February 2005 - Amnesty International EU Office

Briefing to the Members of the European Parliament on the Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

On 19 November 2004 the Council confirmed the political agreement on the asylum procedures directive it had reached in April 2004, postponing to a later date the adoption of a common list of 'safe countries of origin'.

The European Parliament is now being re-consulted on the text and Amnesty International takes this opportunity to draw your intention to our main concerns regarding the Directive as it stands (please note that we rely on the amended proposal 14203/04 ASILE 64, dated 9 November 2004).

Amnesty International has followed with great interest the drafting process of the Directive leading to the last year's political agreement, and has provided comments on a regular basis. It considers the outcome of the negotiations to be particularly poor as an agreement on low common standards some of which risk leading to breaches of international law in their implementation. It is actually worth noting that during the process of negotiation, Amnesty International, together with other NGOs concerned in this field, called for the withdrawal of the Directive .

In this last round of consultation before the European Union embarks on the second phase of the process of drawing up a common European asylum system, Amnesty International presents its concerns to the European Parliament in the hope that they will be reflected in the report to the LIBE Committee.

A missed opportunity to raise protection standards throughout the European Union

The Asylum Procedures Directive is the first legally binding instrument of this sort and an essential step towards a common European asylum system. The objective of this instrument is to reduce the disparities among the Member States' procedures to grant or withdraw refugee status. By establishing a minimum level playing field throughout the European Union, which guarantees a fair and efficient procedure, the initial aim of the Directive was to create an equivalent level of protection throughout Europe.

Amnesty International is concerned that years of arduous negotiations have perverted this initial project. The current text provides for a great number of substantial exceptions and limitations, which allow Member States to lower their procedural standards and/or pass off their responsibility with regard to determining asylum applications. Such provisions, reflected in a multiplicity of procedures and practices, have finally come to amount to a catalogue of national worst practices, seriously undermining the credibility of the EU harmonisation process in the asylum field. In addition, some provisions of the Directive raise serious concerns in respect of widely accepted international human rights and refugee law principles.

Rue d'Arlon 37-41, b.10, B-1000 Brussels, Belgium
Tel. +32-2-502.14.99 - Fax +32-2-502.56.86
E-mail : amnesty-eu@aieu.be - Web site : www.amnesty-eu.org

1. The general procedural guarantees contained in the Directive for the examination of asylum claims risk to remain illusory.

Amnesty International fears that the few general procedural guarantees contained in the Directive (Chapter II, Articles 5-22) will remain a dead letter in practice as safeguards and protection objectives are watered down by a multiplicity of exceptional procedures and practices.

It is very regrettable that the extensive basis for the application of accelerated, inadmissibility and special procedures (Articles 23-25), allow for each of the general procedural safeguards to suffer from a number of exceptions, especially in cases where an application is considered ill-founded and/or is lodged at the border.

Given the wide definition of the concept of manifestly unfounded claims (which potentially applies to 16 different categories), Amnesty International fears that more than 80% of the applications lodged will be processed under a fast-track procedure, thus implying that lower procedural safeguards may routinely apply.

Amnesty International further deplores the creeping confusion between EU asylum and immigration procedures and the distortion of the principal objective of the Common European Asylum System, that is the protection of persons fleeing persecution, to serving the purposes of immigration control. This is clearly illustrated by the articles dealing with border procedures (Articles 35), which provide for the intervention of other decision-making bodies than the 'Refugee Status Determination' bodies required by Article 3A. This implies that border officials will be de facto involved in carrying out an assessment of how well-founded an asylum claim is, even though they do not have the necessary qualifications.

2. The Directive does not contain adequate appeal safeguards for asylum seekers

Amnesty International deplores that, despite a reference to Member States' obligations under international law, the directive does not contain an explicit right of all asylum seekers to remain or request for leave to remain in the asylum country pending the outcome of the appeal procedure. This question is left at Member States' discretion.

This right to remain is essential for the judicial supervision to be effective. The European Court of Human Rights, albeit in the context of an imminent risk of breach of Article 3 of the ECHR, has recognised this. Amnesty International has repeatedly reminded that the exceptions allowing Member States to implement deportation orders without waiting for the court's ruling constitute a breach of international standards.

This lacuna is even more flagrant when one considers that in practice 30 to 40% of the applicants get refugee status or a complementary form of protection at the appeal stage.

Amnesty International calls on the Parliament to advise the Council to correct the existing Directive in order to ensure that all basic procedural guarantees (including the right to have access to a legal adviser and an interpreter, and the right to a suspensive appeal) without exception are fully available in fast track, admissibility and border procedures

3. Some of the most contentious provisions of the Directive are intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU.

The safe country of origin concept may amount to discrimination among refugees

The directive foresees the possibility of using the safe country of origin concept (Articles 30, 30A, 30B) to restrict access to the regular asylum procedure. Amnesty International acknowledges that, under article 30B of the directive, no country can be labelled as "safe" in general terms and the individual may rebut the presumption of safety, but there is no mention of the benefit of the doubt and the burden of proof lies exclusively with the asylum seeker.

Amnesty International is therefore concerned that people coming from countries considered "safe" may be forced to overcome an unreasonable presumption against the validity of their claim, and will have to do so in a procedure which may not offer sufficient safeguards. The use of the safe country of origin concept could thus result in discrimination between refugees that is prohibited under Article 3 of the 1951 Refugee Convention, Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights.

In addition, the Directive foresees the adoption of a minimum common list of safe countries of origin (Article 30) binding on all Member States. No agreement has yet been reached on the countries to be included in the list and the debate is ongoing.

Amnesty International understands that this is due to lack of agreement on the supposed 'safety' of the ten countries listed for the minimum common list, namely Benin, Botswana, Cap Verde, Ghana, Senegal, Mali, Mauritius, Costa Rica, Chile and Uruguay.

Given that Member States were divided on the proposed list on account of serious human rights concerns in the relevant countries, it is highly questionable that this list should be adopted at all. The UNHCR, Amnesty International and other NGOs have consistently criticised the inadequacy of the criteria used in order to designate such safe countries. The fact that the vote is due to take place at a later stage by qualified majority voting with mere consultation of the Parliament is another concern. Whilst we are concerned that QMV shall serve to overcome a lack of agreement on such fundamental issues, the fact that the Parliament is not associated through co-decision goes against article 67 (5) of the EC Treaty , which provides that once the Council has adopted "common rules and basic principles" in relation to asylum procedures by unanimity, further measures in the field must be adopted under the co-decision procedure.

Furthermore, it is important to note that Member States not currently operating safe country systems will actually be required to abide by the EU common list and therefore to dilute their standards by a measure of EC law. This raises competence concerns, as the EU is only entitled to establish minimum standards in that area.

It is also deplorable that Member States may retain national lists of safe countries of origin along with specific examination procedures for these cases (Article 30A).

Rue d'Arlon 37-41, b.10, B-1000 Brussels, Belgium
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The safe country concept allows States to shift their responsibility to third countries

Amnesty International has strong concerns about the use of the safe third country concept (Article 27) in the Directive, which does not appear to be in line with Member States' obligations under international law. The Directive allows Member States to remove asylum seekers to any country willing to accept them, often without any consideration of the merits of their claims or a substantial assessment of the 'safety' of the third country for the asylum seekers. In practice, this may result in shifting responsibility to third countries, regardless of whether the applicant has meaningful links with such countries and whether there are durable solutions in these countries.

Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. Transfer of responsibility can only be envisaged where a meaningful link exists between an asylum applicant and a third country which makes a transfer reasonable and where the third country is determined safe in the individual circumstances of the applicant. Furthermore, a transfer can only take place if the third country gives its consent to admit or readmit the asylum applicant and to provide him/her with full access to a fair and efficient determination procedure. The burden of proof regarding the safety of the third country for the particular applicant lies entirely with the country of asylum and the applicant must be able to rebut the presumption of safety.

Amnesty International is concerned that the Directive does not sufficiently guarantee the right of the asylum applicant to rebut the presumption of safety, as it refers back to national legislation for defining guarantees regarding individual assessment and the notion of "meaningful links" and does not contain sufficiently strict criteria for the designation of safe countries.

The "supersafe" third country concept may amount to a denial of protection

Amnesty International is particularly concerned by the exceptional application of the safe third country concept in cases when the asylum seeker arrives from a third country in the European region (Article 35 A).

Amnesty International is concerned that the Directive endorses a concept, which is based on the assumption that the level of protection available in countries neighbouring the European Union is comparable, if not equivalent, to standards in force in EU Member States. The idea of further extending the Dublin II mechanism is seriously questionable given the shortcomings of the asylum system in some neighbouring countries. This provision actually embodies one of the most problematic aspects of the Directive as it provides that Member States may deny access to the procedure altogether to any asylum seeker arriving "illegally" from designated countries.

The most alarming is that these provisions do not require any individual assessment of the safety of the third country for the particular applicant. Given that these "neighbouring safe third countries" have no obligation to actually process the asylum claim, implementing such a concept may lead to refugees-in-orbit situations, and chain-refoulement, which are clearly in breach of the jurisprudence of the European Court of Human Rights.

Amnesty International calls on the Parliament to reject the above mentioned provisions, as they include significant departures from accepted international human rights and refugee law principles and standards.

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