



COMMISSIONER FOR HUMAN RIGHTS

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**Council of Europe  
Directorate General  
of Human Rights and Rule  
of Law – DGJ  
European Committee on legal  
co-operation**

Ladies and Gentlemen,

The Polish National Prevention Mechanism is highly enthusiastic to learn about the codification work on the draft European rules on the administrative detention of migrants. From the standpoint of national preventive mechanisms monitoring the observance of the rights of migrants in detention, this document could constitute a very important and useful tool providing government authorities with guidance on the proper procedural standards for dealing with migrants. Unfortunately, in their current form, the draft rules do not fulfil all the hopes placed in them, and worse, by directly referencing the European Prison Rules, they detract from the standards governing the migrants' rights as formulated to date.

Accordingly, the Polish National Preventive Mechanism wishes to present its comments and reservations about the proposed rules.

### **1. Scope of the rules' applicability**

In rule B.1., the authors rightly point out that a migrant may be deprived of liberty only pursuant to art. 5 paragraphs 1(b) and 1(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, it is difficult to understand why rules A.2. and A.3. restrict the rules' scope of applicability to migrants held in closed detention centres. It's essential that the protection stemming from a document of this rank extend to all migrants starting the moment they are detained. Any other solution may lead to the unequal treatment of migrants deprived of liberty. Moreover, the Polish National

Preventive Mechanism has found from experience that the time immediately after a migrant is initially detained is a critical period during which fundamental human rights may be violated, including access to legal advice and representation, medical examination, information about the reason for detention and rights of the migrant in the place of detention, provided in a language understood by the migrant, as well as the right to communication with any persons of their choice in order to inform these persons of their situation. It's necessary that the Rules emphasize the strategic importance of the rights mentioned therein, and the obligation by state authorities to realize them.

## **2. Situation of migrants from vulnerable groups**

### **2.1. Victims of torture**

In respect to rule B.6. it should be emphasized that effective identification of victims of torture should be conducted, above all, prior to placement of the migrant in detention. Examinations<sup>1</sup> conducted by Polish non-governmental organizations cooperating with migrants have found that victims of violence held in detention centres suffer from psychosomatic symptoms (malaise, headache, heart pains, chest pain, sweating, cold, insomnia), flashbacks (sudden, intrusive recurrence of memories and visions of traumatic situations – common in people with PTSD), a sense of loss of control over thoughts and emotions (feelings of constant fear, excessive irritability, difficulty concentrating) and transference to the present of past experiences (understanding what is currently happening according to the criteria of the time when they were in danger – e.g. perceiving Border Guard officers to be *police* or *soldiers* who perpetrated violence against them). For victims of violence and abuse, confinement in detention is unjustified prolongation of their suffering, continuation of inhuman and degrading treatment – thus, torture.

Yet inspections by the Polish National Preventive Mechanism conducted in 2016 found that victims of torture or persons declaring they had been tortured were held in all four inspected facilities, despite the clear ban on placing persons in closed detention centres if their psychophysical condition justifies the presumption that they have been subjected to violence, pursuant to art. 400 of the Law on Aliens of 12 December 2013, and art. 88a sub-par. 3 of the Act of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland. This state of affairs can be attributed to the lack of effective screening mechanisms for the early (i.e. prior to placement in detention) identification of victims of torture by the Polish Border Guard. Screening for victims of torture after migrants are placed in detention should also be conducted, but only as another stage in the effort to identify victims who were not identified before being placed in a closed detention centre.

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<sup>1</sup> <http://interwencjaprawna.pl/wp-content/uploads/bezpieczny-dom.pdf>, accessed 4 May 2017, p. 131.

What's more, screening for victims of violence and abuse among migrants held in detention centres should be undertaken at regular intervals. Accordingly, rule B.6. should stipulate the obligation, not merely suggest the preference, to screen for victims of torture or other forms of violence prior to placement in detention, as well as to conduct additional, periodic screening throughout the period during which a migrant is deprived of liberty.

In respect to rule B.7. it should be emphasized that the help provided to victims of human trafficking should also be extended to migrants identified as victims of torture. While these persons can not be placed in detention, neither should they be left without any help at all in overcoming the trauma they suffer from having been tortured. Doubts are raised by this rule's limited scope in terms of not only whom it entitles to help (only human trafficking victims), but also the time period it calls for help to be provided (at least 30 days). This gives rise to the danger that the entities responsible for migrants will limit the assistance provided them to the minimum period indicated, thereby merely formally fulfilling the standard contained in rule B.7. As pointed out by Nils Muiznieks<sup>2</sup>, the Human Rights Commissioner of the Council of Europe, restoring equilibrium after such a traumatic experience as torture or inhuman treatment requires holistic and long-term action, to help rebuild self-esteem, physical and mental health, independence and social reintegration.

It should also be noted that victims of torture, inhuman treatment or other serious forms of psychological, physical or sexual abuse do not fall within the definition of vulnerable groups of migrants included in rule A.2.vi, which puts them at risk of being deprived of the protection to which this group is entitled. Accordingly, it is advisable to consider extending the definition of vulnerable groups of migrants covered under rule A.2.vi to include those stated in 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*, and in Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection*. Both documents directly mention victims of torture, inhuman treatment or other serious forms of psychological, physical or sexual abuse *among the persons who require special treatment*.

## **2.2. Pregnant women**

The rules should not allow for pregnant women to be held in detention until they are due or, worse, give birth in detention. As currently formulated, rule B.13 directly references

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<sup>2</sup> [https://www.coe.int/sl/web/commissioner/blog/-/asset\\_publisher/xZ32OPEoxOkq/content/torture-survivors-have-the-right-to-redress-and-rehabilitation/pop up? 101\\_INSTANCE\\_xZ32OPEoxOkq\\_viewMode=print& 101\\_INSTANCE\\_xZ32OPEoxOkq\\_languageId=sl\\_SI](https://www.coe.int/sl/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/torture-survivors-have-the-right-to-redress-and-rehabilitation/pop-up?_101_INSTANCE_xZ32OPEoxOkq_viewMode=print&_101_INSTANCE_xZ32OPEoxOkq_languageId=sl_SI)

solutions appearing in the European Prison Rules without taking into account the completely different character of liberty deprivation to which migrants are subject (administrative detention) and to which women under arrest or serving prison sentences are subject (penal detention). Forcing migrant women who have committed no crimes, but merely violated administrative rules, to give birth while in detention is disproportionate to the purpose of such detention. This solution also seems to contradict rule B.1, according to which detention should be treated as a last resort, especially for migrants from vulnerable groups.

### **2.3. Children**

In the opinion of the Polish National Preventive Mechanism, the rules should emphasize that placing children in detention is strictly prohibited. The tone of the draft rules in their current form weakens this prohibition, inter alia, due to the formulation of rule B.14., which, in the same sentence, states that children should not be deprived of liberty while indicating the exceptions to this ban. Paradoxically, all the guarantees covering children held in closed detention centres for migrants – even though meant to protect the best interests of children – could lead to the normalization of depriving children of liberty. This also raises the concern that those responsible for managing detention centres for migrants will use these guarantees and their implementation to demonstrate that deprivation of liberty is not so harmful to juveniles. However, the Polish National Preventive Mechanism and non-governmental organizations cooperating with it have found from experience that every child who stays in a closed detention centre experiences very negative psychological effects and functions more poorly after release. Even if such children receive the best-organized teaching possible in such a centre, it cannot substitute for a normal curriculum and socialization with peers during classes held at school and extra-curricular activities. Likewise, even the warmest and most sensitive treatment by detention centre personnel cannot eliminate the fear, shame and helplessness felt by children held in a closed centre, or the feeling that their parents experience the same fear, shame and helplessness due to their inability to protect their children from it.

Migrants who have spent several weeks or months in detention centres together with their entire families have recounted a wide variety of problems suffered by their children during their stays there or after being released, ranging from psychosomatic symptoms (e.g. recurrent bouts of anxiety, problems sleeping, reduced immunity, bedwetting), to learning difficulties (which had not occurred previously), to disciplinary problems and substantial worsening of relations with parents. Moreover, the European Court of Human Rights ruled in *Muskhadzhiyeva v. Belgium* that the extreme vulnerability of a child was paramount and took precedence over status as an illegal alien. UN Special Rapporteur on Human Rights of

Migrants François Crépeau<sup>3</sup> expressed the view that migrant children should never be deprived of their liberty, since detention is never in their interest. The rule in relation to migrant children should stipulate placing them in alternative non-closed facilities. In the case of children unaccompanied by an adult, a better solution is to place them in non-closed facilities adapted to the needs of children. Likewise, minors under the care of their family can not be deprived of their liberty under the pretext of respect for family unity. The whole family should be housed in a non-closed alternative to detention. The principle of using alternative, non-restrictive accommodations in relation to children and their caretakers should be explicitly stated in rule B.1.

#### **2.4. Absence of exceptions from the application of certain solutions in relation to migrants from vulnerable groups**

The absence of absolute bans on the application of highly restrictive solutions to vulnerable groups of migrants is very worrisome. Examples include rule B.11., which sanctions in certain cases the possibility of placing migrants in jails; rule I.6., which allows for personal searches; and rule I.13., which permits solitary confinement. The application of these types of measures against all migrants held in closed detention centres should be regarded as overreach and as rendering administrative detention too similar to penal detention; applying such measures against persons from vulnerable groups raises a serious risk of inhuman treatment. It follows from the foregoing analysis that the entire draft document should be subjected to a rigorous analysis concerning the applicability of certain solutions to vulnerable groups of migrants.

### **3. Regime in closed detention centres for migrants**

In the opinion of the Polish National Preventive Mechanism, the approach to the situation and rights of migrants deprived of their liberty should be changed completely. The approach proposed in the draft document is rooted in an attempt to adapt the European Prison Rules to places that serve the purpose of administrative detention. In their current form, the draft rules create a regime identical to that of incarceration by accepting the possibility, for example, of using force and instruments of restraint, conducting personal searches, disciplinary procedures and solitary confinement (Part I. Order, discipline and safety). Further examples include rules allowing for the imposition of restrictions on visits from external persons (rule E.3.) and on freedom of movement within the detention facility (rule G.1.).

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<sup>3</sup> Inputs of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, to the working group on arbitrary detention's draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, page 3;  
<http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/SRMigrants.pdf>

Those who formulate standards prescribing conditions in detention centres for migrants must keep in mind that, as the report *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Summary Conclusions*<sup>4</sup> has found, deprivation of liberty itself can induce and/or worsen mental illness, trauma, depression, anxiety, aggression, and affect physical, emotional and mental health. There is no doubt that the application of rules meant for penal detention to administrative detention can only deepen the negative consequences of deprivation of liberty.

#### **4. Monitoring places where migrants are detained**

Supervision of the conditions in closed detention centres and observance of migrant's rights should be strengthened by explicitly stating in Rule I.15 that these sites must be visited at regular intervals by national preventive mechanisms.



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<sup>4</sup> *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Summary Conclusions*, page 4, <http://www.unhcr.org/protection/expert/536a00576/global-roundtable-alternatives-detention-asylum-seekers-refugees-migrants.html>