

**SECRETARIAT GENERAL**

MIGRATION CO-ORDINATION  
*COORDINATION EN MATIERE DE MIGRATIONS*



COUNCIL    CONSEIL  
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## European Immigration Detention Rules - A Feasibility Study

December 2013

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## A Feasibility Study

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*December 2013*

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## I. Introduction<sup>1</sup>

The “Framework for Council of Europe Work on Migration Issues for the years 2011-2013”<sup>2</sup> proposes different areas of work, *inter alia* on the human rights dimension of asylum and irregular migration. The Framework (para. 18) foresees that at a later stage “the Council of Europe could start work on a Recommendation by the Committee of Ministers codifying ECtHRs case-law and CPT’s standards, as well as Member States’ practice concerning the detention of irregular migrants (...)”. Appendix II of the Framework containing the areas of possible activities in the field of migration for 2012-2013 states *inter alia* that “with regard to the detention of migrants, the Council of Europe concentrates on two principal aspects: Legality of detention and detention conditions (...). The Committee of Ministers’ Twenty Guidelines on Forced Return offers member States guidelines on detention conditions, including specific provisions for children and families, length of detention, as well as on the conditions under which the detention can be ordered. The Parliamentary Assembly of the Council of Europe has repeatedly raised concerns related to detention of irregular migrants and asylum-seekers in its recommendations (...)” (para. 28). Finally the Framework proposes that at “a later stage, the CM may be invited to consider the advisability and feasibility of developing, as from 2013, specific standards on detention of irregular migrants based on the extensive analysis of the case-law of the ECtHR and CPT standards and the practice of Member States (European Rules for the detention and other measures restricting the right to liberty of aliens). Such rules will facilitate the tasks of member States as well as mutual trust and co-operation in matters of irregular migration and return” (para. 29).

Based on this framework, the authors were mandated by the Council of Europe (CoE) to elaborate a feasibility study on European Immigration Detention Rules. The study aims to discuss the necessity for Common European Immigration Detention Standards by compiling the already existing standard applicable to immigration detention, thereby analysing in particular the case law of the European Court of Human Rights (ECtHR), CPT- and other CoE-Standards and the relevant legislation on EU-level (para. III). The study then shows the shortcomings of the existing standards and the necessity of a set of common European immigration standards, pointing to the legal challenges in drafting such rules (paras. IV. - VI.).

The rules should deal with the issue of „Immigration Detention“: This notion is used in the following with respect to all forms of deprivation of liberty of persons who are not detained on the basis of a penal conviction, but based on an administrative decision either to prevent unauthorized entry into the territory of a foreign state or with a view to safeguarding an expulsion or deportation order against a person who has to leave a state, be it after her residence permit has expired, his application for asylum was rejected or after he or she has been found to be staying in a state illegally. Today, probably all member states of the Council of Europe know such forms of deprivation of liberty for foreign nationals, whereas the length of detention, the detention facilities as well as the frequency of application of such forms of detention vary significantly between different states.<sup>3</sup> For some states

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<sup>1</sup> The authors of this study would like to thank Lucas Ritter, University of Munich, for his valuable compilation on existing standards on immigration detention.

<sup>2</sup> SG/Inf(2011)10 rev.

<sup>3</sup> Parliamentary Assembly, Resolution 1707 (2010), Detention of asylum seekers and irregular migrants in Europe, adopted on 28 October 2010; Elspeth Guild, Briefing Paper for the European Parliament, Directorate General

immigration detention might be a relatively new instrument. This is also reflected by the various uncertainties in the application of immigration detention measures:<sup>4</sup> what length of detention is acceptable for immigration detention? Which detention facilities are in conformity with human rights, considering that there is only little established case law on this relatively new form of detention? How can the fact be adequately reflected that the persons detained are neither convicted nor suspected of having committed a criminal offence and that the measures can in particular also concern minors, women, families, elderly people or other particularly vulnerable persons? Are there particular aspects that have to be taken into consideration when monitoring immigration detention facilities?

Even if the proposal to draft standards in the area of immigration detention mainly concerns the *conditions of detention*, questions of permissible *grounds for detention* and *procedural aspects* cannot be clearly distinguished with the consequence that they would have to be taken into consideration in a discussion of today's applicable standards.

## II. Applicability of the European Prison Rules?

The Council of Europe member States know a comprehensive set of guarantees for persons detained within the penal system. The *European Prison Rules (EPR)*, revised by the Committee of Ministers on 11 January 2006, establish minimum standards for the treatment of prisoners.<sup>5</sup> Built on the European Convention on Human Rights (ECHR) and especially the right to liberty, they serve as a reference document for member States, even though they do not directly bind them.<sup>6</sup> The EPR recall that a deprivation of liberty shall only be used as a measure of last resort and that prison conditions may not infringe the human dignity of those detained. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.<sup>7</sup> Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.<sup>8</sup> Beyond basic principles the EPR enshrine substantive guarantees regarding the conditions of imprisonment, health standards for prisoners, measures of good order within the detention facilities, management and staff, inspection and monitoring and the treatment of untried prisoners.

According to Rule 10.1, the EPR apply to persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction.<sup>9</sup> Detainees other than remand prisoners or sentenced offenders, such as persons detained in an immigration context, do in principle fall under the scope of the EPR and are to be treated as prisoners in terms of these rules, if

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Internal Policies, A typology of different types of centres in Europe. DG Internal Policies of the Union, Citizens Rights and Constitutional Affairs, 2006.

<sup>4</sup> See e.g. Ian Bryan and Peter Langford, *The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights*, *Nordic Journal of International Law* 80 (2011) 193-218; Galina Cornelisse, *Immigration Detention and Human Rights, Rethinking Territorial Sovereignty*, Leiden 2010; Helen O'Nions, *No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience*, *EJML* 10 (2008) 149-185; Daniel Wilsher, *Immigration Detention, Law, History and Politics*, Cambridge 2012.

<sup>5</sup> Council of Europe, Committee of Ministers, *European Prison Rules, Appendix to Recommendation Rec(2006)2*, 11 January 2006.

<sup>6</sup> Jim Murdoch, *The treatment of prisoners, European standards*, Strasbourg 2006, p. 34.

<sup>7</sup> *European Prison Rules* (n 5), Rule 2.

<sup>8</sup> *European Prison Rules* (n 5), Rule 3.

<sup>9</sup> *European Prison Rules* (n 5), Rule 10.1.

they are detained in prisons by virtue of provisions in national law.<sup>10</sup> This view is shared by the Parliamentary Assembly of the Council of Europe and the European Committee for the Prevention of Torture (CPT), which have pointed out that the EPR only apply to persons who are detained in prisons for criminals.<sup>11</sup> I.e., persons in detention centers for irregular migrants and asylum seekers do not fall under the scope of the EPR.<sup>12</sup> Though irregular migrants or asylum seekers might be detained in prisons in practice, it is clear that they should in principle not be held in prisons together with ordinary prisoners.<sup>13</sup>

Even in situations of immigration detainees being held in a prison setting, the EPR do only partly provide adequate solutions, as they do not focus on the specific situation and vulnerabilities of immigration detainees.<sup>14</sup> I.e., whereas some of the EPR rules might be applied by analogy<sup>15</sup>, others are not relevant for the immigration context at all<sup>16</sup>. Additionally, the rules do not address the specific needs and situations of immigration detainees, such as issues related to the preparation and execution of deportation procedures. Therefore, the EPR can only indirectly provide some guidance for the detention of immigrants and asylum seekers but are not sufficient as standards in the field of immigration detention.

### III. Existing Standards

The universal and regional human rights system knows a number of guarantees that protect the rights of persons in detention. The right to liberty is a well-established principle of human rights and international law.<sup>17</sup> It can not only be found in almost all national human rights catalogues, but also in various international treaties, namely in Article 5 ECHR or in Articles 9 and 10 of the International Covenant on Civil and Political Rights (ICCPR).<sup>18</sup> It protects from arbitrary deprivation of liberty and reflects basic principles with regard to the treatment and the rights – including procedural rights – of persons lawfully detained. Apart from the right to liberty, also the prohibition of torture and inhuman or degrading treatment or punishment stipulates certain guarantees for persons in detention, namely with regard to material conditions of detention. Equally, the right to private and family life sets certain standards with respect to conditions of detention. Finally, also fundamental procedural guarantees are internationally recognized. Those fundamental rights are enshrined in a number of binding and non-binding instruments and in interpretive instruments including comments, recommendations, standards, guidelines or principles, as well as in case law both on regional as well

<sup>10</sup> European Prison Rules, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules, Strasbourg 2006, p. 43.

<sup>11</sup> Parliamentary Assembly Recommendation 1900 (2010), The detention of asylum seekers and irregular migrants, 11 January 2010, para. 5.1; European Committee for the Prevention of Torture CPT, CPT Standards: Substantive sections of the CPT's General Reports, CPT/Inf/E (2002) 1 – Rev. 2011, December 2011, Chapter IV on Immigration Detention, 19<sup>th</sup> General Report, para. 78.

<sup>12</sup> Recommendation 1900 (2010) (n 11), para. 5.1.

<sup>13</sup> CPT Standards (n 11), 19<sup>th</sup> General Report, para. 78; see also below, III.2.

<sup>14</sup> Apart from Rule 37 EPR, which concerns foreign prisoners and their right to receive diplomatic or consular protection.

<sup>15</sup> Such as namely the basic principles and generally the guarantees regarding conditions of imprisonment.

<sup>16</sup> This concerns namely Part VII and VIII of the EPR but also e.g. Rule 17.1 or Rule 33.3, which cannot be applied directly to immigration detention.

<sup>17</sup> Cornelisse (n 4), p. 250.

<sup>18</sup> The ECHR is binding upon all member States of the Council of Europe. Equally, all Council of Europe member States have ratified the ICCPR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention against Torture (CAT).

as international level. Taken together, the guarantees reflected in those instruments build a set of standards determining the conditions of immigration detention.

## 1. Sources of Existing Specific Standards

### 1.1. European Level

#### 1.1.1. Council of Europe

Within the Framework of the Council of Europe, the *Committee of Ministers* has adopted a number of instruments that establish standards regarding the situation and the rights of migrants in detention – both after the (unauthorized) entry into a State and in the context of a removal. In *Recommendation Rec(2003)5* on measures of detention of asylum seekers, the Committee of Ministers recommends member States to only detain asylum seekers in certain circumstances and to implement measures of detention in a humane manner and with respect to the dignity of the person concerned and the relevant international norms and standards.<sup>19</sup> The *Twenty Guidelines on Forced Return*, adopted by the Committee in 2005, concern irregular immigrants confronted with a removal order.<sup>20</sup> The Guidelines establish a code of good conduct for expulsion procedures.<sup>21</sup> Even though the Guidelines are not binding, they represent the existing obligations of States with regard to expulsion matters.<sup>22</sup> They recall that such detention may only be ordered in accordance with a procedure prescribed by law and if compliance with the removal order cannot be ensured as effectively by any other non-custodial measures.<sup>23</sup> If persons are detained, then certain conditions of detention need to be fulfilled in order for the detention to be compatible with Council of Europe standards.<sup>24</sup> The European Prison Rules, also adopted by the Committee of Ministers, have already been discussed above.<sup>25</sup>

The Council of Europe's *Parliamentary Assembly* has also expressed itself on the issue of immigration detention and the conditions to be respected in case of such detention. In *Recommendation 1547 (2002)* on expulsion procedures the Parliamentary Assembly recommended a number of measures with regard to detention prior to expulsion.<sup>26</sup> Detention prior to expulsion should be limited to the time strictly necessary, it should not take place in a prison environment and certain conditions of detention should be respected.<sup>27</sup> In *Recommendation 1900 (2010)* on the detention of asylum seekers and irregular migrants in Europe the Assembly calls upon the Committee of Ministers to prepare European rules on minimum standards of conditions of detention of irregular migrants and

<sup>19</sup> Council of Europe, Committee of Ministers, Recommendation Rec(2003)5 on measures of detention of asylum seekers, 16 April 2003.

<sup>20</sup> Council of Europe, Committee of Ministers, Twenty Guidelines on Forced Return, CM(2005)40 final, 9 May 2005.

<sup>21</sup> Council of Europe Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), Comments on the Twenty Guidelines on Forced Return, 925 Meeting, 4 May 2005, CM(2005)40 Addendum final, 20 May 2005, Introduction.

<sup>22</sup> Twenty Guidelines on Forced Return, p. 2, para. 2 let. a; Comments on the Twenty Guidelines on Forced Return, Introduction.

<sup>23</sup> Twenty Guidelines on Forced Return (n 20), Guideline 6.

<sup>24</sup> Twenty Guidelines on Forced Return (n 20), Guidelines 9 ff.

<sup>25</sup> Cf. above II.

<sup>26</sup> Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity of 22 January 2002.

<sup>27</sup> Recommendation 1547 (2002) (n 26), para. 13.

asylum seekers complementing the European Prison Rules.<sup>28</sup> On the same day the Assembly also adopted *15 European Rules Governing Minimum Standards of Conditions in Detention Centres for Migrants and Asylum Seekers* that establish 15 principles on the basic premise that the persons deprived of their liberty shall be treated with dignity and respect for their rights.<sup>29</sup>

Also within the system of the Council of Europe, *the European Committee for the Prevention of Torture (CPT)* has regularly issued positions on the detention of immigrants. The *CPT Standards of Detention* collect the findings of the CPT with regard to detention conditions.<sup>30</sup> The Standards aim at indicating the national authorities the way in which persons deprived of their liberty ought to be treated.<sup>31</sup>

Finally, the *European Court of Human Rights* has developed a case law on immigration detention.<sup>32</sup> The Court examines immigration detention mainly under Article 5 § 1 let. f ECHR. According to this guarantee the lawful arrest or detention of a person to prevent an unauthorized entry into the country or the detention of a person against whom action is being taken with a view to deportation or extradition does not violate the Convention. Furthermore, detention of immigrants prior to their admittance to a member State or in order to safeguard deportation of an immigrant can also be relevant under other articles of the Convention, namely Article 3, especially with regard to conditions of detention, Article 8 with regard to private and family life of detainees, Article 5 § 4 and Article 13 with regard to the judicial review of the detention and the right to an effective remedy. So far, the ECtHR has granted the member States a wide margin of appreciation when it comes to the detention of immigrants.<sup>33</sup> Nevertheless, it has set up certain standards with regards to conditions of detention that have to be fulfilled.

### 1.1.2. European Union

On *European Union* level a number of legislative acts govern the detention of third-country nationals by EU member States. Directive 2003/9/EC *on minimum standards for the reception of asylum seekers (Reception Conditions Directive)*<sup>34</sup> as well as Directive 2005/85/EC *on minimum standards on procedures for granting and withdrawing refugee status (Asylum Procedures Directive)*<sup>35</sup> did foresee that member States could detain asylum seekers if it proves necessary.<sup>36</sup> With *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country*

<sup>28</sup> Recommendation 1900 (2010) (n 11). The Committee of Ministers, however, held in its reply to Recommendation 1900 (2010) that it will not give instructions to prepare such rules or a recommendation on the issue, as there are already the Twenty Guidelines on Forced Return as well as the Committee of Ministers' "Guidelines on human rights protection in the context of accelerated asylum procedures" which provide sufficient safeguards for the rights of irregular migrants or asylum seekers in detention (Doc. 12416 of 15 October 2010).

<sup>29</sup> 15 European Rules Governing Minimum Standards of Conditions in Detention Centres for Migrants and Asylum Seekers, Report Doc. 12105, 11 January 2010.

<sup>30</sup> CPT Standards (n 11), Chapter IV on Immigration Detention.

<sup>31</sup> CPT Standards (n 11), p. 5.

<sup>32</sup> Cornelisse (n 4), p. 277 ff.

<sup>33</sup> Other than the UN HRC the ECtHR, for example, does not subject immigration detention to a necessity test, see e.g. *Čonka v. Belgium*, Judgment of 5 February 2002, Appl. No. 51564/99, para. 38; *Chahal v. UK*, Judgment of 15 November 1996, Appl. No. 22414/92, para. 112; *Saadi v. UK*, Judgment of 29 January 2008, Appl. No. 13229/03, para. 44. See also Cornelisse (n 4), p. 277 ff.

<sup>34</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6 February 2003.

<sup>35</sup> Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 December 2005.

<sup>36</sup> Cornelisse (n 4), p. 269.

*nationals (Returns Directive)* a number of provisions were introduced that rule on the detention of illegally staying third-country nationals for the purpose of removal.<sup>37</sup> Under the Returns Directive member States may detain third-country nationals in order to prepare the return or to carry out the removal if the detention proves to be proportionate to the aim pursued, that is, if the removal cannot be implemented by less coercive means.<sup>38</sup> If third-country nationals are detained with a view to removal, the conditions of detention have to fulfill the standards according to the Directive.<sup>39</sup> In the course of the implementation of the Common European Asylum System, the existing instruments were revised.<sup>40</sup> The new *Reception Conditions Directive*<sup>41</sup> and the new *Asylum Procedures Directive*<sup>42</sup> allow member States only to detain asylum seekers for certain purposes, in so far as it is necessary and no less coercive measure is available. Under the *Dublin III Regulation* a person may not be detained for the sole reason that he is subject to a Dublin procedure.<sup>43</sup> The standards regarding material conditions of detention as imposed by the Reception Conditions Directive are also applicable to detention under the other instruments.

## 1.2. Universal Level

### 1.2.1. UN Treaty Bodies

On international level, standards can be derived from the international human rights treaties and the respective treaty bodies that monitor to those treaties. The *UN Human Rights Committee (HRC)* has held in its Draft General Comment No. 35 on Article 9 ICCPR that detention in the course of proceedings for the control of immigration is not per se arbitrary.<sup>44</sup> However, it needs to be justified as reasonable, necessary and proportionate in the light of the circumstances and reviewed regularly. The principles laid down in Draft General Comment No. 35 are also reflected in views by the HRC deciding upon individual communications.<sup>45</sup>

Standards regarding the accessibility of complaint mechanisms in detention facilities can also be found in General Comment No. 3 of the *UN Committee against Torture (CAT)*.<sup>46</sup> The *Subcommittee on*

<sup>37</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008.

<sup>38</sup> Directive 2008/115/EC Article 15; Cornelisse (n 4), p. 270.

<sup>39</sup> Directive 2008/115/EC Article 16 f.

<sup>40</sup> After the recast versions of the Directives under the Common European Asylum System were adopted by the European Parliament in June 2013 they entered into force in July 2013. The member States have to transpose the Directives into national legislation until mid- 2015. The Dublin III Regulation entered into force on 19 July 2013 and is directly applicable. The Return Directive has so far not been revised.

<sup>41</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180/96, 29.6.2013.

<sup>42</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60, 29.6.2013.

<sup>43</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31, 29.6.2013.

<sup>44</sup> HRC, Draft General Comment No. 35 on the liberty and security of persons, 28 January 2013, CCPR/C/107/R.3, para. 18.

<sup>45</sup> Such as e.g. in *A. v. Australia* (Communication No. 560/1993, CCPR/C/59/D/560/1993), *Jalloh v. the Netherlands* (Communication No. 794/1998, CCPR/C/74/D/794/1998) or *C. v. Australia* (Communication No. 900/1999, CCPR/C/74/D/900/1999).

<sup>46</sup> CAT, General Comment No. 3 (2012), Implementation of article 14 by States parties, 13 December 2012, CAT/C/GC/3.

*Prevention of Torture (SPT)* established by the Optional Protocol to the Convention against Torture (OPCAT) does also visit immigration detention centers but has so far not (yet) developed standards governing immigration detention.

### 1.2.2. UNHCR

Equally on international level, the UNHCR has issued standards with respect to the detention of asylum seekers as well as other persons seeking international protection. The *UNHCR Detention Guidelines* draw up ten principles that should be respected in case of detention of asylum seekers as well as other persons seeking international protection.<sup>47</sup> Even though the guidelines do not cover the situation of immigration detainees outside the asylum procedures, some of the standards can be applied by analogy.<sup>48</sup>

### 1.2.3. International Law Commission

The International Law Commission has prepared *Draft Articles on the Expulsion of Aliens* codifying customary international law.<sup>49</sup> Article 19 of those Draft Articles concerns detention of an alien subject to expulsion. It restates the principles that the detention prior to expulsion should not be punitive in nature and that it may not be excessive but is limited to the period of time necessary to carry out the expulsion.<sup>50</sup>

## 2. Existing Standards with regard to Immigration Detention

The instruments described above do set out a broad range of concrete guarantees that should be respected by the States when detaining immigrants as a result to the control of the entry and the stay in their territory. Which concrete obligations the bulk of these guarantees impose on the States shall be discussed in the following.

### 2.1. Grounds of Detention and Procedural Guarantees

The relevant instruments of international law do in principle recognize that States do have the right to detain immigrants for the sole reason that they entered or stayed in a State illegally in order to control the immigration to a State.<sup>51</sup> However, such detention requires a legal basis for such detention in national law.<sup>52</sup> Detention must be proportionate and effective with regard to the means used and objectives pursued and may not be arbitrary.<sup>53</sup> When deciding on a detention measure, States have to take into account the individual circumstances of a detainee, including his or her physical and mental health.<sup>54</sup>

<sup>47</sup> UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.

<sup>48</sup> UNHCR Guidelines, p. 8 para. 4.

<sup>49</sup> International Law Commission, Draft Articles on Expulsion of Aliens, provisionally adopted on first reading by the Drafting Committee at the sixty-fourth session of the International Law Commission, 24 May 2012, A/CN.4/L.797.

<sup>50</sup> ILC Draft Articles on Expulsion of Aliens, Article 19.

<sup>51</sup> HRC, Draft General Comment No. 35, para. 18.

<sup>52</sup> Article 8 para. 3 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 6 para. 1; UNHCR Guideline 3; ECtHR, *Amuur v. France*, Judgment of 25 June 1996, Appl. No. 19776/92, para. 50.

<sup>53</sup> Article 31 para. 2 Refugee Convention; UNHCR Guideline 4; C-61/11 PPU, ECtHR, *Hassen El Dridi*, Judgment of 28 April 2011, para. 57; HRC, Draft General Comment No. 35, para. 18.

<sup>54</sup> Article 8 para. 2 Directive 2013/33/EU; UNHCR Guideline 4; ECtHR, *Dougoz v. Greece*, Judgment of 6 March 2001, Appl. No. 40907/98, para. 46; *S.D. v. Greece*, Judgment of 11 June 2009, Appl. No. 53541/07, para. 52.

National law has to foresee grounds that allow for the detention of immigrants.<sup>55</sup> Under the new EU Reception Conditions Directive those grounds for detention are limited to the determination or verification of the identity of an asylum seeker, the determination of the elements decisive for the grant or refusal of protection in case there is a risk of absconding, the decision on the right to enter the country, the due functioning of a removal procedure and the protection of the national security or public order.<sup>56,57</sup> Applying for asylum or protection as well as being subject to a Dublin procedure alone cannot justify a detention measure.<sup>58</sup> Even where there is a ground for a detention measure, States have to consider appropriate and available alternatives to detention.<sup>59</sup>

Detention may not be indefinite, but must be as short as possible and only for as long as there are grounds for detention.<sup>60</sup> Detention prior to removal is only lawful as long as a reasonable prospect of removal exists and as removal arrangements are in progress.<sup>61</sup> Proceedings during which a detention order is upheld have to be executed with due diligence.<sup>62</sup> The EU Returns Directive limits detention pending removal to 18 months.<sup>63</sup>

The detention order has to be issued by a judicial or administrative body.<sup>64</sup> It has to be individual, in writing and in a language the person concerned can understand.<sup>65</sup> The lawfulness of the detention has to be reviewed regularly.<sup>66</sup> In case of prolonged detention such review has to be carried out by a judicial authority.<sup>67</sup> Equally, decisions to extend detention must be subject to judicial review.<sup>68</sup> Throughout the entire period of detention all detainees must be provided with a readily accessible and effective judicial remedy in order to be able to challenge the lawfulness of the detention and must have the right to access to a lawyer.<sup>69</sup> Under EU law, detained asylum seekers do have the right

<sup>55</sup> HRC, Draft General Comment No. 35, para. 18.

<sup>56</sup> According to the ECJ, however, a possible threat to public order or safety alone is not enough to justify detention (see C-357/09 PPU, *Said Shamilovich Kadzoev*, Judgment of 30 November 2009, para. 70).

<sup>57</sup> Article 8 para. 3 Directive 2013/33/EU. See also UNHCR Guideline 4.1.

<sup>58</sup> Article 8 para. 1 Directive 2013/33/EU; Article 28 para. 1 Regulation (EU) No 604/2013. However, asylum seekers may be detained under the Returns Directive, if the sole aim for applying for protection has been to delay or jeopardize the enforcement of a return decision (according to ECJ C-534/11, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, Judgment of 30 May 2013, para. 57).

<sup>59</sup> Article 15 Directive 2008/115/EC; Article 8 para. 2 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 6.1; UNHCR Guideline 4.3; HRC, Draft General Comment No. 35, para. 18; ECtHR, *Mikolenko v. Estonia*, Judgment of 8 October 2009, Appl. No. 10664/05, para. 67; *Popov v. France*, Judgment of 19 January 2012, Appl. No. 39472/07, para. 147.

<sup>60</sup> Article 15 para. 5 Directive 2008/115/EC; Article 9 para. 1 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 8 para. 1; UNHCR Guideline 6; HRC, Draft General Comment No. 35, para. 18; ECtHR, *Suso Musa v. Malta*, Judgment of 23 July 2013, Appl. No. 42337/12, paras. 102 ff.

<sup>61</sup> Article 15 para. 4 Directive 2008/115/EC; C-357/09 PPU, *Kadzoev* (n 56), para. 63; *Alexandre Achughbabian v. Préfet du Val-de-Marne*, Judgment of 6 December 2011; *Chahal v. UK* (n 33), para. 113; *Suso Musa v. Malta* (n 60), paras. 91 and 104; *Mikolenko v. Estonia* (n 59), paras. 63 ff.

<sup>62</sup> Article 9 para. 1 Directive 2013/33/EU; Article 28 para. 1 Regulation (EU) No 604/2013.

<sup>63</sup> Article 15 para. 5 and 6 Directive 2008/115/EC.

<sup>64</sup> Article 15 para. 2 Directive 2008/115/EC; Article 9 para. 2 Directive 2013/33/EU.

<sup>65</sup> Article 15 para. 2 Directive 2008/115/EC; Article 9 para. 2 Directive 2013/33/EU; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 85.

<sup>66</sup> Article 15 para. 3 Directive 2008/115/EC; Article 9 Directive 2013/33/EU; HRC, Draft General Comment No. 35, para. 18; ECtHR, *Aden Ahmed v. Malta*, Judgment of 23 July 2013, Appl. No. 55352/12, para. 86; *M.A. v. Cyprus*, Judgment of 23 July 2013, Appl. No. 41872/10, paras. 160 ff.

<sup>67</sup> Twenty Guidelines on Forced Return (n 20), Guideline 8 para. 2.

<sup>68</sup> UNHCR Guideline 7.

<sup>69</sup> Article 5 para. 4 ECHR; Article 9 para. 4 ICCPR; Twenty Guidelines on Forced Return (n 20), Guideline 9; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 31; *Čonka v. Belgium* (n 33), paras. 43 ff.

to free legal assistance and representation in case the detention measure is ordered by an administrative and not a judicial body. Member States can foresee free legal assistance and representation for other cases as well.<sup>70</sup>

## 2.2. Information Rights, Legal Assistance and Registration upon Arrival

Every detainee has to be informed promptly, thoroughly and in a language he or she understands of the legal and factual reasons for his or her detention, the procedure applicable to them and of possible remedies.<sup>71</sup> Equally, every newly detained person has to be informed promptly and in a language he or she understands about his or her rights and obligations while in detention and about the rules in the detention facility.<sup>72</sup> Upon placement in detention the persons detained must immediately be given access to a lawyer or be informed about the right to contact a lawyer of one's choice and given the opportunity to do so.<sup>73</sup> If free legal assistance is available or can be requested, the detainee has to be informed about such opportunity.<sup>74</sup> Persons detained upon entry into a country must be informed about the possibility to apply for international protection and about other immigrant procedures.<sup>75</sup> Also, the detainee shall be given the opportunity to see a doctor and to inform a person of own choice about the detention.<sup>76</sup> A formal record of each detainee shall be made, including the detainees identity, time and date of his admission, duration of his stay and the grounds of admission.<sup>77</sup> General data protection and confidentiality principles must be respected.<sup>78</sup>

## 2.3. Conditions of Detention

The place and conditions of detention should be appropriate, bearing in mind that immigration detention as a measure is applicable not to those who have committed criminal offences but also to aliens who, often fearing for their lives, have fled from their own country.<sup>79</sup> The manner and method of the execution of the measure may not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.<sup>80</sup>

There is a consensus that immigration detainees shall be detained in specialized facilities and not in prisons, as a prison is by definition not a suitable place in which to detain someone who is neither

<sup>70</sup> Article 9, paras. 6 and 7 Directive 2013/33/EU.

<sup>71</sup> Article 5 para. 2 ECHR; Article 9 para. 4 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 6 para. 2; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 30; ECtHR, *Nowak v. Ukraine*, Judgment of 31 March 2011, Appl. No. 60846/10, para. 63; UNHCR Guideline 7. According to the ECJ a breach of procedural rights does not render the detention of a person under the Returns Directive unlawful, C-383/13 PPU, *G and R v. Staatssecretaris van Veiligheid en Justitie*, Judgment of 10 September 2013, para. 39.

<sup>72</sup> Article 16 para. 5 Directive 2008/115/EC; Article 10 para. 5 Directive 2013/33/EU; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 84; UNHCR Guideline 7.

<sup>73</sup> Twenty Guidelines on Forced Return (n 20), Guideline 6 para. 2, Guideline 10 para. 5; UNHCR Guideline 7; *Čonka v. Belgium* (n 33), para. 44.

<sup>74</sup> Article 9 para. 4 Directive 2013/33/EU; UNHCR Guideline 7.

<sup>75</sup> Article 8 para. 2 Directive 2013/32/EU; Article 35 Refugee Convention; UNHCR Guideline 7.

<sup>76</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 5; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 81.

<sup>77</sup> 15 European Rules (n 29), Rule IV.

<sup>78</sup> UNHCR Guideline 7.

<sup>79</sup> *Suso Musa v. Malta* (n 60), para. 93. See also HRC, Draft General Comment No. 35 para. 18. Obviously, migrants or asylum seekers accused or convicted of a criminal offence are subject to a criminal prosecution and sanctioned according to the penitentiary system. They do not fall under the scope of the immigration detention that forms the subject of the discussion at hand.

<sup>80</sup> *Aden Ahmed v. Malta* (n 66), para. 86.

convicted nor suspected of a criminal offence.<sup>81</sup> A carceral environment is to be avoided.<sup>82</sup> If detention in specialized facilities is not possible, detainees must in any case be accommodated separately from ordinary prisoners, whether convicted or on remand.<sup>83</sup>

If migrants are detained in point of entry holding facilities, transit centers or police stations the duration of the stay should be reduced to a minimum.<sup>84</sup> Point of entry holding facilities, such as transit zones are generally not appropriate for the detention of migrants for more than a very short period, as they are specifically designed to only accommodate people for a few days, with characteristics liable to give those detained there a feeling of solitude, with no opportunity to take a walk or have physical exercise, without internal catering arrangements or contact with the outside world.<sup>85</sup> A longer detention of migrants in police stations or other police facilities can amount to degrading treatment.<sup>86</sup> Frequent transfers of detainees from one facility to the other should be avoided.<sup>87</sup>

Generally, conditions of detention must be humane and dignified.<sup>88</sup> Any discrimination based on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited.<sup>89</sup> The detainees' freedom of movement shall be restricted as little as possible.<sup>90</sup> If detained for several days, detainees must have access to fresh air and private areas and the possibility to take a walk.<sup>91</sup> A lack of resources or increasing pressure on reception facilities do not justify inadequate detention facilities.<sup>92</sup> Detention facilities should be adequately furnished, clean and in a good state of repair.<sup>93</sup> They must have sufficient heating respectively air-conditioning, as well as fresh air and sunlight.<sup>94</sup> Detainees must be provided with suitable and sufficient sleeping opportunities, including clean mattresses, blankets and sheets.<sup>95</sup> Further, detainees must have free access to suitably equipped and sufficiently private sanitary and

<sup>81</sup> Article 16 para. 1 Directive 2008/115/EC; Article 10 para. 1 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 1; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 28 and 29; 19<sup>th</sup> General Report, para 77; UNHCR Guideline 8.

<sup>82</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 2; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 29.

<sup>83</sup> Article 16 para 1 Directive 2008/115/EC; Article 10 para. 1 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 4; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 28; 19<sup>th</sup> General Report, para 77. See also Article 10 para. 2 ICCPR.

<sup>84</sup> CPT Standards (n 11), 7<sup>th</sup> General Report, para. 25 ff.

<sup>85</sup> ECtHR, *Riad and Idiab v. Belgium*, Judgment of 24 January 2008, Appl. Nos. 29787/03 and 29810/03, para. 104.

<sup>86</sup> ECtHR, *Tabesh v. Greece*, Judgment of 26 November 2009, Appl. No. 8256/07, paras. 38 ff.; *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Appl. No. 30696/09, para. 222; *Ahmade v. Greece*, Judgment of 25 September 2012, Appl. No. 50520/09.

<sup>87</sup> UNHCR Guideline 8.

<sup>88</sup> Article 10 para. 1 ICCPR; UNHCR Guideline 8; *Aden Ahmed v. Malta* (n 66), para. 86.

<sup>89</sup> Article 14 ECHR; Article 26 ICCPR; UNHCR Guideline 5.

<sup>90</sup> CPT Standards (n 11), 19<sup>th</sup> General Report, para. 79.

<sup>91</sup> *S.D. v. Greece* (n 54), para. 51; *M.S.S. v. Belgium and Greece* (n 86), para. 222.

<sup>92</sup> *M.S.S. v. Belgium and Greece* (n 86), para. 223.

<sup>93</sup> Twenty Guidelines on Forced Return (n 17), Guideline 10 para. 2; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 29.

<sup>94</sup> *M.S.S. v. Belgium and Greece* (n 86), para. 230; *Aden Ahmed v. Malta* (n 66), paras. 88 and 94; *Horshill v. Greece*, Judgment of 1 August 2013, Appl. No. 70427/11, para. 46 ff.

<sup>95</sup> CPT Standards (n 11), 7<sup>th</sup> General Report, para. 26; ECtHR, *A.A. v. Greece*, Judgment of 22 July 2010, Appl. No. 12186/08, paras. 57 ff.; *M.S.S. v. Belgium and Greece* (n 86), paras. 222, 230; *Aden Ahmed v. Malta* (n 66), paras. 96 ff.; UNHCR Guideline 8.

washing facilities and be provided with sanitary products and sanitary facilities.<sup>96</sup> Detainees must have access to free and clean drinking water and must be provided with a sufficient and adequate diet.<sup>97</sup> Finally, detainees must be granted access to their personal belongings.<sup>98</sup>

Detention facilities must provide sufficient living space for all detainees.<sup>99</sup> According to the ECtHR, each detainee should have an individual sleeping place, dispose of at least three square meters<sup>100</sup> of floor space and the overall surface area of the cell should be such as to allow the detainees to move.<sup>101</sup> Serious overcrowding can amount to degrading treatment.<sup>102</sup> In detention, men and women should be accommodated separately, if they wish so.<sup>103</sup> On the other hand, the principle of family unity should be respected and families or relatives thus accommodated separately and with sufficient privacy.<sup>104</sup> Exceptions may apply to the use of common spaces designed for recreational or social activities.<sup>105</sup> Unaccompanied children should in any case be accommodated separately from adults.<sup>106</sup> If possible, asylum applicants shall be kept separately from third-country nationals who have not lodged an application for international protection, namely persons subject to a removal order.<sup>107</sup>

#### 2.4. Health Care and Medical Treatment

Immigration detainees' health and well-being must be adequately secured.<sup>108</sup> Detainees must have access to appropriate medical treatment, including psychological treatment, and access to a doctor.<sup>109</sup> Detainees with special needs and vulnerabilities have to have access to particular care.<sup>110</sup> Access to medication, other medical goods and if necessary appropriate nutrition has to be guaranteed.<sup>111</sup> The mental health of a detainee including possible clinical and psychological after-

<sup>96</sup> CPT Standards (n 11), 7<sup>th</sup> General Report, para. 26; UNHCR Guideline 8; Recommendation 1547 (2002) (n 26), para. 13 d; *S.D. v. Greece* (n 54), para. 51; *M.S.S. v. Belgium and Greece* (n 86), para. 222, 230. *Aden Ahmed v. Malta* (n 66), paras. 88 and 96 ff.

<sup>97</sup> CPT Standards (n 11), 7<sup>th</sup> General Report, para. 26; *A.A. v. Greece* (n 95), paras. 57 ff.; *M.S.S. v. Belgium and Greece* (n 86), paras. 222, 230; *Aden Ahmed v. Malta* (n 66), paras. 96 ff.; UNHCR Guideline 8.

<sup>98</sup> CPT Standards (n 11), 7<sup>th</sup> General Report, para. 26.

<sup>99</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 2; CPT Standards (n 9), 7<sup>th</sup> General Report, para. 29.

<sup>100</sup> See also ECtHR, *Khuroshvili v. Greece*, Judgment of 12 December 2013, Appl. No. 58165/10, para. 82.

<sup>101</sup> *Aden Ahmed v. Malta* (n 66), para. 87. According to the ECtHR, the absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and are in breach of Article 3.

<sup>102</sup> *Dougoz v. Greece* (n 54), para. 48.

<sup>103</sup> Article 11 para. 5 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 4; UNHCR Guideline 8.

<sup>104</sup> Article 23 ICCPR; Article 17 para. 2 Directive 2008/115/EC; Article 11 para. 4 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 4; CPT Standards (n 11), 19<sup>th</sup> General Report, paras. 87 and 100; UNHCR Guideline 8.

<sup>105</sup> Article 11 para. 5 Directive 2013/33/EU.

<sup>106</sup> Article 10 para. 2 ICCPR; UNHCR Guideline 8.

<sup>107</sup> Article 10 para. 1 Directive 2013/33/EU; Parliamentary Assembly, 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible, Report Doc. 12105, Principle II.

<sup>108</sup> *Aden Ahmed v. Malta* (n 66), para. 86.

<sup>109</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 5; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 26; 19<sup>th</sup> General Report, para. 81; UNHCR Guideline 8;

<sup>110</sup> Article 24 CRC; Article 12 CEDAW.

<sup>111</sup> Article 10 ICCPR.

effects of a traumatic experience as well as the cumulative effects of detention conditions have to be taken into consideration.<sup>112</sup> Any risk of self-harm or suicide should be avoided.<sup>113</sup>

## 2.5. Contact with the Outside World and Freedom of Movement within the Detention Facility

Detainees must be allowed to remain in meaningful contacts with the outside world, including contacts with and visits by the family, lawyers or legal representatives, NGOs, the UNHCR, consular authorities and religious or spiritual representatives.<sup>114</sup> Equally, detainees must be granted private access to means of communication, in particular telephones, their own mobile phones and internet.<sup>115</sup>

Detainees' freedom of movement within a detention facility shall be restricted as little as possible.<sup>116</sup> Detainees shall have regular access to fresh air, private areas and day rooms as well as leisure activities, including outdoor activities.<sup>117</sup> They should also be given access to reading and information, including radio, television, newspaper and magazines, as well as education.<sup>118</sup> Detainees must have the right to practice their religion.<sup>119</sup>

## 2.6. Safety, Order and Discipline

Detention facilities must set up house rules for the facilities.<sup>120</sup> Detainees must be informed about those rules.<sup>121</sup> Disciplinary procedures in the detention facility must comply with the law and take the safety, security and discipline of the detainees into account.<sup>122</sup> Any torture or cruel, inhuman or degrading treatment or punishment is prohibited.<sup>123</sup> The use of force and of physical means of restraint is only to be used as a measure of last resort.<sup>124</sup> Detainees must have access to non-discriminatory complaint mechanisms and must be granted the right to file complaints for ill-treatment or for failure to protect them from violence by other detainees.<sup>125</sup>

<sup>112</sup> *Dougoz v. Greece* (n 54), para. 46; *S.D. v. Greece* (n 54), para. 52.

<sup>113</sup> Article 6 and 10 para. 1 ICCPR.

<sup>114</sup> Article 8 ECHR; Article 16 para. 5 Directive 2008/115/EC CPT; Article 10 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 5; CPT Standards (n 11), 19<sup>th</sup> General Report, paras. 79 and 81; Recommendation 1547 (2002) (n 26), para. 13 d; UNHCR Guideline 8; 15 European Rules (n 29), Rule VIII.

<sup>115</sup> Article 8 ECHR; Article 17 and 19 ICCPR; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 79 and 82; Recommendation 1547 (2002) (n 26), para. 13 d; *S.D. v. Greece* (n 54), para. 51; UNHCR Guideline 7 and 8.

<sup>116</sup> CPT Standards (n 11), 19<sup>th</sup> General Report, para. 79.

<sup>117</sup> Article 10 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 2; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 26; Recommendation 1547 (2002) (n 26), para. 13 d; *S.D. v. Greece* (n 54), para. 51; *A.A. v. Greece* (n 95), paras. 57 ff.; *M.S.S. v. Belgium and Greece* (n 86), paras. 222, 230; *Aden Ahmed v. Malta* (n 66), paras. 88 and 96 ff.

<sup>118</sup> Article 22 Refugee Convention; UNHCR Guideline 8; CPT Standards, (n 11), 7<sup>th</sup> General Report, para. 26.

<sup>119</sup> Article 9 ECHR; Article 18 ICCPR; Article 4 Refugee Convention; UNHCR Guideline 8.

<sup>120</sup> CPT Standards (n 11), 19<sup>th</sup> General Report, para. 88.

<sup>121</sup> Article 16 para. 5 Directive 2008/115/EC; Article 10 para. 5 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 7; CPT Standards (n 11), 19<sup>th</sup> General Report, para 88.

<sup>122</sup> 15 European Rules (n 29), Rule XI.

<sup>123</sup> Article 3 ECHR; Article 7, 10 ICCPR; Article 2 CAT.

<sup>124</sup> Article E ECHR; Article 7, 10 ICCPR; 15 European Rules (n 29), Rule XII.

<sup>125</sup> Article 13 CAT; Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 6; UNHCR Guideline 8.

Immigration detention facilities must be subject to regular and independent monitoring, including national preventive mechanisms (NPM).<sup>126</sup> Equally, the UNHCR must be granted free access to the detention facilities.<sup>127</sup> NGOs shall be given the possibility to visit the detention facilities.<sup>128</sup>

## 2.7. Staff

The staff in immigration detention facilities has to be carefully selected and trained appropriately, namely with respect to interpersonal communication, language skills, be familiarized with the different cultural backgrounds of the detainees and should be taught to recognize possible stress or trauma reactions.<sup>129</sup>

## 2.8. Vulnerable Groups

According to the ECtHR, asylum seekers are *per se* in a particularly vulnerable situation.<sup>130</sup> In some instruments it is argued that every immigrant in detention is vulnerable.<sup>131</sup> Generally recognized as particularly vulnerable persons are namely children<sup>132</sup>, women, especially pregnant women or women with children<sup>133</sup>, elderly persons<sup>134</sup>, LGBTI persons<sup>135</sup>, persons suffering from serious medical conditions, persons suffering from serious mental illness<sup>136</sup>, persons with disabilities<sup>137</sup> as well as victims of trauma, torture<sup>138</sup> or trafficking<sup>139 140</sup>.

Vulnerable persons shall only be detained in exceptional circumstances. If in detention they have to be treated with particular and adequate care.<sup>141</sup> Their health, including mental health, shall be of primary concern.<sup>142</sup> The authorities have to take into consideration the mental health of a detainee as well as possible clinical and psychological after-effects of a traumatic experience.<sup>143</sup>

Children shall only be detained as a measure of last resort and for the shortest time possible.<sup>144</sup> The best interest of the child has to be the primary consideration.<sup>145</sup> Unaccompanied children shall be

<sup>126</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 5; UNHCR Guideline 7; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 89. See also Article 9 Optional Protocol to the Convention against Torture (Belgium, Greece, Ireland, Italy and Norway have signed but not yet ratified; Latvia, Lithuania and Russia have not yet signed).

<sup>127</sup> Article 10 para. 3 Directive 2013/33/EU; UNHCR Guideline 8.

<sup>128</sup> Article 16 para. 5 Directive 2008/115/EC; UNHCR Guideline 8.

<sup>129</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10; 15 European Rules (n 29), Rule XIII. See also Article 10 para. 1 CAT.

<sup>130</sup> *M.S.S. v. Belgium and Greece* (n 86), para. 233.

<sup>131</sup> CPT Standards (n 11), 19<sup>th</sup> General Report, para. 75.

<sup>132</sup> Article 37 b) CRC; UNHCR Guideline 9.2.

<sup>133</sup> UNHCR Guideline 9.3. See also UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules), 6 October 2010, A/C.3/65/L.5.

<sup>134</sup> UNHCR Guideline 9.6.

<sup>135</sup> UNHCR Guideline 9.7.

<sup>136</sup> UNHCR Guideline 8.

<sup>137</sup> UNHCR Guideline 9.5.

<sup>138</sup> UNHCR Guideline 9.1.

<sup>139</sup> UNHCR Guideline 9.4.

<sup>140</sup> Cf. Article 3 para. 9 Directive 2008/115/EC.

<sup>141</sup> Article 16 para. 3 Directive 2008/115/EC.

<sup>142</sup> Article 11 para. 1 Directive 2013/33/EU.

<sup>143</sup> *S.D. v. Greece* (n 54), para. 52.

<sup>144</sup> Article 37 b) CRC.

<sup>145</sup> Article 8 ECHR; Article 24 ICCPR; Article 3 CRC; Article 17 para. 1 and 5 Directive 2008/115/EC; Article 11 para. 2; Twenty Guidelines on Forced Return (n 20), Guideline 11 para. 1 and 5; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 97; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgment of 12 October 2006, Appl. No.

accommodated in facilities taking into account their special needs.<sup>146</sup> Children in company of their parents shall not be separated.<sup>147</sup> If placed in detention facilities children must in any case be accommodated separately from adults.<sup>148</sup> In detention, the right of children to education and to leisure needs to be respected.<sup>149</sup>

Women shall be accommodated separately from men, except if they wish to stay with their family. There must be sufficient female staff in the detention facilities, as a lack of female staff may cause discomfort for female detainees, especially if they are victims of sexual violence or suffer from specific medical conditions.<sup>150</sup> Special treatment has to be guaranteed for pregnant women as well as for victims of sexual violence.<sup>151</sup>

Persons suffering from serious medical conditions, persons with disabilities as well as victims of torture and other serious physical, psychological or sexual violence should not be detained.<sup>152</sup> If in detention they need to have regular access to medical care.<sup>153</sup> In case of persons at an advanced stage of HIV infection the authorities have to consider alternatives to detention and take all measures to protect the detainee's health and prevent a worsening of their situation.<sup>154</sup>

## IV. Shortcomings of the Existing Standards

### 1. Scattered Legal Sources

The existing standards described above do set up a broad number of obligations States have to respect when detaining foreign nationals. Nevertheless, the existing standards are scattered among various instruments of international law and are of different legal normativity, and hence of distinct relevance.<sup>155</sup>

Existing guarantees can be found in different *sources*, namely in binding EU law and international human rights treaties, in non-binding resolutions and declarations, interpretative human rights instruments such as guidelines, standards or principles and in case law of international courts.<sup>156</sup> Some guarantees can be derived from binding, general and abstract legal norms whereas others have to be derived from individual and specific cases and the respective judgments of international courts.

With regard to the scope of application *ratione loci* some of the instruments only apply to certain Council of Europe member States, such as for example most prominently the guarantees enshrined in the instrument of the EU Common European Asylum System. Additionally, beyond the scope of

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13178/03; *Muskhadzhiyeva and others v. Belgium*, Judgment of 19 January 2010, Appl. No. 41442/07; *Kanagaratnam v. Belgium*, Judgment of 13 December 2011, Appl. No. 15297/09; *Housein v. Greece*, Judgment of 24 October 2013, Appl. No. 71825/11.

<sup>146</sup> Twenty Guidelines on Forced Return (n 20), Guideline 11 para. 4.

<sup>147</sup> Article 9 CRC.

<sup>148</sup> Article 10 para. 2 ICCPR; UNHCR Guideline 8.

<sup>149</sup> Article 28 CRC; Twenty Guidelines on Forced Return (n 20), Guideline 11 para. 3.

<sup>150</sup> *Aden Ahmed v. Malta* (n 66), para. 95. y

<sup>151</sup> Article 12 CEDAW.

<sup>152</sup> UNHCR Guidelines 8, 9.1 and 9.5.

<sup>153</sup> UNHCR Guideline 9.1.

<sup>154</sup> ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Judgment of 20 December 2011, Appl. No. 10486/10, paras. 91 ff.

<sup>155</sup> *Wilsher* (n 4), p. 318.

<sup>156</sup> Cf. above III.

international law, some States may know their own standards on national level that differ from each other.<sup>157</sup>

As for the scope of application *ratione personae* of the instruments, some do not specifically cover the situation of immigrants in detention, such as the *European Prison Rules* that explicitly only apply to prisoners and can only be relied on by analogy.<sup>158</sup> Other instruments cover only asylum seekers being held in detention upon entry into a country<sup>159</sup>, whereas others apply only to persons detained prior to removal or in case of forced removal<sup>160</sup>. Further instruments provide standards applicable to all possible subject of immigration detention.<sup>161</sup>

Finally, as regards the *material guarantees*, the existing standards differ in specificity and elaborateness, ranging from general recommendations to very concrete standards that member States have to adhere to.<sup>162</sup>

To sum up, the existing standards are scattered among various instruments of mixed legal value. They do not always apply to all situations and all persons concerned, respectively in the entire territory of the Council of Europe. Often, they do moreover not comprehensively cover all aspects relevant to immigration detention and are flawed by certain inconsistencies. A comprehensive set of consistent rules concerning immigration detention applicable to all Council of Europe member States is however missing. This *lacuna* causes legal uncertainty for persons concerned with immigration detention, who would have to apply those standards and for whom – as they often are not professionally trained lawyers – it is almost impossible to find the relevant legal source in the face of the diversity and inconsistency of the existing standards.

## 2. Deficiencies in Content

When comparing the existing standards in the field of immigration detention with the standards applicable to the penitentiary system, namely the *European Prison Rules*, it becomes apparent that a number of important guarantees for persons in detention are not (yet) included in the different existing instruments.

No comprehensive standards exist for example with respect to the obligation to register detainees' personal information upon arrival at a detention facility and the corresponding obligation to respect privacy and data protection guarantees. On the other hand, the standards neither reflect an obligation of the States to prepare and support the detainees upon their release.<sup>163</sup> And also questions regarding the location of immigration detention facility, the types of different facilities, the allocation of detainees to a certain facility and transfers from one facility to another are only covered to a limited extent.<sup>164</sup>

<sup>157</sup> Cornelisse (n 4), p. 8. On national level National Human Rights Institutions have compiled standards concerning immigration detention, as for example, outside the Council of Europe, Australia, cf. Australian Human Rights Commission, Human rights standards for immigration detention, Sydney, April 2013.

<sup>158</sup> Cf. above II.

<sup>159</sup> Such as for example the guarantees in Directives 32/2013/EU and 33/2013/EU or the UNHCR Guidelines.

<sup>160</sup> E.g. the Directive 115/2008/EC or the Twenty Guidelines on Forced Return (n 20)

<sup>161</sup> This includes namely the case law of the ECtHR but also the standards established by the CPT.

<sup>162</sup> Such as e.g. the ECtHR that held that each detainee must dispose of at least three square meters of floor space when in detention, cf. *Aden Ahmed v. Malta* (n 66), para. 87.

<sup>163</sup> *European Prison Rules* (n 5), Rule 33.

<sup>164</sup> *European Prison Rules* (n 5), Rules 17 and 32.

The existing standards also show deficiencies with respect to the question how a system of good order can be upheld in immigration detention facilities and how disciplinary measures can be implemented. Whereas the EPR give good guidance on issues of good order, the existing standards on immigration detention lack specific guarantees namely regarding the security measures applicable in a detention facility, safety and disciplinary measures including isolation, punishment, and the use of force against detainees as well as measures in order to prevent any form of self-harm or suicide.<sup>165</sup> Likewise the existing standards do not provide for a specific investigation and remedy program for any kind of bullying and victimization in detention facilities.<sup>166</sup>

Missing are also sufficient provisions regarding the detainees' property, namely cash, valuables, clothes or means of communication.<sup>167</sup> The existing standards do only very limitedly cover the detainees' right to keep their property, including their own clothes and phone. Detention facilities should grant detainees an opportunity to safely store property in lockable and accessible storage places. All property detainees are not allowed to retain should be registered and placed in safe custody. Moreover, there are no substantial guarantees dealing with the possibility of immigration detainees to work or to pursue remunerated activities.<sup>168</sup>

A lack of comprehensive guarantees can further be found regarding the detainees right to practice their religion, including the right to attend services, to meet with representatives and to respect religious or cultural rules such as dietary rules.<sup>169</sup>

Finally, a large gap exists also with regard to the design of immigration detention facilities. It is commonly agreed that an immigration detention facility should not resemble a prison and should not create a carceral environment.<sup>170</sup> However, in positive terms, there is no guidance on the question how an immigration detention facility should then actually be designed and what facilities it should contain, if it is not to resemble a prison.

### 3. Inconsistencies in Content

As the standards concerning immigration detention are anchored in a vast number of distinct texts of different legal value, it does not come as a surprise that inconsistencies between different instruments can be observed.

One difference can be found with regard to the question whether an immigration detention measure needs to be necessary in order to be lawful. Whereas some instruments apply a necessity test, others allow for detention measures irrespective of an actual need to detain the person concerned. Such, the Human Rights Committee in its case law examines whether the detention of a foreign national is reasonable, necessary and proportionate in the circumstances of the individual case.<sup>171</sup> The necessity criteria can also be found in the instruments of EU law, the Council of Europe and the UNHCR.<sup>172</sup> The

<sup>165</sup> European Prison Rules (n 5), Rules 49 ff.

<sup>166</sup> See e.g. Bangkok Rules (n 133), Rule 25.

<sup>167</sup> European Prison Rules (n 5), Rule 31.

<sup>168</sup> European Prison Rules (n 5), Rule 26.

<sup>169</sup> European Prison Rules (n 5), Rule 22.

<sup>170</sup> Twenty Guidelines on Forced Return (n 20), Guideline 10 para. 2; CPT Standards (n 11), 7<sup>th</sup> General Report, para. 29.

<sup>171</sup> HRC, *A. v. Australia* (n 45), para. 9.3.

<sup>172</sup> Article 8 para. 2 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 6 para. 1; 10 guiding principles (n 109), Principle VI; 15 European Rules (n 29), Rule 9.1.1; UNHCR Guideline 4.2.

ECtHR, on the other hand, has held that detention under Article 5 para. 1 let. f ECHR does not need to be necessary.<sup>173</sup>

Another difference can be found with regards to possible grounds for detention. Under the ECHR, immigration detention is only lawful if it is ordered for the purpose of preventing an unauthorized entry into a country or in order to realize a deportation or extradition. Immigration detention for any other reason is prohibited.<sup>174</sup> EU law as well knows an exhaustive list of grounds for which an asylum seeker can be detained,<sup>175</sup> respectively states that a third-country national who is the subject of return procedures may only be detained in order to prepare the return or the carry out of the removal<sup>176</sup>. Other instruments however, allow for detention irrespective of a specific ground, as long as it is lawful and justified for a legitimate purpose.<sup>177</sup>

Further, some instruments restrict the period of detention generally to the shortest time possible<sup>178</sup> whereas others limit the period of detention to a concrete amount of time<sup>179</sup>. Differences also exist regarding the question whether immigration detainees generally have to be provided with free legal aid or whether the grant of free legal aid is within the States' discretion.<sup>180</sup>

Finally, there are differences regarding the question, which groups are to be considered particularly vulnerable, and, once a group is recognized as vulnerable, whether there is a possibility to detain those persons or whether detention should be absolutely avoided. For example, the ECtHR recognizes the inherent vulnerability of asylum seekers.<sup>181</sup> Yet, it is not disputed that asylum seekers can be broadly detained in a number of different situations.<sup>182</sup> As for children, there is a general consensus that children as particularly vulnerable persons shall not be detained.<sup>183</sup> Nevertheless, many instruments still recognize the possibility to detain children under "exceptional circumstances" or as a measure of "last resort".<sup>184</sup>

## V. Necessity of Common Immigration Detention Standards

Having regard to the existing standards as well as to the shortcomings described above, it becomes clear that the current framework of protection for immigrants and asylum seekers in detention is not sufficient. The European Prison Rules are neither applicable to nor adequate for the situation of immigration detainees. The other existing instruments dealing with immigration detention are

<sup>173</sup> *Čonka v. Belgium* (n 33), para. 38; *Chahal v. UK* (n 33), para. 112; *Saadi v. UK* (n 33), para. 44. See also Cornelisse (n 4), p. 277 ff.; O'Nions (n 4), p. 174.

<sup>174</sup> Cornelisse (n 4), p. 279.

<sup>175</sup> Article 8 para. 3 Directive 2013/33/EU; Article 26 para. 1 Directive 2013/32/EU; Article 28 Regulation No 604/2013.

<sup>176</sup> Article 15 para. 1 Directive 2008/115/EC.

<sup>177</sup> UNHCR Guidelines.

<sup>178</sup> Article 9 para. 1 Directive 2013/33/EU. The ECtHR allows for detention under Article 5 para. 1 let. f ECHR as long as it is reasonable respectively as long as expulsion proceedings are ongoing and not unduly delayed, cf. *Saadi v. UK* (n 33), para. 72 and 74, *Chahal v. UK* (n 33), para. 117, Cornelisse (n 4), p. 297.

<sup>179</sup> Namely the EU Returns Directive that holds that detention may last for a maximum of six months and can be extended by one year, Article 15 paras. 5 and 6. See also Article 28 para. 3 Regulation No 604/2013.

<sup>180</sup> Article 9 para. 7 Directive 2013/33/EU.

<sup>181</sup> Cf. above III.2.; *M.S.S. v. Belgium* (n 86), para. 233.

<sup>182</sup> Article 31 para. 2 Refugee Convention; Article 5 para. 1 let. f first sentence ECHR; Article 8 Directive 2013/33/EU.

<sup>183</sup> 10 guiding principles (n 109), Principle IX.

<sup>184</sup> Article 37 CRC; Article 11 para. 2 Directive 2013/33/EU; Twenty Guidelines on Forced Return (n 20), Guideline 11; UNHCR Guideline 9.2; CPT Standards (n 11), 19<sup>th</sup> General Report, para. 97. The ECtHR, as well, accepts detention of children, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (n 145), para. 101.

scattered, inadequate, inconsistent and not effective.<sup>185</sup> Furthermore, there is uncertainty as to whether and in how far the existing, established standards are applicable to a certain situation or could be applied by analogy.<sup>186</sup> The lack of specific comprehensive guarantees and legal guidance with respect to immigration detention is not surprising, as the systematic detention of foreigners for the purpose of controlling the entry or the departure of immigrants is a relatively young but fast growing phenomenon.<sup>187</sup>

Nevertheless, immigration detention raises complex issues that call for guidance for member States and the individuals concerned with immigration detention. Detention amounts to a severe interference with the right to personal liberty of the detainee and should only be used as *ultima ratio*.<sup>188</sup> This is true *a fortiori* for immigration detention where the deprivation of liberty is not ordered as a criminal sanction but as a procedural safeguard in order for the State to control its territory.<sup>189</sup>

The need for specific European immigration detention rules is also highlighted by the relatively broad number of instruments that address the issue of immigration detention. The more the standards applicable to immigration detention are scattered among different instruments of different legal rank and value, the greater is the risk that differing legal regimes appear and drift apart. Whereas the instruments of the Common European Asylum System establish binding standards for the EU member States, other member States of the Council of Europe fall outside that framework. Additionally, the differing case law of the ECtHR and the UN HRC increases the risk of different legal regimes.<sup>190</sup> A specific instrument for standards applicable to immigration detention on a European level would not only avoid such a risk of diverging legal regimes, it could moreover help to build universally applicable standards.

Furthermore, immigration detainees constitute a heterogeneous and particularly vulnerable group as such including persons seeking international protection; persons that might be victims of trauma or torture; persons with no knowledge of the language or the culture of the country where they are detained; persons that have to leave a country where they might have lived for several years and where they have their family and social ties and might have to return to a place where they do not have close ties anymore; and persons that might face a risk of ill-treatment upon return in their country of origin. Specific and comprehensive immigration detention rules would provide an effective safeguard for the rights of those persons in detention. Such rules could also mitigate the risk of removals or push backs of migrants in States where those persons' rights are violated as the relevant standards are not complied with.

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<sup>185</sup> Wilsher (n 4), p. 318.

<sup>186</sup> Other than argued by the Committee of Ministers, the Twenty Guidelines on Forced Return and the Parliamentary Assembly's ten guiding principles on the circumstances in which detention of asylum seekers and irregular migrants may be legally permissible are not sufficient to provide a clear and comprehensive set of minimum standards for immigration detention; Recommendation 1900 (2010), Reply from the Committee of Ministers, Doc. 12416 (n 28), para. 5.

<sup>187</sup> Cornelisse (n 4), p. 1 ff.; Wilsher (n 4), p. 121 ff.; O'Nions (n 4), p. 152 ff.

<sup>188</sup> Commentary on the European Prison Rules (n 10), p. 40.

<sup>189</sup> Cornelisse (n 4), p. 163 ff.

<sup>190</sup> Cf. eg. Cathryn Costello, Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law, *Indiana Journal of Global Legal Studies*, Vol. 19 Issue 1 (2012), 257-303, p. 301.

In conclusion, there is a manifest need for specific European immigration detention rules – analogous to the European Prison Rules – establishing a comprehensive set of guarantees especially for immigration detention.

## VI. Codification of Immigration Detention Rules – Legal Challenges

The shortcomings described in the previous chapter can be overcome by establishing common and comprehensive immigration detention rules setting up substantive standards for the treatment of immigrants in detention. Such a codification will however face certain challenges, e.g., with regard to their scope of application and the differing needs and interests of a heterogeneous group of persons affected by immigration detention.

### 1. Defining the Scope of Application

A codification of immigration detention rules would have to define a clear material scope of application determining in which situations of detention the rules should apply. The question arises whether general unified immigration detention rules should be established or whether for differing forms of immigration detention (such as detention to prevent illegal entry or detention to safeguard expulsion or extradition) specific rules should be elaborated.<sup>191</sup>

Further, it has to be clarified what forms of immigration detention should be covered by a codification. Should it encompass all forms of restrictions of the right to liberty of movement of immigrants or whether it should comprise only detention in a narrow understanding, meaning the deprivation of liberty or the confinement of a person in a closed place without permission to leave that place at free will?<sup>192</sup> It is especially in the immigration context that persons deprived of their liberty are not (and should not be) primarily detained in prisons but are often held in so called “holding” or “reception” centers, in transit zones or at border points and also in open detention facilities.<sup>193</sup>

Closely connected to the question of comprehensiveness of a codification is the question of the temporal scope of application. From what point on should a person deprived of his or her liberty fall under the scope of such immigration detention rules? In particular detention in connection to the entry into a State persons may be detained for only a couple of hours in order to determine their identity but can also stay in detention for months.<sup>194</sup> On the other end of the temporal scope, the question as to when the applicability ends arises. If a person is detained with a view to deportation, does the applicability of the proposed standards already end if he or she is handed over to the authority responsible for the enforcement of the expulsion or only when he or she arrives at the

<sup>191</sup> Since the Parliamentary Assembly of the Council of Europe (Recommendation 1900 (2010) (n 11), para. 5.1) is proposing to create common European standards for immigration detention that would provide a parallel framework to the European Prison Rules, it would be obvious to also adopt the form of the EPR for a new codification of immigration detention rules. Following the form of the EPR would allow establishing a comprehensive and coherent set of rules.

<sup>192</sup> According to the ECtHR the difference between a deprivation of and a restriction upon liberty is merely one of degree or intensity and not one of nature or substance. The question whether a restriction of the freedom of movement amounts to a deprivation of liberty is thus always depending on the circumstances of the individual case, see *Guzzardi v. Italy*, Judgment of 6 November 1980, Appl. No. 7367/76, para. 93.

<sup>193</sup> Cornelisse (n 4), p. 6.

<sup>194</sup> Cornelisse (n 4), p. 10.

airport? Or even only when the person is handed over to the authorities of the State of destination? Therefore, common European immigration detention rules would have to carefully define the temporal limits of application.

Finally, the codification would have to define the personal scope of application, i.e., determining who should fall under the rules. In order to achieve the aim of establishing a comprehensive set of rules, it would have to cover the situations of both asylum seekers as well as irregular migrants, persons entering a State and persons ordered to leave a State, persons travelling alone as well as families, men, women and children as well as particularly vulnerable persons.

## 2. Different Immigration Detention Grounds

A second challenge a codification of rules would encounter is that there are different (admissible) types of immigration detention for different situations. Detention is ordered upon arrival of migrants to a State in order to prevent illegal entry, it is a measure recognized within the asylum system in order to ensure the asylum procedure and – since the establishment of the Dublin System – in order to implement Dublin transfers and finally, it can be the result of a decision to deport or expel a person and to safeguard that deportation or extradition.<sup>195</sup> The situation of an asylum seeker detained in order to establish his or her identity and in order to examine his or her application for asylum might present itself completely different than the situation of a person that is to be deported to his country of origin and maybe has to leave its family behind. A comprehensive set of rules would have to encompass all those different grounds for detention and cover the different needs of persons in such different situations.

## 3. Different Types of Detention Facilities

Just as the different grounds for detention a future codification would also have to cover immigration detention in all different types of detention facilities. As it has been shown above, it is a characteristic of immigration detention that persons are held in different facilities ranging from detention centers at ports or airports or at other border crossing points, including inadmissible centers, transit areas or specific border prisons, to secured collective housing centers (namely for asylum seekers during their asylum procedure), to housing centers or to specific immigration penitentiaries. Additionally, immigration detainees are (still) held in different types of (ordinary) prisons. Scientific studies further differ between open camps, where detainees can leave and return subject to some restrictions, closed camps that detainees cannot leave, administrative camps that are either publicly or privately operated as well as military camps.<sup>196</sup>

The detention facilities used vary depending on the purpose of detention as well as on the respective immigration policy of a State. A common European consensus which detention facilities would be appropriate for which situation and for what form of detention is missing. A codification may face the challenge of having to take those different detention facilities as well as the different levels of deprivation of liberty that the different facilities entail into account. Furthermore, a codification may have to cover alternatives to detention such as e.g. electronic monitoring, regular reporting to the

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<sup>195</sup> Cornelisse (n 4), p. 8.

<sup>196</sup> Guild (n 3).

authorities, deposit of an adequate financial guarantee, submission of documents, or the obligation to stay at a certain place.<sup>197</sup>

#### 4. Different Categories of Detainees

Another legal challenge for the codification of immigration detention rules is found in the fact that immigration detention affects a broad range of persons with different needs and vulnerabilities. Immigration detention affects women, including pregnant women, or victims of trafficking, domestic violence or other forms, but also couples or persons with children, unaccompanied minors and children, elderly persons or physically or mentally ill persons. On the other hand, also dangerous persons or persons having committed or being suspected of having committed a crime can be subject to immigration detention. Finally, (rejected) asylum seekers, stateless persons or third country nationals outside the asylum procedure are detained for immigration purposes.

European immigration detention rules have to reflect the different needs with regard to treatment, protection and levels of security that the different groups that might be subject to immigration detention do need.

#### 5. Different Vulnerabilities of Detainees

Immigration detainees also have fundamentally different needs and vulnerabilities than convicted persons. As such, immigration detainees often only have poor knowledge of the local language, culture and legal system and are thus to a higher degree depending on interpretation and guidance in many fields. Other than in the penal system there is a lack of established professional legal representation. Immigration detainees, especially if detained upon arrival to a State, lack personal relations in the country of presence, which increases their vulnerabilities. The time limits in asylum and expulsion proceedings create special procedural vulnerability and increase a risk of an «out of sight out of mind»-mentality and of creating a *fait accompli*.

Apart from the fact that immigration detainees have to be considered a vulnerable group *per se*, immigration detention disproportionately affects especially vulnerable groups. Compared to detention within the penal system, immigration detention concerns a higher percentage of women, children and families. Immigration detainees, especially asylum seekers and other persons seeking protection, may more often suffer from a (often unknown) precarious physical and mental health status and/or be victims of domestic violence, trafficking or organized crime. Finally, immigration detention also affects non-identified persons or persons of unclear identity or nationality as well as stateless persons.

Those special vulnerabilities create a strong need for a particular protection of the rights of those persons in immigration detention. Furthermore, a codification would also have to consider the particularities of immigration detention with regard to social rehabilitation and reintegration into society and preparation to release and removal that might present itself differently among the different groups of detainees as well as entirely different when compared to ordinary prisoners.

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<sup>197</sup> See also Art. 7 para. 3 EU-Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

## 6. Different Responsible Authorities

A codification of immigration detention rules has to bear in mind that the addressees of these rules may vary to a large extent: This is because responsibility for immigration detention differs from country to country and even within a single country: Whereas in certain States immigration detention falls within the competence of the penitentiary authorities or the immigration department, in other States this task is incumbent to the police, the border guards or even the military forces. On international level immigration detention also concerns different actors within different (European) States that have to cooperate, e.g. in order to carry out a Dublin transfer. A codification would have to reflect those different competences and responsibilities.

Additionally, the State may revert to private organisations and companies for the management of detention facilities. This can provoke complex questions of responsibility and accountability that have to be taken into account.

## 7. Different Public Interests and Goals

Closely related to the question of different responsibilities among the member States of the Council of Europe are the different public interests and goals of the member States. A common European immigration detention framework would have to encompass the different positions, problems and levels of protection among the Council of Europe member States and create a comparable and coherent level of protection.<sup>198</sup>

## 8. Possible Content of a Codification

Also with regard to the possible content of a codification, inspiration can be drawn from the European Prison Rules, however, taking into account the fundamental distinction between criminal and administrative detention and the particular legal challenges with regard to immigration detention discussed above.

Having regard to the Strasbourg Declaration that has been issued by European National Preventive Mechanisms against Torture on 22 November 2013<sup>199</sup>, common European immigration detention rules should cover, amongst others, the following points:

- Conditions of detention and treatment of detainees;
- Health care;
- Information about rights;
- Access to legal representation and procedures;
- Exercise of the right of asylum;
- Communication with the outside world;
- Appropriate measures for safety and order;
- Effective complaints mechanisms;
- Access to interpreters

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<sup>198</sup> It should be recalled that according to the ECtHR, a lack of resources cannot be an excuse of conditions of detention that violate the Convention, cf. *M.S.S. v. Belgium and Greece* (n 86), para. 223.

<sup>199</sup> The need for Council of Europe rules on immigration detention: A Declaration by European National Preventive Mechanisms against torture, Conference on Immigration Detention in Europe, 21-22 November 2013, Strasbourg (Strasbourg Declaration).

- Due consideration for diversity of personal situations and origins, with special attention to women and especially vulnerable groups;
- Purposeful activities for detainees;
- Procedures and preparation for release and removal.

On a more detailed level, common European Immigration Detention Rules should also comprise rules regarding the following aspects:

- Duration of detention;
- Accommodation and detention facilities;
- Degree of restrictions of liberty in general;
- Separation rules (adequately taking the needs of vulnerable persons, namely women and children as well as families, into consideration);
- Rules on replacing and transferring persons from one facility to another;
- Security, good order and disciplinary rules;
- Access to specialized legal representation, lawyers and NGOs;
- Procedural guarantees (Dublin cases, time limits, families abroad);
- Enabling specific information needs;
- Rules regarding language and communication issues, access to interpreters;
- Communication with the outside world (including visits and access to internet, telephone and media);
- Activities for detainees;
- Health care (specialized to identify torture victims, assess the detainees' fitness for detention, and arrange for special needs of women, in particular pregnant women);
- Specific rules for children establishing grounds for detention as well as conditions of detention (including right to education, play and welfare);
- Specific rules for women and other vulnerable groups (identification of victims of violence and trafficking)
- Rules regarding registers and data protection;
- Rules with respect to food, religious needs, communication;
- Diversity management, staff (training, recruiting of personnel, private operators);
- Monitoring of detention facilities.

## VII. Conclusion

The present study has shown the necessity to codify common European Immigration Detention Rules among the member States of the Council of Europe in the form of a recommendation of the Committee of Ministers, based on the precedent of the European Prison Rules (such as stated in the Strasbourg Declaration<sup>200</sup>).

However, the study has equally illustrated that such a codification is not an easy task but would have to face a number of legal challenges.

The authors would therefore propose a two-step approach:

1. In a first step the various key issues with regard to the temporal, personal and material scope of application of such rules would have to be determined.

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<sup>200</sup> See n 199.

2. In a second step the relevant individual guarantees would have to be formulated – building on the existing standards and taking due account of the current lacunae, possibly with regard to the European Prison Rules.

Such a codification of common European Immigration Detention Rules should by no means fall below the standards set by the European Prison Rules.

## Annexes

### 1. Strasbourg Declaration

**The need for Council of Europe rules on immigration detention:**

**A Declaration by European National Preventive Mechanisms against torture**

*Conference on Immigration Detention in Europe, 21-22 November 2013, Strasbourg*

*Building on Resolution 1707 (2010) of the Parliamentary Assembly on detention of asylum seekers and irregular migrants, and the work and recommendations of the Committee for the Prevention of Torture of the Council of Europe on immigration detention*

*Taking into account the fundamental distinction between criminal and administrative detention*

1. The European National Preventive Mechanisms<sup>201</sup> (NPMs) gathered in Strasbourg support work to develop the codification of a set of *Immigration Detention Rules* applicable to Council of Europe member States, which are based on the precedent of the European Prison Rules. The NPMs are ready to participate in the development of this codification.
2. The support of the existing European NPMs reflects the absence of consolidated rules in the area of immigration detention, the development of which is agreed to be both necessary and feasible.
3. Such rules will help NPMs fulfil their mandates as detention monitoring bodies, in order to prevent torture and ill treatment.
4. Such rules will also provide clear guidance to detention authorities and persons working with immigration detainees.
5. The *Immigration Detention Rules* should:
  - codify existing international and regional human rights standards applicable to all forms of deprivation of liberty on the grounds of immigration status;
  - be of equivalent status to the European Prison Rules;
  - cover, among others, the following areas: conditions of detention and treatment of detainees; health care; information about rights; access to legal representation and procedures; exercise of the right of asylum; communication with the outside world; appropriate measures for safety and order; effective complaints mechanisms; access to interpreters; due consideration for diversity of personal situations and origins, with special attention to women and especially vulnerable groups; purposeful activities for detainees; procedures and preparation for release and removal.
6. We consider that the Council of Europe is the organization that is best placed to realize this endeavour, which should take into account existing European Union legislation in this area.

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<sup>201</sup> National Preventive Mechanisms are independent bodies that have been established by States in line with the Optional Protocol to the UN Convention against Torture, as a means to prevent torture and ill treatment in all places of detention.

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