How to make human rights of migrants a reality for all

Policy paper prepared by the Task Force Migration of the Conference of INGOs

June 2020

This document is based on the legal study conducted by the Expert Council on NGO Law[1] of the Conference of INGOs and the contributions received from several INGOs and NGOs specialized in the field of migration:

- International Detention Coalition
- Fédération internationale de l'Action des chrétiens pour l'abolition de la torture
- Caritas Europa
- PICUM
- Hungarian Helsinki Committee
- European Young Bar Association
- University Women of Europe
- Doctors of the world (Médecins du Monde)
- Standing Committee of European Doctors

Rational

In general perspective the contributions underline the necessity for the Council of Europe to strengthening existing monitoring mechanism, establishing guidelines and sharing best practices, publishing comparative reports, engaging state parties in meaningful dialogues, as well as bringing the most important findings to the attention of the Committee of Ministers and the general public. In addition, the Council of Europe should reinforce its influence on the EU policy on migration as well the national policy of the member States, so that they comply with international human rights standards.

This paper is not intended to be exhaustive. The aim of this document is to highlight the urgent issues which need to be addressed by the policymakers at all levels, the human rights professionals, the independent human rights institutions and civil society organisations. The rational is followed by a set of recommendations for action, addressed in the first place to the policy makers and decision-making bodies.

I. To consolidate national policies on the base of international human rights standards

Currently there are two opposite trends in Europe:

1) the first one aim to adopt a 'transit – state status' by facilitating migrants' (especially refugees') transport to other (mainly northern) European states. To achieve it, the

[1] USING CRIMINAL LAW TO RESTRICT THE WORK OF NGOs SUPPORTING REFUGEES AND OTHER MIGRANTS IN COUNCIL OF EUROPE MEMBER STATES Thematic Study prepared by Dr Carla Ferstman on behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe

authorities focus on accelerating applications' process and refugee passport admissions. Pressure is put on European authorities to renovate the 'Dublin' system. This policy was particularly implemented during the first period of the refugee crisis (2015 – 2018).

2) The second trend aims to adopt a 'guard – state status', which currently seems increase border control, stricter refugee status criteria, faster returns of rejected applicants and even pushbacks. This approach leads to possible limitations of human rights of refugees (procedural and substantial), low quality of administrative procedures and frequent violent incidents in borders as the main state goal is impeding the entry of new third-country nationals.

In this context, it seems crucial to consolidate these opposite approaches at the supranational level by making a good assessment of risks and opportunities, on the relevant Council of Europe standards.

- ✓ ECtHR case law
- ✓ Revised European Social Charter provisions, as well the decision of the European Committee of Social Rights on the Collective Complains regarding migrants and refugees.

This assessment of the situation in Europe and at the national level should involve evidence-based approaches, containing not only quantitative data, but also detailed information from NGOs acting in the field and from migrants themselves directly. Special focusing is needed on the financial, political and social challenges setting the context in first reception countries.

II. NGOs and rights defenders providing assistance and support to migrants and refugees

The quality of the support proposed to refugees and migrants is directly linked to the availability of the services provides by the state and non-state actors, as well the enabling environment and resources provided to CSOs acting in the field of migration. The overcrowded facilities, inside and outside EU, substandard accommodation undermine the Article 3 of ECHR.

The criminalization of solidarity and of the service provided by asylum seekers by CSOs, NGOs and citizens remains one of the defining characteristics of government policies in many member States. "In many countries, criminalization of the work of NGOs is vague, and it is unclear the exact type of activities that are affected. This has led to uncertainty and arbitrary application of laws"[2].

The NGOs focusing on providing various useful services to refugees (legal, integration, education, professional training, social issues, family, entertainment, etc.), they are not adequately involved to accommodation and infrastructure programmes. Similarly, some Council of Europe member States seem unable and/or unwilling to provide the required services in the facilities where asylum seekers are kept, including education, social assistance, psychological and psycho-therapeutic care, legal counselling, etc. At the same time, services

[2] USING CRIMINAL LAW TO RESTRICT THE WORK OF NGOs SUPPORTING REFUGEES AND OTHER MIGRANTS IN COUNCIL OF EUROPE MEMBER STATES Thematic Study prepared by Dr Carla Ferstman on behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe

providers' access with proven track record is hindered or outright banned in the detention centers.

The oversight made by rights defenders, lawyers, NGOs are necessary especially when the asylum service doesn't implement protective legal provisions. The legal provisions and administrative practices frequently limit lawyers' and NGO (strategic litigation) ability to properly represent migrants and refugees' rights.

III. End the detention of migrants and refugees and make their inclusion a reality.

We observe the growing use of (arbitrary) detention with disregard the clear guarantees of Article 5 and the ECtHR's related jurisprudence. Prolonged detention of vulnerable people, especially children and unaccompanied children is slowly becoming the new norm, despite ample existing alternatives to detention.

In many instances a calculated attitude is observed by governments whereby reducing or completely removing integration support, as a tool to encourage irregular secondary movements causing further harm and tensions.

"Access to healthcare for different categories of refugees remains very varied across the EU. National legislation often differentiates between documented migrants in different stages of the asylum process, and undocumented migrants. While patients with an approved status as a refugee or asylum seeker has free access to primary care in most countries, access to secondary care is restricted in many Member States, apart from in emergency situations. Undocumented migrants face far greater barriers to accessing healthcare, both at primary and secondary level, leaving only emergency care services available. Only few countries provide free access to healthcare services"[3].

The "European Alternatives to Detention (ATD) Network" (EATDN) is a group of European NGOs which aims to reduce and end immigration detention by building evidence and momentum on engagement-based alternatives. The network brings together NGOs running case management-based alternative to detention pilot projects in six European countries (Bulgaria, Cyprus, Poland, the UK, Italy and Greece) with regional-level organisations (PICUM and the International Detention Coalition). Each adapted to their own national context, the pilot projects work with a range of migrant cohorts and use monitoring and evaluation to test the effectiveness of case management in increasing people's ability to engage and work towards case resolution.

IV. The target groups for which there is an urgent need for action

Protection of migrant and refugee women is a strategic priority of the Council of Europe's Gender Strategy 2018-202 aiming among others to ensure migrant women's access to justice, protection, health and education.

[3] 'CPME Statement on the Medical Treatment of Refugees1' (CPME 2019/071 FINAL)

It's essential that the Council of Europe focus not only on trafficking and humanitarian support, but also on safe reporting and access to services. The Istanbul Convention is obviously a relevant frame of reference in this regard, including Article 59 on residence permits.

"Physical and psychological trauma due to the extreme stress, migration experiences involving danger or crime, and social isolation have impacted upon women's physical, mental and sexual and reproductive health and rights. The circumstances of flight may also aggravate domestic violence in form of physical and emotional abuse. In addition, refugee women also are at a higher risk of poor pregnancy and perinatal outcomes. From a medical point of view, and given that ensuring sexual and reproductive health and rights is ensuring human rights and contributes to achieving the United Nations' Sustainable Development Goals (SDGs) e.g. SDG 3 on 'Good Health and Wellbeing', there is a need for targeted and coherent action."[4]
There is a strong legal basis for action regarding the promotion of decent work and housing for and combatting labour exploitation of migrant workers. This problem should be viewed from the human rights[5] and holistic perspective, including socio-economic rights, gender and migration contexts, not only be seen as a criminal justice and forced labour problem.

VI Vulnerable groups

The 2030 Development Agenda recognizes the importance of empowering people in vulnerable situations, including persons with disabilities, refugees and internally displaced persons.

United Nations High Commissioner for Refugees called upon States to protect and assist refugees with disabilities against all forms of discrimination and to provide adequate support in addressing all their needs. The member States should ensure a systematic identification and registration of refugees and other persons with disabilities, with particular attention to those who cannot communicate their own needs.

The Qualification Directive (2011/95/EU) defines the criteria for international protection, expressly mentions sexual orientation and gender identity as one of the possible reasons for persecution (Article 10). However, these criteria seem to be undermined by asylum officers who lack specific attention to persecution based on sexual orientation or gender identity.

V Address the new and urgent issues like climate refugees / environmental migrants

That climate change can lead to the violation of essential rights such as the right to life, food, water and shelter and that the absence of measures is itself recognized as a violation of human rights; especially for the most vulnerable people. These threats, sometimes combined with political or social crises, will inevitably lead to population movement and impact the life of future generations. The Council of Europe has already the necessary standards allowing to address this question in regard to climate and social justice (like Bern Convention and European Social Charter or some case law provided by ECtHR). There is a need the introduction of return

[4] 'CPME Statement on the Medical Treatment of Refugees1' (CPME 2019/071 FINAL)
[5] PICUM 2020. A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice. https://picum.org/wp-content/uploads/2020/03/A-Worker-is-a-Worker-full-doc.pdf

assistance in cases of circular migration, together with work with the diaspora to restore the land of origin.[6]

Recommendations:

- ✓ **Articulations between national policy and international human rights standards**

Protect access to asylum in Europe, including access to the territory, and fair and efficient asylum procedures, which include safeguards and protection against refoulement.

To develop the specific legal provisions aiming to protect migrants' and asylum seekers' rights during emergency periods, in close cooperation with field actors. It goes with respect for the principle of non-refoulement: this notably involves the strict supervision of so-called accelerated procedures to guarantee each asylum seeker an individual and in-depth examination of their request and the right to a suspensive appeal.

Monitor Covid-19 emergency measures affecting the right to seek and enjoy asylum in the Council of Europe States (proportionality, legality and necessity of measures, duration, whether the measures are lifted along with other emergency measures or if they become permanent).

- ✓ **Protection of rights defenders and NGOs providing assistance and support to migrants and refugees**

Remove "solidarity offence "from national legislation and ensure that NGOs can conduct their legitimate activities (including assistance and monitoring), helping migrants and refugees in different geographical contexts.

Ensure that these stakeholders have a decent condition to help and represent migrants and refugees, that the confidentiality of their work is respected, that they have access to reception camps.

To ensure that medical care provided in 'hotspots' has the same level of care to all patients, regardless of ethnicity, skin colour, political status or religion.

To involve the professionals (medical stuff, social workers, lawyers, etc.) in crisis management to respond to refugee patients' urgent health needs and maintain the ethical obligation to safeguard their rights to high quality healthcare.

Protect access to asylum in Europe, including access to the territory, and fair and efficient asylum procedures, which include safeguards and protection against refoulement.

[6] Conference of INGOs Recommendation on climate change, migration and human rights in view of the United Nations Conference on Climate Change (COP25)

Ensure the access to territory and procedure[7]. This issue is strongly connected to the collective expulsions, violence at borders[8] an extremely violent and dangerous practice which is becoming widespread in the member States.

Provide to civil society sector the access to facilities and to asylum seekers. State authorities are refusing civil society access to most facilities. As the capacities of the Council of Europe are limited in this regard, especially when taking into account the number of potential facilities in the member States, there is a necessity to encourage the regular reporting on the situation in these places.

- ✓ **The detention of migrants and refugees and ensure adequate conditions for reception**

To ensure adequate and up to standard reception conditions for asylum seekers and refugees

To ensure and monitor the respect of human rights in the context of the return procedures. This should include ensuring that, before a return decision is issued, all options for case resolution are assessed, including regularization, moving to a third country and returning to the country of origin. Return decisions should always be based on an in-depth assessment of individuals' circumstances, needs and vulnerabilities, and the impact that returns would have on their lives in terms of respect of fundamental rights, including private and family life. When children are involved, the best interest of the child should be the guiding principle. Voluntary departure should always be the preferred option, and the use of force always be rejected.

To end detention of children. The detention of minors is contrary to their inclusion in the community. There is a need to reinforce the advocacy to end to the detention of minors, particularly when this detention is based solely on their migrant status.

"Medical age assessment is ethically problematic. In cases where medical age assessment is unavoidable, the health and safety of the young refugee must be the highest priority. Any examination should take into consideration possible traumatic experiences and cultural or religious sensitivities of each individual person. For age assessment, the use of ionizing radiation or other potentially harmful investigation, such as genital examination, is unethical and should be avoided."[9]

To make an early assessment of the child's situation with a view to regularization the situation of children. The children becoming undocumented adults (i.e. "aging out") because decisions aren't taken before they turn 18 is an important child rights challenge in many countries. It's important for best interest procedures to be made before the child turns 18, or their protection as children be extended beyond 18 if the decision was not made in time by the Immigration Office. A child rights-based position from the Council of Europe on this would be an important step forward for children in migration.

[7] Although the right to seek asylum is not protected under the Convention, many member states as well as all EU member States have this right enshrined in their domestic legislation

[9] CPME Statement on the Medical Treatment of Refugees**1**' (CPME 2019/071 FINAL).

To implement the alternative solutions to detention, following CDDH-MIG work but also civil society projects[10]

To engage with local communities and direct consultation with their representatives, aiming to bridge any differences with refugee and migrant population and increase cohesion between them.

- ✓ **Migrant women**

Member States should ensure that maternity care and reproductive health care, including preventive measures, are accessible to all women without cost or eligibility barriers.

To monitor the situation of the undocumented women and their access to rights

To valorize the women migrant contribution to society and their public image

- ✓ **Migrant workers**

There is a need to ensure the equal treatment of everyone in Europe.

In the context of health emergency and Covid-19 pandemic, there is an urgent need to promote refugee doctors' access to the recognition of professional qualifications and licensing procedures to re-gain the right to practise medicine in the host country. In this, it is recommended to take into account possible specificities in these doctors' situation, such as adopting administrative procedures to accommodate loss of identity documents[11]

- ✓ **Vulnerable groups**

Ensure that the human rights of undocumented migrants are respected.

Provide adequate support in answering the specific needs of the vulnerable groups.

Provide and promote a training which would bring together representatives of the public administration, judges, lawyers, police and civil society in order to increase their capacities to implement the rights of these groups in the asylum procedure, accommodation facilities, health care services

Improve the reporting on discrimination and harassment and hate crime towards vulnerable groups.

[10] https://www.atdnetwork.org/about/

[11] CPME Statement concerning the integration of refugee doctors into the European workforce' (CPME 2018/022 FINAL).