

**Steering Committee for Human Rights (CDDH)
Drafting Group on Migration and Human Rights (CDDH-MIG)**

ENNHRI Submission to the consultation on the Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration (CDDH-MIG(2017)02Rev)

1. Introduction

ENNHRI comprises 41 National Human Rights Institutions (“NHRIs”) from across wider Europe. NHRIs are state funded institutions, independent of government, with a broad legislative or constitutional mandate to promote and protect human rights. They are accredited by reference to the UN Paris Principles to ensure their independence, impartiality pluralism and accountability. NHRIs are key actors in the national and international human rights frameworks.

NHRIs throughout the Council of Europe area address the full range of human rights, and work towards the implementation of the international human rights instruments. NHRIs can improve the implementation of human rights at the national and local level through promotion and awareness raising, protection and individual assistance, investigations and inquiries, monitoring, research and reporting, advising governments and parliaments, and engaging with regional and international human rights systems. In addition, NHRIs cooperate with civil society, other national bodies and the international human rights system. They form a bridge between civil society and the state, and between the national and international arenas. NHRIs are thus pivotal actors in the implementation of international human rights standards and are a crucial part in the Convention system, as reiterated in the Brighton and Brussels Declarations.

Within their broad mandate, European NHRIs prioritise the human rights of migrants, asylum seekers, refugees and persons in need of international protection in their work. For several years, ENNHRI’s Asylum and Migration Working Group has prioritised work on Migrant detention. This includes statements in 2014 to underline that detention of Migrants should be a measure of last resort, avoided in the case of children, and always comply with international human rights standards and in 2017 highlighting that administrative detention of migrants should always be a measure of last resort and alternatives to it should be explored and implemented prior to resorting to detention. The importance of NHRI monitoring of Migrant detention has also been recognised in the Belgrade Declaration on the Protection and Promotion of the Rights of Refugees and Migrants (November 2015) and in the GANHRI Statement on the occasion of the United Nations Summit for Refugees and Migrants New York (September 2016).

ENNHRI's work on Migrant detention is framed within the context that alternatives to detention should be used where possible. At the same time, ENNHRI supports its members' work to monitor and advocate for human rights compliance in situations where Migrants are held in reception and detention facilities.

ENNHRI has implemented its observer status by attending and participating in the Drafting Group on Migration and Human Rights meetings. ENNHRI also has collated good practices from across Europe on effective alternatives to Migrants detention and the results of this consultation has been fed into the CDDH-MIG request for information sent on 10 October 2016. ENNHRI welcomes the "Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration" as a very comprehensive and expert review of the legal and practical aspects of effective alternatives to detention. ENNHRI now seizes the opportunity of this consultation to share with the Drafting Group on Migration and Human Rights some updates on the information provided previously by NHRIs and a few suggestions.

2. Update on national developments in Luxembourg

The Luxembourg NHRIs was among ENNHRI members who responded the CDDH-MIG request for information on existing alternatives to detention. By a new law from March 2017 a bill¹ mentioned in the initial answers of the Commission Consultative des Droits de l'Homme du Grand Duché du Luxembourg, the maximum period of detention of persons or families accompanied by minors is now extended from the previous 72 hours to 7 days².

This new legislation has been criticized both nationally and internationally. In its opinion³ on the draft bill n°6992, the Collective of Refugee Associations in Luxembourg (le Collectif Réfugiés (LFR)) underlined that this extension of the detention period does not respect the principle of the superior interest of the child, his/her human dignity and goes beyond the "shortest appropriate period of time" recommended by the Convention on the Rights of the Child⁴ and the European Court of Human Rights⁵. This change in

¹ Projet de loi n°6992 portant modification 1) de la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration; 2) de la loi modifiée du 28 mai 2009 concernant le Centre de rétention; 3) de la loi du 2 septembre 2011 réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales

² Loi du 8 mars 2017 portant modification 1) de la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration; 2) de la loi modifiée du 28 mai 2009 concernant le Centre de rétention; 3) de la loi du 2 septembre 2011 réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales.

³ Avis du Lëtzebuurger Flüchtlingsrot (Collectif Réfugiés) sur le projet de loi n° 6992, doc. parl. 6992/09, <http://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDccpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=6992>.

⁴ A.B. and Others v. France (no. 11593/12), R.M. and M.M. v. France (no. 33201/11), A.M. and Others v. France (no. 24587/12), R.K. v. France (no. 68264/14) and R.C. v. France (no. 76491/14), 12 July 2016

⁵ Article 37 b) of the Convention on the Rights of the Child.

legislation has also been criticized by the Commissioner for Human Rights from the Council of Europe.⁶

In its opinions on asylum and migration legislation,⁷ the Luxembourg Human Rights Commission has repeatedly exhorted the government to exclude the possibility to detain minors in a retention centre from the Law, underlining that the placing of minors in immigration detention is contrary to the superior interest of a child and constitutes a violation of his/her rights. In support of its analysis, the CCDH made a reference to the report from the Parliamentary Assembly of the Council of Europe « The alternatives to immigration detention of children » from 15 September 2014 as well as its Resolution 1707 (2010) « Detention of asylum seekers and irregular migrants in Europe ».⁸

4. Migrants in detention and access to information (Para 185 et sq)

Effective and efficient provision of information to migrants is decisive for migrants' effective access to procedures, international protection, remedies but also for their future integration. In 2017, National Human Rights Institutions (NHRIs) from thirteen Council of Europe Member States (Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Latvia, Lithuania, Netherlands, Slovenia and Ukraine), including reception, transit, and destination countries have joined forces to monitor and improve the Migrants' access to information on their rights in detention and reception centres in Europe. Data collected show that there is still some way to go before the reality of migrants' access to information on their rights matches the theory under the European legal framework. Based on this data collection, ENNHRI draws the attention of the Drafting Group on Human Rights and Migration on the following issues that have been found the main obstacles to an effective understanding of the information provided: professional interpretation, the diversification of the communication channels with migrants, the accessibility, quality and language of supporting documents and investment in detention and reception staff training.

⁶ <http://www.coe.int/en/web/commissioner/-/luxembourg-should-not-etend-the-period-of-detention-of-migrant-children-but-work-to-eliminate-the-practice>.

⁷ - Avis 04/2015 de la CCDH sur le projet de loi 6779: 1.relative à la protection internationale et à la protection temporaire; 2. modifiant- la loi modifiée du 10 août 1991 sur la profession d'avocat,- la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration,- la loi du 28 mai 2009 concernant le Centre de rétention ; 3. abrogeant la loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection; <https://ccdh.public.lu/fr/avis/2015/avis-PL-6779.pdf>

- Avis 02/2011 de la CCDH sur le projet de loi 6218 modifiant la loi modifiée du 29 août 2008 sur la circulation des personnes et l'immigration et la loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection; https://ccdh.public.lu/fr/avis/2011/avis_PL6218_final.pdf

⁸ Avis 04/2015 de la CCDH sur le projet de loi 6779.

3. Additional benefit from Alternatives to detention (para 228 et sq)

Detaining migrants creates perceptions of migrants being criminal. Supporting a more systematic implementation of alternatives to detention at the national level could only be beneficial to that regard. NHRIs across Europe can only confirm the existing academic the academic literature and EU research⁹ on criminalisation of migration in Europe and documenting the fact that a deteriorated perception of migrants also negatively impact on their integration process, their opportunities to contribute actively to their host community, increases discrimination and sometimes even affects the perception of migrants as individuals entitled with human rights. NHRIs work to raise public awareness on human rights is crucial for promoting a culture of rights where hate speech is not accepted. Indeed, NHRIs inform the public, conduct surveys, give opinions and recommendations, and suggest appropriate legal and strategic solutions to government. All of these are within NHRI's mandate, and working with the media is explicitly set out in the UN Paris Principles (against which all NHRIs are accredited).

In a recent statement, Coming together to Promote and Protect Human Rights (Geneva, March 2017)¹⁰, ENNHRI called for “European Solidarity in the field of Migration” and urged state authorities, among others, “to take all necessary measures in order to prevent hate speech and discriminatory practices and start to develop and implement long-term integration measures such as educational strategies, labour market policies and social integration measures.” Supporting a more systematic implementation of alternatives to detention at the national level could only be beneficial to that regard and ENNHRI suggests that this could be added by the Drafting Group on Human Rights and Migration to the current list of additional benefits gained by alternatives to detention.

6. Gender mainstreaming (Para 201 et sq)

In 2007 the UNHCR ‘Age, Gender and Diversity Mainstreaming’ led by the United Nations High Commissioner for Refugees (UNHCR) made clear that there is a need to improve the living conditions of women and girls in the reception centres for asylum seekers and certain other groups¹¹. This is also true for any type of collective facilities

⁹ See inter alia : A. Bloomfield, E. Tsourdi and J. Pétrin, Alternatives to Immigration and Asylum Detention in the EU, 2015, p. 19, European Agency of Fundamental Rights (FRA) Report - Criminalisation of migrants in an irregular situation and of persons engaging with them, March 2014, available at <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>. See also J. Parkin, The Criminalisation of Migration in Europe A state-of-the-art of the Academic Literature and Research, October 2013 available on <https://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf>. and M. Provera The Criminalisation of Irregular Migration in the European Union, February 2015 available on <https://www.ceps.eu/system/files/Criminalisation%20of%20Irregular%20Migration.pdf>

¹⁰ Statement available at http://ennhri.org/IMG/pdf/ennhri_general_assembly_statement_2017.03.08.pdf

¹¹ See Age, Gender and Diversity Mainstreaming, Forward Plan 2011-2016 available on <http://www.unhcr.org/4e7762f19.pdf> . See also the “Opinion on gender mainstreaming in refugees’ reception and integration measures” of the Advisory Committee on Equal Opportunities for Women and

from open and semi-open to detention facilities. ENNHRI respectfully invites the Drafting Group on Human Rights and Migration to consider including gender mainstreaming considerations in the Draft analysis assessment of the advantages and challenges and human rights implications of the different types of alternatives to detention.

7. Impact of transfers (Para 201 et sq)

The administrative practice to transfer individuals from one detention facility to another negatively impact on several human rights as the right to defence, the continuity of health care (in particular psychological follow up) or the right to education for children. Analogically, transfers between residential types of alternatives to detention, or from one type of alternative to another may impact negatively on the same human rights. ENNHRI respectfully suggests the Drafting Group on Human Rights and Migration to consider including gender the possible impacts of transfers from one type of residential alternative to detention to another in the Draft analysis assessment of the advantages and challenges and human rights implications of the different types of alternatives to detention.

8. Role of civil society (Para 266)

The Drafting Group on Human Rights and Migration has established that Council of Europe State parties might need additional support “on how to productively involve civil society organisations in the exploration and development of effective alternatives to immigration detention, especially as civil society organisations have proven to be a key partner in meeting the various objectives of effectiveness”.

ENNHRI respectfully suggests that the Draft analysis should include National Human Rights Institutions among the key partners of State authorities for working on possible alternatives to detention. Indeed each NHRI carries out human rights monitoring, and most have the power to enter places of detention without prior announcement or authorisation, as well as access documents within their investigatory work. This is particularly the case for those NHRIs with the National Preventative Mandate under the Optional Protocol for the Convention against Torture, which specifically refers to the UN Paris Principles. By contrast, civil society organisations cannot enter or monitor state detention or reception without permission, and do not have an official state mandate to report and advise the government, parliament and other state bodies.

The requirement for pluralism also ensures that NHRIs have a greater understanding of the needs of a variety of societal groups that might be held in detention. In order to enhance this understanding, NHRIs also cooperate with civil society organisations and inter-disciplinary experts in their monitoring activities (for example health professionals, psychologists, interpreters). This combination of an official mandate, privileged access,

independence, pluralism and cooperation results in the strong legitimacy of NHRIs at policy level, as well as for individual, which makes NHRIs powerful actors for the protection and promotion of human rights.

9. Possible next steps at Council of Europe level

ENNHRI welcomes in particular the possible next steps that are put forward by the Drafting Group on Human rights and Migration, and shares the views that Council of Europe could usefully support member States in developing and implementing a wider range of alternatives to detention models based upon the essential elements of effective alternatives to immigration detention. Guidelines on developing effective alternatives to immigration detention accompanied by an instructive guide on essential elements to good practice would undeniably be of use for all state actors including independent monitors of detention places as National Human Rights Institutions and National Preventative Mechanisms.

The European Network of National Human Rights Institutions (ENNHRI) brings together 41 NHRIs across wider Europe. ENNHRI's goal is to enhance the promotion and protection of human rights across the Europe region. It carries this out through assisting in the establishment and accreditation of NHRIs; coordinating exchange of information and best practice between members; facilitating capacity building and training; engaging with regional mechanisms; and intervening on legal and policy developments at a European level.

ENNHRI is one of four regional networks of NHRIs, which together make up the Global Alliance of NHRIs. ENNHRI has been constituted as an international not-for-profit association with a Permanent Secretariat and registered office in Brussels.