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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP ON MIGRATION AND HUMAN RIGHTS
(CDDH-MIG)**

Extracts from Council of Europe Standards on Alternatives to Immigration Detention

4th meeting

21 March (9.30) – 22 March 2018 (13.00)

Council of Europe Palais (Palais de l'Europe), Room 3

Extracts from Council of Europe Standards on Alternatives to Immigration Detention¹

| Committee of Ministers |
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| <p><u>Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe</u>, Committee of Ministers, 127th Session of the Committee of Ministers (Nicosia, 19 May 2017)</p> |
| <p><u>Reply to PACE Recommendation 2056 (2014) - The alternatives to immigration detention of children</u></p> <p>[...]</p> <p>2. The Committee of Ministers shares the Assembly's concerns and points out that children's rights are a priority for the Council of Europe. It refers in particular to the situation of migrant children, particularly unaccompanied minors, and considers that the Council of Europe, drawing on the work that it has done in this field, has a role to play in bringing to an end the immigration detention of migrant children and in identifying alternatives to that practice.</p> <p>[...]</p> |
| <p><u>Reply to PACE Recommendation 1900 (2010) - The detention of asylum seekers and irregular migrants in Europe</u></p> <p>[...]</p> <p>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</p> <p>[...]</p> |

¹ This is a non-exhaustive overview prepared for CDDH-MIG. The relevant extracts are listed by date (starting from the most recent). For a more comprehensive overview of Council of Europe standards it is advisable to read the whole text of the documents.

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.")

5. [...] the Committee of Minister 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.

[...]

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum

[...]

[Guideline] 22. The deprivation of liberty of unaccompanied minors, including those seeking asylum, and separated children should never be motivated or based solely on the absence of residence status.

[...]

Explanatory memorandum

78. Several references recall that the guidelines do apply to children seeking asylum and that specific attention should be given to this particularly vulnerable group; unaccompanied minors, whether or not they are asylum seekers, should not be deprived of their liberty solely as a result of the absence of residence status (Guideline 22).

[...]

Committee of Ministers – Guidelines on human rights protection in the context of accelerated asylum procedures, adopted by the Committee of Ministers on 1 July 2009 at the 1062nd meeting of the Ministers’ Deputies

[...]

XI. Detention

1. Detention of asylum seekers should be the exception.
2. Children, including unaccompanied minors, should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance.
3. In those cases where other vulnerable persons are detained they should be provided with adequate assistance and support.
4. Asylum seekers may only be deprived of their liberty 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 state in which the asylum application is lodged have concluded that the presence of the asylum seekers for the purpose of carrying out the accelerated procedure cannot be ensured as effectively by another, less coercive measure.

[...]

Committee of Ministers - Twenty Guidelines on Forced Return, 4 May 2005,³ including the comments on the guidelines drafted by the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)

[...]

Guideline 6. Conditions under which detention may be ordered

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.

[...]

COMMENTARY [CAHAR]

Paragraph 1:

[...]

3. The guarantees afforded by Article 5 of the ECHR include that detention of the person should be limited to certain specific circumstances where there are objective reasons to believe that he/she will not comply with the order, for instance if the time limit for departing from the territory has passed and the alien has changed his/her place of residence without notifying the authorities of a change of address, if he/she has not complied with the measures adopted to ensure that he/she will not abscond, if he/she has in the past evaded removal. Detention should only be resorted to where other measures have failed or if there are reasons to believe that they will not suffice. These measures may include the surrendering of the passport or other identity documents to the authorities, an obligation to reside in a particular place or within a certain district, an obligation to report at regular intervals to the authorities, for instance to the closest police station, bail or sureties. As these measures constitute restrictions to the right to move freely and to choose one's residence or to the right to respect for private life, they will have to respect the conditions defined in Article 2(4) of Protocol No. 4 to the ECHR and Article 8(2) ECHR.

[...]

³ When adopting this decision, the Permanent Representative of the United Kingdom indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with Guidelines 2, 4, 6, 7, 8, 11 and 16.

Guideline 11. Children and families

1. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.
3. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities appropriate to their age. The provision of education could be subject to the length of their stay.
4. Separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.
5. The best interest of the child shall be a primary consideration in the context of the detention of children pending removal.

[...]

Committee of Ministers Recommendation Rec(2003)5 on measures of detention of asylum-seekers, adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies

[...]

General provisions

3. The aim of detention is not to penalise asylum seekers. Measures of detention of asylum seekers may be resorted to only in the following situations:

- when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state;
- when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained;
- when a decision needs to be taken on their right to enter the territory of the state concerned, or
- when protection of national security and public order so requires.

4. Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights.

[...]

6. Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.

[....]

Additional provisions for minors

20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time.

21. Minors should not be separated from their parents against their will, nor from other adults responsible for them whether by law or custom.

22. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, special arrangements must be made which are suitable for children and their families.

23. For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time.

[...]

Reply to PACE Recommendation 1327 (1997) - Protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, adopted at the 675th meeting of the Ministers' Deputies, 15 June 1999

[...]

The Committee of Ministers endorses the Assembly's suggestion in paragraph 8 (vii)(g) of the recommendation that priority be given to non-custodial measures such as the supervision system, the requirement to report regularly to the authorities, bail or other guarantee systems. In the past the Committee of Ministers has appealed to member States to make more use of such measures so as to avert the desocialisation which detention frequently causes. The appeal was reiterated in Recommendation R (92) 16 on the European Rules on Community Sanctions and Measures. The Committee of Ministers none the less stresses that here the non-custodial measures need to be combined with effective guarantees that asylum-seekers will not abscond.

[...]

Parliamentary Assembly

Parliamentary Assembly Resolution 2059 (2015) - Criminalisation of irregular migrants: a crime without a victim

[...]

7. [The Assembly] also proposes that detention only be used as a last resort, in particular for asylum seekers, when it should be as short as possible, and that alternatives to detention should be used wherever possible.[...]

11. Accordingly, the Assembly calls on the member States to:

[...]

11.8. put in place alternatives to detention wherever possible;

[....]

Parliamentary Assembly Resolution 2020 (2014) – The alternatives to immigration detention of children

[...]

9. The Assembly considers that it is urgent to put an end to the detention of migrant children and that this requires concerted efforts from the relevant national authorities. The Assembly therefore calls on the member States to:

9.1. acknowledge that it is never in the best interests of a child to be detained on the basis of their or their parents' immigration status;

9.2. introduce legislation prohibiting the detention of children for immigration reasons, if it has not yet been done, and ensure its full implementation in practice;

9.3. refrain from placing unaccompanied or separated children in administrative detention;

9.4. ensure that children are treated as children first and foremost, and that persons who claim to be children are treated as such until proven otherwise;

9.5. develop child-friendly age-assessment procedures for migrant children;

9.6. continue efforts to make their legislation on foreign nationals conform with the best international standards, while taking into account the best interests of the child as enshrined in Article 3 of the United Nations Convention on the Rights of the Child and promoting various forms of internationally recognised alternatives to detention;

9.7. adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved;

9.8. provide necessary resources in order to develop alternatives to the detention of migrant children;

9.9. seek to develop and implement non-custodial, community-based alternatives to detention programmes for children and their families, using the "Child-sensitive Community Assessment and Placement (CCAP) Model";

9.10. raise the awareness of all public officials, including the police, prosecutors and judges dealing with migration matters, of international human rights standards, by emphasising the rights of children and the alternatives to detention;

9.11. share best practices on the alternatives to the detention of migrant children in all member States;

9.12. encourage collaboration between governments of member States, the Council of Europe, United Nations agencies, intergovernmental organisations and civil society organisations to end child immigration detention and implement non-custodial,

community-based alternatives to detention for children and their families.

Parliamentary Assembly Recommendation 2056 (2014) – The alternatives to immigration detention of children

[...]

2. The Assembly stresses that States which practise the immigration detention of children contravene the principle of the best interests of the child and violate children's rights. They deprive children of their fundamental right to liberty and put them at risk of severe and lifelong physical, mental and developmental harm. They may also violate other fundamental child rights, such as the rights to family, health, education and play. The Assembly considers that in order to stop this inhuman practice, the Council of Europe has an important role to play in promoting alternatives to the immigration detention of children.

3. The Assembly therefore on the Committee of Ministers to:

3.1. launch a study to collect qualitative and quantitative data on the immigration detention of children and the use of non-custodial, community-based alternatives to detention for children and families, and promote the sharing of these practices across Europe;

[...]

Parliamentary Assembly Recommendation 1985 (2011) - Undocumented migrant children in an irregular situation: a real cause for concern

1. A child is first, foremost and only, a child. Only after this may he or she be seen as a migrant. This, together with the need to take into account the best interest of the child, as stipulated by Article 3 of the United Nations Convention on the Rights of the Child, and the requirement not to discriminate between children, should be the starting point of any discussion about undocumented migrant children. The issue of migratory status can only ever be a secondary consideration.

2. Undocumented migrant children are triply vulnerable: as migrants, as persons in an undocumented situation and as children.

3. The Parliamentary Assembly highlights five particular areas where the rights of undocumented migrant children need to be clarified and strengthened. These include education, health care, housing, detention and exploitation.

[...]

6. The Assembly notes that there is a wide discrepancy across Europe in how member states treat these children, both in law and in practice, and considers that all member states should have a firm legislative basis for dealing with the rights of children belonging to this vulnerable group.

[...]

9. Bearing in mind the need for a firm legislative basis and implementation of the laws in practice, the Assembly recommends that member states:

[...]

9.4. refrain from detaining undocumented migrant children, and protect their liberty by abiding by the following principles:

9.4.1. a child should, in principle, never be detained. Where there is any consideration to detain a child, the best interest of the child should always come first;

9.4.2. in exceptional cases where detention is necessary, it should be provided for by law, with all relevant legal protection and effective judicial review remedies, and only after alternatives to detention have been considered;

9.4.3. if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;

9.4.4. if detention does take place, it must be in separate facilities from those for adults, or in facilities meant to accommodate children with their parents or other family members, and the child should not be separated from a parent, except in exceptional circumstances;

9.4.5. unaccompanied children should, however, never be detained;

9.4.6. no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;

[...]

Parliamentary Assembly Resolution 1810 (2011) - Unaccompanied children in Europe: issues of arrival, stay and return

[...]

5. The Assembly believes that child protection rather than immigration control should be the driving concern in how countries deal with unaccompanied children. With this in mind, it establishes the following set of 15 common principles, which it invites member states to observe and work together to achieve:

5.1. unaccompanied children must be treated first and foremost as children, not as migrants;

5.2. the child's best interests must be a primary consideration in all actions regarding the child, regardless of the child's migration or residence status;

5.3. no child should be denied access to the territory or be summarily turned back at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's

best interest;

5.4. child victims of human trafficking should benefit from special arrangements in terms of identification, reception and protection. These should be adapted to their needs and ensure their protection in line with the Council of Europe Conventions on Action against Trafficking in Human Beings (CETS No. 197) and on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201);

5.5. every unaccompanied child should be provided immediately with a guardian mandated to safeguard his or her best interest. The legal guardian should be independent and should have the necessary expertise in the field of childcare. Every guardian should receive regular training and undergo regular and independent check-ups/monitoring

[...]

5.9. no detention of unaccompanied children on migration grounds should be allowed. Detention should be replaced with appropriate care arrangements, preferably foster care, with living conditions suitable for children's needs and for the appropriate period of time. Where children are accommodated in centres, they must be separated from adults;

[....]

Parliamentary Assembly Recommendation 1917 (2010) - Migrants and refugees: a continuing challenge for the Council of Europe

[...]

3. The Parliamentary Assembly is of the opinion that dealing with these challenges should be placed much higher on the political agenda of the Council of Europe and prioritised within the Organisation's reform process. The Council of Europe is a value-based organisation, which was created to protect the rights of all people within Europe. Migrants, refugees, asylum seekers and displaced persons are often some of the most vulnerable people in Europe. There is a need not only to strengthen their rights but also to ensure that these rights are guaranteed in practice.

[...]

12. The Assembly recommends that in devising a medium-term strategy on migration, asylum and displaced persons, the Committee of Ministers take into account the following priorities:

[...]

12.2. fill the gaps in current Council of Europe legal standards through developing further hard and soft law instruments and practical activities pertaining to migrants, asylum seekers, refugees and displaced persons. In this respect the Committee of Ministers is encouraged to take into account, inter alia, the following specific issues, some of which are the subject of Assembly recommendations:

[...]

12.2.6. developing guidelines on alternatives to detention for irregular migrants and asylum seekers;

[...]

Parliamentary Assembly Recommendation 1900 (2010) - Detention of asylum seekers and irregular migrants in Europe

[...]

3. The Council of Europe has an important role to ensure that any deprivation of liberty is carefully monitored and that less restrictive alternatives to detention are considered and used first, only resorting to detention if it is established that no alternative will be effective in achieving the legitimate objective. The Council of Europe also has an important role to ensure that alternatives to detention are available and accessible in domestic law and in practice, and applied without discrimination.

[...]

5. Therefore, the Assembly recommends that the Committee of Ministers:

[...]

5.3. instruct the relevant expert committee within the Council of Europe to examine further the issue of alternatives to detention of migrants and asylum seekers and identify best practice on this issue with a view to preparation of a recommendation to member states by the Committee of Ministers on the subject.

[...]

Parliamentary Assembly Resolution 1707 (2010) - Detention of asylum seekers and irregular migrants in Europe

[...]

8. The Assembly reiterates that the grounds for immigration detention are limited by Article 5.1. f of the European Convention on Human Rights (ETS No.5). 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 been found to be effective. Unfortunately, in some states, alternatives to detention are rarely used or have not even been included in national law, notwithstanding all obligations to consider such alternatives.

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 subject to periodic judicial review;
- 9.1.4. detention shall be ordered only for the specific purpose of preventing unauthorised entry into a state's territory 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;

[...]

9.3. 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 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, non-governmental

organisations (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 CPT 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 for conditions of detention. Furthermore, they are invited to encourage member states to examine and use to a much greater extent alternatives to detention.

Parliamentary Assembly Resolution 1637 (2008) - Europe's boat people: mixed migration flows by sea into southern Europe

[...]

9. The Assembly calls on Mediterranean member states of the Council of Europe receiving mixed flows of irregular migrants, refugees and asylum seekers to: [...]

9.4. ensure that detention is authorised by the judiciary and is used only if it is necessary and if there is no suitable alternative. Furthermore, detention must be for the shortest possible period of time. Malta should re-examine its policy of systematic and excessive periods of detention which can be for up to eighteen months for irregular migrants and twelve months for asylum seekers; [...]

9.6. respect the principle that vulnerable persons should not be detained. Vulnerable persons include unaccompanied minors, pregnant women, families with minors, persons with medical or other special needs, the elderly, victims of torture and sexual violence and victims of trafficking. In all circumstances, adequate assistance must be granted to vulnerable persons and particular attention must be paid to the situation of unaccompanied minors in view of worrying reports concerning their treatment in Spain, Greece and other countries in the region;

[...]

Parliamentary Assembly Resolution 1509 (2006) - Human rights of irregular migrants

[...]

5. The Assembly considers that, as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights.

[...]

12. In terms of civil and political rights, the Assembly considers that the European Convention on Human Rights provides a

minimum safeguard and notes that the Convention requires that its contracting parties take measures for the effective prevention of human rights violations against vulnerable persons such as irregular migrants. The following minimum rights merit highlighting:

[...]

12.4 detention of irregular migrants should be used only as a last resort and not for an excessive period of time. Where necessary, irregular migrants should be held in special detention facilities and separately from convicted prisoners. Children should only be detained as a measure of last resort and then for the shortest possible period of time. Detention or holding of other vulnerable persons (pregnant women, mothers with young children, the elderly, people with disabilities) should be avoided whenever possible. Suitable accommodation should be available to lodge families, but otherwise men and women should be housed separately. Detainees should have the right to contact anyone of their choice (lawyers, family members, NGOs, UNHCR, etc.), have access to adequate medical care and access to an interpreter and free legal aid where appropriate;

[...]

Parliamentary Assembly Recommendation 1547 (2002) –Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity

[...]

7. The Assembly believes that forced expulsion should only be used as a last resort, that it should be reserved for persons who put up clear and continued resistance and that it can be avoided if genuine efforts are made to provide deportees with personal and supervised assistance in preparing for their departure.

[...]

13. Finally, the Assembly recommends that the Committee of Ministers urge member states: [...] *to adapt without delay their legislation and practices regarding holding prior to expulsion, in order to:*

[...]

e. guarantee, under regular supervision by the judge, the strict necessity and the proportionality of the use and continuation of detention for the enforcement of the deportation order, and to set the length of detention at a maximum of one month;

f. favour alternatives to detention which place less restrictions on freedom, such as compulsory residence orders or other forms of supervision and monitoring, such as the obligation to register; and to set up open reception centres;

[...]

h. take into account, in any decision to limit personal freedom, the needs of vulnerable groups [...]

Parliamentary Assembly Recommendation 1327 (1997) - Protection and reinforcement of the human rights of refugees and asylum-seekers in Europe

[...]

8. The Parliamentary Assembly recommends that the Committee of Ministers to:

[...]

8.7. urge the member states:

[...]

g. to give priority to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems;

[...]

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

[CPT Standards. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. CPT/Inf/E \(2002\) 1 - Rev. 2015](#)

IV. Immigration detention

Safeguards for irregular migrants deprived of their liberty Extract from the 19th General Report [CPT/Inf (2009) 27], published in 2007

75. [...] These visits [to immigration detention centres as well as to police stations and prison establishments] have, all too often, reinforced the Committee's opinion that immigration detainees are particularly vulnerable to various forms of ill-treatment, whether at the moment of apprehension, during the period of custody or while being deported.

Given the vulnerable nature of this group of persons, the CPT has, in the course of many of its visits, focused its attention on the treatment of immigration detainees [...]

76. In this 19th General Report, the CPT is setting out its views on the safeguards that should be afforded to detained irregular migrants, with an additional special emphasis on children.⁴ [...]

It should be noted that asylum seekers are not irregular migrants, although the persons concerned may become so should their asylum application be rejected and their leave to stay in a country rescinded. Whenever asylum seekers are deprived of their liberty pending the outcome of their application, they should be afforded a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants which are set out in the following paragraphs.⁵

⁴ This is not to suggest that children are the only vulnerable group. Elderly persons and unaccompanied women, for instance, are also vulnerable.

⁵ For asylum seekers, certain international safeguards originate under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol. Further, European Union legislation, in particular Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum

[...]

80. More generally, in certain countries, authorities routinely resort to administrative detention of irregular migrants pending deportation, sometimes with no time limitation or judicial review. It is clear that automatic administrative detention under such conditions runs the risk of being in contradiction with, inter alia, the case law of the European Court of Human Rights. In the CPT's view, States should be selective when exercising their power to deprive irregular migrants of their liberty; detention should only be resorted to after a careful examination of each individual case.

[...]

Additional safeguards for children

97. The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the "best interests of the child", as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children, is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status.

When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; all efforts should be made to allow the immediate release of unaccompanied or separated children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives.

98. As soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person should conduct an initial interview, in a language the child understands. An assessment should be made of the child's particular vulnerabilities, including from the standpoints of age, health, psychosocial factors and other protection needs, including those deriving from violence, trafficking or trauma. Unaccompanied or separated children deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.

[...]

Commissioner for Human Rights⁶

seekers, has established a number of guarantees; however, the applicability of this legislation is limited to EU member States. Reference should also be made to the Guidelines on human rights protection in the context of accelerated asylum procedures, adopted by the Committee of Ministers of the Council of Europe on 1 July 2009.

⁶ The Commissioner for Human Rights has produced numerous standards on alternatives to immigration detention in various country reports. These are not listed in this overview.

Human Rights Comment, [High time for states to invest in alternatives to migrant detention](#), 31/01/2017⁷

Migration and the digital environment: two areas where children's rights must be better respected,

[Keynote address by Nils Muižnieks Council of Europe Commissioner for Human Rights](#)

Conference on children's rights in the migration crisis and in the digital environment Tallinn , 4 November 2016

[...]

The detention of migrant and refugee children, whether in family or unaccompanied, is another priority topic for me. For children travelling with their family, the argument for imposing detention is often the fact that family unity must be preserved. For unaccompanied children detention is often presented as a means of providing protection to them. "Crisis situations" are also used as arguments to justify detention. I firmly believe that immigration detention of children is never in a child's best interests and should never be ordered.

Detention of children in the migration process is on the rise in Europe, notably following the EU - Turkey statement of March 2016 and the setting up of hotspots in Italy and Greece. It is also one of the practical consequences of populist rhetoric criminalising irregular migrants, including children. Moreover, in countries where detention of children is prohibited, the ban is not always implemented.

Detention has long - standing harmful effects on the physical and psychological health of children, as also underlined by the European Court of Human Rights. Detention conditions can amount to inhuman and degrading treatment: children can be detained together with adults and ill - treated; they are sometimes not provided with basic health care, they are deprived of contacts with relatives and lack access to education. In many places, they are not provided with a guardian, legal representation and they lack information about their situation and existing legal remedies.

Yet, alternatives to detention exist. I have visited places where families with children are accommodated outside closed detention centres. I could see that in these facilities the living conditions were much more respectful of the rights of the child. I was also informed that such options are sometimes less costly for states than detention. Moreover, they help better prepare subsequent steps in the life of children, whether they will stay in the host country or are returned to their country of origin. I believe that more efforts should be invested in developing sustainable and human rights - compliant alternatives rather than increasing the number of detention places.

⁷ The relevant extracts on alternatives to detention from the Commissioner's Human Rights comment are too lengthy to be included in this list. It would be advisable, therefore, to read them in their entirety

Human Rights Comment, [Protecting Children's Rights: Europe should do more](#), 18/11/2014

[...]

Firstly, migrant children can still be detained in several member states, on the sole basis of their migration status or that of their parents. As recently highlighted by the Parliamentary Assembly of the Council of Europe, politicians are often pandering to rhetoric criminalising irregular migrants, including children, and immigration detention is therefore increasingly used in the member states. Although some countries prohibit the detention of migrant children, the ban is not always implemented in practice. Detention has long-standing harmful effects on children. It undermines their physical and psychological well-being and development, even more so when they are separated from their parents. However, children should also not be detained with their family in order to keep the family together, a practice still in force in several states, which the European Court of Human Rights (ECtHR) said the authorities should limit. I strongly believe that migrant children, whether travelling alone or with their families, should never be detained.

[...]

[The Protection of Migrant Rights in Europe](#), Round - Table with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights Paris, 5 October 2012, Report, Strasbourg, CommDH(2013)9, 18 April 2013

[...]

17. One major deficiency identified in the asylum systems of many European countries is the absence of legislation and policies providing for alternative measures to detention. Some of the alternative measures used in Council of Europe member states are the registration of migrants who are subsequently provided with official documents and required to report periodically to the relevant authorities; the deposit of documents; the assignment of guarantors who take responsibility for the non-absconding of migrants; house arrest; electronic monitoring; placement in an open-type collective accommodation; and individual case management (supervised release), where case managers establish a personal rapport with the migrants and assist in finding adequate solutions to their situation. Certain human rights defenders expressed caution towards alternatives to detention which, in practice, may well turn into alternative forms of detention (such as house arrest). There is also a risk that the application of alternatives becomes too broad, being extended even to migrants who would not otherwise be subject to detention. Individual case management appears to be the alternative favoured by human rights defenders, as it allows the participation of the concerned migrants in finding personalised solutions for their particular situation.

[...]

[Positions on the rights of migrants in an irregular situation](#)**Position Paper from the Council of Europe Commissioner for Human Rights, CommDH/PositionPaper(2010)5, 24 June 2010**

[...]

The irregular entry and stay of an alien should in principle be an administrative offence, and not a criminal one. Criminalising irregular migrants is extremely harmful and leads to inextricable situations in which these persons, who are in no sense offenders, are treated as if they were guilty. The countries that have established criminal law provisions relating to foreigners' irregular entry and stay, should thus move to decriminalise such offences.

The principle of not criminalising irregular migrants should apply to all aspects of their treatment. Member states should accordingly refrain from adopting criminal laws which apply exclusively to foreign nationals unless this is specifically and clearly justified on grounds of international human rights commitments and is consistent with the relevant Council of Europe treaties.

[...]

Key recommendations

[...]

No one should be subject to detention of any kind on the sole basis that he or she is not a national. As a matter of principle, no person seeking international protection should be subject to detention.

Detention should be used only as a last resort, judicially authorised, and not exceed a reasonable period of time. In addition, the use of pre-deportation detention should be restricted to situations where it is clear that the deportation can in fact take place in the immediate future. In relevant cases, authorities should find alternative solutions to confinement for indefinite periods.

[...]

Positions on the Rights of minor migrants in an irregular situation, CommDH/PositionPaper(2010)6, 25 June 2010

[...]

Key recommendations

[...]

Children should only be detained in exceptional circumstances as a last resort and for the shortest appropriate period of time. As a principle, migrant children should not be subjected to detention. Moreover all detentions of children must be strictly and closely monitored. Special arrangements must be made for suitable living quarters for children that are separate from adults, unless it is in their best interest not to do so. A judicial authority must be involved in any decision entailing the detention of children. Children must have access to legal advice and be able to receive visits. All basic necessities, including recreational activities, must be provided to them.

[...]

Separated and unaccompanied minors should not be detained. States should provide them with care, accommodation and competent custodians with powers to act in their best interest. States must recognise the vulnerability of separated children and take measures to strengthen their protection.

[...]

Special Representative of the Secretary General on Migration and Refugees

Thematic Report on migrant and refugee children, [Prepared by the Special Representative of the Secretary General on migration and refugees](#), Information Documents SG/Inf(2017)13, 10 March 2017

[...]

Alternatives to detention for families and suitable alternative care arrangements for unaccompanied and separated children

Immigration detention is never in the best interests of the child. Furthermore, separation of a child from his or her family should only take place when it is in the best interests of the child. Yet, migrant and refugee children are detained and many are separated from a parent who is placed in immigration detention. A lack of alternatives to detention is one of the most damaging structural problems affecting children, which urgently needs to be addressed. The Council of Europe has supported the Global Campaign to end immigration detention of children and we shall continue our efforts to end this violation of children's rights.

[...]