

Mr. Dragutin Mate
Minister of Interior
EU Presidency

Brussels, 9 May 2008
Our ref: b-767

Dear Mr. Mate,

Subject: Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals

Amnesty International has been following closely the discussions on the proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals and has raised its concerns on various occasions, including ahead of the April Justice and Home Affairs Council Meeting. During the legislative process, we have seen a constant downgrading of human rights safeguards and standards resulting in a compromise provisionally agreed between the Slovenian Presidency and the Rapporteur which is very worrying in many respects. The EU as a global actor for the promotion of human rights can not afford to adopt common standards on return that risk undermining international human rights standards. Amnesty International urges the Member States, the European Parliament and the Commission to put the protection of the fundamental rights of those subject to return again at the centre of their discussions and re-assess the compromise in this perspective.

During the COREPER-meeting of 7 May the compromise text did not receive sufficient support from the Member States for a variety of reasons. As the Presidency explores the possibilities to resolve this situation Amnesty International reiterates its main concerns with regard to the compromise which is currently discussed, from a human rights perspective. These concerns relate to the scope of the directive, the safeguarding of the principle of voluntary departure, entry bans, detention and emergency situations. In Amnesty International's view the compromise text should not be adopted as long as those concerns are not effectively addressed.

Possibilities for Member States to **exclude categories of illegally staying third country nationals from the scope of the directive** have been constantly expanded. The compromise allows Member States not to apply all the standards of the directive to persons refused entry at the border or those who entered irregularly and have been apprehended or intercepted in connection with the irregular crossing of the border and have not subsequently obtained an authorisation or a right to stay in a Member State. Using vague and undefined criteria such as 'in connection with' leaves room for extremely large interpretation and could encompass potentially every third country national who entered the territory of the Member States irregularly, regardless of where he or she was apprehended in the territory or the duration of his or her irregular stay. As a result crucial safeguards in the directive with regard to legal remedies against return decisions as well as safeguards with regard to detention and judicial review of detention would not apply in those cases. Such broad derogations raise questions with regard to discriminatory treatment of certain groups of irregularly staying third country nationals.

Amnesty International has expressed full support for the general principle underpinning the original Commission proposal that irregularly staying third country nationals should have the **opportunity first to leave the territory on their own accord as an alternative to forced removal**. Unfortunately, this important principle has been seriously watered down. The period of voluntary

departure to be granted by Member States ranges between only seven and thirty days. Member States may also provide in their national legislation that such period shall only be granted following an application of the third country national concerned. In addition, Member States may refrain from granting such a period of voluntary departure to start with if there is a 'risk of absconding' or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent. The reference to applications dismissed as manifestly unfounded or fraudulent will allow Member States to exclude *inter alia* asylum seekers whose application for asylum has been rejected as manifestly unfounded from being granted a period of voluntary departure. In light of the widespread practice in the Member States to reject asylum claims on the basis that they are manifestly unfounded, this may potentially exclude a large group of persons from such a period of voluntary departure.

Effective safeguards with regard to the duration of the minimum period for voluntary departure as well as the reception conditions to be guaranteed to the individuals concerned during the period of voluntary departure or postponement of the return decision must be reinserted. This is necessary so as to allow the third country nationals concerned to make the necessary practical arrangement for their return as well as prevent them from becoming destitute.

Amnesty International considers **entry bans** to be a blunt instrument that is entirely inappropriate in light of the fact that changes in a country of origin, and thus the individual's need for international protection, cannot be predicted. While a general safeguard clause ensuring the right to international protection as defined in the Qualification Directive is included, it remains difficult to foresee in practice how this could be realized. At the same time, entry bans could also present an important practical obstacle to family reunification with family members residing in EU Member States, including under the family reunification directive. Amnesty International strongly believes that Member States should never be under an obligation to impose an entry ban and questions the necessity and appropriateness of including such an instrument in the directive as it risks undermining Member States' human rights obligations under international human rights law in practice.

Amnesty International considers the compromise text with regard to the **maximum duration of detention** excessive and unacceptable as common EU standard. 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. Lack of cooperation of the countries of origin in the removal process remains in the compromise text one of the reasons to extend the period of detention up to 18 months. This is open to wide interpretation and might open the door to abusive practices at national level leading to unjustifiably long periods of detention for reasons for which the individual concerned can not be held responsible. The general presumption against detention in international law and the exceptional grounds for deprivation of liberty are incompatible with the creation of such additional grounds for prolonged detention.

In line with international standards, the EU should maintain a qualitative approach and ensure that detention should always be for the shortest possible time and must not be prolonged or indefinite. Detention is an extreme sanction for people who have not committed a criminal offence. It violates one of the fundamental rights protected by international law – the right to liberty.

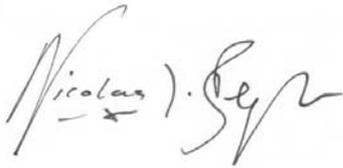
Furthermore, persons deprived of their liberty within the framework of this directive should be given an adequate opportunity to have their detention reviewed both on its legality and its necessity. This should include a prompt, fair, individual hearing before a court, accompanied by the provision of legal assistance. The compromise ensures a speedy judicial review of detention ordered by administrative authorities either *ex officio* or at the request of the person detained but does not guarantee that subsequent review of detention at reasonable intervals of time must be carried out by a judicial authority.

Amnesty International also believes that the detention of children should be avoided. In line with Article 37 of the UN Convention on the Rights of the Child, children should only be detained as a last resort and in facilities appropriate to their status. As unaccompanied children are particularly vulnerable, the directive should in addition prohibit their detention and effectively ensure that they are represented by a guardian. Additional safeguards are needed to avoid the detention of other vulnerable groups, including victims of trafficking, seriously ill people, elderly persons and pregnant women.

Finally, Amnesty International is strongly opposed to the possibility for Member States to weaken the safeguards on judicial review of detention as well as detention conditions in so-called **emergency situations** which are hardly defined in the compromise text. This is particularly worrying as it could serve as a pretext for Member States to derogate from the obligation to carry out detention as a rule in specialised detention facilities which could lead to more generalised use of ordinary prison accommodation for detention of third country nationals in the context of removal. In addition it would allow Member States to provide for a judicial review of detention which is less "speedily" as required under "normal" circumstances. EU Member States should not undermine their obligations under international human rights law and standards with regard to deprivation of liberty through EU legislation. Including a possibility for Member States to derogate in ill-defined emergency situations from the minimal safeguards in the directive on judicial review and reception conditions again opens the door for abusive interpretation and must be rejected.

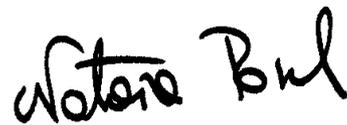
Amnesty International urges you to ensure that these concerns are taken into account and effectively addressed in your further discussions with all actors involved.

Yours sincerely,



Nicolas Beger

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