



**Doc. 11493**

19 January 2008

## Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report

**Reply to Recommendation<sup>1</sup>:** Recommendation 1801 (2007)  
Committee of Ministers

1. The Committee of Ministers has studied Parliamentary Assembly [Recommendation 1801 \(2007\)](#) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, with great attention. It has transmitted the recommendation to the governments of member states as well as to the European Commission for Democracy through Law (Venice Commission), the European Committee on Crime Problems (CDPC) and to the Steering Committee for Human Rights (CDDH), for information and possible comments. The opinions received are appended to this reply.

2. The Committee of Ministers has always stressed the need to promote democratic values and the respect of human rights in the fight against terrorism.<sup>2</sup> Less than a year after the events in New York on 11 September 2001, the Committee adopted guidelines for member states on human rights and the fight against terrorism. In these guidelines, it reaffirmed states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights. The guidelines have been widely disseminated and have served as an inspiration for discussions at the international level. In 2005, the Committee of Ministers adopted and opened for signature the Council of Europe Convention on the Prevention of Terrorism, a landmark treaty in this area.

3. The Committee of Ministers has taken due note of the reports by the Parliamentary Assembly which contain allegations of serious human rights violations. Moreover, these reports and those by the Secretary General mention certain lacunae in the internal law of member states, which does not seem to offer sufficient protection against such violations. In this context, it recalls the existing obligations under the European Convention on Human Rights (ECHR), according to which prompt and effective investigations capable of leading to the identification and punishment of those responsible for any illegal acts is the most appropriate reaction to serious allegations of grave human rights violations. It also recalls that, according to the relevant case law of the European Court of Human Rights, the responsibility of a state party for a material breach of the provisions of the Convention may not only result from direct action by its authorities, but also from failing to comply with their positive obligations to prevent human rights violations on their territory or to conduct an independent and impartial investigation into substantial allegations of such human rights violations.

4. As the Committee of Ministers stated in its reply to Parliamentary Assembly [Recommendation 1713 \(2005\)](#) on the democratic oversight of the security sector in member states,<sup>3</sup> the legislation on national security services should be adapted to the task of combating the current level of terrorist threats while protecting human rights, the rule of law and democracy. It considered that a study of the legislation on, and the practice

---

1. Adopted by the Committee of Ministers on 16 January 2008, at the 1015th meeting of the Ministers' Deputies.

2. See the reply to Parliamentary Assembly [Recommendation 1687 \(2004\)](#) on combating terrorism through culture (Document CM/AS(2004)Rec1687 final).

3. "Democratic oversight of the security sector in member states" – Parliamentary Assembly [Recommendation 1713 \(2005\)](#) (Reply adopted by the Committee of Ministers on 21 June 2006 at the 969th meeting of the Ministers' Deputies, see Document CM/AS(2006)Rec1713 final).



in respect of, democratic oversight of national security in the Council of Europe member states would be a useful tool for defining how the accountability of these services can best be achieved in a democratic society, due regard being paid to the need for them to be efficient. The Committee therefore invited the Venice Commission to carry out such a study giving special emphasis to the role of parliaments and their specialised committees as well as to that of national courts in carrying out this task.

5. Subsequently, in its reply to the Assembly's [Recommendation 1754 \(2006\)](#) on alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, the Committee of Ministers stressed that the proposals made by the Secretary General for follow-up activities to his reports under Article 52 of the ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies,<sup>4</sup> reached deeply into sensitive areas of national security, law and practice.<sup>5</sup> It would therefore give them careful consideration and return to this issue at one of its forthcoming meetings.

6. The Venice Commission adopted its report on the democratic oversight of security services in June 2007.<sup>6</sup> From this report, the Committee of Ministers noted, *inter alia*, that the commission considered that in order to anticipate, prevent or protect itself against threats to its national security, a state needs effective intelligence and security services. However, the commission also pointed out that in the post-11 September 2001 era, the changed powers and functions of the domestic security services and international co-operation in the fight against terrorism require improved control over the manner in which these powers are used and their acceptability in a democratic society. In its report, the Venice Commission highlighted the difficulties of holding the security services accountable, mostly on account of the "subjectivity and flexibility of the term 'national security'". It also pinpointed, in relation to the possibility of redressing undue human rights infringements by the services, that a court's ability to consider all the evidence or to go to the heart of the issue may be limited by invoking the "state secret". It noted that, for this reason, certain states have alternative, specialist tribunals, or ombudsman-like systems, or allocate complaint functions to parliamentary committees.<sup>7</sup>

7. The Committee of Ministers is convinced of the utmost importance of promoting and protecting human rights for all and the rule of law while combating terrorism. Taking into account the complex nature of the issues raised, the Committee of Ministers will, if necessary, consider undertaking further work in this respect, keeping in mind the opinions already given by the CDDH, the CDPC and the Venice Commission report on the democratic oversight of secret services. It will in this respect ensure that any possible work will be operational and bring real added value. The Committee of Ministers emphasises that while dealing with such sensitive issues as allegations about secret detentions and illegal interstate transfers of detainees, only information from reliable sources shall be taken into consideration and used in official documents.

8. Finally, the Committee of Ministers recalls the International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature on 6 February 2007, the entry into force of which would significantly contribute to combating the practice of enforced disappearances.

---

4. See Document SG/Inf(2006)01.

5. His proposals had been elaborated in the light not only of his reports under Article 52, but also of [Resolution 1507 \(2006\)](#) and of [Recommendation 1754 \(2006\)](#) of the Parliamentary Assembly, as well as of the Venice Commission's Opinion No. 363/2005.

6. Venice Commission, report on the democratic oversight of the security services, CDL-AD(2007)016.

7. CDL-AD(2007)016 (paragraphs 195-217; 241-250).

## **Appendix 1 – Opinion of the European Commission for Democracy through Law (Venice Commission) on Parliamentary Assembly Recommendation 1801 (2007) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report**

### **A. Introduction**

On 5 July 2007, the Committee of Ministers of the Council of Europe decided to ask the Venice Commission to provide comments on Parliamentary Assembly [Recommendation 1801 \(2007\)](#) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, before 30 October 2007.

These comments were prepared by Mr Jan Helgesen (CDL(2007)082). The commission took note of them at its 72nd Plenary Session (Venice, 19-20 October 2007).

### **B. Background**

In its [Recommendation 1801 \(2007\)](#) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, adopted on 27 June 2007, the Parliamentary Assembly of the Council of Europe invited the Committee of Ministers to prepare a recommendation concerning the concepts of state secrecy or national security in order to: ensure that information and evidence concerning the civil, criminal or political liability of the state's representatives for grave human rights violations committed are excluded from protection as state secrets; introduce appropriate procedures ensuring that the culprits are accountable for their actions while preserving lawful state secrecy and national security, when secrets unworthy of protection are inextricably linked with lawful state secrets.

The Parliamentary Assembly also invited the Committee of Ministers to look into the need for member states to provide democratic oversight of the activities of national intelligence services in respect of, in particular, military intelligence services as well as those foreign intelligence services operating in their territory.

On 5 July 2007, the Committee of Ministers decided to bring this recommendation to the knowledge of the Venice Commission and to seek its possible comments thereon before 31 October 2007.

### **C. Previous work of the Venice Commission in this area**

The Venice Commission has previously carried out two studies on the internal security services, in which it had stressed the need for national constitutions and legislation to state the accountability of the security services for undue human rights infringements.<sup>8</sup>

The Venice Commission, in its report on the democratic oversight of the security services, highlighted the difficulties of holding the security services accountable, mostly on account of the “subjectivity and flexibility of the term ‘national security’”. It also pinpointed, in relation to the possibility of redressing undue human rights infringements by the services, that a court's ability to consider all the evidence or to go to the heart of the issue may clearly be limited by invoking the “state secret”. It noted that, for this reason, certain states have alternative, specialist tribunals or ombudsman-like systems, or allocate complaint functions to parliamentary committees.<sup>9</sup>

The commission has so far not dealt with the oversight of foreign intelligence services or of military intelligence services, except in so far as these perform internal security functions. In its report on the democratic oversight of the security services, the commission considered that “the diffuse boundary between these services and the function of internal security, especially as regards the fight against terrorism, merits further study”.<sup>10</sup>

---

8. Venice Commission, Internal Security Services in Europe, CDL-INF(1998)6 and Report on the democratic oversight of the security services, CDL-AD(2007)016.

9. CDL-AD(2007)016 (paragraphs 195-217; 241-250).

10. Venice Commission, report on the democratic oversight of the security service, CDL-AD(2007)016, footnote 1, first column, this page. The Venice Commission addressed instead in detail the issue of the international co-operation between intelligence agencies: paragraphs 115-121; 177-189.

**D. Future perspectives**

It appears relevant and useful to examine more in detail:

- a.* the national legislation and practice relating to the concepts of “national security” and “state secret”;
- b.* the need for the democratic oversight of the foreign intelligence services and of military intelligence services.

The Venice Commission is ready to assist in the examination of these matters, if so requested.

**Appendix 2 – Opinion of the Steering Committee for Human Rights (CDDH) on Parliamentary Assembly Recommendation 1801 (2007) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report**

The Steering Committee for Human Rights (CDDH) already indicated in its comments on Parliamentary Assembly [Recommendation 1791 \(2007\)](#) – State of human rights and democracy in Europe – that it will address human rights problems raised by secret detentions and illegal transfers of detainees in comments on Parliamentary Assembly [Recommendations 1754 \(2006\)](#) and [1801 \(2007\)](#).<sup>11</sup>

The CDDH notes that the reports by the Parliamentary Assembly and the Secretary General contain allegations of serious human rights violations and of certain lacunae in the internal law of member states, which does not seem to offer sufficient protection against such violations. In this context, the CDDH wishes to recall the existing obligations under the ECHR, according to which prompt and effective investigations capable of leading to the identification and punishment of those responsible for any illegal acts is the most appropriate reaction to serious allegations of grave human rights violations. The CDDH also recalls that, according to the case law of the European Court of Human Rights, the responsibility of a state party for the material breach of the provisions of the ECHR may not only result from direct action by its authorities, but also from failing to comply with their positive obligations to prevent human rights violations on their territory or to conduct an independent and impartial investigation into substantial allegations of such human rights violations. The CDDH recalls that it is the responsibility of states parties to take the necessary steps to comply with these requirements of the Convention.

The CDDH is ready, should the Committee of Ministers so request, to undertake any intergovernmental activities that will assist member states in taking firm action to protect human rights in their jurisdictions and to contribute to any other measures, the purpose of which should be preventive.

The CDDH notes that the Committee of Ministers still has to take a final decision on the Secretary General's proposals prepared in June 2006 and submitted to the Committee in September 2006 (SG(2006)01).<sup>12</sup> These proposals, which took account of the results of the Parliamentary Assembly's inquiry and the opinion of the European Commission for Democracy through Law (Venice Commission) of March 2006 (Opinion No. 363/2005), have been endorsed by the European Parliament and the Parliamentary Assembly itself. In the opinion of the CDDH, if the Committee of Ministers deems it necessary, they could be a starting point for future intergovernmental work.

Taking into account the complex and sensitive nature of the issues raised, one option could be, as a first step, for the Committee of Ministers to convene an expert meeting with a view to identifying issues such as state secrecy and national security interests mentioned in paragraph 3 of [Recommendation 1801 \(2007\)](#) that could be addressed through intergovernmental follow-up, drawing on the work already undertaken in the Council of Europe and other fora, in particular the United Nations. The CDDH is ready to participate in such a meeting and to contribute its expertise in human rights, it being understood that the participation of senior specialists of all relevant fields would be required.

---

11. CDDH(2007)013 paragraph 9: "As to allegations of secret detentions and unlawful interstate transfers, the CDDH agrees with the Assembly that there is a need to examine any possible problems of human rights in this area. It will address these issues in separate comments, which the Committee of Ministers has requested it on Parliamentary Assembly [Recommendations 1754 \(2006\)](#) and [1801 \(2007\)](#)".

12. Reproduced in CDDH(2007)014 Addendum.

**Appendix 3 – Opinion of the European Committee on Crime Problems (CDPC) on Parliamentary Assembly Recommendation 1801 (2007) on secret detentions and illegal transfers of detainees involving Council of Europe member states: second report**

Following the adoption by the Parliamentary Assembly of [Recommendation 1801 \(2007\)](#) on the secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, the Committee of Ministers decided to communicate it to the European Committee on Crime Problems (CDPC), for information and possible comments. The CDPC examined the above-mentioned recommendation and decided to contribute to the response of the Committee of Ministers by providing the following comments:

The CDPC recalled the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly of the United Nations<sup>13</sup> on 20 December 2006 and opened for signature on 6 February 2007, entry into force of which would significantly contribute to combating secret detention practices.

The CDPC underlined the fundamental importance for any society based on democratic values and human rights that any responsibility of government authorities in relation to allegations of grave human rights violations be thoroughly investigated, those responsible brought to justice and the presumed victims compensated.

The CDPC confirmed its readiness to contribute, within its fields of competence, to any future work that the Committee of Ministers might decide to undertake in this field.

---

13. The initial signatories were France, Albania, Algeria, Argentina, Austria, Azerbaijan, Brazil, Burkina Faso, Burundi, Congo, Croatia, Ghana, Guatemala, Haiti, Japan, Lithuania, Maldives, Moldova, Morocco, Uganda, Senegal, Serbia, Sierra Leone, Chad, Tunisia, Vanuatu, Belgium, Bolivia, Bosnia and Herzegovina, Cameroon, Cap Verde, Chile, Comoros, Costa Rica, Cuba, Cyprus, Finland, Grenada, Honduras, India, Kenya, Lebanon, Luxembourg, Madagascar, Mali, Malta, Mexico, Monaco, Mongolia, Montenegro, Niger, Paraguay, Portugal, Samoa, Sweden, “the former Yugoslav Republic of Macedonia” and Uruguay. Ireland signed the convention on 29 March 2007. Armenia signed on 10 April 2007, Ecuador on 24 May 2007 and Italy on 3 July 2007. The convention will enter into force when ratified by 20 parties. So far, no country has ratified the convention.