

ENNHRI Working Group on Asylum and Migration, comprised of 23 NHRIs from across the Council of Europe Member States, reiterates its submission of June 2017 to the Council of Europe's Committee on Legal Co-operation (Annex), in which it highlighted its **concerns that the 'Draft European Rules on the Conditions for the Administrative Detention of Migrants' (Draft Rules) lack compatibility with human rights norms and standards**, including:

1. that administrative detention of migrants should always be compliant with the standards laid down in Article 5 ECHR and the relevant case-law of the European Court of Human Rights (ECtHR), so as to ensure, amongst others, that detention is always a measure of last resort and that deprivation of liberty can only be carried out in accordance with a procedure prescribed by law;
2. that vulnerable persons, including children, should not be placed in detention, and that vulnerability should be assessed before any detention decision, with a view to assess alternatives to detention; In this context, we would like to stress the importance of the new Joint General Comment of the UN Committee on the Rights of Children (CRC) and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), ([CRC/C/GC/23, 2017, para 5](#)) which states that "children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice."
3. that the scope of application of the Draft Rules should cover all persons who are deprived of their liberty for reason of their migration status, regardless of whether the facility in which they are detained is designed for this purpose.

The ENNHRI Working Group on Asylum and Migration remains concerned about the CDCJ Draft Rules and **would welcome information** (from CDCJ and CJ-DAM) on the recent developments with relation to the draft and would appreciate **the opportunity to comment** on a revised version of the Draft Rules, in order to achieve that the Draft Rules will be in compliance with established human rights norms and standards.

Submission to the Council of Europe consultation on the Draft European Rules on the Conditions for the Administrative Detention of Migrants

ENNHRI calls for prioritisation of alternatives to detention and full implementation of human rights in the context of migration

ENNHRI welcomes the opportunity to comment on the Draft European Rules on the Conditions for the Administrative Detention of Migrants (the Draft Rules), and so to contribute to the Council of Europe's endeavor of codifying existing international standards relating to detention in the context of migration.

ENNHRI has previously supported¹ the European National Preventive Mechanisms (NPMs) in their call for codifying "a set of *Immigration Detention Rules*"² that would help them fulfill their mandates as detention monitoring bodies, in order to prevent torture and ill treatment.³ This codification should include fully the important guidelines provided by international and regional human rights bodies on detention of migrants, especially when it comes to persons in situations of vulnerability. However, ENNHRI is concerned that the current Draft Rules lack compatibility with human rights norms and standards.

First, depriving migrants – whether or not in need of international protection, undocumented, asylum seekers, stateless persons – of their liberty by detaining them based on their status as migrants, is not in line with human rights standards. Administrative detention of migrants, for the purpose of border control, pending the determination of their refugee status or their removal from the country as foreseen by Article 5 1F of the European Convention of Human Rights, should always be a measure of last resort⁴, should be avoided by any means and be carried out in full compliance with States' international obligations⁵. Clear and adequate rules should guarantee the respect of the migrants' right to liberty and security so as to prevent inhuman or degrading treatment. Alternatives to detention in the context of migration should be implemented and states should first explore alternative measures prior to resorting to detention.

Secondly, ENNHRI voices strong concerns regarding the Draft Rules' approach to people in situations of vulnerability. Vulnerable persons should never be placed in detention⁶, and vulnerability should be assessed before any detention decision, leaving

¹ [ENNHRI Statement on immigration detention](#), 24 September 2014

² [The Need for Council Of Europe Rules on immigration detention: A Declaration by European National Preventive Mechanisms against torture](#), Strasbourg 2013.

³ 24 out of the 32 NPMs in the European region are ENNHRI members.

⁴ See ECtHR, *M.S.S. vs Belgium and Greece*, (app. N° 30696/09), Grand Chamber Judgement of 21 January 2011, para. 216. Detention of migrants should always be a proportionate measure according to the ECtHR in *Nolan and K. vs Russia*, 12 February 2009.

⁵ ECtHR, *M.S.S. vs Belgium and Greece*, (app. N° 30696/09), Grand Chamber Judgement of 21 January 2011, para. 216.

⁶ [Detention of asylum seekers and irregular migrants in Europe](#), CoE Parliamentary Assembly resolution 1707 (2010) See also CPT [Factsheet detention of migrants](#) May 2017.

open the option of alternatives to detention. In particular, minors should not be subject to punitive measures because of their own or their parents' migrant status. This would constitute a violation of their human rights, contravening the principle of the best interests of the child.⁷ Pregnant and nursing women should also never be placed in detention.⁸ ENNHRI also recommends the Draft Rules be adapted to align them with the UN CRPD standards⁹. It is both the responsibility and obligation of states to approach law- and policy-making with regard to migration detention under the guidance of human rights norms and standards.

Thirdly, the scope of application of the Draft Rules, currently limited to the “closed detention centres as places where migrants are deprived of their liberty and specifically designed for this purpose”, raises concerns. People deprived of their liberty are, in any circumstance, at risk of cruel and inhuman treatment. Limiting the scope of application of the Draft Rules, leads to an enhanced risk of ill-treatment for detained migrants. Furthermore, the definition of detention should be in line with human rights standards as anchored in the case law of the European Court of Human Rights.

Finally, we are concerned that aspects of the European Prison Rules could be transferred to the Draft Rules, given that criminal detention is an entirely different context to the administrative detention of migrants (who have not be through any criminal procedures).

In order to help address these concerns, ENNHRI stands ready to provide input and dialogue to CDCJ's work on the Draft Rules, in order to achieve a comprehensive approach on human rights standards of detention of migrants. Further, we encourage ongoing dialogue between CDDH-MIG and CDCJ-DAM.

About ENNHRI

ENNHRI is made up of 41 National Human Rights Institutions (NHRIs) from across wider Europe. It works to enhance the promotion and protection of human rights across wider Europe. NHRIs are independent bodies with a broad state mandate to promote and protect human rights. They are a key element of a strong and effective national, regional and global human rights framework. NHRIs are accredited by reference to international standards, the UN Paris Principles, to ensure their independence, pluralism, impartiality, and accountability. ENNHRI supports NHRIs throughout Europe, including on establishment and accreditation, exchange of good practices, capacity building, and engagement with regional human rights mechanisms.

⁷ Committee on the Rights of the Child, [Report and Recommendations of the General Discussion Day 2012 on the Rights of all children affected by international migration](#) (CRC DGD (2012) in line with Committee on the Rights of the Child General Comment 6 CRC/GC/2005/6; UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, in the following statement of 5 March 2015. See also [18/12/2016 joint statement of UN Special Rapporteur](#) on the human rights of migrants, Chair of the Committee on the Protection of the Rights of All Migrant Workers, Chair of the Committee on the Rights of the Child, and the Chair of the Working Group on Arbitrary Detention

⁸ CPT Factsheet detention of migrants May 2017

⁹ UN CRPD, Article 14 and 15.