Returning "irregular" migrants: the human rights perspective

Amnesty International's comments on the draft directive on common standards and procedures in Member States for returning illegally staying third country nationals
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I. General remarks

Amnesty International welcomes the opportunity to comment on the Commission's proposal for a directive on common procedures for the return of illegally staying third country nationals - the "returns directive". Whilst the draft returns directive covers all third country nationals who are illegally staying in an EU Member State, our comments are mainly focussing on the implications of the directive for asylum-seekers whose applications have been rejected by a Member State, as well as individuals who have had refugee or complementary protection status in the past, but whose status has subsequently been withdrawn. Our main interest in this proposal relates to the extent to which it will ensure the safety of individuals who are returned by the EU Member States.

Although the draft return directive does not deal with the reasons for ending an individual's right to stay, there are intrinsic links between the present proposal and the Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, adopted on 1 December 2005. Amnesty International, together with UNHCR and key NGOs, has repeatedly voiced concerns regarding the lack of meaningful procedural safeguards in the asylum procedures directive. On March 2006, the European Parliament decided to challenge the legality of the directive. It is therefore to be deplored that the EU Member States have decided to harmonise return standards before the European Court of Justice was able to check the potential deficiencies of the asylum procedures directive. The provisions of the draft returns directive should therefore not be analysed and negotiated in isolation. EU Member States and MEPs should duly consider the outstanding concerns regarding the asylum procedures directive and, a later stage, draw appropriate conclusions from the ECJ ruling.

2. Introductory remarks

The European Union's multi-annual programme in the area of freedom, security and justice (the "Hague Programme") provides that common standards on return must ensure that persons are returned "in a humane manner and with full respect for their human rights and dignity". Amnesty International notes that existing operational co-operation at EU level with respect to return will also be further strengthened. Indeed, the current proposals for the 2007-2013 EU financial perspective include significant funds to support returns of third country nationals with no legal right to enter or stay in the EU.

Amnesty International believes that common standards on return, including effective human rights safeguards, should be a prerequisite for these plans. As recently illustrated during the crisis in the Spanish enclaves of Ceuta and Melilla, human rights abuses are often the result of restrictive migration control measures aiming at barring access to the EU territory or aiming at removing irregular migrants from the territory of the host State. Amnesty International acknowledges that States have a sovereign right to control the entry, residence and removal of foreign nationals on their territory. That right must, however, be exercised in accordance with international refugee and human rights law and standards. Importantly, these include the principles of non-discrimination and proportionality. The exercise of State sovereignty cannot take place at the expense of the fundamental human rights of asylum seekers or migrants, whatever their legal status.

Amnesty International acknowledges the fact that the draft returns directive requires that its provisions be applied in line with international law, including refugee protection and human rights standards. However, Amnesty International supports the view of the United Nations High Commissioner for Refugees (UNHCR) that these standards, as well as appropriate procedures to ensure their implementation, need to be set out in more detail.

Together with UNHCR, Amnesty International recommends that the draft returns directive explicitly state that no return decision may be issued and no removal be carried out, which would violate the *non-refoulement* principle defined in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) or in other human rights instruments such as the UN Convention against torture and the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR).

Amnesty International also strongly recommends that reference to the Guidelines on forced return adopted recently by the Council of Europe is included.

Furthermore, Amnesty International is concerned that the draft directive might promote detention as a key instrument to fight against irregular immigration. Detention is often justified as the only way to ensure an effective removal policy, but Amnesty International's reports show that on numerous occasions individuals may be detained even if the prospect of effecting their forcible removal within a reasonable time may be slim due in particular to lack of co-operation of the countries of origin. Given the human impact of detention, Amnesty International recommends that the provisions dealing with the use of detention should be more strictly limited and that procedural safeguards should be further strengthened.

3. Outstanding issues not addressed by the draft directive

3.1. Independent monitoring mechanism

The Commission asserts that "an effective return policy is a necessary component of a well managed and credible policy on migration". Recent discussions surrounding EU initiatives regarding the fight against "irregular" immigration have focussed on a quantitative approach with the explicit aim to substantially increase the number of persons sent back from the EU territory.

While acknowledging that return is indeed a component of the migration system, Amnesty International believes that a qualitative approach is a more important indicator of a credible migration policy as it will ensure the sustainability of returns and the full respect of individuals' fundamental rights. Setting a high standard for safe returns is therefore crucial to the integrity of immigration systems. This is all the more needed given that recent case law - both at national and European level - has identified serious shortcomings in Member States' practice as regards both assessing the safety of countries of return, and monitoring of returnees[1].

We therefore strongly recommend that the draft EU return directive includes adequate provision on monitoring. The EU should develop an EU-wide monitoring and accountability mechanism, which would be complementary to the national procedures. At national level, Member States should also establish independent monitoring systems for expulsion procedures, for example by appointing observers, mediators or ombudsmen, and conduct impartial and in-depth enquiries at all levels into allegations of ill-treatment. UNHCR and NGOs should be granted access to reception facilities at all stages of the procedure. Independent investigations should be carried out into cases where expulsion has resulted in an actual breach of the principle of *non-refoulement*. Given the extra-territorial effect of article 3 ECHR, Member States are accountable for breaches of the *non-refoulement* principle occurring outside the EU territory.

3.2. Ratification of Protocol IV of ECHR on mass deportations

Recent examples of mass deportations which have taken place from the Spanish enclaves of Ceuta and Melilla, or from the Island of Lampedusa also highlights the critical need to firmly anchor the EU policy in the boundaries set up by the provisions of the ECHR and the jurisprudence of the European Court of Human Rights.

Amnesty International believes that ratification of Protocol IV ECHR is a necessary prerequisite for EU harmonisation in the field of return of "irregular" migrants. In this context, it is to be deplored that Spain has not yet ratified the Protocol IV of the ECHR that prohibits collective expulsions.

3.3. EU code of conduct on the use of force by law enforcement officials

Severe human rights abuses are often the result of restrictive migration control measures aiming at barring access to the EU territory or aiming at removing irregular migrants from the territory of the host State. Within the context of current discussions on the draft directive (in particular on its article 10), the European Commission should introduce a proposal for a binding EU code of conduct on the use of force for law enforcement officials, which would fully comply with the guidelines defined by the UN and the Council of Europe.

[1] ECHR,10 May 2005, req. n° 11593 Salem and others vs Italy; UK, Asylum and Immigration Tribunal, AA v Secretary of State for the Home Department AA/0457/2005 [2005] UKAIT CG.

4. Comments on the draft directive

Article 2 – Scope of the proposal

- **Personal scope (article 2.1)**

Amnesty International notes that the scope of the directive is very broad and is intended to apply to a wide range of individuals who have very different experiences and needs. Those affected will include individuals who have overstayed their visas; asylum seeking adults and children whose application have been rejected, as well as those whose Convention refugee status or subsidiary protection has been withdrawn.

While the grounds for ending or withdrawing international protection are defined under article 14, 19 and 21 of the EC directive 83/2004 – "qualification" directive - Amnesty International is concerned that the combined effect of these provisions could have a far reaching impact on the principle of *non-refoulement*. Indeed, according to the qualification directive, international protection can be withdrawn when there is a "potential threat to national security" or when the applicant has committed "a particularly serious crime".

Amnesty International has stressed that, in the absence of common definitions, such provisions open the door to extensive and inappropriate interpretation in particular within the context of the fight against terrorism. While States' legal obligations are clearly established, governments in Europe and North America are increasingly sending alleged terrorist suspects and others to abusive states, based on so-called "diplomatic assurances" of humane treatment. These in fact expose those individuals to serious risk of torture or other ill-treatment upon return. Countries offering such assurances have included those where torture and other ill-treatment are often practised, as well as those where members of particular groups are routinely singled out for the worst forms of abuse. In the face of the absolute prohibition of *refoulement*, sending governments have justified such transfers by referring to diplomatic assurances they sought from the receiving country, that the suspects would not be tortured or ill-treated upon return. Recent practice shows that an assessment of the appropriateness of the use of diplomatic assurances varies greatly according to states' diplomatic agendas[2].

Whilst the explanatory memorandum of the draft directive acknowledges the dangers of including expulsion/removal for reasons of public order and national security within the scope of the directive, it then states that: "once the legal stay of a third country national has been ended for reasons of public order, this person becomes a third country national staying illegally in the territory of a Member State and the provisions of the directive will be applied to this person". Amnesty International is concerned that the lack of clarity of the explanatory memorandum will add to the confusion and will lead to diverging interpretation regarding the personal scope of the directive.

⇔ Amnesty International urges to clarify the scope of the directive and recommends that another specific EU instrument deals with expulsions and removals for reasons of public order.

- **Geographical scope (article 2.2)**

Amnesty International recommends the deletion of paragraph 2 which allows Member States not to apply all the standards of the draft directive to persons awaiting deportation in a transit zone. Amnesty International is concerned by this selective approach as these persons would be deprived of important safeguards such as those provided by article 5 (family relationship and best interest of the child); article 6 (the right to comply voluntarily with a return decision); article 12 (judicial review of the return decision); and article 14 (mandatory oversight of administrative detention).

In line with the Member States' obligations under the ECHR, there should be no restriction to the directive's geographical scope. Indeed, the European Court of Human Rights stated in the case of *Amuur vs. France* (judgement of 20 May 1996) that "*the international zone does not have an extraterritorial status"* and that States have therefore to secure all the rights guaranteed under the Convention.

⇔ Amnesty International recommends amending article 2 accordingly.

[2] Amnesty International, UK Human rights a broken promise, AI Index EUR 45/004/2006.

Article 3 – Definitions

- **Article 3 (b): notion of "illegal stay"**

Amnesty International believes that the notion of "illegal stay" should be further clarified in order to insert safeguards regarding asylum-seekers being removed under a "safe third country" procedure or a responsibility sharing agreement. In its comments on the asylum procedures directive, Amnesty International has stated that particular safeguards need to be put in place for the return to third countries of asylum-seekers whose applications have not been determined on substance in a Member State. In those cases, removal should be implemented only if access is assured to an asylum procedure in the relevant country, and to effective protection in cases where it is needed.

⇔ Amnesty International recommends amending Article 3 (b) in order to clearly exclude asylum seekers who have not yet been issued a final decision at first instance or in appeal.

- **Article 3 (c): definition of "return"**

Amnesty International also believes that the notion of "return" as defined by article 3(c) should be amended as it currently encompasses return to a country of origin, of transit, as well as to another third country. In order to ensure the safety of those returned to a transit country, the directive should stipulate that prior to return the receiving state must explicitly agree to accept the individual being returned and that the sending state must establish that the individual's human rights will be fully respected in the county to which they are being transferred. Further, the directive should prohibit returns to a country where the individuals have never been or with which they have no meaningful link.

⇔ Amnesty International recommends narrowing down the scope of article 3 (c) accordingly.

Article 4 – More favourable provisions

Article 4 paragraph 2 states that the returns directive shall be without prejudice to any provision which may be more favourable for the third country national laid down in Community legislation. While Amnesty International understands that the list included under paragraph 2 is not exhaustive, it recommends to add a reference to the Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, adopted on 1st December 2005.

⇔ Amnesty International recommends amending article 4 accordingly.

Article 5 – Family relationship and best interest of the child

Amnesty International welcomes the proposed obligation on Member States to take due account of family relationships, duration of stay in the Member States and the existence of family, cultural and social ties with the country of origin. This is a positive acknowledgement of the fact that return procedures are not executed in a social vacuum and that there are essential considerations that must be taken into account before deciding whether or not to remove someone from EU territory.

However, Amnesty International recommends strengthening the reference to the best interest of the child. Pursuant to article 3 of the 1989 UN Convention on the Rights of the Child, the child's best interest should be a primary consideration in the expulsion procedure. Further, Amnesty International supports UNHCR's view regarding the need for States to set up an appropriate process for assessing within a reasonable time frame what is in the child's best interest.

⇔ Amnesty International recommends amending article 5 accordingly.

Articles 6 and 7– Return decision and removal order

- **Article 6 (1) - Mandatory return**

While Amnesty International agrees with the general principle that individuals should have an opportunity to leave the territory of their own accord as an alternative to forced removal, it is concerned that the use of the term 'voluntary' to describe all departures that are undertaken as an alternative to forced removal, has led to confusion

and misunderstanding. For example, in several EU Member States (such as France, United Kingdom, the Netherlands and Germany) many rejected asylum seekers, such as those from Afghanistan, have only been able to obtain the means to avoid destitution by agreeing to participate in "voluntary return" schemes. Amnesty International supports ECRE's suggestion that the term "mandatory return" be used to describe situations whereby a person consents to return to his/her country of origin instead of staying illegally or being forcibly removed.

⇔ Amnesty International recommends amending article 6 and other relevant provisions of the directive accordingly.

Against this background, Amnesty International deplores that the draft directive is silent as to the minimum social and economic support that individuals should have while they decide whether or not to return voluntarily. It is essential that individuals are not left destitute during this time. Situations where individuals are driven into destitution while making such an important decision are unacceptable and may lead to violations of states' obligations under ECHR. Amnesty International strongly believes that the provision of socio-economic benefits should continue until an individual's actual departure.

⇔ Amnesty International recommends amending article 6 and other relevant provisions of the directive accordingly.

Amnesty International believes that many individuals and families would benefit from the opportunity to make considered and well informed decisions about their return. Access to information, advice and counselling services, independent of governments and of intergovernmental organisations, can assist returns. Coming to terms with the return decision and obtaining accurate and confidence building information about return prospects may take time. People who have been recognised as refugees but have subsequently had their status withdrawn may need time to prepare mentally for return to the country from which they were forced to flee. Others who have been absent from the country of origin for prolonged periods of time may benefit from time to explore the conditions in the country to which they will return. Amnesty International deplores that the draft directive is silent as to measures that states should introduce to assist return.

⇔ Amnesty International recommends amending article 6 and other relevant provisions of the directive accordingly Amnesty International recommends the inclusion of a provision in the directive obliging states to introduce packages to assist the return of those they have issued with a return decision, as well as measures to make return more viable.

- **Article 6 (2) – Period of voluntary departure**

Amnesty International is concerned that a period of "up to four weeks" may prove insufficient for many individuals who would otherwise choose to depart voluntarily. Amnesty International suggests that four weeks is designated as a minimum (not a maximum) period to allow for departure. Maximum time limits are inappropriate in this context as they fetter States' capacity to respond flexibly to individual needs.

In some cases, four weeks may be insufficient time to obtain a travel document and finalise practical travel arrangements, including obtaining any transit visas that are required. Many rejected asylum applicants have difficulty in obtaining travel documents from their embassy or consulates. Often the delays in such procedures are beyond the control of the individual seeking to leave or that of any organisation assisting departure.

The appropriate period of time will also depend on factors such as the length of time an individual has been present in the country: asylum seekers who have been fast-tracked through an asylum system are likely to require less time to make practical arrangements than those who have been living in an EU Member State for a number of years. The latter group is likely to require more than four weeks to sort out their affairs including, for example, financial and property arrangements and children schooling. Allowing time to resolve such matters may help to ensure the return is dignified and durable.

⇔ Amnesty International recommends that four weeks is designated as a minimum (not a maximum) period to allow for departure.

- **Article 6 (2) – Risk of absconding**

The draft directive provides that Member States may deny individuals the opportunity to return "voluntarily" where there are reasons to believe that the person concerned might abscond during such a period. Amnesty International

believes that the text as currently drafted may result in abuses as Member States might use a very broad range of grounds for believing an individual may abscond. Reports recently published by Amnesty International show that the authorities are using the risk of absconding as justification for detention without a detailed and meaningful assessment of the risk posed by each individual. Individuals concerned may be placed in detention on the basis that a bed is available in a detention centre, rather than considering the necessity, legality and appropriateness of detaining them. The precarious situation of migrants is enhanced by the absence of a regular and automatic judicial review.

In order for "voluntary return" opportunities to be meaningful, a clear obligation must be placed upon the State to demonstrate sound reasons for believing that there is a risk of absconding, through transparent and fair judicial procedures. Unless this is the case, Amnesty International is concerned that Member States will be free to deny the opportunity to return voluntarily to all those receiving a return decision. Amnesty International is all the more concerned that articles 6(3) and 7(1) allow Member States not to apply the two-step procedure when there is a risk that a person may abscond (see *infra*).

⇔ Amnesty International recommends amending article 6 (2) in order to include a definition of the "risk of absconding". Further, this provision should include legal safeguards concerning the use of such a concept in particular regarding the burden of proof and the judicial control. (See *infra* comments on article 14.1.)

- **Article 6(3) and 7 (1) – Two step-procedure**

According to the draft directive, return decision and removal order are separate administrative acts, which are not necessarily issued at the same time (two-step procedure). However, Amnesty International is concerned that the directive allows Member State to substantially limit the principle of voluntary return as States' competent authorities would be entitled to issue the return decision and the removal order at the same time when there is a risk that the individual may abscond. Leaving the implementation of the two step procedure at Member States' discretion is paradoxical, as it is likely to undermine the promotion of voluntary returns.

⇔ Amnesty International recommends the deletion of these provisions.

- **Article 6 (4) – *Non-refoulement***

Amnesty International welcomes the recognition in Article 6.4 of Member States' obligations derived from fundamental rights, including those resulting from the European Convention on Human Rights. However, Amnesty International supports UNHCR' s view that the provision should include an express reference to the 1951 Geneva Convention. As stated by UNHCR, the *non-refoulement* principle of article 3 ECHR and article 33 of the Geneva Convention are complementary and both need to be taken into account for the return decision to be in line with international law.

Further, it is essential that where individuals cannot be returned according to international standards, Member States should not only refrain from issuing a return decision, but also ensure that individuals are provided with legal status for remaining in their territory (see infra comments on article 13).

⇔ Amnesty International recommends amending article 6 and other relevant provisions of the directive accordingly.

Articles 8 and 13 – Postponement of the return decision and safeguards pending returns

- **Grounds for postponing returns**

Amnesty International welcomes the provision in article 8(1) for Member States to postpone the enforcement of a return decision as a result of specific circumstances of the individual case. However, we urge States to recognise that there are additional factors providing sound grounds for postponing a return decision which are not referred to in the draft directive. Amnesty International recommends that references be included in Article 8 (2) (b) to cases where the third country fails to co-operate in the issuance of travel document, one of the most frequent obstacles to removal.

In order for returns not to destabilise a fragile country, Amnesty International believes that UNHCR should be consulted about the conditions for enforcing removals to countries of origin which have experienced large scale forced migration, conflict situations, or are facing heavy reconstruction challenges.

⇔ Amnesty International recommends amending article 8 accordingly.

- **Unaccompanied minors**

Amnesty International welcomes the safeguards included in article 8.2 (c) in relation to the return of accompanied minors. However, to ensure that these safeguards are implemented in practice, clarification and additional guarantees are needed in order to ensure that the best interest of the child is a primary consideration. In order to enhance children's protection, the directive should establish criteria determining to which competent authorities will assess the need to postpone a removal order. Such criteria could include the age of the claimant, his/her family situation, his/her degree of integration in the host country.

Amnesty International also believes that the current draft is too vague when it comes to assessing the reception conditions in the country of origin While in its present form, the draft directive states that minors could be handed over to "a family member", "a guardian or an equivalent representative" or "a competent official of the country of return", we believe that unaccompanied children should only be returned when they are handed over to the person who will be their primary carer, whether that is a family member or a legal guardian. The child and his/her legal guardian in the EU Member State must be informed of the name of the person to whom the child will be handed over, as well as the person's future relationship to the child. An additional provision is required to ensure that any postponement of separated child's return is communicated to that child and to their legal guardian.

⇔ Amnesty International recommends amending article 8.2 (c) accordingly.

- **Safeguards pending return**

According to Article 13 of draft directive, individuals who cannot be removed, or for whom the return decision has been postponed, should be provided with written confirmation of their situation. They should also be provided with conditions of stay in line with a limited number of provisions of the reception directive[3]. While Amnesty International acknowledges that this will be an improvement in many Member States, we believe that the protection of such individuals should be further strengthened in order to avoid situations where people are left in limbo. Once a removal order or a return decision is cancelled or suspended, the person subject to the order or to the decision must immediately be granted a legal right to remain that allows for the exercise of rights. If after a reasonable period defined by law, the removal or the return decision cannot be executed, the person subject to the order should have the opportunity to apply for a residence permit (including social entitlements and access to work). Further, the draft directive should include an explicit requirement that those persons should never be detained.

Amnesty International is concerned that the draft returns directive makes no reference to the reception directive's provisions on employment, social assistance or housing, or to provisions on appeal if any benefits are refused, reduced or withdrawn. The reception directive outlines the minimum standards that will normally suffice to ensure asylum seekers a dignified standard of living. By allowing states to disregard a large number of these minimum standards in relation to those who are in their territory but who cannot be returned, the draft directive is countenancing a situation where large numbers of people will be vulnerable to destitution and homelessness, forced to survive at the fringes of society for an indefinite period of time.

⇔ Amnesty International recommends amending article 13 and other relevant provisions of the directive accordingly.

Article 9 – Re-entry ban

- **Legal safeguards**

Amnesty International is opposed to the draft directive's requirement that Member States impose a re-entry ban of up to five years in removal orders. The draft directive proposes that the re-entry ban may also be imposed on people departing "voluntarily", thus clearly reducing any advantage for individuals who depart before their removal is enforced. Further, Amnesty International is concerned that the ban may be extended indefinitely for people

[3] Under Article 13 of the draft returns directive, the conditions of stay for those who are not returned must only be as favorable as the following articles of the EU reception directive: residence and freedom of movement (article 7); families (article 8); medical screening (article 9); schooling and education of minors (article 10); health care(article 15); provisions for persons with special needs (articles 17-20).

constituting a "serious threat to public policy or public security". In absence of a clear definition of such concepts, Amnesty International fears that this provision could lead to abusive interpretation. We are particularly concerned about the lack of access to legal remedies in the face of such a ban. Amnesty International also deplores that withdrawal and suspension of the re-entry ban are permitted only under stringent conditions (article 9.4).

⇔ Amnesty International believes that the current proposal is inadequate. In order to avoid arbitrary decisions and a breach of the principle of *non-refoulement*, Amnesty International recommends setting clear rules regarding remedies available against re-entry ban, its withdrawal and suspension. These rules should indicate the responsible body, the procedures involved and the time-frame.

- **Re-entry ban and asylum-seekers**

Whilst the draft directive states that the ban is "without prejudice to the right to seek asylum in one of the Member States" (Article 9.5), it is difficult to foresee in practice how this right could be realised. If a person is denied entry to the EU for any purpose, s/he will have little chance in practice of ever getting access to an EU asylum procedure for the purpose of making a claim. Re-entry bans are a blunt instrument that are entirely inappropriate in light of the fact that future changes in a country of origin, and thus an individual's need for international protection, cannot be predicted. As currently drafted, the re-entry ban could apply to Convention refugees where states have accepted that they have been at risk of persecution in the past and granted them status, but where it has been decided that due to changes in the country of origin, the risk of persecution is no longer present.

If the re-entry ban is retained in the directive, changes are needed to ensure that the withdrawal of a re-entry ban would have cross-territorial effect and would be automatically effected in cases where there is an alteration in the situation in the country of origin, creating the need for an individual to flee to access safety in the EU. Further, it is essential that any ban be withdrawn if an individual is subsequently deemed in need of resettlement to an EU country. As proposed by UNHCR, there should be realistic and accessible opportunities to request and obtain withdrawal of a re-entry ban in case of an asylum claim or refugee resettlement request. A process for withdrawal of re-entry ban would need to be available at border posts as well as at consular posts abroad.

Finally, Amnesty International believes that the draft directive should be clarified in order to ensure that all EU-Member States would recognise the extraterritorial effect of a withdrawal of a re-entry ban by the administration of one Member State.

⇔ Amnesty International recommends setting clear rules regarding remedies available against re-entry ban, its withdrawal and suspension. These rules should indicate the responsible body, the procedures involved, the time-frame, as well as specific guarantees for asylum seekers.

Article 10 - Removal

Amnesty International welcomes the requirement that coercive measures shall be proportional and not exceed reasonable force. However, in order to ensure that these provisions are effective in practice, further clarification and guarantees are needed. Amnesty International recommends that the directive specify that coercive measures must only ever be used as a last resort, and that physical force must never be used where vulnerable persons are concerned, including children and the elderly.

We regret that the draft directive does not provide any clarity as to what 'coercive' measures are envisaged by the Commission and urge Member States and the European Parliament to set clear limits to the measures that are permitted. The Council of Europe's Guidelines on Forced Return were drawn up to provide guidance for states on how to carry out return in a way that is effective whilst fully respecting human rights. The Guidelines stipulate particularly dangerous coercive measures that shall not be used, and outline the training that members of any escort team should undergo. We believe that the European Council and the European Parliament should draw on these guidelines and ensure that the returns directive includes stringent safeguards on states' use of coercive measures.

⇔ Amnesty International recommends amending article 10 accordingly.

Article 12 – Judicial remedies

Amnesty International is concerned that article 12(2) does not ensure an automatic suspensive effect of appeals, even when the person claims to be in need of international protection. Amnesty International believes that

effective judicial remedies are all the more necessary in view of the fact that the EC Council directive on asylum procedures does not include the right to an automatic suspensive appeal. In line with the jurisprudence of the European Court of Human Rights, Amnesty International believes that all those subject to a removal order should have an in-country right of appeal against the removal decision before an independent judicial body, and be able to raise fears of *refoulement* or ill-treatment on return, contrary to articles 3 and 8 ECHR and other international human rights treaties.

Amnesty International believes that the exceptions allowing Member States to implement deportation orders without waiting for the court's ruling, constitute a violation of international law and standards. The European Court of Human Rights reminded Member States in the case of *TI v. the UK*, that any measure adopted by them individually or collectively had to ensure the fulfilment of their obligations under the European Convention of Human Rights. One such obligation is to provide for effective remedies against violations of the rights guaranteed by the Convention. In the case *Jabari vs. Turkey*, the Court held that "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to article 3, the notion of an effective remedy under Article 13 requires independent and vigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3 and to the possibility of suspending the implementation of the measure impugned" [ECHR, judgement 11 July 2000, §50].This ruling was further developed in the case of *Conka vs. Belgium*, where the Court held that "it is inconsistent with article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention."

Although the Court acknowledged that contracting states are afforded some discretion as to the manner in which they conform to their obligations under this provision, it shall be reminded that the Court has expressly held that there can be no exception on the grounds of public order or national security. In the case of *Chahal v. the UK,* the Court stated that in *non-refoulement* cases "the issues concerning national security are immaterial" (§150), since "given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to [the prohibition of torture] the notion of an effective remedy under article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State" (§151).

⇔ Amnesty International recommends amending article 12 in order for this provision to fully comply with the ECHR rulings.

Articles 14 and 15 – Temporary custody

- **Risk of absconding (article 14.1)**

Amnesty International appreciates that article 14.1 provides for alternatives to detention. However, in order for these alternatives to be implemented in practice, Amnesty International recommends including a definition of the "risk of absconding". Further, this provision should include legal safeguards concerning the use of such a concept in particular regarding the burden of proof and the judicial control (see *supra* comments on article 6.2).

Further, the directive should clearly state that the policy is to avoid detention of returnees and that alternatives to detention and non-custodial measures should always be considered before resorting to detention.

- **Duration of detention (article 14.4)**

Amnesty International is concerned by the provision allowing the detention of individuals for a maximum duration of up to six months. Although six months is the average length of detention of irregular migrants in the EU, Amnesty International believes that this duration is excessive. Detention is often justified as the only way to ensure an effective removal policy, but Amnesty International's reports show that on numerous occasions individuals may be detained even if the prospect of effecting their forcible removal within a reasonable time may be slim due in particular to lack of co-operation of the countries of origin.

In line with international standards, the EU should stick to a qualitative approach and ensure that detention should not last longer than necessary. Detention is an extreme sanction for people who have not committed a criminal offence. It violates one of the fundamental human rights protected by international law - the right to liberty. Detention pending removal is only justified for as long as removal arrangements are in progress. If such arrangements are not executed with due expedition and diligence, the detention will cease to be permissible.

- **Legal safeguards (article 14.3)**

Amnesty International appreciates that temporary custody orders shall be subject to review by judicial authorities at least once a month. However, given its critical importance, article 14 paragraph 3 should be strengthened. Persons deprived of their liberty should be given adequate opportunity to have their detention reviewed (both on its legality and on its necessity) by means of a prompt, fair, individual hearing before a judicial authority whose status and tenure afford the strongest possible guarantees of competence, impartiality and independence.

- **Conditions of temporary custody (article 15.1)**

Amnesty International welcomes the guarantees contained in article 15 (1). However, this provision should be further clarified in order to ensure access to effective legal assistance, access to services of competent, qualified and impartial interpreters and access to qualified medical personnel.

- **Vulnerable groups (article 15.2)**

Amnesty International believes that children's detention should in principle be avoided. In line with article 37 of the UN Convention on the Rights of Child, children should only be detained as a last resort and in facilities appropriate to their status. Unaccompanied minors should be represented by a guardian. Further, the draft directive should be amended in order to include additional safeguards to avoid the detention of other vulnerable groups - including victims of trafficking, seriously ill people, elderly persons and pregnant women.

- **Monitoring (article 15.3)**

Amnesty International welcomes the provisions concerning the possibility for international and non-governmental organisations to visit detention facilities. However, the draft directive should add specific wording to ensure that UNHCR and NGOs are granted access to reception facilities at all stages of the procedure. In particular, security grounds shall not be used to deny right of access unless there is a demonstrable threat.

Complementary to NGO and IGO scrutiny, Member States should mandate an *independent inspection body at national level* to make regular, unannounced and unrestricted visits to airport detention cells and airport transit zones. They should also establish *independent monitoring systems for expulsion procedures*, for example by appointing observers, mediators or ombudsmen, and conduct impartial and in-depth enquiries at all levels into allegations of ill-treatment.

Independent investigations should be carried out into cases where expulsion has resulted in an actual breach of the principle of *non-refoulement*. Given the extra-territorial effect of article 3 ECHR, Member States are held accountable for breaches of the *non-refoulement* principle occurring outside the EU territory.

The EU should develop an *EU-wide monitoring and accountability mechanism*, which would be complementary to the national procedures.

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