

Provisional edition

The detention of asylum seekers and irregular migrants in Europe

Resolution 1707 (2010)¹

1. The detention of asylum seekers and irregular migrants in Council of Europe member states has increased substantially in recent years. Whilst the cause of this increase is in part due to the growing number of arrivals of irregular migrants and asylum seekers in certain parts of Europe, it is also to a large extent due to policy and political decisions resulting from a hardening attitude towards irregular migrants and asylum seekers.
2. Overcrowding in detention centres is a serious problem. As population pushes up against capacity, states are building more and bigger centres. However if they build more, they fill more, often to justify the expenditure. Yet this does not necessarily translate into better conditions for the persons detained. Furthermore, alternative facilities, which are inappropriate for detaining asylum seekers and irregular migrants belonging to this group, such as police stations, prisons, disused army barracks, hotels, mobile containers, etc. are also being used in order to detain growing numbers of persons.
3. Whilst it is universally accepted that detention must be used only as a last resort, it is increasingly used as a first response and also as a deterrent. This results in mass and needless detention. The Parliamentary Assembly is concerned by this excessive use of detention and the long list of serious problems which arise as a result and which are regularly highlighted, not only by Council of Europe human rights monitoring bodies such as the European Court of Human Rights, the European Committee for the Prevention of Torture, the Human Rights Commissioner and the Assembly's Committee on Migration, Refugees and Population, but also by other international and national organisations.
4. Conditions and safeguards afforded to immigration detainees who have committed no crime are often worse than those of criminal detainees. Conditions can be appalling (dirty, unsanitary, lack of beds, clothing and food, lack of sufficient health care, etc.) and the regime is often inappropriate or almost entirely absent (activities, education, access to the outside and fresh air). Furthermore, provision for the needs of vulnerable persons is often insufficient and allegations of ill-treatment, violence and abuse by officials persist. This all has a negative impact on the mental and physical well-being of persons detained both during and after detention.
5. Detention has a high cost in financial terms for the states which often resort to detention and which detain persons for lengthy periods of time. The European Union's Return Directive, which has a fixed duration for detaining an irregular migrant to a maximum of 18 months, can be criticised for adopting the lowest common standard in regard to detention length by allowing European Union member states to practice long-term detention, and increasing the possibility that states increase their minimum duration of detention.
6. The Assembly is particularly concerned about the detention of asylum seekers who should be distinguished from irregular migrants. Under the 1951 Convention Relating to the Status of Refugees there are only specific and narrow exceptions to the right to freedom of movement. According to the convention, asylum seekers should not be detained solely on the basis of lodging a claim for asylum, nor for their illegal entry or presence in the country where they lodge a claim for asylum.
7. It is not just conditions of detention that are of concern. The lack of clarity over when detention may be legally justified preoccupies the Assembly. There is a clear lack of a precise, accessible legal framework governing the use of detention under international human rights law and refugee law. Furthermore, national laws and regulations are often insufficient (leaving too much discretion to immigration officials), detention policies non-transparent (leaving individuals open to abuse or arbitrariness), detainees' access to lawyers limited and empirical data concerning detention lacking. In addition, there must be a clear, accessible framework, governing the operation of centres and the conditions afforded, which must also be subject to judicial review.
8. The Assembly reiterates that the grounds for immigration detention are limited by Article 5.1.f of the

European Convention on Human Rights. Detention should be used only if less intrusive measures have been tried and found insufficient. Consequently, priority should be given to alternatives to detention for the individuals in question (although they may also have human rights implications). Alternatives to detention are financially more attractive for the states concerned and have found to be effective. Unfortunately, in some states, alternatives to detention are rarely used or they do not even find expression in national law, notwithstanding all obligations to consider these.

9. In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:

9.1. follow 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible. These principles aim to ensure that:

9.1.1. detention of asylum seekers and irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative;

9.1.2. detention shall distinguish between asylum seekers and irregular migrants; asylum seekers must be protected from penalties on account of their unauthorised entry or presence;

9.1.3. detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and be subject to a periodic judicial review;

9.1.4. detention shall be ordered only for the specific purpose of preventing an unauthorised entry or with a view to deportation or extradition;

9.1.5. detention shall not be arbitrary;

9.1.6. detention shall only be used when necessary;

9.1.7. detention shall be proportionate to the objective to be achieved;

9.1.8. the place, conditions and regime of detention shall be appropriate;

9.1.9. vulnerable people should not, as a rule, be placed in detention and specifically, unaccompanied minors should never be detained;

9.1.10. detention must be for the shortest time possible;

9.2. put into law and practice 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers to ensure that:

9.2.1. persons deprived of their liberty shall be treated with dignity and respect for their rights;

9.2.2. detainees shall be accommodated in centres specifically designed for the purpose of immigration detention and not in prisons;

9.2.3. all detainees must be informed promptly, in simple non-technical language that they can understand, the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention; during detention, detainees must be provided with the opportunity to make a claim for asylum or complementary/subsidiary protection, and effective access to a fair and satisfactory asylum process with full procedural safeguards;

9.2.4. legal and factual admission criteria shall be complied with, including carrying out appropriate screening and medical checks to identify special needs. Proper records concerning admissions, stay and departure of detainees must be kept;

9.2.5. the material conditions shall be appropriate to the individual's legal and factual situation;

9.2.6. the detention regime must be appropriate to the individual's legal and factual situation;

9.2.7. the detention authorities shall safeguard the health and well-being of all detainees in their

care;

9.2.8. detainees shall be guaranteed effective access to the outside world (including access to lawyers, family, friends, the Office of the United Nations High Commissioner for Refugees (UNHCR), civil society, religious/spiritual representatives) and the right to receive frequent visits from the outside world;

9.2.9. detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge;

9.2.10. detainees must be able periodically to effectively challenge their detention before a court and decisions regarding detention should be reviewed automatically at regular intervals

9.2.11. the safety, security and discipline of detainees shall be taken into account in order to maintain the good order of detention centres;

9.2.12. detention centre staff and immigration officers shall not use force against detainees except in self-defence or in cases of attempted escape or active physical resistance to a lawful order and always as a last resort and proportionate to the situation;

9.2.13. detention centre management and staff shall be carefully recruited, provided with appropriate training and operate to the highest professional, ethical and personal standards;

9.2.14. detainees shall have ample opportunity to make requests or complaints to any competent authority and be guaranteed confidentiality when doing so;

9.2.15. independent inspection and monitoring of detention centres and of conditions of detention shall take place;

9.3. consider alternatives to detention and:

9.3.1. provide for a presumption in favour of liberty under national law;

9.3.2. clarify the framework for the implementation of alternatives to detention and incorporate into national law and practice a proper legal institutional framework to ensure that alternatives are considered first, if release or temporary admission is not granted;

9.3.3. ensure that their application is non-discriminatory, proportionate and necessary and that the individual circumstances and vulnerabilities of those to whom they are applied are taken into account and that the possibility of a review by an independent judicial body or other competent authority is provided for;

9.3.4. commission and carry out empirical research and analysis on alternatives to detention, their use and effectiveness, and best practice, distinguishing between community-based alternatives that allow for freedom of movement and those which curtail freedom of movement. In this respect, the following alternatives can, inter alia, be taken into account:

9.3.4.1. placement in special establishments (open or semi-open);

9.3.4.2. registration and reporting;

9.3.4.3. release on bail/surety;

9.3.4.4. controlled release to individuals, family members, NGOs, religious organisations, or others;

9.3.4.5. handover of travel and other documents, release combined with appointment of a special worker;

9.3.4.6. electronic documents or electronic monitoring

10. The Assembly invites the Council of Europe's Commissioner for Human Rights and the European Committee for the Prevention of Torture to continue to monitor closely the situation of the detention of asylum seekers and irregular migrants and to support the guiding principles laid out above in relation to legally permissible detention and minimum standards of conditions of detention. Furthermore, they are invited to encourage member states to

examine and use to a much greater extent alternatives to detention.

¹ *Assembly debate* on 28 January 2010 (7th Sitting) (see [Doc. 12105](#), report of the Committee on Migration, Refugees and Population, rapporteur: Mrs Mendonça). *Text adopted by the Assembly* on 28 January 2010 (7th Sitting).

See also [Recommendation 1900](#) (2010).