⁸⁶
 - Individual screening and assessment procedures, including age determination, best interest determination, and protection claims;⁸⁷
 - Access to legal advice and representation;⁸⁸
 - The right to be informed both orally and in writing, in a language the person understands, of the reasons for detention and the procedures for challenging one's detention;⁸⁹
 - The right to have visits and freely communicate with family members;⁹⁰
 - The right to communicate with consular authorities and, if asylum seekers, with UNHCR.⁹¹

⁸⁴ Human Rights Committee, General Comment no. 67; General comment No. 32, para. 6.

⁸⁵ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 18; UN Body of Principles, principle 12; *A v. Australia*, CCPR, Communication No. 560/1993, Views of 30 April 1997, para. 9.3: “The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends.” *Saed Shams and others v. Australia*, Communication No.1255/2004, 11 September 2007; *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002: arbitrariness” must be interpreted more broadly than “against the law” to include elements of unreasonableness; *F.K.A.G. v. Australia*, CCPR, Communication No. 2094/2011, Views of 26 July 2013, para 9.3. In that case was not unreasonable to detain considering the risk of escape, as had previously fled from open facility.

⁸⁶ *Yaw and others v Italy*, para. 71.

⁸⁷ ECtHR, *Chahal v. the United Kingdom* [GC], No. 22414/93, 15 November 1996, para. 113; ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 164. Article 15 (1) of the Returns Directive; The Council of Europe Commissioner for Human Rights has expressed concern where “persons in a situation of particular vulnerability” can be detained for immigration purposes, citing detention of single parents with minor children as well as persons who have been subjected to forms of serious psychological, physical or sexual violence. This is also mirrored by UNHCR in their Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (Guideline 9) (Annex 3) contending that vulnerable persons include unaccompanied elderly persons, and survivors of torture or other serious physical, psychological or sexual violence. ECtHR *Khudobin v Russia* No.59696/00, 26 October 2006, para 93; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (no 13178/03), 12 October 2006 para 103; *Muskhadzhiyeva and others v Belgium* (No. 41442/07), 19 January 2010 para 73; Regarding Statelessness determination procedures, see UNHCR *Handbook on Protection of Stateless Persons* and e.g. *Kim v Russia* ([2014] Application no 44260/13).

⁸⁸ *Rahimi v. Greece*, Application No. 8687/08, Judgment of 5 April 2011; See, ICJ, Migration and International Human Rights Law, pp. 179-180 for related comprehensive jurisprudence; UN Body of Principles, principle 17; *Concluding Observations on Australia*, CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol.I, UN Doc. A/55/40 (2000), para. 526, where the Committee expressed concern “at the State Party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.” See also, Article 17.2(d), CPED; WGAD, *Annual Report 1998, op. cit.*, para. 69, Guarantees 6 and 7; WGAD, *Annual Report 1999, op. cit.*, Principle 2; *European Guidelines on Accelerated Asylum Procedures*, CMCE, *op. cit.*, Guideline XI.5 and 6.

⁸⁹ Human Rights Committee, General Comment no. 35, *op. cit.*, paras. 24-26; paras. 46, 58. UN Body of Principle, principle 14; See, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR, 2012, Guideline 7; *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 at the 925th meeting of the Ministers' Deputies, Guideline 6; and, *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, Principle XI.5.

⁹⁰ Article 17.2(d) CPED; Article 10.2, *UN Declaration on the Protection of All Persons from Enforced Disappearance*; Principles 16 and 19, *Body of Principles for the Protection of all persons deprived of their liberty*; *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, CPT, CoE Doc. Ref.: CPT/Inf (92) 3, 13 April 1992, para. 36; WGAD, *Annual Report 1998, op. cit.*, para. 69, Guarantee 6; WGAD, *Annual Report 1999, op. cit.*, Principle 2.

⁹¹ Human Rights Committee, General Comment no. 35, *op. cit.*, para. 58. See Body of Principles (note 102 above), principle 16, para. 2; Article 36 of the *Vienna Convention on Consular Relations* of 1963 (VCCA); *UNHCR Guidelines on Detention, op. cit.*, Guideline 7(vii); bWGAD, *Annual Report 1998, op. cit.*, Guarantee 14; WGAD, *Annual Report 1999 op. cit.*, Principle 10, which include also the International Committee of the Red Cross and specialized NGOs; *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, Principle XIV. See other material in UNHCR *Handbook on Protection of Stateless Persons* and e.g. *Kim v Russia* ([2014] Application no 44260/13)

Detention Conditions

48. The current draft Rules in Parts E thru J largely codify existing penal standards and should be closely reviewed by the drafting committee to **ensure all penal standards are deleted**. Where specific standards are lacking in the immigration detention context, the drafting committee should refer to general principles of international law, rather than seek to codify penal standards either directly or by analogy. Overall, an **ethic of care and protection should prevail over enforcement aims**.
49. We reiterate that immigration detention regimes **should never be criminal-like or punitive**, either in purpose or effect. Migration is not a crime *per se* against person or property and should never be treated as such. The current draft document risks blurring this line and unhelpfully linking migration with criminality or threats to national security.
50. For example, rules regarding the right of children to communicate with the outside world are wholly inappropriate as the Committee on the Rights of the Child has held that under the UN Convention on the Rights of the Child, **States cannot justify detaining migrant children on the basis of their, or their parents, migration status**, nor on grounds of keeping the family together during migration procedures. Immigration detention is never in the best interests of the child and represents a child rights violation.⁹²
51. Similarly, current Rule F.18 is highly problematic and should be further clarified vis-a-vis the non-derogable obligation never to detain any person arbitrarily. This includes **situations in which there is no connection between the State's legitimate objective and the place of detention, conditions of detention, or treatment of the person within detention**.⁹³

⁹² Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, para 78, 28 September 2012.

⁹³ COE, para. 32; *James, Wells and Lee v. the United Kingdom*, paras. 191-95; and *Saadi v. the United Kingdom* [GC], paras. 68-74; 1629/2007, *Fardon v. Australia*, para. 7.4(a); Concluding observations, Belgium 2004, para. 18; Concluding observations, United Kingdom 2001, para. 16.

CONCLUSION

52. The IDC and ICJ warmly welcome the consultation process by the Committee on Legal Co-Operation of the Council of Europe and the opportunity for greater expert input to these draft Rules.
53. We note that current detention practices in most Council of Europe member States raise serious questions as to their compatibility with existing normative obligations insofar as the use of immigration detention must always be an exceptional measure of last resort in full respect of the norms of necessity, proportionality and non-discrimination.
54. We remain concerned that the current draft document fails to adequately distinguish between criminal and administrative immigration detention regimes. In doing so, the document risks normalizing unlawful detention practices and codifying prison standards that are wholly inappropriate in the context of migration.
55. We are highly troubled that the draft document condones the immigration detention of persons in situations of particular vulnerability, including children, pregnant women, nursing mothers, survivors of torture and trauma, trafficking victims, elderly persons, the disabled or those with physical or mental health needs. As a general rule, persons in situations of particular vulnerability should *never* be detained merely for the purposes of enforcing immigration control, including because doing so gives rise to a real risk of violation not only of the right to liberty and security of person but of the rights to be free from torture or other ill-treatment, mental and physical integrity, and equality before the law and equal protection of the law with discrimination.
56. We encourage the drafting committee to focus much more attention on the legal obligation of States to ensure that detention is always a limited and exceptional measure of last resort in the context of migration; to prioritize alternative measures to detention; and to cease--expeditiously and completely--the detention of persons who in situations of particular vulnerability.

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APPENDIX

Appendix 1: ICJ Practitioners Guide no. 6, *Migration and International Human Rights Law*, Chapter 4

The Practitioners Guide on Migration and International Human Rights Law analyses the protection afforded to migrants by international law and the means to implement it at national and international levels. The Guide synthesises and clarifies international standards on key issues, in particular: the rights and procedures connected to the way migrants enter a country and their status in the country of destination; human rights and refugee law constraints on expulsion; the human rights and refugee law rights linked to expulsion procedures; the rights and guarantees for administrative detention of migrants; rights connected to work and labour; and rights to education, to the highest attainable standard of health, to adequate housing, to water, to food, and to social security.

Available at <https://www.icj.org/practitioners-guide-on-migration-and-international-human-rights-law-practitioners-guide-no-6/>

Appendix 2: IDC Handbook, *There are Alternatives*

Governments around the world are increasingly using detention as a migration management tool, with refugees, asylum-seekers and migrants detained for prolonged periods. However, there are humane and cost effective alternatives to detention that prevent unnecessary and damaging detention and that ensure detention is only ever used as a last resort. The IDC has identified good practices from around the world and compiled them in a handbook, while also introducing CAP, the Community Assessment and Placement model, as a way for governments to uphold their article 9 responsibilities in the context of immigration detention.

Available at <http://idcoalition.org/cap/handbook/>