

**Amicus Curiae from
the Center for Reproductive Rights and
Foundation for Women and Family Planning**

I. Scope and summary of the submissions in this brief

1. This amicus brief is submitted jointly by the Center for Reproductive Rights (**‘the Center’**)¹ and the Foundation for Women and Family Planning (**‘FEDERA’**),² with leave of the Court granted on 26 May 2023.
2. This amicus brief describes the obligations on contracting parties under international human rights law, including the European Convention on Human Rights (**‘the Convention’**), in relation to immigration detention of pregnant women, including obligations to guarantee access to sexual and reproductive services for pregnant women in detention.³
3. **Section I** outlines the manner in which international human rights law and standards recognise pregnant women as a particularly vulnerable group and prohibit the immigration detention of pregnant women unless as a measure of last resort. It also captures how these standards align with the approach of this Court when considering whether immigration detention of vulnerable groups can be permitted under the Convention. In summary, the general principle that immigration detention should be used only where necessary and for the shortest period possible applies *a fortiori* to the detention of vulnerable groups such as pregnant women. Their combined vulnerability on account of their pregnancy, together with their status as migrants/asylum seekers and confinement in detention, means that the immigration detention of pregnant women is likely in most cases to cross the threshold of ill-treatment prohibited by international law including Article 3 of the Convention.
4. **Section II** details the obligations of contracting parties under the Convention and general international law to ensure that whenever pregnant women are subject to immigration detention they are provided with good quality reproductive healthcare and

¹ The Center is a global non-governmental human rights organization dedicated to advancing women’s human rights in the sphere of reproductive health. The Center works across Europe to advance women’s sexual and reproductive health and rights and its expertise on comparative European law on reproductive rights is regularly requested by the Council of Europe Commissioner for Human Rights and the United Nations human rights mechanisms. It has represented the applicants or intervened as a third party in many of the seminal legal proceedings regarding reproductive rights issues in Europe.¹ The Center’s expertise is regularly sought by international and regional human rights institutions

² FEDERA is a non-governmental organization based in Poland that works locally, regionally, and internationally on the advancement of women’s reproductive rights through monitoring, advocacy and educational activities as well as strategic litigation before domestic and international courts. The Foundation’s lawyers were representatives in *Tysiąc v. Poland* (2006), *R.R. v. Poland* (2011) and *P. and S. v. Poland* (2013).²

³ Throughout this document the term ‘pregnant women and girls’ is used in a non-exclusionary manner to refer all persons who can become pregnant or who need sexual and reproductive health care services, including women, girls, non-binary persons and transgender men.

monitoring of their detention in light of their pregnancy and particular health situation. A failure to ensure such provision is likely to amount to breaches of Articles 3 and 8 of the Convention.

5. This amicus brief presents the Court with an overview of general international human rights law and standards on these matters, in addition to a review of relevant Convention provisions, in light of the Court's reasoning that the Convention cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part. As a result, when interpreting Convention rights, the Court has repeatedly taken into account the content of other relevant international legal rules and principles applicable to the contracting parties, as well as the interpretation of such elements by competent organs, including the decisions, concluding observations and jurisprudence of other international legal bodies on similar questions.

II. International Human Rights Law and Standards Do Not Permit the Detention of Pregnant Women for Immigration Purposes, Unless as a Measure of Last Resort.

6. It is now well established in international human rights law that any detention for immigration control must be justified as reasonable, necessary and proportionate.⁴ International law is clear that immigration detention should only be used as a measure of last resort.⁵ Guidance from international mechanisms and public health bodies make it clear that alternatives to administrative detention should always be considered as a first option.⁶ European Union law stipulates that an applicant for international protection may only be detained '*if other less coercive alternative measures cannot be applied effectively*', '*when it proves necessary and on the basis of an individual assessment of each case*'.⁷ The Council of Europe Parliamentary Assembly has invited

⁴ The right to liberty and security of the person is guaranteed in international human rights law, by *inter alia*, Article 9.1 of the International Convention on Civil and Political Rights ('**ICCPR**'), is applicable to all deprivations of liberty, including immigration control. General Comment No 35 provides guidance on Article 9 of the ICCPR and provides that immigration detention must be '*justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time... Any necessary detention should take place in appropriate, sanitary, non-punitive facilities*'.

⁵ Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention. Geneva: United Nations High Commissioner for Refugees; 2012 (<https://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html>, accessed 21 December 2021). Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, General comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention and their connection with other human rights, CMW/C7GC75, 21 July 2022.

⁶ *Ibid* General Comment no 5. Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention. Geneva: United Nations High Commissioner for Refugees; 2012, General Assembly Resolution 63/184 called upon all States to 'adopt, where applicable, alternative measures to detention'. Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2 April 2012, para 48. Working Group on Arbitrary Detention, E/CN.4/1999/63/add. 3, para 33, Human Rights Committee, communication No. 900/1999, para 8.2. World Health Organization, Addressing the health challenges in immigration detention, and alternatives to detention: A country implementation guide. Available at: <https://apps.who.int/iris/bitstream/handle/10665/353569/9789289057929-eng.pdf?sequence=2&isAllowed=y>

⁷ 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 (recast), OJ. 2013; L. 180/96 Article 8. See also European Parliament and Council. Directive 2008/115/EC of the European Parliament and of the Council of

member states to ‘*progressively proscribe administrative detention of irregular migrants and asylum seekers... and in the meantime allow detention only if it is absolutely necessary...*’⁸

7. The general principle that immigration detention should only be allowed when absolutely necessary applies *a fortiori* and even more strictly to vulnerable groups. While asylum seekers generally are vulnerable,⁹ international and regional human rights courts and bodies have recognised that certain people, including pregnant women and children, are particularly vulnerable.¹⁰
8. International and regional human rights bodies and mechanisms have emphasised that those who are vulnerable should not be detained and that being detained *per se* creates additional vulnerability which is likely to subject the vulnerable individual to ill-treatment contrary to international law. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has emphasised that:

*“As a general rule, the longer a situation of arbitrary detention and inadequate conditions lasts, and the less affected detainees can do to influence their own situation, the more intense their mental and emotional suffering will become, and the higher is the likelihood that the prohibition of ill-treatment has been breached. Depending on the circumstances, this threshold can be reached very quickly, if not immediately, for migrants in situations of increased vulnerability, such as children, women, older people, persons with disabilities, medical conditions, or torture trauma, and members of ethnic or social minorities including lesbian, gay, bisexual, transgender and intersex (LGBTI) persons”.*¹¹

16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ. 2008;L. 348/98.

⁸ PACE Resolution 2008, Commissioner for Human Rights of the Council of Europe, Issue Paper: Criminalisation of Migration in Europe: Human Rights Implications page 10. [https://rm.coe.int/ref/CommDH/IssuePaper\(2010\)1](https://rm.coe.int/ref/CommDH/IssuePaper(2010)1)

⁹ *MSS v Belgium and Greece* (2011) 53 EHRR 28, §232.

¹⁰ See paras 10 et seq. below for a discussion on standards recognizing the vulnerability of pregnant women. For children, see e.g. the UN Special Rapporteur on the Human Rights of Migrants has made it clear that that the practice of detaining children should be eliminated and that ‘*International and regional human rights bodies have repeatedly stated that immigration detention of children is never in the best interests of the child and that it is a violation of international human rights law*’: Report of the Special Rapporteur on the human rights of migrants, Ending immigration detention of children and providing adequate care and reception for them, A/75/183, 20 July 2020. Additionally, when pregnant women, as is often the case, are detained with their minor children, human rights mechanisms have recognised it is more likely that both women and children will be exposed to treatment which can be characterized as inhuman and degrading. This Court has found that the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1 (f) only where the national authorities can establish that such a measure of last resort was taken after verification that no other measure involving a lesser restriction of their freedom could be implemented (see *G.B. and Others v. Turkey*, no. 4633/15, §§ 151 and 168, 17 October 2019, with further references, and *A.B. and Others v. France*, no. 11593/12, § 120, 20 July 2016). See also *Nikoghsyan and Others v Poland*, no. 14743/17, 3 March 2022. In this context, it is relevant that the Committee against Torture has recommended that Poland ensure that the detention of asylum seekers, and in particular children and other vulnerable persons, should be used as a measure of last resort, for as short a period as possible and in facilities appropriate for their status should be used as a measure of last resort, for as short a period as possible and in facilities appropriate for their status. See Committee against Torture, Concluding observations on the seventh periodic report of Poland, CAT/C/POL/CO/7, 29 August 2019, para 18 (a).

¹¹ A/HRC/37/50, §28 emphasis added.

9. The Council of Europe Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe have also made it clear that vulnerable persons should not be placed in detention, and that specific protection and adequate support should be provided instead, such as in the form of alternatives to detention.¹²
10. International human rights mechanisms have repeatedly recognised the particularly vulnerable position of pregnant women.¹³ The Committee of Ministers of the Council of Europe, and the Council of Europe the Parliamentary Assembly have referred to ‘*persons with special needs*’ or persons with vulnerabilities to include minors and pregnant women.¹⁴ European Union law similarly recognises pregnant asylum-seeking women as particularly vulnerable individuals and EU Member States are required to properly to take into account of the ‘*specific situation*’ of pregnant women as a vulnerable category under Article 21 Reception Conditions Directive.¹⁵ In finding violations of the Convention, this Court has recognised that ‘*under Chapter IV of the Reception Conditions Directive, the authorities were in principle obliged to take into account the specific situation of minors and pregnant women, both categories considered vulnerable by the Directive, as well as assess and monitor any special reception needs linked to their status throughout the duration of their asylum procedures*’.¹⁶
11. Pregnant asylum-seeking women are thus cumulatively vulnerable in detention on account of their dual status as pregnant women and as asylum seekers. Therefore, under international human rights law, the situations of pregnant women deprived of their liberty require a differentiated approach to ensure protection of their rights and sets a higher threshold to justify their detention and their detention should be a last resort.¹⁷ The UNCHR Detention Guidelines (Guideline 9) provide that as a general rule pregnant women should not be detained.¹⁸ The Inter-American Court of Human Rights has similarly recognised the special vulnerability of pregnant women that is even greater

¹² Parliamentary Assembly, Resolution 1637 (2008), § 9.6; Commissioner for Human Rights, Document CommDH(2014)4, 24 March 2014, § 72; Document CommDH(2014)18, 14 October 2014, §101. <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f>

¹³ For example, Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation no 24: Article 12 of the Convention (Women and Health), A/54/38/Rev. 1, para 6. Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, General comment No. 5 (2021) on migrants’ rights to liberty and freedom from arbitrary detention and their connection with other human rights, CMW/C7GC75, 21 July 2022 and the principle therein that people in vulnerable situations including pregnant and breastfeeding women, should not be detained. See also Report of the Working Group on Arbitrary Detention, A/HRC/45/16, 24 July 2020, para 15.

¹⁴ Committee of Ministers, Recommendation Rec(2003)5 § 13; Parliamentary Assembly, Resolution 1637 (2008) on Europe’s boat people: mixed migration flows by sea into southern Europe, §9.6;

¹⁵ Reception Conditions Directive, Article 21.

¹⁶ *RR v Hungary*, Application No 36037/17, §58.

¹⁷ Even in the criminal justice context, international human rights law promotes prioritisation of the use of alternative or substitute measures. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (**‘the Bangkok Rules’**) provide that ‘*Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the women represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.*’¹⁷

¹⁸ Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention. Geneva: United Nations High Commissioner for Refugees; 2012 Available online at <https://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

when they are deprived of their liberty since they require specific services, such as those related to prenatal care, postpartum care and childbirth assistance.¹⁹

12. The Council of Europe Commissioner for Human Rights has also taken a clear position against the detention of pregnant women.²⁰ The World Health Organisation (WHO) has made it clear that pregnant women should not be detained due to the associated health risks.²¹
13. The approach of international human rights law and standards in relation to the detention of pregnant women for immigration purposes align with the reasoning of this Court which has repeatedly found breaches of Article 3 and 5 of the Convention in cases involving pregnant women placed in immigration detention.
14. It is well-recognised that in considering whether the threshold for breach of Article 3 of the Convention is met, the Court will consider the particular vulnerability of the applicant. The Court has considered the vulnerability of those in detention *per se*²² as well as the particular vulnerability of certain groups of detained individuals.²³ It is in this context that this Court has recognised the additional vulnerability of pregnant women in immigration detention and found their detention in breach of Article 3 taking into account those vulnerabilities.²⁴ For example, the Court has found that, even where conditions in terms of accommodation, hygiene and medical care were generally acceptable for others, the Article 3 threshold was met on account of *'the applicant mother's pregnancy and serious health condition.'*²⁵ In finding violations of the Convention the Court has highlighted, the psychological and emotional impact of detention on pregnant women who did not know when they would give birth and what would happen to them and their children.²⁶ It has also taken into account the cumulative effect of conditions of a woman who was severely depressed. The Court explained that her psychological distress was due to a number of factors, not least her prolonged detention but also her miscarriage in detention and her separation from her son. In finding a violation of Article 3, the Court has recognised the cumulative impact of a lack of female staff which caused discomfort given the specific medical conditions related to miscarriage, as well as a lack of appropriate and varied diet. The Court stated that *'the applicant was in a vulnerable position, not only because of the fact that she*

¹⁹ *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, §177, *Case of Gelman v. Uruguay. Merits and Reparations.* Judgment of February 24, 2011, §97, *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 2, 2021. Series C No. 441, e.g. §§200-201.

²⁰ Commissioner for Human Rights, CommDH(2016)17, § 55; CommDH(2014)18, §101. Available online at <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f>

²¹ World Health Organisation, Addressing the health challenges in immigration detention, and alternatives to detention: A country implementation guide. Page 52 . Available online at <https://apps.who.int/iris/bitstream/handle/10665/353569/9789289057929-eng.pdf?sequence=2&isAllowed=y>

²² *Testa v Croatia* (2008) 47 EHRR 29, §44; *Rooman v Belgium* Application No. 18052/11, §143, *Khlaifia and Others v. Italy* [GC], no. 16483/12, §159c.

²³ As to detained mothers and/or children, see e.g. *GB & Others v Turkey* (2020) Application No. 4633/15 and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03.

²⁴ *Mahmundi and Others v. Greece* Application no 14902/10, §70, *RR and others v. Hungary*, Application No 36037/17. See also *Aden Ahmed v Malta* Application no 55352/12, §97, concerning a vulnerable woman who had suffered a miscarriage while detained.

²⁵ *RR and others v. Hungary*, §52.

²⁶ *Mahmundi and Others v. Greece*, 2012, §70.

was an irregular immigrant and because of her specific past and her personal emotional circumstances, but also because of her fragile health.²⁷

15. It follows from the standards and materials described above that pregnant migrant women are especially vulnerable to harm in detention such that their immigration detention will often amount to inhuman and degrading treatment for the purpose of Article 3 of the Convention. It is for this reason that international human rights law permits the detention of pregnant women only in very limited circumstances and, if absolutely necessary, for a very limited duration and in facilities adequate for their status.

International Human Rights Law and Standards Require that if Subject to Detention Pregnant Women Must be Provided with Good Quality Reproductive Healthcare

16. Contracting parties' obligations under the Convention and international human rights law and standards require state authorities to ensure that where subject to detention, a person is detained in conditions which are compatible with respect for her human dignity, that the manner and method of the execution of the measure do not subject her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, her health and well-being are adequately secured.²⁸ Thus, when assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the detained person²⁹.
17. It is well established by this Court and international human rights mechanisms that there are three particular elements to be considered in relation to the compatibility of an applicant's health with her stay in detention: (a) the medical condition of the detainee, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant³⁰.
18. European Union law also requires that when vulnerable persons and applicants with special reception needs are detained, their health, including mental health, shall be of primary concern to national authorities. Member States are required to ensure regular monitoring and adequate support taking into account the particular situation of the vulnerable person, including their health.³¹
19. The principles above must be interpreted in the context of international human rights law and standards regarding women's health and the obligations on contracting partners to ensure that women in detention are provided with essential sexual and reproductive healthcare, which derive from the rights to life, to freedom from torture and other ill-treatment, to privacy, to the highest attainable standard of health and to the equal

²⁷ *Aden Ahmed v Malta* Application no 55352/12, §97.

²⁸ *Khlaifia and Others* §159c, *Kudla v. Poland* [GC], Application no 30210/96, §§92-94, and *Rahimi v. Greece*, Application no 8687/08, §60).

²⁹ See *Dougoz v. Greece*, Application no 40907/98, § 46, *Khlaifia* §163. Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person) 16 December 2014, 1324/2004, *Shafiq v. Australia*, para. 7.3; 900/1999.

³⁰ *Slawomir Musial v Poland*, Application no 28300/06, §88. Human Rights Committee, General comment No. 35, Article 9 (Liberty and Security of Person), CPPR/C/GC/35, 16 December 2014, para 18.

³¹ Reception Conditions. Directive, Article 11.

enjoyment of these rights free from discrimination which require contracting parties to ensure all women can access to sexual and reproductive health services.³²

20. International human rights mechanisms have accordingly repeatedly found violations of the rights to life, torture and ill-treatment, privacy and health because of state authorities' failures to guarantee access to good quality reproductive health care.³³ This Court, similarly, has found that acts and omissions on the part of State authorities in the field of reproductive healthcare, may breach Article 8 and reach the required threshold to engage and constitute a breach of Article 3 and 8 of the Convention due to the failure to provide appropriate medical care and treatment options.³⁴
21. The Committee on Economic, Social and Cultural Rights has emphasised that states are required to ensure access to sexual and reproductive health care including to refugees, stateless persons, asylum seekers, undocumented migrants, given their additional vulnerability by condition of their detention, and has emphasised that this is a group 'with specific needs that require the State to take particular steps to ensure their access to sexual and reproductive information, goods and healthcare'.³⁵
22. When applied to the health needs of pregnant women, these standards require contracting parties to ensure access to essential maternal care including good quality antenatal care and emergency obstetric care granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.³⁶

³² Human Rights Committee, General Comment No. 36: On the right to life (Art. 6 of the International Covenant on Civil and Political Rights), para. 26, U.N. Doc. CCPR/C/GC/36 (2018) [hereinafter Human Rights Committee, Gen. Comment No. 36]. On freedom from torture and ill-treatment see CEDAW Committee, Gen. Recommendation No. 35, Gender-based violence against women, updating general recommendation No. 19 U.N. Doc. CEDAW/C/GC/35 (2017) para. 18.; CAT Committee, Concluding Observations: Poland, para. 33(d), U.N. Doc. CAT/C/POL/CO/7 (2019).; CAT Committee, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, para. 46, U.N. Doc. CAT/C/GBR/CO/6 (2019). On the right to privacy, to the highest attainable standard of health and equal enjoyment of rights free from discriminations see Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (women and health), (20th Sess., 1999), para. 26, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008). Article 12 CEDAW and Article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), (22nd Sess., 2000), para. 12 U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008); Committee on Economic, Social and Cultural Rights, General Comment No. 22: On the right to sexual and reproductive health (Art. 12), paras. 11-21, U.N. Doc. E/C.12/GC/22 (2016); Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (women and health), (20th Sess., 1999), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).

³³ For example, in the context of denial of abortion services, the Human Rights Committee has found lack of access to reproductive healthcare to subject the complainant to inhuman and degrading treatment: e.g. *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), at §3.2. See also *Alyne da Silva Pimentel Teixeira v. Brazil*, CEDAW Committee, Comm'n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011). The same principles can be applied, by analogy, to lack of access to support following pregnancy complications and miscarriage.

³⁴ See, e.g., *R.R. v. Poland* (2011), App. No. 27617/04, §152; *P. and S. v. Poland* (2013), App. no. 57375/08, §160; *V.C. v. Slovakia* (2012), App. no. 18968/07 §§106-120, *Konolova v Russia*, App. no. 37873/04 (2015).

³⁵ General Comment No. 22: On the right to sexual and reproductive health (Art. 12), para 31.

³⁶ See in particular Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), Article 12: '... States Parties shall ensure to women appropriate services in connection with pregnancy ...'. The obligations under CEDAW apply in the same ways to migrant women: CEDAW General Recommendation No 26 on Migrant Women workers, §1.CEDAW Article 12.2 WHO, *Promoting the health of refugees and migrants: Framework of Priorities and Guiding Principles to Promote the Health of Refugees and Migrants*, 7 (2017), available at <https://bit.ly/2Kq9yEw>. Other standards include to ensure all pregnant women are protected from life threatening risks arising from inadequate access to maternal health care, Ensure the right of access to maternal health facilities, goods and services in a non-discriminatory basis, especially for marginalised groups, To ensure

23. The World Health Organisation has established that essential antenatal care includes:
- a. Antenatal care, including screening for maternal illnesses, nutritional deficiencies and complications,
 - b. Counselling on family planning and birth and emergency preparedness.³⁷
24. This ante-natal care is crucial for detecting and treating health conditions which, when left undetected, expose pregnant women to pregnancy related complications and heightened risks of maternal mortality and morbidity. Insufficient or delayed access to antenatal care exposes women to higher risks of complications during pregnancy including premature birth, miscarriage and death.³⁸
25. It is well established that these obligations apply in the sphere of migration and detention, and that contracting parties are required to guarantee access to good quality maternal healthcare for women in detention. The UN Special Rapporteur on the human rights of migrants drew attention to the specific situations, demands, views and needs of migrant women in detention and noted that these were often unmet, in particular concerning their access to sexual and reproductive healthcare. The mandate noted that for instance *‘pregnant women in detention centres may have to deliver their children in inadequate conditions, or may suffer miscarriages.*³⁹ Similarly, the WHO has

that effective measures are in place so that undocumented migrant women qualify for maternal health care and remove any legal, administrative, linguistic, and cultural barriers that may hamper their access to care and Adopt tailored measures to address the distinct needs of undocumented migrant women and eliminate barriers they face in accessing maternal health care: Human Rights Committee, General Comment No. 28: Article 3 (The equality of rights between men and women), (68th Sess., 2000), para. 6, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008), Committee on Economic, Social and Cultural Rights, General Comment No. 22: On the right to sexual and reproductive health (Art. 12), para. 17, U.N. Doc. E/C.12/GC/22 (2016), Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), (22nd Sess., 2000), para. 43, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008); Committee on the Elimination of Racial Discrimination, Concluding Observations: Belgium, U.N. Doc. CERD/C/BEL/CO/16-19 (2014). Committee on Economic, Social and Cultural Rights, General Comment No. 22: On the right to sexual and reproductive health (Art. 12), paras. 24-25, U.N. Doc. E/C.12/GC/22 (2016).

³⁷ WHO, Promoting the health of refugees and migrants: Framework of Priorities and Guiding Principles to Promote the Health of Refugees and Migrants, 7 (2017),

³⁸ WHO, *ibid.* . In the above context, the Center and FEDERA express concerns about recent reports concerning the treatment of pregnant migrant women in Poland. The 2022 report of the National Mechanism for the Prevention of Torture following its visits to immigration detention centres raised concerns about the inadequate provision of health services, including an urgent need to strengthen access to psychological services. The report recommended ensuring regular access to gynaecologists in centres for families. The National Mechanism for the Prevention of Torture reiterated the recommendation which has not been implemented by the Polish authorities since its report of 2021 to ensure regular access to gynaecologists in centres for families. It follows from the newest report that there was still no adequate access to gynaecological care in the centres visited by the Mechanism. The report by Amnesty International (April 2022) into the circumstances on the Polish-Belarusian border, includes case studies of detained women denied access to adequate health care, including a pregnant girl denied access to medical services despite pregnant complications and a woman with bleeding caused by her gynaecological condition being prevented from timely access to relevant services and follow up care. *Sytuacja Cudzoziemców W Ośrodkach Strzeżonych W Dobie Kryzysu Na Granicy Polski I Białorusi Raport Z Wizytacji Krajowego Mechanizmu Prewencji Tortur.* Available in Polish at <https://protect-eu.mimecast.com/s/5rM7CGOkIRO9OsKMv8x>.

³⁹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/107/91/PDF/G1910791.pdf?OpenElement> para 60. The rapporteur more generally highlighted that *‘Migrant women and girls often do not have reliable access to health care or reproductive health care services in transit and destination countries.*’ In 2019 the mandate

documented that pregnant women experience difficulty with the continuity of their maternity care in detention and that pregnant women's health concerns in detention are often not believed, or they receive delayed care or never receive any medical attention. Women experiencing high-risk pregnancies or miscarriages do not receive psychological support, and the pregnant women are often hungry due to a lack of nutrition and being unable to keep food in their rooms.⁴⁰

26. The Bangkok Rules provide that the initial screening for women in detention should cover the reproductive history of a woman, 'including current or recent pregnancies, childbirth and any related reproductive health issues' (Rule 6(c)). Further, it provides that pregnant and breastfeeding women should receive 'advice on their health and diet to be drawn up and monitored by a qualified health practitioner' (Rule 48).
27. Similarly, the European Committee on the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment ('CPT') has recognised that⁴¹:
 - a. It is essential that the health care provided to persons deprived of their liberty be of a standard equivalent to that enjoyed by patients in the outside community;⁴²
 - b. Insofar as women deprived of their liberty are concerned, ensuring that this principle of equivalence of care is respected will require that health care is provided by medical practitioners and nurses who have specific training in women's health issues, including in gynaecology;⁴³
 - c. any ante- and post-natal care provided in custody should be equivalent to that available in the outside community.⁴⁴
28. It follows that there is an obligation on contracting parties to assess and monitor the health of pregnant women in detention and assess the continuation of detention in light of their condition as well as ensure that they are provided with good quality health provision and mental health support, equivalent to that provided in the community, including when dealing with consequences of pregnancy complications and pregnancy loss.
29. A failure to comply with these obligations is likely to amount to a breach of Article 3 of the Convention. Thus the Court considered the issue of access to adequate medical treatment and found of concern that there was no professional psychological treatment for traumatised asylum seekers in finding a violation of Article 3 of the Convention for a pregnant woman in immigration detention.⁴⁵
30. Failing to ensure pregnant women in detention have access to adequate sexual and reproductive services, including good quality antenatal care, including when they suffer

⁴⁰ *Addressing the health challenges in immigration detention, and alternatives to detention: a Country Implementation Guide* <https://apps.who.int/iris/bitstream/handle/10665/353569/9789289057929-eng.pdf?sequence=2&isAllowed=y> section 3.2.5

⁴¹ European Committee on the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment, *Women deprived of liberty*, Extract of the Tenth General Report, 2000, §22.

⁴² *Ibid*, §32.

⁴³ *Ibid*, §32.

⁴⁴ *Ibid*, §29.

⁴⁵ *RR v Hungary*, cited above, §§62-3, *Mahmundi and Others v. Greece*, cited above, §70.

a miscarriage and require relevant healthcare including mental healthcare is also likely to constitute a violation of Article 8 of the Convention.⁴⁶

III: Conclusions

31. It follows that:

- a. International human rights law standards establish that pregnant women are vulnerable category of individuals who can only be detained as a measure of last resort;
- b. Because of their vulnerability detention of pregnant women is likely to constitute a breach of Article 3 of the Convention;
- c. Denial of access to adequate sexual and reproductive health services and inadequate monitoring of the health of pregnant women in detention can in itself amount to a breach of Article 3 and/or 8 ECHR.

⁴⁶ It is well-recognised that a person's private life is a broad concept and includes their physical, psychological and moral integrity, personal autonomy and mental health: *Botta v Italy*, Application No. 21439/93, *Tysiqc v. Poland* §107). The preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life: *Bensaid v the United Kingdom*, Application No. 44599/98.