

**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), 8 September 2017

1. Introduction

ENNHRI is a network of 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 full implementation of the international human rights instruments. NHRIs can contribute to improving the effective 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. Furthermore, for several years, ENNHRI's Asylum and Migration Working Group has focused its work on migrant detention, based on the principle that alternatives to detention should take precedence over any form of detention.

This includes a statement in 2014, which underlined that detention of migrants should be a measure of last resort, best avoided in the case of children, and the need to always comply with international human rights standards. Moreover, in its latest statement in March 2017, ENNHRI highlighted 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.

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.

The importance of NHRI monitoring of migrant detention has been recognised in the Belgrade Declaration on the Protection and Promotion of the Rights of Refugees and Migrants (November 2015) and in a statement by the Global Alliance of National Human Rights Institutions (GANHRI) on the occasion of the United Nations Summit for Refugees and Migrants in New York (September 2016).

ENNHRI has fulfilled its observer status by attending and participating in the meetings of the Drafting Group on Migration and Human Rights (CDDH-MIG) since September 2016. ENNHRI has also collated good practices from across Europe on effective alternatives to migrant detention and the results of this consultation have 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 some of its member NHRIs, and a few suggestions, as follows.

2. Update on national developments in Luxembourg

Following the CDDH-MIG request for information on existing alternatives to detention, the NHRI from Luxembourg (Commission Consultative des Droits de l'Homme du Grand Duché du Luxembourg) contributed to ENNHRI's input.

In a new law of March 2017, the maximum period of detention of persons or families accompanied by minors is now extended from the previous 72 hours to 7 days¹. This new legislation has been criticized both nationally and internationally. In its opinion² on the draft bill³ n°6992, the Collective of Refugee Associations in Luxembourg (le Collectif Réfugiés (LFR)) underlined that this extension of the detention period does not respect

¹ 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.

² 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>.

³ 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

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. While detention is a traumatic experience in general, children are particularly vulnerable to the negative effects of detention and can be severely traumatised. For this reason children should never be put in detention. This change in 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 urged the government to exclude from the Law the possibility to detain minors in a retention centre, 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

3. Migrants access to information on their rights (Para 185 et seq.)

Effective and efficient provision of information to migrants is decisive for migrants’ effective access to procedures, international protection and remedies, but also for their social inclusion. In 2017, NHRIs from twelve Council of Europe Member States : Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Latvia, Lithuania, Netherlands, Slovenia and Ukraine (and Kosovo), including arrival, transit and destination countries, have joined forces to monitor and improve 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

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.

⁶ <http://www.coe.int/en/web/commissioner/-/luxembourg-should-not-extend-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.

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, with a view on detection of migrants in situations of vulnerability and their adequate information.

4. Gender mainstreaming (Para 201 et seq.)

In 2007, the UNHCR 'Age, Gender and Diversity Mainstreaming' reports 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 groups⁹. This is also true for any type of collective facilities, from open and semi-open to detention facilities.

ENNHRI respectfully invites the Drafting Group on Human Rights and Migration to consider including gender mainstreaming in the Draft's assessment of the advantages, challenges and human rights implications of the different types of alternatives to detention.

5. Impact of transfers (Para 201 et seq.)

The administrative practice of transferring individuals from one detention facility to another impacts negatively on several human rights, such as the right to effective access to legal representation, the continuity of health care (in particular psychological follow up care) or the right to education for children. Apart from their negative impact on human rights, transfers have also a negative impact on the mental health condition of the migrants. Performing medical examination before transfer, as it has been recommended by National Preventative Mechanisms, could be put forward as a good practice. 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 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.

6. Additional benefit from alternatives to detention (para 228 et seq.)

Detaining migrants creates a perception of migrants being criminals. Supporting a more systematic implementation of alternatives to detention at the national level would lend itself to preventing such perceptions. Migrants are right holders and should be recognized as such, especially since they may experience particular situations of

⁹ 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 Men (2/12/2016- available at <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=30762&no=2>

vulnerability, which only strengthen the reasons why to apply alternatives to detention on national level.

Detention also should not be punitive by nature. When migrants are deprived of liberty, conditions reflecting that they have committed no criminal offence should be ensured. NHRIs across Europe can only confirm the existing academic literature and EU research¹⁰ on the criminalisation of migration in Europe and document the fact that a deteriorated perception of migrants has a negative impact on their integration process, on their opportunities to contribute actively to their host community, increases discrimination and sometimes even negatively 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 NHRIs' mandate, and working with the media is explicitly set out in the UN Paris Principles.

In a recent statement, "Coming together to Promote and Protect Human Rights" (Geneva, March 2017)¹¹, 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.

7. 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

¹⁰ 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>

¹¹ Statement available at http://ennhri.org/IMG/pdf/ennhri_general_assembly_statement_2017.03.08.pdf

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. NHRIs are experts in the analysis of human rights implications of both detention and alternatives to detention. Indeed, each NHRI carries out human rights monitoring, and many have the power to enter places of detention without prior announcement or authorisation, as well as to 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.

8. 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 the Council of Europe could support member States in developing and implementing a wider range of alternatives to detention models, based upon the essential elements of effective alternatives to migration detention. Guidelines on developing effective alternatives to migration 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, such as National Human Rights Institutions and National Preventative Mechanisms.