Fédération internationale des ligues des droits de l'Homme
17, Passage de la Main d'Or 75011 Paris - Tel : 33 (0) 1 43 55 25 18 - Fax : 33 (0) 1 43 55 18 80 - Email : fidh@fidh.org - Site internet : www.fidh.org

Proposal for a "returns" Directive
The FIDH calls for the suspension of the text's adoption until it conforms to Member States international human rights obligations.

Brussels, the 6th of May 2008

The International Federation for Human Rights (FIDH) expresses its deep concern regarding the proposed Directive *" on common standards and procedures in Member States for returning illegally staying third-country nationals."*

The latest version of the text, laid down following the "trialogue" between the Commission, the Slovenian Presidency and the European Parliament's Rapporteur, contains numerous measures contrary to Human Rights thus placing Member States in violation with their international obligations.

Many worrying issues, over which the FIDH had suggested corrective measures[1], are confirmed when not compounded, and the text in its entirety illustrates the drastic weakening of all the protective safeguards that the proposed Directive could have set.

The FIDH is particularly concerned about the measures in the text that:

- Organise a **potentially arbitrary detention,** stemming from its virtually automatic implementation, its excessive length (18 months) and its justification through administrative reasons (*Article 14)*;
- Systematise a 5-year entry ban to European territory for returned nationals, a **counter-productive banishment and against which appeals would be impossible and impractical.** *(Article 9)*;
- Enable a **double exclusion,** thus the forced return of illegally staying third-country nationals to a country other than their country of origin (*Article 3c)*;
- Enable the **enforced return of unaccompanied minors to a third country (other than the country of origin) where they have neither family nor legal guardian** (articles 3c and 8a); also enable the **detention of unaccompanied minors** (Article 15.a);
- Allow to exclude from the scope of the Directive, and thus from all protective safeguards, people intercepted up to 7 days after their entry onto the territory (Article 2);
- Considerably weaken the possibilities for voluntary departure, albeit the only real alternative to an enforced return. (Article 6a)

More generally, FIDH would like to put forward, at this time of progressive harmonization of migration policies, the historic responsibility of the MEPs and the European member states in the construction of a global migration policy both fair and exemplary. This responsibility demands not only the scrupulous verification of any measure adopted within the framework of the fight against illegal immigration in order to ensure no human rights violations, but also implies the need to ensure that community harmonization enables the adoption of the most humane and protective measures possible with regard to migrants rights.

The FIDH calls upon the Member States of the European Union and the European Parliament to suspend the adoption of this text, and to defer to the European Fundamental Rights Agency in order to guarantee the conformity of this proposed Directive to the international obligations and commitments of Member States

[1] FIDH Position Paper " EU "returns" directive, 10 recommendations for a protective harmonization in line with Human Rights", 11th of February 2008.

ANALYSIS

1. A potentially arbitrary detention:

The FIDH remains concerned by the possibility of detaining third-country nationals for an excessive period, automatically, and for administrative convenience. Each of these three elements can confer an arbitrary nature to the detention.

- ***Automatic nature of the detention***
  Article 14 enables the Member States to detain an illegally staying person *"unless other sufficient but less coercive measures can be applied effectively in the concrete case"*. The text does not oblige the Member states to verify, following an individual and thorough preliminary examination that other **non-freedom depriving measures** would not lead **to an equally efficient result.** The rule is detention, the other measures are presented here as exceptions.
  These measures potentially violate article 9 of the Covenant on civil and political rights, relative to detention, which specifies that, in case of illegal entry, the obligation to justify the detention as opposed to other measures.[2]
  Finally, this measure does not satisfy the terms set by the 6th guideline on forced return adopted by the Committee of Ministers of the Council of Europe which specifies that detention can only be as a last resort and after a careful examination of the necessity of deprivation of liberty in each individual case.[3]
- ***Length of detention***
  The possibility of detaining a person up to 18 months is in contradiction with the 8th guideline on forced returns adopted by the Committee of Ministers of the Council of Europe. Thus, although the proposed directive states that "*any detention shall be for as short a period as possible*" (Article 14.1), the text allows the period of detention to be extended to 18 months. The Council of Europe's Human Rights Commissioner has, for example, qualified as "*excessive*[4]" the maximum legal length of administrative detention in Ireland which is set at 8 weeks, adding that it was susceptible to causing "*great suffering*", a length nonetheless far inferior to the maximum length proposed by the Directive.
- ***Detention for administrative convenience***
  Finally, the FIDH is seriously concerned about the possibility of keeping a person in detention for administrative convenience, such as prior to the decision of return, in order to "*prepare (the) return*" (Article 14), and after the decision of return "*due to delays in obtaining necessary documentation from third countries*" (Article 14.5)
  These measures from the proposed directive are contrary to article 9 of the International Covenant on civil and political rights, and its political jurisprudence that forbids detention for administrative convenience.[5]

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[2] See the jurisprudence of the United Nations Human Rights Committee in the case of *A. v. Australia,* communication N° 560/1993, UN doc. CCPR/C/59/D/560/1993 (1997). In the decision *Bakhtiyari v Australia*, the Committee confirms that a judicial control which does not allow the courts to reexamine the justification of detention of the interested party in fact does not satisfy the demands of article 9 (*Bakhtiyari v. Australia*), communication N° 1069/202, UN doc. CCPR/C/79/D/10069/2002 (2003)

[3] Guideline 6: "A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed [...] 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."

[4] Report by the Commissioner for Human Rights Mr. Thomas Hammarberg, on his visit to Ireland, 26-30 November 2007, Council of Europe.

[5] Article 9 prevents arbitrary arrest and detention and this applies to all cases of deprivation of liberty, including control of immigration. The United Nations Human Rights Committee considers that deprivation of liberty must not only be lawful, but must also not be due to reasons of administrative convenience (*Van Alphen v. The Netherlands*, UN doc. CCPR/C/39/D/305/1988 (1990))

2. **<u>Banning is counter-productive and indisputable in practice:</u> systematisation of the entry-ban on the European territory for 5 years and restriction to measures of appeal.**

The FIDH remains concerned by the possibility of imposing a 5-year entry-ban to the European territory for all returned individual. This measure is potentially disproportionate and counter-productive in that it will prevent returned people from re-entering Europe legally and will incite them to immigrate illegally.
Moreover, the ban to the European territory not only potentially violates the right to family reunification and threatens other activities in the framework of professional missions, cultural exchanges, further education, etc.

3. **<u>Double exclusion:</u> Possibility of returning illegally staying third-country nationals to countries other than their country of origin.**

Article 3c of the proposed Directive plans the possibility of returning an illegally staying third-country national back to the country of origin, a transit country with whom the Member state or the Community has a re-entry agreement, or any third country that the people agree to go to voluntarily and where they will be accepted.
The FIDH is particularly concerned about the second option that enables the enforced removal of an illegally staying third-country national to a country other than that of origin, where they would have no ties.

4. **<u>Children's rights mocked</u>: detention and enforced return of unaccompanied minors to third countries other than their country of origin.**

Article 8a concerning the enforced return of unaccompanied minors would allow unaccompanied minors to be returned alone, to a country other than the country of origin, where the minor would have neither family nor contacts as long as:
– the child transited through this country,
– the transit country has readmission agreements or arrangements with Member States
– the transit country provides "*adequate reception facilities*".
This measure is incompatible with Article 3 of the United Nations Convention on the Rights of the Child which states that "*the best interests of the child shall be a primary consideration*" in all decisions. Moreover, according to the General Comment N°6 of the United Nations Committee on the Rights of the Child "*all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary in the best interest of the child.*"[6]
Furthermore, Article 15a of the proposed Directive, by detailing the conditions under which unaccompanied minors can be detained, establishes in fact the possibility for detention.
This violates article 37 of the United Nations Convention on the Rights of the Child. The United Nations Committee on the Rights of the Child indeed stated in its General Comment N°6 that: « *in application of Article 37 of the convention and the principle of the best interest of the child, unaccompanied or separated children should not, as a general rule, be detained* » and further specified that "*detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status; or lack thereof.*"

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[6] General Comment No. 6 (2005), Committee of the rights of the child, *Treatment of unaccompanied and separated children outside their country of origin*

5. **<u>Undesirable amidst the undesirable:</u> absence of minimal safeguards for illegally staying third-country nationals intercepted within 7 days after their entry into European territory.**

The proposed Directive allows the States to exclude from the scope of the directive, and thus deprive from the minimal safeguards, illegally staying third-country nationals apprehended or intercepted by the authorities in charge of border control, within 7 days after the crossing of the border (Article 2 and Part III, annex I.)
These people would then be automatically placed under detention for the purpose of removal, without however benefiting from the minimal safeguards set by the proposed Directive such as the right to appeal against the order of detention or removal. No reasonable and objective argument justifies that fact that these people be deprived of rights and freedom without being able to benefit from these minimal safeguards.
The FIDH recalls that, in its observations concerning the proposed Directive, the United Nations High Commission for Refugees had recommended deletion of this measure and specified that "*the directive's safeguards should be applied without distinction*"[7]. The UNHCR had also specified that this recommendation, aiming for the equal treatment of asylum-seekers intercepted at the border and those already on European territory, be in line with the jurisprudence of the European Court of Human Rights (*see ECHR Ammuur v. France, 19776/92*).

6. **<u>Alternatives to detention and reduced returns:</u> the principle of voluntary return becomes potentially inoperable**

Although the proposed Directive reaffirms the principle that voluntary return is "*preferable*" to forced returns, the text renders it virtually impossible in practice (Article 6a.)
- First, the latest proposed Directive reduces the period for voluntary departure to a period ranging between seven days and thirty days.
- Then, it widens the scope for refusing to grant a period for voluntary departure, or grant a period shorter than seven days, if "*there is a risk of absconding*" or if the application for legal stay is "*dismissed as unfounded or fraudulent*". However, the definition of "*risk of absconding*" (Article 3h) is very broad and the amount of unfounded or fraudulent applications for legal stay is very large, hence the new drafting of Article 6 a.4 yet further reduces the perspectives of voluntary departure.
- Finally, the text allows the Member States to provide in their national legislation that such period shall only be granted following an application of the third-country national concerned, an option of which they are rarely informed.

The entirety of these measures goes against the 1st Guideline of the Council of Europe which states that "*the host state should take measures to promote voluntary returns, which should be preferred to forced returns*."

Contact
FIDH – delegation to the European Union
15, rue de la Linière – 1060 Brussels, Belgium
tel. +32 (0)2 609 44 22 - fax. +32 (0)2 609 44 33
amadelin@fidh.org - gthery@fidh.org - cabsalom@fidh.org
http://www.fidh.org

[7] UNHCR Observations on the European Commission's Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM (2005) 391 final)