SUBMISSION TO THE COUNCIL OF EUROPE'S EUROPEAN COMMITTEE ON LEGAL COOPERATION

OBSERVATIONS ON THE FIRST DRAFT OF THE EUROPEAN RULES ON THE ADMINISTRATIVE DETENTION OF MIGRANTS

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Introduction

1. This submission is made by Professor Lorna McGregor, Director of the Detention, Rights and Social Justice Programme and Human Rights Centre at the University of Essex. Professor McGregor was the co-chair of an expert group of academics and practitioners on the review of the Standard Minimum Rules on the Treatment of Prisoners (producing the 'Essex papers') and is a co-chair of the European Society of International Law's Interest Group on Human Rights, a co-Chair of the International Law Association's Study Group on Individual Responsibility in International Law and a Commissioner of the British Equality and Human Rights Commission. Prior to becoming an academic, Professor McGregor was the International Legal Advisor to REDRESS and a programme lawyer at the International Bar Association.

2. The Human Rights Centre brings together over 100 academic staff from 11 departments who are prominent scholars in human rights and advise and act on behalf of governments, NGOs, national and regional human rights bodies, and international organisations such as the United Nations.

3. The Detention, Rights and Social Justice programme is an interdisciplinary programme that aims to identify the parameters of lawful and legitimate detention and the social forces that give shape to it. It also focuses on treatment in detention and seeks to develop an understanding of the experiences and lived reality of detainees. The Programme works on all types of detention, including in prisons, pre-trial detention and administrative detention (security, immigration and on grounds of mental health) as well as groups in a position of vulnerability such as children.

4. Recent activities of the programme include the convening of experts meetings on the proposed reform of the UN Standard Minimum Rules on the Treatment of Prisoners (SMR) together with Penal Reform International. These meetings led to two analyses of the compatability of the SMR with current international standards and norms (informally referred to as the 'Essex papers'). [1] Following the adoption of the Nelson Mandela Rules, the programme convened a further expert meeting on the implementation of the revised Rules.[2]

5. This submission comments on certain aspects of the first draft of the European Rules on the Administrative Detention of Migrants. These observations are not exhaustive but confined to the following points:

- the definition of deprivation of liberty and the coverage of the Rules;
- the grounds for detention and the availability and use of alternatives;
- the treatment of migrants in a position of 'vulnerability'; and
- the design, purpose and running of a detention centre and the standards on the maintenance of good order.

THE DEFINITION OF DETENTION

6. The draft Rules define administrative detention as 'the deprivation of liberty of a migrant in a closed detention centre' (A.2.i.). 'Closed detention centre' is defined as a 'place where migrants held within it are deprived of their liberty and specifically designed for that purpose' (A.2. ii.).

7. The focus of the Rules on a 'closed detention centre' appears narrower than the definition of detention contained in other international standards and norms and has the potential to create

[1] Essex Paper 1, *Expert Meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review* (20 November 2012) available at: http://www.essex.ac.uk/hrc/documents/practice/summary-expert-meeting-20-nov-2012. pdf; Essex Paper 2, *Second Report of the Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners* (March 2014) available at: http://www.essex.ac.uk/hrc/documents/practice/second-reportof-essex-expert-group-smr-revision-19-march-2014.pdf

[2] Essex Paper 3, the latest in the series, *Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules* (2017) is available at: https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf

gaps whereby a person is deprived of his or her liberty, for example in a transit zone, an airport or on a ship, but not held in a formal 'closed detention centre'. [3]

8. By contrast, the UNHCR Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention[4] (the 'UNHCR Guidelines') refer to 'the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.'[5] The Guidelines provide a wide-range of examples of detention beyond purpose-built centres, noting that, '[d]etention can take place in a range of locations, including at land and sea borders, in the "international zones" at airports, on islands, on boats, as well as in closed refugee camps, in one's own home (house arrest) and even extraterritorially. Regardless of the name given to a particular place of detention, the important questions are whether an asylum-seeker is being deprived of his or her liberty de facto and whether this deprivation is lawful according to international law.'[6]

9. Rules B.11 and B.12 also state that in exceptional circumstances, migrants may be held in prisons and police custody. This position differs from other international standards and norms which provide that prisons and police custody are not suitable places in which to hold migrants and therefore should not be used. For example, the UN Human Rights Committee in its General Comment on Article 9 states that '[a]ny necessary detention should take place in appropriate, non-punitive facilities and should not take place in prisons'.[7]

10. Further, while Rule B.11 provides that should migrants be held in prisons, the current Rules would apply to them, Rule B.12 does not contain a similar clause making it unclear which instrument would govern the treatment of migrants held in police custody.

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[3] See for example, *Amuur v France*, Application No.19776/92, Judgment of 25 June 1996
[4] UNHCR *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: http://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html (*UNHCR Guidelines* 2012)
[5] Ibid.,p.9, at para. 5
[6] Ibid. p.9, at para. 7
[7] UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person*), 16 December 2014, CCPR/C/GC/35, available at: http://www.refworld.org/docid/553e0f984.html (HRC, *General comment no. 35*)

GROUNDS FOR DETENTION AND THE USE OF ALTERNATIVES

11. We welcome the decision of the Committee to not only focus the draft Rules on the treatment and conditions of immigration detention but also on the legality and legitimacy of the decision to detain in the first place. This is an area in which a statement of the existing international standards and norms is particularly important given the well-documented physical and psychological harm that can be caused by immigration detention as well as the increase in the use of immigration detention despite the move towards its exceptionality in international law.[8]

12. Draft Rule B.1 provides that '[d]etention should be for the shortest time possible and imposed only as a measure of last resort and after full consideration of all sufficient but less coercive alternatives, in particular as concerned [sic] migrants in vulnerable situations'. Rule B2 recognises that the decision to detain should be on an individual basis, thus prohibiting routine or blanket detention and Rule D1 requires that the 'detention itself shall be lawful, proportionate and not arbitrary'. The Rules provide that migrants 'shall only be detained for as short a period as possible and for only so long as strictly necessary … In no case shall the detention be for an unlimited period of time' (Rule D.2).

13. While the Rules generally converge with international standards and norms on the legality and legitimacy of detention, they do not address whether a decision to detain a person must be for a legitimate purpose. This is in contrast to UNHCR's Guidelines which not only require that the detention must be in accordance with and authorised by the law (guideline 3) and necessary (guideline 4.2) but also that where detention is exceptionally used, it must be for a legitimate purpose (4.1). The Guidelines limit a legitimate purpose to protecting public order (to prevent absconding and/or in cases of non-cooperation, to deal with accelerated procedures for manifestly unfounded cases, and for initial screening and/or security

[8] For the latest figures across Council of Europe States, see the Global Detention Project, available at: https://www.globaldetentionproject.org/organisations-alliances/council-europe. For more recent analyses of the rise in use and resulting harm of immigration detention, see M. Bosworth, *Mental Health in Immigration Detention: A Literature Review*, Review into the Welfare in Detention of Vulnerable Persons, (2016), Cm 9186. London: HSMO. Criminal Justice, Borders and Citizenship Research Paper No. 2732892; M. Bosworth and M. Vannier, *Human Rights and Immigration Detention in France and the UK'* (2016) 18 European Journal of Migration and Law 157 – 176, available at: http://booksandjournals.brillonline.com/content/journals/10.1163/15718166-12342097 ;Admir Skodo, *How immigration detention compares around the world*, The Conversation, (2017), available at: https://theconversation.com/how-immigration-detention-compares-around-the-world-76067.

verification), public health or national security. Even where such a purpose is identified, the detention must still be individualised, necessary and proportionate in consideration of alternatives. The UNHCR Guidelines also provide examples of purposes that would not be considered legitimate, such as where detention is used as a penalty for illegal entry and when it is used to deter individuals from seeking asylum (guideline 4.1.4).

14. Similarly, the draft Rules do not set out a meaning of 'sufficient but less coercive alternatives'; how they are to be regulated to ensure that they do not become alternative forms of detention themselves or violate human rights; or the consequences for states that do not have any alternatives – or sufficient alternatives – in place.

15. Substantial thinking has gone into appropriate alternatives to detention such as the International Detention Coalition's report on 'There are Alternatives' drawing on the practice of 60 countries.[9] The report emphasises that the models should not only focus on 'accommodation models'; that they do not necessarily require reporting or bail conditions; and that they should not become 'alternative forms of detention' but to be successful they should 'rely on a range of strategies to keep individuals engaged in immigration procedures while living in the community' including ensuring effective case management and resolution and 'ensuring basic needs can be met'. These are key points to operationalising the presumption against immigration detention in practice. Since the Committee has decided to focus on the legality and legitimacy of detention in addition to conditions and treatment, the draft Rules would be stronger if they also set out the types of alternatives expected and how they should be regulated.

RULES APPLICABLE TO 'MIGRANTS IN VULNERABLE SITUATIONS'

16. Rule B.1 refers to 'migrants in vulnerable situations'. Rule D.3 also requires that '[t]he individual circumstances of the migrant, especially his or her vulnerability, shall be taken into consideration' and Rule B.6 provides that '[m]igrants should be screened to assess whether or not they are vulnerable … Appropriate protective action should be taken whenever a person is assessed as vulnerable'.

[9] International Detention Coalition, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 2011, available at: http://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf

17. The European Committee on the Prevention of Torture and the European Court of Human Rights have recognised that all migrants held in an immigration centre are, by virtue of their detention, in a 'vulnerable situation'.[10] This is compounded by the fact that administrative detention is not imposed in response to a crime and the risks posed to migrants through detention. The point of departure for the Rules should therefore be the recognition of this situational vulnerability of all migrants which should shape whether detention is used at all and where it is, the conditions and treatment of migrants.

18. Certain migrants may be in a position of particular vulnerability. The current draft defines a 'vulnerable person' as 'any individual in a specific situation of vulnerability, in particular any individual belonging to a group or community that is at a higher risk of being subjected to discriminatory practices, violence or hardship than other groups – at a given time in a given situation.' While the definition is broad, throughout the draft particular groups are identified as in a situation of vulnerability. These include torture survivors, survivors of sexual or gender-based violence, victims of trafficking in human beings, children, pregnant women and persons with disabilities.

19. The groups identified by the draft Rules are narrower than other international standards and norms. For example, while not exhaustive, the UNHCR Guidelines (Guideline 9) identify 'the special circumstances and needs of particular asylum seekers' including 'victims of trauma and torture', children, 'pregnant women and nursing mothers', 'victims or potential victims of trafficking', 'asylum seekers with disabilities', 'older asylum seekers' and LGTBI asylum seekers.

20. Beyond a general clause prohibiting discrimination, the Rules do not address the potential risks to LGTBIQ migrants. Yet, in *O.M. v Hungary*, the European Court of Human Rights identified the particular risks that may be posed to members of the LGTBIQ communities in immigration detention, noting that:

> … in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular

[10] see *The CPT Standards,CPT/Inf/E (2002) 1 - Rev. 2015*, para 75, available at: http://www.coe.int/en/web/cpt/home ; *M.S.S. v. Belgium and Greec*e, Application no. 30696/09, Judgment of 21 January 2011, para. 251

> care in order to *avoid situations which may reproduce the plight that forced these persons to flee in the first place*. In the present case, the authorities failed to do so when they ordered the applicant's detention without considering the extent to which vulnerable individuals – for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. *Again, the decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant, member of a vulnerable group by virtue of belonging to a sexual minority in Iran* ...[11] (emphasis added).

21. Similarly, the Rules do not address how stateless persons should be treated despite the risk of stateless persons being subject to indefinite immigration detention as highlighted by the European Court of Human Rights in *Kim v Russia*:

> … As a stateless person, he was unable to benefit from consular assistance and advice, which would normally be extended by diplomatic staff of an incarcerated individual's country of nationality. Furthermore, he appears to have no financial resources or family connections in Russia and he must have experienced considerable difficulties in contacting and retaining a legal representative. The domestic authorities do not appear to have taken any initiative to accelerate the progress of the removal proceedings and to ensure the effective protection of his right to liberty, although the decision by the Constitutional Court of 17 February 1998 may be read as expressly requiring them to do so ... As a consequence, the applicant was simply left to languish for months and years, locked up in his cell, without any authority taking an active interest in his fate and well-being.[12]

22. The UNHCR's Guidelines (para 9) provide that: 'Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission. In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought'.[13]

[11] *O.M. v. Hungary*, Application No. 9912/15, Judgment of 5 July 2016, para. 53
[12] *Kim v. Russia*, Application No. 44260/13, Judgment of 17 July 2014, para.54
[13] See also HRC, *General comment no. 35*, para 18.

23. In other parts of the Rules particular groups are referred to as in a position of vulnerability. However, the draft Rules do not address whether migrants within a situation of particular vulnerability should be detained at all. Rather, the Rules vary in the actions required of the authorities vary without clear explanation for the distinction.

24. For example, draft Rule E5 provides that '[a]uthorized bodies responsible for identifying victims of trafficking and victims of torture or of inhuman or degrading treatment or punishment should have access to administrative detention facilities for the purposes of carrying out the necessary identification and procedures'. In H.4 the Rules provide that, '[p]articular efforts shall be made to provide migrants who have been subject to physical or mental or sexual abuse, torture or ill-treatment, whether prior to detention or whilst detained, with appropriate medical advice, counselling and with the necessary physical and mental health-care'. H.16 repeats this in relation to sexual or gender based violence. However, the Rules do not address whether such victims should be detained in the first place.

25. By contrast, Rule B.7 sets out that, [s]hould … victims of trafficking be identified in a closed detention centre, they should be released and offered a recovery and reflection period of at least 30 days, during which they shall be entitled to assistance, including appropriate accommodation, psychological and material assistance, access to emergency medical treatment, counselling and information, in particular as regards their legal rights and the services available to them'. The reason for the distinction in treatment is not explained by the Rules.

26. The Rules provide that '[a]s a general rule, migrants with severe long-term physical, mental, intellectual and sensory impairments should not be detained'. The footnote refers to the UN Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention. However, these Standards do not use the qualification of 'severity' and it is unclear what the draft Rules mean in this respect.

27. Rule B.13 states pregnant women should not be held 'if the detention would harm their health or that of their child' but makes no reference nursing mothers. This does not reflect the UNHCR Guidelines, which state, 'as a general rule the detention of pregnant women in their

final months and nursing mothers, both of whom have special needs, should be avoided'.[14]

28. The Rules state that children should not be detained and Rule B.14 provides that '[a]ll efforts shall be made to release the detained children and place them in accommodation suitable for children'. However, B.14 still provides that children can be detained 'as a last resort' without any indication of the type of situation in which the detention of children would be legitimate, proportionate and necessary.

29. Further, where the Rules deal with treatment of children in detention, they do not reinforce that children should not be detained in the first place (see for example, Rules B.15– 18 and H.12). This is in contrast to the European Prison Rules which underscore the exceptionality of the detention of children every time the treatment of a child in detention is addressed. For example, Rule 11.2 of the EPR provides that '[i]f children are *nevertheless exceptionally held* in such a prison there shall be special regulations that take account of their status and needs.' (emphasis added).

30. Consideration might therefore be given to the coverage of groups identified as in a situation of particular vulnerability and whether they should be detained in the first place.

THE PURPOSE, DESIGN AND RUNNING OF IMMIGRATION DETENTION CENTRES

31. Finally, the draft Rules recognise that 'migrants in administrative detention shall be accommodated in facilities that are specifically designed for the reason for their detention and offer material conditions and a regime that is appropriate to their legal situation' (B.8). However, the draft Rules do not expand on the provision or provide positive instructions on how an immigration detention centre should be designed or operated. Rather, the parts of the Rules on the conditions and treatment in detention largely replicate the text of the EPR without contextualisation.

32. The effect of importing individual rules from the EPR into a document on immigration detention is most clearly illustrated by the section on 'maintaining good order'. Other than

[14] *UNHCR Guidelines* 2012, Guideline 9.3.

reference to human dignity and one Rule requiring that '[d]isciplinary procedures shall be mechanisms of last resort' and 'the authorities of administrative detention facilities shall use mechanisms of restoration and mediation to resolve disputes with and among migrants' (LI.10), the Rules makes no mention of how the immigration centre should be designed and run to reflect the non-punitive nature of the detention, its administrative purpose and the position of vulnerability in which migrants are placed. Rather, it focuses on the use of force, searches, restraint and solitary confinement.

33. This approach has led a coalition of NGOs to call upon the Committee to consider a 'fundamentally different way of conceptualising what detention conditions are appropriate in the administrative immigration context … Norms based on existing human rights standards for migrants and on general principles of care and protection – not punishment or mitigation of threat – should be the driving rationale'. The Coalition argues that the codification exercise should be 're-frame[d] … from one in which standards are put in place to merely avoid serious harms or abuses; to one that provides guidance to States on how to properly ensure the safety, dignity and humanity of all migrants within places of immigration detention … it is nonetheless difficult to imagine why a regime that is fundamentally concerned with administrative migration procedures should ever contemplate the use of force or solitary confinement, for example'.[15]

34. The individual rules in this section also fall short of existing international standards and norms in some key respects. For example, on restraint, the Rules simply provide that restraint 'shall never be applied as a sanction' without identifying prohibited methods of restraint and forms that 'are inherently degrading or painful' as per Rule 47 of the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules):

> 1. The use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited.
> 2. Other instruments of restraint shall only be used when authorized by law and in the following circumstances:

[15] *Joint Statement to the European Committee on Legal Co-Operation of the Council of Europe on the codification of European Rules for the Conditions of Administrative Detention of Migrants:* A Fundamentally Different Approach is Needed (22 June 2017) available at: http://fileserver.wave-network.org/home/JS_Detention_2017.pdf

(a) As a precaution against escape during a transfer, provided that they are removed when the prisoner appears before a judicial or administrative authority;

(b) By order of the prison director, if other methods of control fail, in order to prevent a prisoner from injuring himself or herself or others or from damaging property; in such instances, the director shall immediately alert the physician or other qualified health-care professionals and report to the higher administrative authority. [16]

35. Rule LI.4 provides that where force or restraints are used, 'it shall always be proportionate, the minimum necessary and for the shortest necessary time'. Similarly, Rules 47 and 48 of the Nelson Mandela Rules provide much more detail on the limited circumstances under which restraint is permitted, such as precaution against escape and as a way of preventing a prisoner from self-harming in limited circumstances.

CONCLUSION

36. The codification exercise has the potential to make a significant contribution to the development and use of alternatives to immigration detention and to ensuring that immigration detention is exceptional, not used against migrants in a situation of particular vulnerability and where it is used, the dignity and human rights of migrants are protected. In this respect, the draft Rules would benefit from further consideration in order to fully reflect other international standards and norms and to expand on how a detention centre should be designed and run in line with its non-punitive, administrative purpose. We welcome the opportunity to contribute to this exercise and would be pleased to elaborate further on any of the points made in this submission should it be helpful to the Committee.

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[16] *Revised Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules) UN-Doc A/Res/70/175), 17 December 2015, available at: https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf