Fédération internationale des ligues des droits de l'Homme
ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO, DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
International Federation for Human Rights
Federación Internacional de los Derechos Humanos
الفدرالية الدولية لحقوق الانسان

EU « Returns » Directive10 recommendations for a protective harmonization in line with Human Rights

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FIDH is concerned by the proposal[1]of this Directive such as amended by the Parliament's LIBE[1] commission. Four propositions are of particular concern to us insofar as they do not conform to European and international fundamental rights.

FIDH would like to draw the attention of the Members of European Parliament and of the Council to the fact that many of these provisions are contrary to the commitments undertaken barely three years ago by the member states of the EU in the framework of the Council of Europe's Committee of Ministers. FIDH thus recommends taking into account the following recommendations in order to insure the conformity of the proposed Directive with the international obligations and commitments of the member states. It is only under these conditions that the directive can be both legally acceptable and politically defendable.

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.

1. <u>Purpose and scope of pre-removal detention (articles 14 and 15 of the proposal)</u>

The possibility of detaining persons not concerned by a removal decision is contrary to

[1] Proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005)0931-C6-0266 – 2005/0167(COD))

[1] Committee on Civil Liberties, Justice and Home Affairs. (LIBE Committee)

the guidelines adopted by the Council of Europe's Committee of Ministers and to the UN High Commission for Refugees recommendations (UNHCR).

Article 14 of the Directive allows the detention of a " third-country national, ***who is or will be*** subject of a ***return decision or removal order***." This measure violates international law on two counts:

–First, insofar as this measure allows the possibility of detaining a national who has not yet been subject of a removal order "***who is or will be***…." However, within the Council of Europe, the governments of the EU member states and the High Commissioner for Refugees have clearly indicated that detention is only justified, under certain conditions, pending removal, and more specifically, is only justified for as long as removal arrangements are in progress[2].

–Also, the Directive should not consider the detention of a person subject to the simple order of "return" (and not a removal order). The proposed Directive itself makes explicit that the order of "return" opens a delay for voluntary return and cannot engender measures of control that deprive freedom (article 6 of the Directive). In this, the text of the Directive is contradictory.

So as to clearly identify the purpose of this measure and rule out all dispositions contrary to fundamental rights, FIDH recommends systematically replacing the word "detention" by "pre-removal detention", a concept allowed in human rights international law.

2.**Length of pre-removal detention (article 14 of the Proposal of Directive)**

The length of administrative detention is disproportionate with regard to its purpose: the actual removal; the only purpose allowed by international law.

Article 14 of the Proposal of Directive allows the administrative detention of a third country national in an irregular situation, for duration going up to 18 months.

–This measure is in contradiction with European norms on the protection of human rights, notably with the 8th guideline on forced returns adopted by the Council of Europe's Committee of Ministers according to which *" any detention pending removal shall be as short a period as possible"*. The Commissioner for Human Rights of the Council of Europe has, for example, qualified as "*excessive*" the maximum length of administrative detention in Ireland which is fixed at 8 weeks, adding that is was susceptible to causing "great suffering"[3] – a duration though which is far inferior to the maximal duration considered in the Proposal of Directive.

–Moreover, the duration of administrative detention, which is fixed at 18 months, is

[2] Twenty Guidelines on Forced Return of the Committee of Ministers of The Council of Europe on Forced Return CM(2005)40- mai 2005)

Guideline 7. Obligation to release where the removal arrangements are halted.

« Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible ».

[3] 5 Thomas Hammarberg Commissioner for Human Rights of the Council of Europe reporting his official mission in Ireland from 26 to 30 November 2007.

disproportionate with regard to the purpose of this detention: the period of removal arrangements. Indeed, as we have aforementioned, only the logistical arrangements regarding removal can justify detention. When the necessary removal arrangements cannot be undertaken with the speed and diligence required, detention ceases to be justified.

3.Re-entry ban on European territory (article 9)

FIDH is concerned by the discretionary and counter-productive nature of this measure that is potentially incompatible with the right to asylum. Thus, FIDH call for the suppression of this measure.

Article 9 of the Proposal of Directive makes provision that *"removal orders may include a re-entry ban of a maximum of 5 years."*

A discretionary and poorly managed implementation

Though FIDH welcomes Parliament's amendment modifying an automatic re-entry ban (the Commission's project) into the " possibility" of a ban, we must put forth concerns regarding the legal uncertainty resulting from this measure.

–First of all, it is the determination of the re-entry ban's duration (up to 5 years), and not the ban itself that figures in the text. In consequence, any legal appeal against the re-entry ban will not be able to invoke the State's determination, thus rendering ineffective the possibility of appeal.

–In addition, the terms for appeal and withdrawal are neither clear nor really available insofar as these appeals will be made from the country of return. The text of the Directive should, at the minimum, explicitly make provision for the fact that the asylum-seeker's residing abroad will not be an obstacle to an appeal for the withdrawal of a re-entry ban, and that the European union's consular posts abroad facilitate the introduction of these appeals, notably by facilitating the exchange of information between the recipient of the ban and the representative of the member state having issued it.

–This concern regarding the measure's legal uncertainty is shared by the UNHRC who recommends « *setting clearer rules for determination and for remedies available against the imposition of a re-entry ban, its withdrawal and suspension»*[4].

Incompatibility with the right to asylum

In the current wording of the text of the Proposal of Directive, article 9 paragraph 3 point (ba) new, is contrary to the principle of *non-refoulement* and, subsequently, violates the right to asylum.

The only **possibility** of the suppression of this measure, when the third country national *« has his or her life threatened owing to changes in his or her country of return entailing a risk of persecution»* contravenes European and international protection standards[5] for asylum seekers. The simple request to seek asylum should indeed **automatically** suspend any re-entry ban, until a decision is taken regarding the right to asylum. This measure

[4] *« These should indicate the responsible body, the procedures involved, and the timeframes for decisions.(...) A process for withdrawal of a re-entry ban would need to be available at border posts as well as at consular posts abroad »*

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

[5] Geneva Convention relating to the status of refugees,1951 and Protocol relating to the status of refugees, 1967.

effectively contradicts itself within the text as article 9 paragraph 5 makes provision that *" Paragraphs 1 to 4 apply without prejudice to the right to seek asylum or international protection in one of the Member States*. »

A disproportionate and ineffectual measure

Finally, and significantly, one must wonder at the disproportionate and ineffectual nature of the re-entry ban.

–This ban will only affect, by definition, the subjects seeking the legal route to immigration. Indeed, it will not affect those entering the territory illegally. On the contrary, it will dissuade all demarche for **legal** entry to the territory. Its efficiency is thus very uncertain, and counter-productive results - encouraging illegal immigration – are to be feared.

–Moreover, it's potential impact on fundamental rights and legitimate demarches for entry upon the territory is evident: the right to family reunion, the right to asylum, but also, activities within the framework of professional assignments, cultural exchanges, higher education, etc.

4.<u>« Vulnerable persons» (article 3)</u>

To be in line with fundamental rights, the Proposal should extend the definition of "vulnerable persons" and exclude any possibility of removal for persons whose physical integrity or life may be threatened if they were removed to their country of origin or a third one.

Necessary extension of the « vulnerable persons » list

Article 3 (gc) of the Proposal amended by the European Parliament makes provision for a definition of what is meant by "vulnerable persons ": *" minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.*[6]*"*

This list is restrictive and must be enlarged to include other categories of « vulnerable persons » who also need added protection with regard to the general removal system: people who are victim of trafficking, slave labour, slave trade, or any kind of slavery; people victim of all forms and manifestations of discrimination based on sex, religion, beliefs, political opinions or any other opinion, disability, age, sexual orientations and all racial discriminations in line with the CERD[7]: people who are victim of « honour » crimes and people suffering from illness.

Necessary extension to the removal ban

In Article 10, the proposal specifies that *"coercive measures should be avoided when removing vulnerable persons"*. However, the protection of vulnerable persons cannot only be satisfied with the avoidance of coercive measures. Furthermore, the Proposal must also exclude the removal of people whose life and physical integrity are threatened in their country of origin. FIDH welcomes amendment 23 of the European Parliament (article 5c and 5d) that makes provisions for people suffering from illness and who cannot receive appropriate treatment and medical care in their country of origin and unaccompanied minors not to be removed to their country of origin[8]. However, FIDH recommends that such a removal ban be extended to all categories of « vulnerable persons » whose life and physical

[6] This list is taken from Article 17(1) of Council Directive 2003/9/CE laying down minimum standards for the reception of asylum seekers.

[7] International Convention on the Elimination of All Forms of Racial Discrimination and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

[8] Comment n'6 (2005) of the UN Committee on the Rights of the Child. On « Treatment of unaccompanied Children»

integrity would be threatened if they were removed to their country of origin. This protection, offered via a residency permit, should be specifically extended to persons victim of the slave trade or sexual violence, as to persons victim of discrimination who may be exposed to similar violence in their country upon return.

A specific status for « vulnerable persons » might be itemised such as provided for in Directive 2003/09/CE thus laying down minimum standards for the reception of asylum seekers. (See chapter IV- Provisions for persons with special needs).

Ban detention for minors

Furthermore, FIDH stresses the necessary extension of the detention ban applied to unaccompanied minors (European Parliament Amendment 23- article 5c) to all minors. This requirement directly follows from article 10 of the Proposal that holds that *« coercive measures should be avoided when removing vulnerable persons ».*

And yet, minors are considered as vulnerable persons in the amended proposal, and detention is defined as the most coercive measure. FIDH suggests that only *« less coercive measures*[9]*»* than detention shall be imposed to minors, even accompanied minors.

10 recommendations

Thus, FIDH calls for the following 10 recommendations in order to make the Proposal of Directive in line with the international Human rights commitments of the European Union member states:

Articles 14 and 15: For an administrative pre-removal detention in line with fundamental rights.

1. Strictly limit administrative detention to the implementation of removal arrangements
2. Avoid all possibility of detaining a person:
   - who is not yet under a removal order
   - whose application for asylum is still being examined
   - who is only under a return order
3. Only use administrative detention as a last resort, after concluding, through a stringent and individual examination of the situation, of the inadequacy of all other coercive measures that do not deprive of freedom.
4. Limit the duration of pre-removal detention to the period, as short as possible, strictly necessary for the implementation of removal arrangements
5. Release all persons when removal arrangements are halted or made impossible over a short-term period
6. Clarify the purpose of the detention by systematically replacing the word « detention » with « pre-removal detention ».

[9] Amendment 55, Art.14 paragraph 1 « less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over documents, an obligation to stay at a designated place »

Article 9

7. Remove article 9 from the proposed Directive that provides for the introduction of « a re-entry ban » on all the territory of all the member states. This « re-entry ban » is source of legal uncertainty, is not in line with the *non-refoulement* principle and is obviously counter productive: it's principal effect will be to block legal entry routes into the territory of the European union.

Article 3: For a protection of « vulnerable persons » in line with asylum rights, physical integrity and life rights.

8. Extend and define more precisely the list of « vulnerable persons » particularly adding persons suffering from illness, disabled people, victims of slave trade, of rape and victims of all forms and manifestations of discrimination that may affect their right to life, safety, security and physical integrity.
9. Extend the European Parliament's amendment that provides a removal ban for unaccompanied minors and sick people who cannot receive appropriate treatment and medical care in their country of origin to each person whose physical integrity might be threatened, in any manner, if they were removed to their State of origin or to a third country.
10. Extend the detention ban for unaccompanied minors (European Parliament amendment 23) to accompanied minors, for whom only less coercive measures than detention can taken regarding removal.

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