

# European Network of National Human Rights Institutions (ENNHRI)

## Contribution to the EU Public Consultation: Debate on the future of Home Affairs policies: An open and safe Europe – what next?

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January 2014

The European Network of National Human Rights Institutions (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. NHRIs are accredited by reference to the UN Paris Principles to ensure their independence, plurality, impartiality and effectiveness. ENNHRI recently established a Permanent Secretariat in Brussels.

ENNHRI's members operate as independent actors between the state and civil society. They have in-depth expertise of international and European human rights law and their mission is to monitor compliance with human rights obligations on the national level. In the area of asylum and migration, they monitor the national implementation of the EU asylum package in accordance with Member States' human rights obligations. They give research-based policy advice to integrate human rights into domestic, European and international policies. In a number of Member States, they are also specifically mandated to monitor independently places of immigration detention as well as forced returns, advice individual cases of alleged violations of fundamental rights of migrants and refugees, and intervene in respective court cases.

Acknowledging that safeguarding the human rights of refugees and migrants is one of the most urgent human rights challenges across Europe today, ENNHRI has established a permanent *Working Group on Asylum and Migration* in 2007. Additionally ENNHRI's *Legal Working Group* has been involved for several years in strengthening European fundamental and human rights instruments and procedures, namely the reform of the European Court of Human Rights, EU accession to the European Convention on Human Rights and the implementation of the EU Charter of fundamental rights.

The present contribution therefore presents ENNHRI's recommendations for the future EU Justice and Home Affairs strategic guidelines in the field of (I.) asylum and migration and (II.) fundamental rights.

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## I. Asylum and Migration

### **Both consolidation and new mind-set needed**

Council members expressed the opinion that the focus of the post-2014 guidelines should be on consolidation of progress and proper implementation of existing initiatives and legal acts. ENNHRI acknowledges that some important progress has been made on the legislative side to develop a high level of protection for refugees and further human rights standards for refugees and migrants in Europe. The full implementation of these standards in domestic law and practice remains a huge challenge. ENNHRI therefore agrees that a priority in the new strategic guidelines should be to monitor and evaluate implementation, especially on those parts of the CEAS relating to the human rights of refugees and migrants by the Member States. The role that NHRIs play in this regard should be explicitly acknowledged.

This being said, ENNHRI is of the opinion that the EU cannot limit its action in the field of asylum and migration to consolidation and implementation. Even if proper implementation of the existing CEAS by all member states could be achieved in the phase covered by the future strategic guidelines, EU institutions must adopt a new mind-set, especially with regard to legal and safe entry channels for refugees and migrants to the EU instead of the current concentration on border control and externalization.

Thus, ENNHRI focusses its contribution on several aspects both covering issues of proper implementation and new challenges for the European approach to asylum and migration.

### **Full implementation and evaluation of the second phase of the Common European Asylum system**

ENNHRI acknowledges that some important progress has been made on the legislative side to develop a high level of protection for refugees and strong human rights standards for refugees and migrants in Europe. Most certainly, in their monitoring role on the domestic level, ENNHRI members witness an implementation gap between those legal obligations and the reality in member states' legislation and practice, in some cases amounting to dysfunctional asylum systems that do not only leave refugees without protection, but in itself result in additional severe human rights violations. ENNHRI therefore agrees that a priority in the new strategic guidelines should be to monitor and evaluate implementation, especially on those parts of the CEAS relating to the human rights of refugees and migrants by the Member States and the use of all appropriate means, including infringement procedures, when states do not comply with their obligations.

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## Recommendations:

- Monitor full implementation of CEAS and use all appropriate means, including infringement procedures, when states do not comply with their obligations.
- Externally evaluate the human rights impact of the second phase of CEAS with a focus on human rights sensitive areas such as detention, access to justice, children's rights, safe countries regulation and initiate amendments in EU law if necessary.
- Assess the need to adopt a directive dedicated to the status and rights of stateless persons in Europe by an in-depth analysis of the actual situation of this population on the territory of the European Union.

## **Immigration detention**

ENNHRI is concerned that in many European countries, refugees and irregular migrants are detained to a large scale and for long periods of time, and without due respect to the special vulnerability and status of the persons concerned. In some countries, immigration detention has even become the standard procedure after arrival. ENNHRI emphasizes that deprivation of liberty constitutes a serious human rights intrusion and must be subject to a strict legality and proportionality test in every single case. This of course includes taking into due account the rights of children enshrined in CRC. Alternatives to detention are being insufficiently employed by Member States. It is worrisome that the broad range of grounds for detention laid down in the recast of the reception conditions directive may lead to further increase in the use of detention in practice.

Furthermore, many European NHRIs have been entrusted with independent monitoring functions into immigration detention facilities in their respective countries. In executing this mandate, they repeatedly witness detention conditions and regimes for refugees and migrants that do not live up to human rights standards enshrined in binding European and international human rights treaties (such as the ECHR, ICCPR, UNCAT and CRC). They also notice the absence of a consolidated set of specific safeguards and protection for immigration detainees, resulting in a lack of guidance both for detention authorities and monitoring bodies.

## Recommendations

- Monitor and evaluate of the practice of immigration detention in Member States and, when appropriate, use of infringement procedures and legal amendments to guarantee that the human right to liberty, is fully respected in all EU Member States.
- Completely refrain from holding children in immigration detention.

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- Closely evaluate the obligations of Member States to employ less coercive alternatives to detention and appropriate measures to ensure that detention is only used after a strict proportionality test in all Member States.
- Closely monitor and evaluate immigration detention conditions to guarantee that European and International human rights standards are respected in all Member States.
- Ensure independent monitoring during forced returns in all Member States and the priority given to voluntary return solutions.

## **Dublin System**

Recent amendments have been made to the Dublin regulation in the course of the asylum package, in reaction to jurisprudence both by the European Court of Human Rights and the European Court of Justice. Despite these, ENNHRI is concerned that the Dublin system can lead to exposing people in need of protection to human rights violations as long as access to asylum proceedings, recognition rates and reception conditions differ as significantly as they do in the present reality in Member States. Even if these differences could be overcome over time and full implementation of the CEAS and full accordance with Member States' human rights obligations would be reached, ENNHRI is worried that the Dublin system will fail to provide a system of solidarity within the EU.

## **Recommendations**

- Rethink the Dublin system in the light of fundamental rights and with a view to realize solidarity between the EU member states ("fair responsibility sharing").
- Provide member states in distress with the necessary support to uphold human rights standards.
- Apply consistently and systematically the right to choose another country of determination of the refugee status when the asylum system in country of entry in the EU does not comply with the Geneva Convention and includes risks of degrading and inhuman treatment as enshrined in article 4 of the Charter of fundamental rights.

## **Border control and externalization**

The strong impetus put on border control, prevention of illegal migration and externalization of border control through cooperation with third countries has raised serious human rights concerns. The European Court of Human Rights has established that push-backs on the high seas and cooperation agreements with third states that do not respect the Geneva Convention on refugees contravene the Convention and its fourth protocol. Other critics include the UN special rapporteur on

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the human rights of migrants and the Council of Europe's Human Rights Commissioner. The European Ombudsman has made important observations in its Special Report on the own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, including the need to set up a complaints mechanism.

Contrary to assertions after the tragedy off the shores of Lampedusa in 2013, no effective sea rescue operations system has been developed yet. The results of the Task Force Mediterranean presented in December 2013 again emphasize border surveillance and the fight against illegal migration.

ENNHRI representing institutions from across wider Europe, NHRIs in EU neighboring states report distressing refugee situations in their countries where people in need of protection are denied their most basic needs partly due to EU border and neighborhood policies.

## Recommendations

- Ensure that migrants are not pushed back or pulled back at borders, but have full access to asylum procedures, in accordance with the jurisdiction of the European Court of Human Rights.
- Establish an effective sea rescue operations system including a mechanism to determine who is responsible for rescuing boats in distress.
- Set up of independent monitoring and complaints mechanism on alleged fundamental right infringements arising from Frontex operations.
- Support the work of the Frontex Consultative Forum and the Fundamental Rights Officer.
- Carry out ex-ante human rights impact assessments of EU- third country agreements on readmission, mobility partnerships and border control cooperation and ensure strong human rights safeguards in such agreements and policies.
- Make sure that development aid is not conditioned upon the conclusion of agreements with developing country on migration control.

## Legal and safe entry channels

The tragedies in the Mediterranean in 2013, when hundreds of people died off the coasts of Italy and Malta during their attempts to reach safety and protection in Europe, sadly illustrated again the urgent need to develop specific measures for legal and safe entry channels to the EU. The results of the Task Force Mediterranean fell short of a comprehensive approach to this challenge, partly due to the Task Force's limited focus on short-term solutions.

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## Recommendations

- Put the development of a new approach on legal and safe entry channels at the center of the next JHA strategy.
- Create protected entry proceedings for refugees without prejudice to the rights of access to asylum procedures in the EU.
- Increase substantially resettlement of refugees within the EU.
- Develop a comprehensive and human rights based approach on legal migration to the EU, including a revision of EU Members States' and the EU Commission's position on the UN Migrant Workers Convention, one of the core UN human rights treaties.

## **Strengthen the human rights of non-removable persons**

ENNHRI notes, with concern, that there is no comprehensive regulation regarding non-removable persons in Europe. The Return Directive treats the issue of non-removability merely as a temporary phenomenon, while experience shows that this is not necessarily the case. Indeed, our members' work shows that many irremovable migrants remain in a legal limbo.

## Recommendations

- The EU should encourage Member states to adopt measures to avoid or put an end to the legal uncertainty resulting from the lack of status of non-removable persons.
- The EU should provide a strong position on the fundamental rights of non-removable persons and establish guidelines for Member States to assess the non-removability of persons, based on the Charter of Fundamental Rights and other international standards. In particular, we refer to Article 2 ECHR (the right to life), Article 3 ECHR (the protection from torture and inhumane treatment), Article 8 ECHR (the right to respect for private and family life), article 3 CRC (best interests of the child).
- This legal framework should include the prohibition of detention of non-removable persons and provide them with the possibility to obtain legal residency.

## **II. Fundamental Rights**

### **EU Access to ECHR**

In accordance with Article 6 of the Treaty on European Union (TEU), the EU has made a binding commitment to acceding to the European Convention on Human Rights. This development provides a welcome opportunity for much greater clarity

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and coherence between the human rights obligations of the individual Member States, and the obligations that arise from their membership of the EU, and indeed the human rights obligations of the EU itself when operating internationally as a federal body. While this development is welcomed, ENNHRI has also expressed certain concerns during the ongoing accession negotiations in relation to certain practical aspects of the proposed accession agreement, which have the potential to impact negatively on individual applicants to the European Court of Human Rights (ECtHR) and in turn hamper the effective operation of the Court system.

## Recommendations

ENNHRI would therefore submit that the future EU Justice and Home Affairs strategic guidelines should take account of this development and that practical measures should be considered to deal with the following matters:

- Clarity regarding when the EU is likely to seek to be joined as a co-respondent pursuant to Article 36 ECHR in proceedings before the ECtHR.
- Where a matter is referred to the Court of Justice of the European Union (CJEU) pursuant to Article 3(6) Draft Accession Agreement, the practical measures that need to be put in place to ensure that the proceedings before the CJEU are expedited, not to add to the pre-existing severe delays that already arise before the ECtHR, noting also that the EU will be bound by Article 6 ECHR in this regard. ENNHRI would also highlight in this regard that a system of legal aid may be necessary to ensure that individual applicants can effectively participate in the proceedings before the CJEU.
- Acceptance of third-party submissions to the CJEU on an extended basis, including the 'prior review procedure' emanating from the ECtHR.
- Ensuring domestic remedies within the EU for the purposes of Article 13 of the European Convention to avoid needless applications being taken to Strasbourg as articulated in the Interlaken, Izmir and Brighton Ministerial Declarations on Reform of the European Court.

On the condition that these elements are fully taken into account, the ratification process should come to a conclusion as rapidly as possible.

## **Domestic Application of EU Charter of Fundamental Rights**

NHRIs all have competencies in relation to protecting and promoting human rights within their respective State jurisdictions, including in relation to those fundamental rights established under the EU Charter of Fundamental Rights. However, ENNHRI is concerned that there is as yet a lack of clarity at a number of levels regarding how the Charter applies at a national level and how the individual rights under the Charter may be vindicated. While judgments of the CJEU provide some clarity in this regard,

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this is a limited form of remedy, not open to most persons residing within the Members States of the EU.

The EU itself must ensure that the rights protected under the CFR are complied with by individual Member States when transposing EU Directives, or applying EU law. It is not sufficient to assume that each Directive already contains the guarantees necessary to ensure compliance with the CFR, particularly those Directives that pre-date the coming into force of the Charter. This matter takes on additional significance in light of the imminent accession of the EU to the ECHR, particularly in those areas where there is clear similarities or overlap between the rights protected under those respective instruments.

## Recommendations

- ENNHRI considers that it would be appropriate in the context of the next JHA strategy to give very detailed consideration to developing pro-active steps to implementation of the CFR at domestic level within Members States.
- In particular the EU should develop a mechanism, such as a State report, which addresses how the CFR was complied with in the transposition of a particular Directive, or in implementing EU law more generally.
- Further consideration should be given in the context of the next JHA strategy to what structural role NHRIs can play in ensuring the protection and enforcement of the fundamental rights enshrined in the CFR, and increasing the level of engagement between the relevant EU institutions, individual NHRIs, and ENNHRI as their coordinating body.

## **III. Conclusion**

ENNHRI will follow with interest the report and follow-up action relating to the consultation on *Debate on the future of Home Affairs policies: An open and safe Europe – what next?* We remain available to participate in future dialogue on this important subject for the safeguarding of fundamental rights in the European Union.