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ADMINISTRATIVE DETENTION OF MIGRANTS
(CJ-DAM)**

**ANALYSIS OF THE RESULTS OF THE WRITTEN CONSULTATION
ON THE 1ST DRAFT OF THE CODIFYING INSTRUMENT OF EUROPEAN RULES
ON THE ADMINISTRATIVE DETENTION OF MIGRANTS**

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I. Introduction

1. Mandate

1. The consultants were mandated by the Council of Europe to provide an *analysis of the results of the written consultation* on the draft codifying instrument of European rules on the administrative detention of migrants (hereinafter: draft codifying instrument).

2. The following report shall provide this analysis by *summarizing the observations* made by the participants to the written consultation. The report shall set out which elements of the draft were approved and which parts or provisions are facing criticism.¹ The first part of the report outlines the consultation process (I). In the second part the main general criticism on the draft codifying instrument as well as the gaps highlighted by the participants in the consultation process are summarised (II). The third part then discusses some of the specific observations on some individual draft provisions and parts of the draft codifying instrument (III).

2. Consultation Process

3. The European Committee on Legal Co-operation (CDCJ) conducted a wide *consultation of key actors and the civil society* on the draft codifying instrument dated 18 May 2017. The consultation process was held in two steps. The draft codifying instrument was sent out to key actors and stakeholders as well as published on the website of the CDCJ. A *written consultation* was opened on 18 May 2017 and lasted until 15 July 2017 (the initial deadline of 30 June 2017 was prolonged at the stakeholder meeting in June 2017).

4. In parallel to the written consultation, a *hearing with key stakeholders* was held on 22-23 June 2017 at the Council of Europe Headquarters in Strasbourg. Around 50 representatives from civil society as well as representatives of the Council of Europe bodies participated together with members of the CJ-DAM in the oral hearing.

5. The Report on the Hearing by the General Rapporteur summarises the results of the oral hearing. The report presents the main points of discussion along the line of the three sessions held at the hearing. Based on the discussions between the participants at the hearing the report presents both the views of the civil society as well as the motives and views of the members of the CJ-DAM. The issues raised at the hearing by and large correspond to the observations made in the written consultation, namely:

- The scope and structure of the envisaged instrument and the standards to be taken into consideration;
- Alternatives to detention;
- Special protection for vulnerable groups;
- The need for a more rights-based approach;
- Administrative detention in other places than closed centres; and
- The need to avoid a prison-like environment.

¹ The enumeration of stakeholders mentioned in brackets after a certain statement is for illustrative purposes and not exhaustive.

3. *Written Observations*

6. As a result of the written consultation, a total of *45 written observations* on the draft codifying instrument were received. 39 observations were submitted by individual actors or organisations. Two observations were joint statements. Four observations were submitted by Council of Europe bodies and services.

7. Observations were submitted by national institutions, including independent authorities such as Ombudspersons or NPMs (12), by international organisations (8) and by non-governmental organisations (14), as well as academics (4). Five observations were submitted by actors who had the status of observers within the European Committee on Legal Co-operation Committee of Experts on Administrative Detention of Migrants (CJ-DAM) meetings. Equally, the Office of the Special Representative of the Secretary General on Migration and Refugees was invited to the meetings of the CJ-DAM.

8. The following actors submitted written observations:

Individual comments

- Association pour la prévention de la torture APT
- Austrian Ombudsman Board
- CGLPL – Contrôleur général des lieux de privation de liberté – France
- Children’s Rights Alliance (CRA)
- CILD – Italian Coalition for Civil Liberties and Rights
- DEI – Défense des Enfants International
- Deutsches Kinderhilfswerk (DKH)
- ENNHRI – European Network of National Human Rights Institutions
- ENS European Network on Statelessness
- European Council on Refugees and Exiles ECRE
- European Commission – DG HOME (Directorate General of the European Commission for Migration and Home Affairs)
- European Commission – DG JUST (Directorate General for Justice and Consumers)
- FRA – European Union Agency for Fundamental Rights
- Garante Nazionale dei diritti delle persone detenute o private della libertà personale (Garante Nazionale)
- Global Detention Project (GDP)
- HM Inspectorate of Prisons and the UK NPM (UK NPM)
- Human Rights Watch (HRW)
- ICRC – International Committee of the Red Cross
- IOM – International Organization for Migration
- IRCT – International Rehabilitation Council for Torture Victims
- ISS – International Social Service
- Meldpunt Vreemdelingendetentie – Immigration Detention Hotline
- Ministry of Justice, Slovenia
- Monitoring Board for Detained Persons (MBDP)
- MRAX – Mouvement contre le Racisme, l’Antisémitisme et la Xénophobie
- OSCE Office for Democratic Institutions and Human Rights ODIHR
- Office of the Commissioner For Human Rights National Preventive Mechanism of Poland
- Office of the Public Defender of Rights – Czech Republic
- Office of the United Nations High Commissioner for Human Rights (OHCHR)
- Ombudsman of Greece (Greek NPM)
- Ombudsman of the Republic of Moldova

- Ombudswoman of Republic of Croatia, National Preventive Mechanism
- Professeur Hélène Tigroudja, University of Aix en Provence, France,
- Professor Elspeth Guild, Queen Mary University of London, United Kingdom,
- Professor Lorna McGregor, University of Essex, United Kingdom,
- Professor Mary Bosworth, University of Oxford, United Kingdom,
- The Norwegian Bar Association (NBA)
- The United Kingdom Home Office (Border, Immigration & Citizenship System Policy) (UKHO)
- UNICEF

Joint Statements

- International Detention Coalition (IDC) & International Commission of Jurists (ICJ)
- Joint Statement of 53 organisations ²

Council of Europe Bodies and Services

- Children's rights Division
- Commissioner for Human Rights
- Gender Equality Unit
- Office of the Special Representative of the Secretary General on Migration and Refugees

² Aditus foundation; AITIMA; Amnesty International; Association For Legal Intervention; Association for the Prevention of Torture (APT); Austrian Women's Shelter Network (AÖF); Churches' Commission for Migrants in Europe (CCME); Child Rights International Network (CRIN); Detention Action UK; Defence for Children International – International Secretariat; Defence for Children International – Belgium; Defence for Children International – Czechia; Defence for Children International - the Netherlands; Destination Unknown Campaign; Dutch Council for Refugees; Eurochild; European Network of Migrant Women (ENOMW); European Network on Statelessness (ENS); Estonian Human Rights Centre; Flemish Refugee Action; Forum for Human Rights; Future Worlds Center Cyprus; Global Campaign to End Child Immigration Detention; Greek Council for Refugees; Helsinki Foundation for Human Rights; Hungarian Helsinki Committee; Immigrant Council of Ireland; Institute for Statelessness and Inclusion (ISI); International Child Development Initiatives (ICDI); International Detention Coalition (IDC); Italian Coalition for Civil Liberties and Rights (CILD); Jesuit Refugee Service Europe; KISA Cyprus; Koperazzjoni Internazzjonali (Kopin); Ludwig Boltzmann Institute of Human Rights; Médecins du monde; Médecins du monde Netherlands / Dokters van de Wereld; Mental Health Europe; Missing Children Europe; Nasc, the Irish Immigrant Support Centre; Norwegian Organisation for Asylum Seekers (NOAS); Organization for Aid to Refugees (OPU); Platform for International Cooperation on Undocumented Migrants (PICUM); Plate-forme Mineurs en exil – Platform Kinderen op de vlucht – Platform Minors in exile; PRAKSIS; Red Acoge; Refugee Rights Turkey; Separated Children in Europe Programme (SCEP); SolidarityNow; Terre des Hommes; The Kosova Rehabilitation Centre for Torture Victims; The Salvation Army – EU Affairs Office; Women Against Violence Europe (WAVE).

II. General Remarks

1. Overall Response

9. The work of the CJ-DAM on a draft instrument codifying existing international standards on the conditions of administrative detention of migrants attracted *considerable interest* among key stakeholders and the civil society. The high number of participants and quality of the observations highlights the significance attributed to a codifying instrument of common European standards on administrative detention of migrants by relevant stakeholders.

10. All participants *welcome the initiative* to draft a Council of Europe instrument on administrative detention of migrants and, in general, support the draft codifying instrument. The vast majority of participants, however, voices *serious concerns with regard to the basic approach and the scope of application*. Most stakeholders regret that the draft codifying instrument, as it stands, fails to set a new vision of a regime of immigration detention for Europe. It is widely criticised that the draft does not sufficiently *distinguish between criminal and administrative detention* and heavily relies on standards relating to criminal detention which are inadequately applied to the migration context. This, so the often raised fear, leads to a criminalisation of migrants and migration. Instead, a large majority of participants calls for a *stronger human rights approach* to administrative detention of migrants based on the right to liberty, free movement and human dignity. The codifying instrument should thus be built on the basis of the primary obligation of states to protect and secure the rights of migrants irrespective of their legal status. One participant criticises the draft codifying instrument as going beyond the current binding international framework and setting new norms. One participant declined to comment the draft codifying instrument as it stands due to the fact that the draft does not contain an absolute prohibition of detention of children.

11. In general, the *most criticised parts* of the draft instrument seem to be the applicable sources and the scope of the instrument, the definitions in Rule A.2, the general principles and provisions on persons in situations of particular vulnerability in Part B, in particular the admissibility of detention of children, the rules on procedures and remedies to prevent arbitrary and unlawful detention in Parts C and D, as well as the rules on disciplinary measures, use of force, and means of restraint in Part I.

2. Positive Remarks

12. All participants *welcome the initiative* to draft minimum standards on the administrative detention of migrants. At least one actor positively notes that the draft codifying instrument covers both the asylum as well as the removal context.

13. Positive remarks are also made with regard to the use of the term “child” instead of “minor”, to Rule B.19 according to which a legal guardian should be appointed to unaccompanied children as soon as possible and to Rules H.3 and H.4 on mental health care and counselling as well as H.12 on child specific health-care .

3. Cross-sectional Issues

a) Mandate

14. Some stakeholders maintain that the draft codifying instrument goes *beyond the mandate* of the CJ-DAM by transposing rules from the criminal law framework into a migration law context and thus creating new standards.

15. One observation holds that the draft codifying instrument goes beyond the mandate of the CJ-DAM by covering more aspects than merely the conditions of administrative detention.

16. Several actors recall the need to consider *alternatives to detention*. One observation suggests improving the synergies with the process on legal and practical aspects of effective alternatives to detention in the context of migration, undertaken by the Steering Committee for Human Rights.

b) Distinction between criminal and administrative detention

17. Almost all participants strongly criticise that the approach of the draft codifying instrument is primarily a *criminal law approach*. The fundamental difference between criminal and administrative detention should be highlighted. Administrative detention of migrants should never take place in a prison-like environment.

18. A number of participants also recall that migration *per se* is not a crime and that migration and the migrants themselves should *not be criminalised*. Therefore, administrative detention of migrants should *never be punitive*.

c) Human Rights Approach

19. Many participants call for a *clear human rights focus* and emphasise that the instrument should be based on the *duty of states to protect* the human rights of migrants. The codifying instrument should explicitly be based on the right of everyone, including migrants, to liberty and security. Other human rights which, according to the participants, should be covered by the codifying instrument include: the right to leave any country, including one's own, the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of discrimination, the right to information, the best interest of the child, the right of children to education, freedom of religion, freedom of expression, the right to an effective remedy, the right to life, and the principle of non-refoulement.

d) Adequate Level of Protection

20. Several observations also voice concern that the draft codifying instrument as it stands falls *below existing human rights norms* and standards. Criticised are in particular the draft provisions concerning children and other vulnerable persons, the provisions on legal remedies, communication and visitation rights as well as the rules on disciplinary measures, use of force and possible means of restraint (see also the discussion below III.).

e) Sources

21. Many participants raise doubts as to whether the sources cited as relevant international standards relating to criminal detention are applicable and transposable to the situation of administrative detention. Stakeholders often question in particular the adequacy of the *European Prison Rules* as a source for standards due to their focus on criminal detention. However, several participants also acknowledge that there are few specific standards on administrative detention and that therefore recourse may be had to general rules on the deprivation of liberty as long as they are relevant to the administrative detention of migrants and clearly *bring additional protection*. Some stakeholders therefore further refer to other instruments relating to criminal detention, such as the Mandela Rules or the Bangkok Rules as a relevant source. In any case, the rules set up in the codifying instrument should go beyond the standards set in criminal detention instruments and should lead to *tailor-made rules for immigration detention*.

22. Some participants question the legitimacy of EU law instruments as sources as they only bind EU member states and not all Council of Europe member states. One participant, on the other hand, questions the normative value of some of the other sources used and their enforceability.

23. Additional sources mentioned by the participants include:

- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Optional Protocol of the Convention against Torture (OPCAT);
- Convention on the Rights of the Child;
- Convention on the Rights of Persons with Disabilities;
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- EU Directive 2004/81/EC;
- 2015 Revisions of the UN Standard Minimum Rules on the Treatment of Prisoners ('Mandela Rules');
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly Resolution 43/173);
- Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules);
- PACE Resolution 1707(2010);
- Committee of Ministers, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity;
- Council of Europe Strategy for the Rights of the Child;
- Reports by the special procedures of the Human Rights Council, including reports of the Special Rapporteur on the Human Rights of Migrants;
- General Comments of UN Human Rights Treaty Bodies;
- UN 2009 Guidelines for the Alternative Care of Children;
- Reports of the Working Group on Arbitrary Detention.

f) *Scope of Application*

24. Almost all stakeholders state that the focus on *closed detention centres* is too narrow. In order to adequately protect all migrants and to reflect the current practice in European migration law, the *personal scope of application* of the draft codifying instrument needs to be clarified.

25. A number of observations suggest applying the same scope as *Article 4 OPCAT*, covering “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”. Others refer to the ECHR and argue that the codifying instrument should apply to all situations of immigration detention which are covered by one of the grounds listed in Article 5(1) ECHR, in particular Article 5(1)(b) and 5(1)(f). Some suggest that the codifying instrument should be applicable to all premises “designated for” holding migrants or every place where migrants are held on the basis of their migration status or in application of laws relating to migration and asylum. Other participants simply call upon the CJ-DAM to clarify the scope of the instrument.

g) *Proportionality*

26. Several participants suggest to state more prominently the *proportionality principle* and that administrative detention is only ever lawful, if it is prescribed by law, grounded in one of the reasons of Article 5 ECHR, necessary in the specific circumstances, proportionate to the legitimate aim pursued and – on the basis of an individual assessment – the least intrusive and restrictive measure possible. Furthermore, the detention conditions must be adequate and the length of detention may not exceed what is reasonably required. In case of deportation or removal, detention may only be maintained for so long as the relevant proceedings are in progress and removal or deportation is possible. Almost all participants also recall the need to consider alternatives to detention.

h) *Persons in situations of particular vulnerability*

27. A majority of participants strongly criticises the proposed rules on persons in situations of particular vulnerability. The definition of “vulnerable person” in Rule A.2.vi is criticised as being too vague and open. Some participants suggest including a non-exhaustive list of vulnerable persons, whereas other actors suggest a general definition. One participant proposes to group the rules on persons in situations of particular vulnerability together in a specific section.

28. Several actors call for a systematic vulnerability screening prior to decision on detention, as required by due diligence standards. One observation also suggests including a provision on the on-going assessment of vulnerability. If a person is considered to be vulnerable, detention should generally be avoided.

29. A number of observations point out that the particular situation of elder migrants, migrants with disabilities, stateless persons as well as lesbian, gay, bisexual, trans- and intersex migrants is not sufficiently taken into consideration. Several participants further stress that pregnant women should never be detained and that the codifying instrument fails to reflect that standard.

i) *Children*

30. Of particular concern to almost all participants are the rules on children in administrative detention. It is widely criticised that the draft allows for the detention of children. The consensus among participants is that, *as a general rule, children should not be detained*. They recall that detention is almost never compatible with the *best interest of the child*. Some participants maintain that detention of children solely on the basis of their migratory status should be excluded and that it should only be used as a last resort whereas others oppose detention of children generally.

31. Several observations welcome the presumption of minority in Rule B.16 but argue that the burden of proof should lie with the state which should prove that a child is above the age of 18. Other actors argue that age assessment procedures should be voluntary.

4. Gaps

32. *Lack of resources*: Several participants recall that the lack of resources shall not impede the realisation of the rights of persons in administrative detention.

33. *Privatisation*: One participant suggests adding an additional provision confirming the applicability of the codifying instrument in case of co-operation with private companies.

34. *Statelessness*: A few participants criticise the absence of a reference to the particular situation and the rights of stateless persons and recall the particular risk of stateless persons to be detained arbitrarily. It is therefore suggested to include the need to identify stateless persons as a key procedural safeguard.

35. Further Gaps which are mentioned include safeguards against prolonged detention and in respect of disciplinary measures and concerning the conduct of searches, protection of migrant's property rights, safeguards against limitation to visitation rights, responsibility of staff for negligence, abuse or ill-treatment, welfare support for migrants in administrative detention upon release.

III. Specific Remarks

1. Title (and Rule A.1)

36. A number of observations point out that the proposed *title of the draft codifying instrument* "European Rules on Conditions of Administrative Detention for Migrants" is too narrow for the actual scope envisaged. Some suggest alternatives such as: "European Rules on the administrative detention of migrants", "European Minimum Rules for Immigration Detention". Similar remarks are also made with regard to the rule on the scope of application in A.3.

2. Definitions (Rule A.2)

37. Several participants voice concerns regarding the *definitions* in A.2. Strong criticism is raised with regard to the definition of "*migrant*". It is argued that the draft codifying instrument introduces such a definition while there is no internationally agreed upon definition in the relevant international instruments. It is widely suggested to omit a definition of the notion of "*migrant*".

38. The definitions of "closed detention centre" and "vulnerable person" are also criticised for the reasons discussed above (II.3.d) and II.3.g)).

3. Non-Discrimination Clause (Rule B.9)

39. A number of observations suggest additional grounds to the *non-discrimination clause* in Rule B.9, in particular discrimination on the ground of sexual orientation and gender identity, age, disability, migration status, statelessness, marital or family status, health status, economic and social status.

4. Right to be Informed and to Understand (Rules C.2 C.5, D.5, D.6, I.8)

40. Several participants propose to strengthen the *right to be informed* in the draft codifying instrument. In particular it is criticised that the current wording of the draft codifying instrument according to which it is sufficient if a person "is reasonably presumed to understand" is not compatible with the standard established by the ECHR and other relevant instruments. Under the relevant human rights instruments it is up to the state to ensure and also to prove that they are communicating in a language the person concerned understands.

5. Access to International Protection (Rule D.7)

41. A number of observations wish to clarify that the fact of being held in administrative detention may not hinder the person concerned from *applying for asylum or international protection*.

6. “Personal Development” (Part G)

42. Some participants criticise that the notion of “*personal development*” used in Part G is not codified as a concept in international law and is consequently too vague. They propose to omit that notion.

43. Several stakeholders recall the importance of the right to education for children.

7. Health Care (Part H)

44. Several observations underline the need to clearly confirm the right of migrants in administrative detention to have *access to health care* as a consequence of the right to life and the prohibition of degrading treatment. They point out that adequate health care includes daily access to a qualified health practitioner as well as access to services such as dental care and opticians. Other observations stress the importance of the migrant’s right to access to his or her medical files.

8. Discipline, Use of Force and Restraints (Part I)

45. The instrument should clearly state that any use of force, any means of restraint or any disciplinary measure must remain *exceptional* and should be considered on individual grounds and be based on the principle of proportionality. Instead, a protection approach should also govern the use of force and restraints as well as disciplinary measures. Some stakeholders clearly maintain that use of force should never be applied

46. Several participants furthermore ask to omit rule I.13 on solitary confinement. Solitary confinement shall never be used as a disciplinary sanction. Equally, restrictions on the visitation rights by family members shall not be allowed as a disciplinary measure (Rule I.12).

9. External Monitoring (I.14-I.16)

47. A number of participants criticised that the control and complaint mechanisms foreseen were insufficient and suggest that *independent monitoring bodies*, in particular National Preventive Mechanisms, should be given a greater role. Reports by independent bodies should be publicly available. It is suggested to adapt Rules I.14-I.16 accordingly.