

Mr. Dragutin Mate  
Minister of the Interior  
EU Presidency

Brussels, 14 April 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. As the process of 'trialogues' between the Presidency, the European Parliament and the Commission continues and provisional compromises are being made, we are witnessing a constant downgrading of human rights safeguards and standards in the draft directive. The EU as a global actor for the promotion of human rights can not afford to adopt common standards on return that undermine 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 latest proposals in this perspective.

In the lead up to the Justice and Home Affairs Council meeting on 17 and 18 April, Amnesty International would like to reiterate its concerns with regard to five major issues in the proposal for a directive on return from a human rights perspective. These concerns relate to the scope of the directive, safeguarding of the principle of voluntary departure, entry bans, detention and exceptional measures .

In the course of the discussions, possibilities for Member States to **exclude categories of illegally staying third country nationals from the scope of the directive** have been constantly expanded. Latest compromises allow 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 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.

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 in the negotiating process. 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.

In addition, as the risk of absconding determines whether or not the third country national will be granted the possibility to leave voluntarily, whether or not the third country national can be detained and whether or not the return decision must be accompanied with an entry ban, a clear definition of this concept in the directive is needed. Such a definition should at least clearly state the principle that the mere fact of having entered the territory of a Member State irregularly or being irregularly present in a Member States' territory should never be a decisive element for determining whether or not there is a risk of absconding.

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 to seriously undermine Member States' human rights obligations under international human rights law in practice.

Amnesty International remains extremely concerned about current tendencies in the debate surrounding **detention** in the context of this draft directive. Amnesty International considers current proposals with regard to the maximum duration of detention excessive and unacceptable as common EU standards. 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 recent proposals one of the reasons to extend the period of detention up to 18 months. In addition, the Council also proposes to allow extension of the maximum period of detention beyond six months if the removal operation is likely to last longer due to a pending appeal procedure. 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. Therefore, safeguards should be included in the directive ensuring that detention pending removal is only acceptable if it is necessary and only for as long as removal arrangements are in progress and shall cease to be justified if such arrangements are not executed with due expedition and diligence.

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.

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 detention of unaccompanied children and 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 recent proposal to weaken the safeguards on judicial review of detention as well as detention conditions in so-called **emergency situations**.

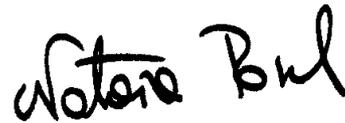
EU Member States should not undermine their obligations under international human rights law and standards with regard to deprivation of liberty through EU legislation. Including a possibility for Member States to derogate in emergency situations from the minimal safeguards in the directive on judicial review and reception conditions again opens the door for abusive interpretation and must be rejected.

Amnesty International hopes these considerations may be taken into account during your discussions in Luxembourg.

Yours sincerely,



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