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The detention of asylum seekers and irregular migrants in Europe

Reply to Recommendation[1]: Recommendation 1900 (2010)
Committee of Ministers

1. The Committee of Ministers welcomes Parliamentary Assembly Recommendation 1900 (2010) on "The detention of asylum seekers and irregular migrants in Europe", which it has communicated to the member states' governments and to the Council of Europe Commissioner for Human Rights for information. It has also communicated it to the European Committee on Legal Co-operation (CDCJ), to the Steering Committee for Human Rights (CDDH), to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and to the European Committee on Migration (CDMG) for information and possible comments.

2. Like the Assembly, the Committee of Ministers is aware of and concerned by the vulnerable situation of asylum seekers and irregular migrants and notes that deprivation of liberty may increase their vulnerability. Noting that detention may be permitted under Article 5§1(f) of the Convention only under exceptional circumstances, it has repeatedly held that the detention of asylum seekers and irregular migrants may only be continued if it is deemed necessary in order to comply with a removal order.[2]

3. The Assembly recommends (paragraph 5.1) that rules on minimum standards of conditions of detention of irregular migrants and asylum seekers be prepared. The Committee of Ministers recalls the rather extensive provisions on this subject contained in its "Twenty guidelines on forced return" (2005).[3] These guidelines cover issues such as the general state of the detention facilities, recreation, access to lawyers, doctors, NGOs, as well as family and the UNHCR, training of staff, respect for family life, inspection of the

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1. adopted at the 1095th meeting of the Ministers' Deputies (13 October 2010)
2. See Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers (Paragraph 4. "Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case" and paragraph 6. "Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention."), the Committee of Ministers' "Twenty guidelines on forced return" (2005) (Guideline 6.1. "A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.") and the Committee of Ministers' "Guidelines on human rights protection in the context of accelerated asylum procedures" (2009) (Paragraph XI.1 "Detention of asylum seekers should be the exception.")
3. These provisions are explained in comments to the guidelines issued in document CM(2005)40 addfinal. The origin of the guidelines lies in Parliamentary Assembly Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity. In its reply to Recommendation 1547 (2002), the Committee of Ministers expressed its support for the idea put forward by the Parliamentary Assembly to draw up a code of good conduct for expulsion procedures that "would make it possible to lay down the various guidelines developed by different bodies within the Council of Europe in one pragmatic text to be used by governments when developing national legislation and regulations on the subject". The Committee of Ministers also found that "such a text should also be a useful source of guidance for those directly or indirectly involved in expulsion measures" and "would provide an opportunity to increase the visibility of the Council of Europe's activities in this field".

detention facilities, access to information and to remedies and a complaints procedure concerning alleged ill-treatment. The guidelines also contain special rules applicable to children and families. They state that "as a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time." They further underline that if minors are detained, they must not be held under prison-like conditions. Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers contains similar provisions and provides, *inter alia*, that "asylum seekers should be guaranteed access to a complaints mechanism concerning the conditions of detention". Finally, the Committee of Ministers' "Guidelines on human rights protection in the context of accelerated asylum procedures" (2009) also provide guidance on the conditions of detention, as well as on application of the procedural guarantees that must be accorded to all detained individuals.

4. With respect to the Assembly's ten guiding principles on the circumstances in which detention of asylum seekers and irregular migrants may be legally permissible (paragraph 5.2), the Committee of Ministers notes that its above-mentioned texts respond to a very large extent to the Assembly's recommendations. They take account of the case law of the European Court of Human Rights and the recommendations of the CPT. The "Twenty guidelines on forced return" were also based on a study of best practices carried out by means of a questionnaire on forced return sent to the member states.

5. For these reasons, the Committee of Ministers will not, at the present stage, give instruction for the preparation of rules on minimum standards of conditions of detention of irregular migrants and asylum seekers, nor for the preparation of a recommendation on the circumstances in which detention is legally permissible. Instead, it will consider asking the CDCJ to carry out a study on how Recommendation Rec(2003)5 on measures of detention of asylum seekers and the "Twenty guidelines on forced return" have been implemented in member states. The study should aim also at identifying best practices as regards alternatives to detention of irregular migrants and asylum seekers, with a view to the elaboration of a report or a draft recommendation on this issue. The CDDH should be associated with this work. The Committee of Ministers considers that presently it is too early to assess the implementation of its "Guidelines on human rights protection in the context of accelerated asylum procedures" which were adopted in 2009.

6. With respect to the Assembly's call for the establishment of "a new permanent committee within the Council of Europe with a mandate to examine issues concerning asylum and internally displaced persons to replace the Ad hoc Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR)" (paragraph 6), the Committee of Ministers considers that the subjects at issue often call for a transversal and multidisciplinary approach. Although the present budgetary situation does not allow for the establishment of a new permanent committee, the Committee of Ministers will reflect on other possibilities and means for ensuring the necessary co-ordination in this field.

7. Finally, the Committee of Ministers underlines that it is presently considering the follow-up to Resolution No. 1 on access to justice for migrants and asylum seekers, adopted at the 28th Conference of European Ministers of Justice (25-26 October 2007, Lanzarote, Spain).