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Year: 2012/2013

ABSTRACT

As part of its policy to combat illegal immigration, in 2008 the European Union adopted a Return Directive that set out common standards and procedures for Member States to return irregular migrants. This directive resulted in being controversial and generated divided opinions. The sectors that supported the Directive believed that it should be seen as a set of measures aimed at other objectives to promote legal and orderly immigration. However, critics have raised serious concerns regarding the Directive's absence of sufficient safeguards for ensuring integral respect of the rights of migrants.

Taking the latter approach, the aim of this thesis is to carry out a critical analysis of the Return Directive and question certain aspects of its regulations, from both a human rights perspective and also from the perspective of an irregular migrant - to which this directive applies.

It does not appear as though the Return Directive guarantees neither a safe and dignified return for irregular migrants nor their right to integrity. Furthermore, international human rights standards for the protection of migrants appear to be applicable.

INTRODUCTION

Since the Tampere European Council of 15 and 16 October 1999, the European Union has adopted an immigration policy in the fight against illegal immigration. This new policy resulted in the establishment of norms, and legislations including the return of irregular migrants.

In 2008, after a prolonged dialogue between the European Commission, the European Parliament and the Council of European Union a new directive was introduced that sought to regulate and harmonise common standards and procedures for returning migrants and introduce a higher protection of human rights for them: “Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals” (hereinafter Return Directive). This directive resulted in being controversial and generated divided opinions. The sectors that support the Directive believed that it should be seen as a set of measures aimed at other objectives to promote legal, orderly immigration or penalize employers who hire illegal immigrants. Other sectors have recognised that, although the directive is not perfect and has various shortcomings, at the same time it is a step forward to achieving concrete guarantees.

On the other hand, the Return Directive has received criticism from various fronts. Its adoption does not seem to guarantee a safe and dignified return of irregular migrant nor their right to integrity.

Taking the latter approach, the aim of this thesis is to carry out a critical analysis of the Return Directive and question certain aspects of its regulations, from both a human rights perspective and also from the perspective of an irregular migrant - to which this directive applies.

The most questionable measures refer to the possibility of up to 18 months detention, deprivation of liberty of children and other vulnerable groups, the entry ban, expulsion and

the impact of the family unit, among others. According to human rights mechanisms, migrants often find themselves in vulnerable situations, owing, among other things, to their absence from their State of origin and to the difficulties they encounter due to differences of language, customs and culture. They also face economic and social difficulties and obstacles because they are undocumented or in an irregular situation because of their State of origin.

For this purpose, the analysis will try to solve the following questions and aspects: Is the Return Directive meeting international human rights standards? What actions and measures has the EU adopted according to human rights standards? Has the EU complied with the recommendations from the different mechanisms of human rights protections, such as the European Court on Human Rights or UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families? Regarding the detention, is the detention proportionated to the administration of immigration policy's aims? How do internment and detention affect a migrant's dignity? Are we before a criminalization of immigration? What did the European Court of Human Rights and human rights mechanisms say in this aspect?

It is important to note that this dissertation is not intended to assess the way each Member State has implemented the Directive, but it does take some specific examples of how the process has brought into play since the Return Directive was enacted. The aim is to discover whether the precepts provided by the Directive, as well as the margin of discretion, have given rise to States subordinating personal integrity. Also it should be considered that human rights mechanisms have been clear in stating that although countries have a sovereign right to determine conditions of entry and stay in their territories, they also have an obligation to respect, protect and fulfil the human rights of all individuals within their jurisdiction, regardless of their nationality or origin and regardless of their immigration status.

The first chapter will develop a brief introduction to the context and historical analysis in which the EU Directive was adopted. In this respect, it will state that the EU Return

Directive is a consequence of one of the main measures adopted by the External Dimension of EU Migration and Asylum Law and Policy and the EU Global Approach for Migration in the fight against illegal immigration.

The second chapter will discuss the content of the Return Directive itself. Firstly, I will analyse the principal provisions ruling the removal process: the return decision, voluntary departure, removal and entry ban. The European Court of Human Rights has discussed the effects of the implementation of these processes, as well as comparative jurisprudence on the protection of the migrants' human rights.

The third chapter will analyse the main Procedural Safeguards these removal processes should take into account. In this regard it will analyse what the international human rights instruments have stated regarding guarantees of Procedural Safeguards for migrants.

A fourth and final chapter will be devoted to the possibility of implementing the detention of migrants as a coercive measure of removal by Member States. In my opinion, this is the most critical aspect of the Directive, so the imprisonment of a migrant therefore deserves further scrutiny from a human rights perspective. First the concept of criminalization of the phenomenon of migration will be introduced. Then the positions of human rights protection mechanisms, human rights organisations and academics will be observed and analysed through their newsletters and communications. It will be observed how the member states implement the Directive, regarding to the condition of the detention centres. I can say in advance, Human rights organizations have reported that migrants are in "deplorable" conditions and under inhuman conditions.

After the analysis, conclusions and recommendations will be explored.

For the research presented in this thesis, international instruments of human rights, particularly the principles and international standards of the protection of migrants' human rights, have been taken into account. Also, the jurisprudence of the European Court of Human Rights has been examined alongside the comparative jurisprudence for human

rights protection, and a review of EU communications and legislation. The thesis also features interviews with some experts and scholars in the field. Some of them are quoted and others are conveyed in the context in which the Return Directive has been developed and is implemented in different Member States.

CHAPTER I: CONTEXT OF THE ADOPTION OF THE RETURN DIRECTIVE

1. RETURN DIRECTIVE'S CONTEXT

The European Union's (EU) Directive on "common standards and procedures in Member States for returning illegally staying third-country nationals" (hereinafter "Return Directive") was adopted on December 16 2008, as part of EU policy in its "fight against illegal immigration."¹ The EU's competence in the field of migration dates back to 1999, before this time it was the states that chose their own policies on migration.

The approach between neighboring countries for border control and migration issues began in the 1980s. In 1984 the **Saabbrücken** bilateral agreement was signed between France and Germany, which made both countries commit to a gradual abolition of border control, harmonized legislation on foreign drugs and arms and strengthened police and customs cooperation. In 1986 the **Single European Act (SEA)** set the European Community an objective of establishing a single market "without internal frontiers in which the free movement of goods, person, services and capital is ensured" by 31 December 1992.²

After the signing of the **Saabbrücken** agreement, the Netherlands, Belgium and Luxembourg began to show an interest in the project.³ The formation of a common area with lasting impact on EU migration policies was established on June 14, 1985 when Germany, France, Belgium, Luxembourg and the Netherlands gathered in the town of Schengen, Luxembourg, to sign an agreement to phase out their internal borders and

¹ Directive 2008/115/EC of The European Parliament And of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Preamble, Recital 1.

² The SEA, signed in Luxembourg on 17 February 1986 by the nine Member States and on 28 February 1986 by Denmark, Italy and Greece, is the first major amendment of the Treaty establishing the European Economic Community (EEC). at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm (consulted May 15 2013)

³ Rubén Zaiotti "Cultures of Borders Control: Schengen and the evolution of European Frontiers". 2011. p70

establish the free movement of persons at common borders. As a result the Schengen area gradually expanded to include nearly every member state.⁴

A further convention was drafted and signed on June 19 1990. When it took effect in 1995, it abolished checks at the parties states' internal borders and created a single external border for the Schengen area. This was carried out in accordance with identical procedures of common rules and regarding visas. Checks at external borders were adopted to allow for the free movement of persons within the signatory states without disrupting law and order⁵. Thereafter, more restrictive policies began to emerge, which established a visa policy and external border crossings.

In 1992 with the signing of the Maastricht Treaty, the EU acquired certain competences on migration. Nevertheless, it is from the Treaty of Amsterdam⁶, which entered into force in 1999, that the following was established: ⁷

- a) The EU was able to legislate on immigration and has the competence on the management of the external borders and on their crossing by persons which was usually a domain of state sovereignty⁸.

⁴ Italy signed the agreements on 27 November 1990, Spain and Portugal joined on 25 June 1991, Greece followed on 6 November 1992, then Austria on 28 April 1995 and Denmark, Finland and Sweden on 19 December 1996. The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined on 21 December 2007 and the associated country Switzerland on 12 December 2008. Bulgaria, Cyprus and Romania are not yet fully-fledged members of the Schengen area; border controls between them and the Schengen area are maintained until the EU Council decides that the conditions for abolishing internal border controls have been

⁵European Union "Summaries of EU legislation" at http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm (consulted on 6 May 2013).

⁶ "Treaty of Amsterdam" officially the "Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts" was signed 2 October 1997 .

⁷ The Schengen acquis was integrated into the framework of the European Union on 1 May 1999 by the Protocol annexed to the Treaty of Amsterdam and the Council defined the parts of the Schengen acquis integrated in the Union framework in its Decision of 20 May 1999. at, <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,es&lng2=da,de,el,en,es,fi,fr,it,nl,pt,sv.&val=256725:cs>. (consulted on 14 May 2013).

⁸ Acosta, Diego "Migration and Borders in the European Union. Implementation of the Returns Directive in Spain and Italy" pp 83.

The scholar Diego Acosta indicates that there are two options in dealing with the irregular migration that is present in EU territory: deportation and regularization.⁹ The legislation of the former now is in charge of EU. The latter, related to grant a legal stay in the territory, is at present exercised at the discretion of Member States.¹⁰ For such a responsibility the EU could not fail. Only a firm policy to prevent and reduce illegal immigration could strengthen the credibility of transparent EU rules on legal migration¹¹.

- b) A protocol attached to the Treaty of Amsterdam incorporates the Schengen Aquis, within the legal and institutional framework of the EU¹². A consequence of this integration, which allowed for the freedom of movement of citizens in the European zone, was that it “required” additional measures. Indeed, scholar Marleen Maes identified that new actions were deemed necessary both to stop illegal immigration and to prevent secondary migration within the EU.”

In fact, the presidency conclusions of the Tampere European Council conference stated:

“..It would be in contradiction with Europe’s traditions to deny such freedom [of movement] to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both

⁹ A third option that a country might have is to tolerate or not enforce the expulsion of an undocumented third-country national.

¹⁰ Commission of the European Communities. Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals. Brussels, 19.7.2006 COM(2006) 402 final Paragraph 33.A

¹¹ Ibidem

¹² http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylumha_migration/133020_es.htm. Article 62(2) (a) of the Amsterdam Treaty.

clear to our own citizens and also offer guarantees to those who seek protection or access to the European Union.”¹³

Through this integration, citizens were provided with the possibility of accessing legal remedies in the Court of Justice or national courts when their rights were challenged.

- c) The treaty of Amsterdam also stated that one of the EU’s objectives was the development and maintenance of the Union as an “Area of Freedom Security and Justice”.

Taking all of these points into account, on October 15 and 16 1999, the Tampere European Council decided to develop a common **EU asylum and migration policy**¹⁴. In this sense, the Tampere agreements are hailed because they recognize immigration as a beneficial phenomenon, as long as it is regulated, controlled, and organized around specific objectives. It also establishes the criteria and guidelines that should guide future policies on immigration and asylum.

Based on the Amsterdam Treaty and the Tampere Agreement, the European Commission provided the Council and the European Parliament with several specific guidelines on immigration and asylum such as define concepts, determine the complexity of the phenomenon and debate how illegal migration was considered to be¹⁵, of a comprehensive immigration and asylum policy¹⁶.

An important factor during these years was the terrorist attack in New York on September 11, 2001. After this event, the European Council of Laeken (December 2001) and the Council of Seville (June 2002) established **security and defense** as common policy priorities. The European Council called for the creation of an Action Plan on illegal

¹³ Ibidem

¹⁴European Council, Tampere Presidency Conclusions, 15 and 16 october 1999. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-rl.end9.htm.

¹⁵ Commission of the European Communities . Brussels, 15.11.2001 Com(2001) 672 final. Communication from the commission to the council and the European Parliament On a common policy on illegal immigration

¹⁶ Ibidem

immigration¹⁷, whilst the latter reaffirmed the necessity to fight effectively against illegal immigration as an essential part of a comprehensive policy on immigration and asylum. It also decided to speed up the implementation of the programme adopted in Tampere for the creation of an area of freedom, security and justice in the EU.¹⁸

Thereafter, and as we will see later in this document, the position against irregular migrants was exacerbated up to the point that rather than being considered to be a threat, they were considered to be criminals.

2. RETURN DIRECTIVE: BACKGROUND

The Directive of the Council 2001/40/EC was the first proposed regarding a Return Procedure¹⁹. The purpose of this French initiative was to recognize an expulsion decision declared in one Member State (issuing Member State) against a third country national present within the territory of another Member State (enforcing Member State). In other words, it applied to cases where a third country national was expelled from one Member State, which could not actually remove that person as the third country national had already moved further to other Member State²⁰.

In the same year, 2001, the European Commission issued a communication on a Common Policy on Illegal Migration (COM 2001, 672 final) to the Council and the European

¹⁷ Conclusion n 40; Brussels European Council Conclusions, 4\5 November 2004, p. 5

¹⁸ European Union, Return Action Programme, 28 November 2002, at: <http://www.refworld.org/docid/3f52298c4.html> (consulted on 18 May 2013)

¹⁹ Directive 2001/40/EC issued (28.05.2001) http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133154_en.htm (consulted on May 18 2013)

²⁰ Fronteras de la ciudadanía en España y en la Unión Europea. http://books.google.com.pe/books?id=cCB8aqgkS4C&pg=PA87&lpg=PA87&dq=OJ+2001+L+149/34&source=bl&ots=mYnuoueLbL&sig=4p8RU-2qEnq_Kho9K8uh_PiVip8&hl=es&sa=X&ei=MmuXUZuCFo-LhQevtYGQCw&ved=0CEQQ6AEwAw (consulted on 18 May 2013).

Parliament. In this regard, the Commission wanted to include a readmission and return policy as part of the action plan to fight against clandestine migration.²¹

The first of the Commission's instruments regarding "Return" was produced in April 10, 2002. The Green Book, which focused on common policy for the return of irregular migrants, stated that the EU's priority was to give the option of a "voluntary return" to illegal migrants inside the Union, instead of just a "forced return", for human reasons, voluntary return requires less administrative efforts than forced return.²² According to the European Commission's web site, Green Papers are documents published by the European Commission to stimulate discussion on given topics at a European level.²³

This text refers to three points:

- △ the common policy regarding return must be part of a common immigration EU policy, taking into account asylum seekers, protection of human rights, and cooperation with third country governments;
- △ the need to establish a cooperation among EU Member States, setting common rules which cover the whole return-issue;
- △ besides these rules, the EU must design a 'readmission' policy, signing readmission agreements (or clauses of readmission) with the migrants' country of origin.

In 2002 the Commission presented the results of the public consultation during a Communication on the Community Return Policy on Illegal Residents.

²¹ Commission of the European Communities . Brussels, 15.11.2001 Com(2001) 672 final. Communication from the commission to the council and the European Parliament On a common policy on illegal immigration Point 4.8

²² Commission of the European Communities Brussels, Com(2002) 175 Final Green Paper on a Community Return Policy On Illegal Residents, April 10 2002, p. 8

²³ They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.

In the same year the Justice and Home Affairs Council adopted a Return Action Programme, in which it suggested developing a number of measures, including a common EU-wide minimum standards or guidelines regarding the return of illegal residents. It also stressed the need for enhanced cooperation among Member States.²⁴

Two years later, in November 2004, the Brussels European Council announced the adoption of the Hague Programme. This program dealt with many aspects that includes policies related to freedom, security and justice, including their external dimensions, notably fundamental rights and citizenship, asylum and migration, border management, integration, the fight against terrorism and organized crime, justice and police cooperation, and civil law.²⁵

This programme also called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned to their native country in a humane manner and with full respect for their fundamental rights and dignity²⁶. As a result of that session, in 2005 European Council invited the European Commission to submit a proposal for concrete actions and to implement the programme. In this context, the European Council emphasised the importance of transparency and **the involvement of the European Parliament**.²⁷

On May 4 2005, the Committee of Ministers of the Council of Europe adopted ‘Twenty guidelines on forced return’. These guidelines constitute recommendations addressed to the

²⁴European Union, Return Action Programme, 28 November 2002, available at: <http://www.refworld.org/docid/3f52298c4.html> (consulted on 18 May 2013)

²⁵ Brussels European Council. 4-5 November 2004. Presidency Conclusions 1492/1/04. POINT 16.

²⁶ Brussels European Council. 4-5 November 2004. Presidency Conclusions 1492/1/04 HAGUE PROGRAMMEME Point 1.6.4

²⁷ Brussels European Council. 4-5 November 2004. Presidency Conclusions 1492/1/04 HAGUE PROGRAMMEME Point 17.

Member States “which appear to represent innovative and promising ways to reconcile a return policy with full respect for human rights”.²⁸

On September 1 2005, the Commission presented a proposition of a Returns directive to the Council and Parliament.

3. TRIDIALOGUE

The EU Directive comes from "tri-dialogue", which first occurred between the European Parliament, the European Commission and the European Council after three years of intensive negotiations that started in 2005.

According to article 67 of the Treaty of Amsterdam, the Council had to act unanimously on a proposal from the Commission or on the initiative of a Member State. The European Parliament appeared only as a **consulting power** to the Council on migration and asylum.

Since January 1, 2005 all the discussions and texts about irregular immigration have needed to be admitted and approved by the Parliament.

A brief of the new procedure for the adoption of an act is as follows:

“The Commission sends a proposal to both the Council and the Parliament, which act as co-legislators. Then, the Parliament will adopt an opinion and the Council will either approve the act, by endorsing the amendments contained within the Parliament’s opinion, or it will adopt a common position. This is known as ‘first reading’. If the Council adopts a common position the Parliament can then make amendments to it, which the Council can then accept or reject in the ‘second reading’. If there is no agreement, a Conciliation Committee will be set up with equal numbers of Council representatives and MEPs. The

²⁸Council of Europe “Twenty guidelines on forced return” at http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf (consulted 18 May 2013)

agreed text by the Conciliation Committee will be voted on by a qualified majority in the Council and by a majority of members in the Parliament”²⁹

For some conservatives representatives “the Parliament showed its capacity to prioritize the security issues alongside the Council, the security issues (over fundamental rights)”³⁰ For human rights organisations, Parliament's position was disappointing. Parliament had been considered as having a more open position towards the rights of migrants in the EU and was supposed to be a "watchdog" over the traditionally conservative Council, which purported to have a restrictive policy towards immigration and migrant's rights. Due to European Parliament has historically been considered as having a migrant friendly approach³¹.

This attitude responded to the fact that it was the first time a tri- dialogue had occurred among these institutions. Parliament was committed to "tolerating" certain points and amending certain inconsistencies. After all, it is debating not only legal decisions, but also political ones. “... it was preferable to have a directive[Return Directive] than to not have a directive and they were prepared to go a long way in the direction of the Council’s position on certain points in order to save the directive.”³² The lack of transparency in this process only resulted in a weakening of migrants’ rights.

“With the adoption of the return directive, the European Parliament has lost its virginity as a co-legislator in the area of EU immigration and asylum law and has also demonstrated its capacity to broker deals with the Council in an extremely sensitive area such as standards on return of irregularly staying third country nationals. However, in order to do so it had to

²⁹ Diego Acosta: *The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly?*The Ugly, the bad the good, 2009 p 24.

³⁰Papagianni, Georgia “Institutional and Policy Dynamics of EU Migration Law” 2006, pp. 199–220; Drodz, Joan “Spanish leadership in developing a 'common'European immigration policy: Intergovernmentalist supranationalization”2011, pp.5.

³¹Cfr Supra 29

³² Cfr Supra 30

make considerable concessions with regards to the level of human rights protection in the directive”.³³

This situation shows that the “tri-dialogue” among the Council, the European Parliament and the Commission was not only a public negotiation, but also consisted of a parallel dialogue “behind closed doors”³⁴. This informal “tri-dialogue” tries to find an ‘early agreement’ between the Council and the Parliament to arrive at ‘first reading’ compromises.³⁵ “a first reading agreement only requires a simple majority in plenary while an absolute majority is needed in a second reading. In the case of a second reading, the Council needs to take a position within three months after the EP has adopted its position. However, such an approach risks weakening the position of the European Parliament. Indeed, the urge to conclude a first reading agreement with the Council is likely to push the European Parliament to compromise as it is under pressure to avoid second readings”.³⁶

Even these informal agreements allow for the flow of negotiations and decision making, and affect democratic legitimacy. They weaken the standards of democratic accountability that Parliament is supposed to live up to.³⁷ Affect the legitimacy, because the information is subject to manipulation and without transparency .

The role of the Member States during the negotiation process was also criticized. Instead of having a dialogue with a view to seeking a “common directive”, which would be better for Europe, states opted to have a better beneficiary position for their own countries. Thus, Pollet noted that most of the Spanish socialists in plenary voted in favor of the compromise whereas the position of the Socialist group was to vote against the compromised text. The

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³⁴ Cfr Supra

³⁵ T. Bunyan, ‘Statewatch viewpoint. Secret Tridialogues and the Democratic Deficit’, September 2007, <http://www.statewatch.org/analyses/no-64-secret-tridialogues.pdf>.

³⁶ T. Bunyan, ‘Statewatch viewpoint. Secret Tridialogues and the Democratic Deficit’, September 2007, <http://www.statewatch.org/analyses/no-64-secret-tridialogues.pdf>.

³⁷ H. Farrell and A. Héritier, ‘The Invisible Transformation of Codecision: Problems of Democratic Legitimacy’, SIEPS (Swedish Institute for European Policy Studies) Report No. 7 June (2003), pp. 7

Spanish government was in favour of the compromised text and wanted to close the discussion.³⁸

³⁸ Pollet, Krist, “The Negotiations of the Returns Directive”, 2011, p. 29.

CHAPTER II: CONTENT OF THE RETURN DIRECTIVE

OVERVIEW

The term “Return” refers to the process by which third- country nationals go back to their country of origin or any country of transit in accordance with Community or bilateral readmission agreements.³⁹

A third-country national considered as any person who is not a citizen of the European Union and who is not a person enjoying the Community right of free movement.⁴⁰ At present there are 28 member countries of the European Union.⁴¹

2.1 SCOPE OF THE RETURN DIRECTIVE

The Return Directive applies to **third country nationals staying illegally** on the territory of a Member State⁴². Nevertheless member states can decide to exclude from the scope:

Third country nationals who are refused entry,⁴³ or apprehended or intercepted in connection with an irregular crossing of the external land, sea, or air border of a Member State and were not later allowed to stay in that Member State.⁴⁴

³⁹ Cfr. Supra footnote 1, Article 3.3

⁴⁰ Cfr. Supra footnote 1, Article 3.1; Regulation (Ec) No 562/2006 of the European Parliament and of The Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Article 2.6; Regulation (Ec) No 810/2009 of the European Parliament And of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), Article 2.1

⁴¹ European Union, “Member states of the European Union”, at <http://europa.eu/about-eu/countries/member-countries/> (consulted on June 11 2013)

⁴² Cfr. Supra footnote 1, Article 2.1

⁴³ Regulation (Ec) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), Article 5.1.

The entry conditions for third-country nationals shall be the following:

- (a) they are in possession of a valid travel document or documents authorising them to cross the border;
- (b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (1), except where they hold a valid residence permit;

The wording “ *in connection with irregular crossing by land, sea or air of the external border of a Member State* ” is not clear, because it is difficult to establish when **exactly** an irregular border crossing took place: if we are referring to the moment when the migrant is **at or near** to the border or once is in the country, is latter detected by the authorities.

In the interview to the representative of the Michele Cavinato, Policy Officer of UNHCR’s European Bureau, and policy advisor for Directive, has admitted “ it is not clear for me either.. it is hard to say. Maybe an interpretation of the court of justice is need to know the interpretation.. some member states have transposed them, some countries just don’t apply these article 2, but I couldn’t tell you all the list. “⁴⁵

In this regard, scholar Baldicini considers is a “narrow interpretation of the categories of irregular migrants that are excluded from its scope”.⁴⁶ Hailbronner estimates that “ a verifiable direct link to the act of irregular border crossing should be required”.⁴⁷ I agree with Steven Peers that states “in this light, the optional exclusion for irregular border crossing **should only apply where a person was stopped at or near the border**, in principle by border guards carrying out border surveillance as part of their border control obligations”.⁴⁸

Are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national data bases for the purposes of refusing entry on the same grounds.

⁴⁴Cfr. Supra footnote 1, Article 2.2 (a)

⁴⁵ Interview with Mr. Michele Cavinato Office of the High Commissioner for Refugees. Policy Officer in UNHCR’s Bureau for Europe in Brussels, Luxembourg, 5 July 2013

⁴⁶ Baldicini, Anneliese, “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive” 2009, p.3

⁴⁷ Beck, Hart, Nomos “EU Immigration and Asylum Law. Commentary on EU Regulations and Directives”, 2010, p.1513.

⁴⁸Peers, Steve “EU Justice and Home Affairs Law”, 2010, pp. 563-575.

What happens when the mere fact of being an undocumented migrant you are subject to a criminal law sanction? For instance, Italy, considered one of the countries with the worst antimigrant legislation, has established that entering or staying in Italian territory without permission is a criminal offence, punishable by a fine of 5,000 to 10,000 Euros.⁴⁹ Bonetti, announced the Italian Government itself has sometimes declared that the rationale for introducing such provision was **to avoid its obligations under the Directive by declaring all irregular migrants as criminals.**⁵⁰ In 2009, a 28 year old young palestine was the first condemned to pay this fine. Fortunately, the Court of Justice of the European Union (CJEU) ruled in 2011 that Italian legislation criminalising irregular stay did not comply with the EU Return Directive.⁵¹

This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5)⁵² of the Schengen Borders Code. This category concerns particularly third country nationals who are family members of citizens of the Union. They are protected against expulsion save on serious grounds of public policy or public security. In this regard the Court of Justice has ruled that family members who

⁴⁹ Legge 15 luglio 2009, n. 94 "Disposizioni in materia di sicurezza pubblica" pubblicata nella Gazzetta Ufficiale n. 170 del 24 luglio 2009 - Supplemento ordinario n. 128, 24 July 2013, at <http://www.parlamento.it/parlam/leggi/090941.htm> (consulted on 10 July 2013)

⁵⁰ Paolo Bonetti "La Proroga del Trattenimento e i Reati di Ingresso o Permanenza Irregolare nel Sistema del Diritto degli Stranieri: Profili Costituzionali e Rapporti con la Direttiva Comunitaria sui Rimpatri", *Diritto Immigrazione e Cittadinanza*, 2009 pp. 85-128.

⁵¹ El Dridi, C-61/11, European Union: Court of Justice of the European Union (First Chamber), 28 April 2011, at: <http://www.refworld.org/docid/4dde46cb2.html> (consulted on 21 April 2013)

⁵² In accordance with the Article 2(5) of the Schengen Borders Code, above n. 10, 'persons enjoying the Community right of free movement' means:

- (a) Union citizens within the meaning of Article 17(1) of the Treaty, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States applies;
- (b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Community and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizen

satisfy the underlying conditions for residence cannot be expelled because they have entered illegally or because their visa has expired⁵³.

In addition, the Directive stipulates that Member States may grant a residence permit to an irregular migrant for humanitarian, compassionate or other reasons. This therefore opens up the possibility of regularising undocumented migrants based on the assessment of individual cases.⁵⁴

In any case, and considering that the right to an effective remedy is a general principle of EU law and a fundamental right (Article 47 Charter Fundamental Rights), migrants have the right to appeal. Nevertheless, the minimal safeguards cover those who are under the Return Directive, what are the guarantees for those in the meanwhile? what are the protection granted for those who are not in the scope?

In this regard, the UNHCR expressed its concerned that those who are excluded from the scope may extend to individuals whose applications for protection were rejected by a Member State, without a determination on the substance. This could for instance be the case of persons whose applications have been rejected on 'safe third country' grounds.⁵⁵

⁵³ Case C-459/99 MRAX vs Etat Belge, (2002); ECR I-6591 European Court of Justice, July 25 2002 Third country nationals who are the spouse of a Member State national. C-127/08 Metock and others, Judgment of 25 July 2008.

⁵⁴ Cfr. Supra footnote 1, Article 6.4

⁵⁵ If responsibility for assessing the particular asylum application in substance is assumed by a third country, where the asylum-seeker will be protected from refoulement and will be able to seek and enjoy asylum in accordance with accepted international standards.

UN High Commissioner for Refugees, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, at: <http://www.refworld.org/docid/3b36f2fca.html> (consulted on 17 June 2013).

2.2 Principal Characteristics and Removal Processes

For those who are covered by the scope of the Return Directive, it establishes how they can be returned. According to the Return Directive, the “termination of illegal stay” can be as follows:

2.2.1 RETURN DECISION

The Return Directive says that Member States shall issue a return decision to any third-country national who has been staying in their territory illegally.⁵⁶ Those who are in an irregular situation in a given area of the European Union (EU) but who hold a valid residence permit, or other authorization, issued by another state, that allows them the right to stay are required to immediately go to the territory of that member state, otherwise a return decision shall be issued.⁵⁷ If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Member States may refrain from issuing a return decision to a third-country national staying illegally in their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements.⁵⁹ Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering the right to stay for compassionate, humanitarian or other reasons.⁶⁰

If a third-country national, staying illegally in the territory of a Member State, is the subject of a **pending procedure** for renewal of its residence permit or other authorization offering

⁵⁶Cfr. Supra footnote 1, Article 6.1

⁵⁷Cfr. Supra footnote 1, Article 6.2

⁵⁸Cfr. Supra footnote 1, Article 7.4

⁵⁹Cfr. Supra footnote 1, Article 6.3

⁶⁰Cfr. Supra footnote 1, Article 6.4

them the right to stay, that Member State **shall consider refraining** from issuing a return decision, until the pending procedure is finished.⁶¹

It means, the Directive provides the possibility to member states consider returning procedures before obtaining the results. In my view, if a migrant stays before a pending procedure, it would seem evident that the return process should be stopped until a resolution for the migrant is achieved. It would be a more favourable provision to wait until the expedition of the resolution. I would be a more favourable provision in agreement what has been established by international human rights legislation in the “to be present in his own sentence” rather than wait in the country of origin until the resolution of this return is issued. In the text of the Directive says that Member States may adopt or maintain provisions that are more favourable to a person to whom it applies⁶². *Contrario sensu* the less favourable provisions are prohibited. In this regard, the European Court on Human Rights ruling opens by recalling that “... In fact, the ECJ affirms that while MS may adopt or maintain legislation more favourable than Directive 2008/115, they are not allowed to apply stricter standards. This is a very important point because it fixes the standards of the Directive as the minimum, common to all the Member States. Different rules are allowed, but only if more favourable”⁶³. Taking to account that member states have ratified the international human rights instruments, member states may adopt this legislation.

Also this possibility also restricted the migrant’s right to appeal the decision. If the migrant obtains a positive resolution, would member states be able to locate the migrant?

The Directive is not clear if the same criteria are applicable to an asylum seeker. In this case, if the migrant is immediately expelled is the Return Directive violating the principle of non-refoulement? What is worst if it is expelled for not completing the formal requirements and is in immediately expelled without waiting for a resolution? Is it against principle of refoulement?

⁶¹Cfr. Supra footnote 1, Article 6.5

⁶²Cfr. Supra footnote 1, Article 4.3

⁶³Favilli, Chaiara, “The Implementation of the Returns Directive in Italy”, 2011, p. 80.

2.2.1 VOLUNTARY DEPARTURE

One of the most important features of the Return Directive, hailed for being more humane and dignified for the migrant, is voluntary departure. It means that when a return decision has been issued, the migrant can leave the country of its own accord, within a fixed time-limit.

The Return Directive encourages voluntary return, believing that it would be preferred over forced return, and that a period for voluntary departure should be granted.⁶⁴ Also the Directive promotes voluntary return and asks Member States to provide enhanced return assistance, counselling. In this regard, it would crucial member states make best use of the relevant funding possibilities offered under the European Return Fund.⁶⁵

The migrant who opts for voluntary departure would have a more humane return and would not be exposed to coercive measures as they might be if placed in a detention centre (as I will explain below), nor shall they receive an entry ban, as those who are expelled do.⁶⁶

A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days. The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.⁶⁷ Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.⁶⁸

Precisely for these criteria, I consider that setting a return period of just over thirty days is a disproportionate length of time. Missing the benefits of a voluntary departure, makes it difficult for the migrant, who does not have as many options for a decent return without

⁶⁴Cfr. Supra footnote 1, Preamble, Recital 10

⁶⁵Cfr. Supra footnote 1, Preamble, Recital 10

⁶⁶Cfr. Supra footnote 1, Article 8 and Article 11

⁶⁷Cfr. Supra footnote 1, Article 7.1

⁶⁸Cfr. Supra footnote 1, Article 7.1

consequences. In addition, irregular migrants have to returning ‘home’ where the system has probably collapsed, which is why he/she left in the first place. This migrant would then need to find a new opportunity for itself and its family.

On the other hand, the Return Directive provides the possibility that the authorities impose certain obligations aimed at avoiding the risk of migrants absconding: such as making them report regularly to authorities and depositing an adequate financial guarantee. Submitting documents, or the obligation to stay at a certain place, may be imposed upon the migrant for the duration of the period of voluntary departure.⁶⁹

Exceptions for voluntary departure:

Member States may refrain from granting a period of voluntary departure, or may grant a period shorter than seven days, when there is a risk that the irregular migrant may abscond, when the person concerned poses a risk to public policy, public security or national security, or when the irregular migrant makes an application for a legal stay that has been dismissed as manifestly unfounded or fraudulent.⁷⁰

The definition of risk of absconding in the Directive refers “to the existence of reasons in an individual case which are based **on objective criteria defined by law** to believe that a third-country national who is the subject of return procedures may abscond.”⁷¹

As part of the investigation a representative of the International Organization of Migration was interviewed to explain how a voluntary return program was implemented. In this case, in Luxembourg (where I was assigned):

“... the criterias to provide assistants are different, it depends on the country. The program is applied to three categories of persons: irregular migrants and to asylum seekers who are in the procedure, asylum seekers who were rejected for asylumIn this case irregular

⁶⁹Cfr. Supra footnote 1, Article 7

⁷⁰Cfr. Supra footnote 1, Article 7.4

⁷¹Cfr. Supra footnote 1, Article 3.7

migrant people who are in a detention center or outside the detention can receive the program. In the case of the migrants outside the detention can come to my office and I explain how the program is working . We have office on the country of origins and we work together. The first step is delivery and preparation of travel documents, because most of the people don't have any papers in order. I can call to the embassy or they can do it by their own.It is basically financial assistance. They receive travel expenses, travel tickets, so they can return home without any problem. They receive help in the transit countries because we have offices and colleagues that can assistance migrants in question for example accompanied them to the gate airport... We provide cash at the airport for 300 euros and when they are already in the country they receive 500 euros. This is not given in cash, in nature. For example someone that wants to rent or shop, we can pay for it, so we can monitor what the people is doing with the money. In a couple of Algeria, Nigeria, are exceptional and we give the money in cash. **How does the people that are outside know about the program?** They can get information from the embassy, informal channels like the church, the commune, the lawyers, friends, they are pretty aware of the program. It is difficult to promote the program to the irregular migrants that outside so we can use these channels. **What are the biggest obstacles?** The biggest problem is the document travellers. They don't have identity papers. The embassy of origin refuses to issue the documents for them. Some people are not able to receive an identity paper ever, or from a relative, principally it is difficult for them in Africa. For instance I just came minutes ago from the Embassy of Burundi, and they say don't want to recognise this person as national from Burundi. We cannot do anything about without documents. ...”⁷²

2.2.3 REMOVAL:

If no period for voluntary departure has been granted, or if the obligation to return has not been complied within the period for voluntary departure, Member States shall enforce the

⁷² Interview Ms. Vivian Van Hoeck, Assisted Voluntary Return and Reintegration from Luxembourg International Organization for Migration, Luxembourg, 10 July 2013

return decision and remove the irregular migrant.⁷³ In the case that “risk of absconding” emerges it is not necessary to wait until the period of voluntary departure expires.⁷⁴ In this situation, individuals are assessed on a case-by-case basis.

Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures **shall be proportionate and shall not exceed reasonable force**⁷⁵. The **Principle of Proportionality**⁷⁶ has established that “an individual should not have its freedom of action limited beyond the degree necessary in the public interest”⁷⁷ The Principle of Proportionality is also recognised in Article 5 of the EC Treaty, which states that “any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”⁷⁸

Member states shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned. In this regard, I consider the Return Directive should specify to give special treatment to vulnerable persons such as pregnant women, people with mental health problems and the elderly, among others.

Member States shall provide for an effective forced-return monitoring system.. The monitoring system is important to make sure the authorities respect the fundamental rights of migrants during the removal process, specifically for the border controls: aircrafts, vessels or land. For this reason, the Office of the High Commissioner for Refugees or NGOs should be involved.

⁷³ Cfr. Supra footnote 1, Article 8.1

⁷⁴ Cfr. Supra footnote 1, Article 8.2

⁷⁵ Cfr. Supra footnote 1, Article 8.4

⁷⁶ The legal concept of proportionality has been recognised as one of the general principles of European Union law by the European Court of Justice since the 1950s.

⁷⁷ *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* ECR 1125 Case 11/70 (1970)

⁷⁸ Article 5 EC Treaty Establishing the European Community as Amended by Subsequent Treaties ROME, 25 March 1957 TREATY ON EUROPEAN UNION Official Journal C 191, 29 July 1992.

In practice, the technical monitoring for removal purposes occurs with the support of the border agency FRONTEX, The Agency for the Management of Operational Cooperation at the External Borders. Although Member States are responsible for the control and surveillance of external borders, this agency facilitates the implementation of Community measures relating to the management of the border. One of its main functions is to support Member States organizing joint return operations. In this sense, the EU has indicated that FRONTEX also plays a key role in operational cooperation on return, one of its tasks being to provide assistance for joint return operations and identify the best practices on the acquisition of travel documents and removal of non-EU nationals irregularly present in the territory of an EU State.⁷⁹ “There are three domains for Frontex Joint Operations, which correspond to the three types of border – sea, land and air. Frontex-coordinated returns by air group together non-EU nationals from several Member States for a flight. Returnees are transported from several Member States to the Member State organising the flight, where they embark an aircraft and travel together to the destination airport in a third country. Frontex acts as an intermediary, coordinating with the various national authorities that want to participate in a joint return flight. However, Frontex does not have any background information about the individual cases of the returnees.”⁸⁰

According to their institutional site a return procedure is as follows:

“One of the EU Member States or Schengen Associated Countries takes the initiative to organise a joint return flight to a specific destination country and charters a plane for that purpose. The countries of destination are chosen according to needs — the presence of irregular immigrants of a given nationality who have received return decisions — and conditions applied by the destination country, such as readmission agreements.

⁷⁹European Commission “Common Rules for managing the return of irregular migrants “ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/return-readmission/index_en.htm a (consulted 2 July 2013)

⁸⁰ FRONTEX at <http://www.frontex.europa.eu/operations/types-of-operations/general> (consulted 10 July 2013)

1. The organising Member State informs Frontex of the planned flight and the number of seats available for other participants. Frontex dispatches this information to other Member States. Member States that wish to participate contact Frontex. In some cases, the organising Member State sends an advance party to the destination country several days prior to departure. The advance party's task is to meet with local authorities, provide information about the returnees and agree details of disembarkation and processing upon arrival.

2. The returnees, accompanied by escorts (security personnel responsible for escorting), travel from participating Member States to the organising Member State where they board the plane to the final destination. The organising country prepares and oversees the flight in line with a best practices manual developed by Frontex and also ensures the presence of medical personnel on board every joint return flight. In addition, each Member State is legally obliged to have a monitoring system in place to ensure compliance with the EU Charter on Fundamental Rights.

A Frontex project manager always travels on the charter flight to the destination country. His tasks include making sure that the joint return operation is carried out in accordance with the Code of Conduct for return flights created by Frontex.

3. The returnees disembark in the destination country and the organisers and escorts return on the same charter flight.”

In regards to the respect for human rights during the process, the World Report 2012 by Human Rights Watch, said the agency incorporated changes to its rules to emphasise its obligation to respect human rights in their operations, and established a set of agent rights and a forum for consultation with civil society. However, it created a mechanism which makes Frontex accountable for violations of human rights.⁸¹

⁸¹ World Report 2012: European Union at <http://www.hrw.org/world-report-2012/world-report-2012-european-union>, 2012 (consulted 17 June 2013)

Postponement of Removal Process

It is important to mention that Member States shall postpone removal when it violates the principle of non-refoulement, or for as long as a suspensory effect is granted.⁸²

Member States **may** postpone removal **for an appropriate period, the third-country national's physical state or mental capacity**. It means that there is a possibility of not postponing this removal. The Return Directive indicates that expulsion may be postponed for an "appropriate period". It means the migrants are held for an indefinite time until their situation has been solved, staying in a situation of uncertainty. This circumstance is even more harmful for vulnerable people and asylum seekers whose applications have been rejected. I believe that it should be the opposite: if there is a risk for the migrant, his or her health must prevail above all else and, for example, he or she should be taken to a hospital or wait until he or she has the optimal conditions for transfer.

Another reason for postponement of removal could be for **technical reasons**: such as a lack of transport capacity, or lack of identification. In this regard, in practise, to avoid "lack of transport capacity" member states who are geographically close to one another make arrangements to place migrants on planes with the aim of accelerating returns. The European Commission states that the EU's return policy would not be effective without operational cooperation between EU States. This allows them to avoid duplicating work. Such operational cooperation includes assistance in cases of transit for the purposes of removal by air, organisation of joint flights for removals, mutual recognition of decisions on expulsion, and implementation of guidelines on forced return.⁸³

Return and Removal of Unaccompanied Minors

Children should receive special treatment for the vulnerable situation in which they find themselves in. The UN Convention of the Rights of the Child recognises their particular

⁸² Cfr. Supra footnote 1, Article 9.1 and Article 9.2

⁸³ Cfr Supra footnote 79

vulnerability and provides children deprived of their families with entitlements to special protection and assistance from the state.⁸⁴ They may be the victims of trafficking for sexual, labour or other exploitation purposes, or they may have travelled to Europe to escape conditions of serious deprivation.⁸⁵

It is very important that the Return Directive has stated that "the interests of the child" should be a primary consideration of Member States when implementing the Directive. In this sense, the Return Directive states that before deciding to issue a return decision in respect to an unaccompanied minor, assistance **by appropriate bodies other than the authorities** enforcing the return shall be granted with due consideration being given to the best interests of the child. The Convention on the Rights of the Child stipulates that these authorities should decide whether the child should return to the country of origin or stay in the host country after following certain procedures: reviewing a report on the assessment of the country of origin (including family tracing); listening to the child as well as to the child's legal guardian; reviewing a report on the integration of the child in the host country.⁸⁶

The Return Directive also indicates that before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in that State.

2.2. 4. ENTRY BAN:

One of the most criticized aspects of the Return Directive is the issue of the Entry Ban. Once the decision to return has been issued by a Member State, it should be accompanied

⁸⁴ United Convention on the Rights of the Child. 1989, Article 20

⁸⁵ Save the Children and the Separated Children in Europe, Programme Position Paper on Returns and Separated Children, September 2004

⁸⁶ Ibidem

by an entry ban. An entry ban means an administrative or judicial decision or act prohibiting entry into and stay in the territory of the Member States for a specified period.⁸⁷

The Entry Ban applies when no period has been granted for voluntary departure, or when the obligation to return has not been complied with⁸⁸. In other cases, member states have the discretion to expedite it.

The length of the entry ban could be issued **in principle up to five years**, except in cases where a migrant poses a serious threat, in which case it may be extended. If the third-country national represents a serious threat to public policy, public security or national security, the entry ban may be exceeded.⁸⁹ In my view, the issue of an entry ban means the irregular migrants suffer a double penalty: being expelled from the territory of the EU and then facing a ban lasting up to five years. Furthermore, it should be taking into account that after five years of being separated, the family becomes vulnerable. International law has indicated that when parents and children live in different countries, the State is obliged to facilitate contact and process requirements to enter or leave the State and come together in a humane and expeditious manner.

This right is particularly important for refugees and there are special procedures in most countries for reunification of refugee parents with their children. These rights can only be restricted for reasons of national security and public order rather than a situation of administrative irregularity such as the migration of the "without documents". Thus the entry ban should apply only for them after thorough analysis of their respective cases by authorities. At this point a "voluntary departure" would become an incentive for migrants not to suffer the consequences of entry bans.

It is important to mention that the Return Directive protects third-country national victims of human trafficking who have been granted a residence permit. They are not subject to an

⁸⁷Cfr. Supra footnote 1, Article 11

⁸⁸Cfr. Supra footnote 1, Article 11.1

⁸⁹Cfr. Supra footnote1, Article 11.2

entry ban, unless they represent a threat to public policy, public security or national security. Besides, Member States may refrain from issuing, withdrawing or suspending an entry ban in individual cases for humanitarian reasons.⁹⁰ Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons. The authority must make a correct analysis of the case and the situation in order not to violate the principle of *roufelement*. For instance, in the case that an asylum application is rejected by formal requirements, it will result in an entry ban.

SIS Schengen Information System

Once entry has been issued by a Member State, the Return Directive indicates that EU Member States should have rapid access to this information. This sharing takes place on the establishment, operation and use of the second generation Schengen Information System (SIS II)⁹¹. The same system applies for the refusal of visas under the Visa Code.

The SIS II system is a second generation database, (previously SIS (I)), that alerts a prohibition of entry to the territories of all Schengen States. The United Kingdom and Ireland do not take part in the SIS⁹² or Schengen acquis. Neither do they participate in the Returns Directive.

According to the Schengen Borders Code, Member States must refuse entry to any person whose name has been entered into the SIS.⁹³ For this purpose, SIS II Regulation also stresses the importance of the proportionality principle otherwise it could result in arbitrary discrimination of migrants' rights. It means that before issuing an alert, Member States shall determine whether the case is adequate, relevant and important enough.

Given the importance of this database, which in many cases will determine the fate of thousands of migrants, and in the application of the principle of interoperability, the SIS II

⁹⁰Cfr. Supra footnote 1, Article 11.3.

⁹¹Cfr Supra footnote 1, Article 18

⁹²Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006, Recital 28 and 29

⁹³ Cfr Supra note Article 3 (iv)

must be updated on a daily basis. It must also be coordinated with other EU Databases used in the field of immigration control like the fingerprint detection system (Eurodac) or the Visa Information System (System) . How efficient is this system and what quality of information does it provide?

The study by Dr. Evelin Brouwer says there is no a harmonized criteria on the SIS system. She explains “considering the relatively large number of data held on “inadmissible migrants” in SISI I, one would expect a relatively high “success rate” for the use of this database. In other words, if national authorities consult the NSIS during external or internal border controls or police checks, it seems likely that theses authorities will more often find “hits” based on an Article 96 alert than based on other alerts. However, we have seen that starting in 2001, statistics on entry result in a relatively small number of hits. The success or efficiency of the SIS registration is relatively low.”⁹⁴

“Based on these data statistics, one could conclude that the registrations of third-country nationals in the SIS is in practice less effective, compared to the records on persons stored in the SIS for other purpose. Even if information stored in the SIS concerns predominantly third-country nationals to be refused entry, the number of hits and therefore, the actual effects of this storage are relatively small compared to the number of the other categories of persons stored in the SIS.”⁹⁵

At the end of the day we are referring to databases operated by people: administrative, judicial, police authorities that are supposed to work together and in line in over 20 countries. How much should we trust in and rely on these systems? How much should the Directive rely too? Even if Eu law rely on mutual trust but the system fails, how many and how could migrant be affected?

⁹⁴ Evelien Brouwer. “Digital Borders and Real Rights. Effective Remedies for Third Country Nationals in the Schengen Information System” 2008 p 513

⁹⁵Cfr Supra footnote 94 p70

CHAPTER III: PROCEDURAL SAFEGUARDS

The human rights of migrants and their families are protected by international human rights instruments, from universal and regional systems. Policies and regulations affecting migrants, including Return Management, should be bound by the respect and protection guaranteed to migrants through their basic rights.

The compliance Member States' international obligations of human rights for migrants includes non-discrimination, basic due process and procedural safeguards, conditions of detention in immigration, and the obligation to ensure that persons at risk of persecution not be returned.

The Return Directive respects their fundamental rights and observes the principles recognized by the Charter of Fundamental Human Rights and the European Convention on Human Rights. In addition, Member States, it must comply with their international obligations to the areas of human rights and refugees.⁹⁶ To this purpose, the Directive has established a set of common standards for the effective protection of the interests of the people. Also, the Directive requires the Member States to ensure the compliance of certain principles: it stresses the application of the principle of proportionality, which establishes that an individual should not have his/her freedom of action limited beyond the degree necessary in the public interest.⁹⁷ The Directive states that, 'according to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay'⁹⁸. The text of the Directive secures that Member States may adopt or maintain provisions that are more favourable to a person to whom it applies⁹⁹. It recognizes

⁹⁶Cfr. Supra footnote 1, Preamble, Recital 24

⁹⁷ European Covenant on Human Rights, Article 13.

⁹⁸Cfr. Supra footnote 1, Preamble, Recital 6

⁹⁹Cfr. Supra footnote 1, Article 4.3

the respect for the principle of non-refoulement¹⁰⁰, which states that “no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁰¹

It will be analysed if return’s procedural safeguards are according to member’s states international obligations and if irregular migrant and asylums seekers should feel protected before the system.

That said, I will develop the safeguards set forth in the Return Directive:

The Return Directive lays down a minimum set of legal safeguards on decisions related to return. They are established to guarantee effective protection of the interests of the individuals concerned¹⁰² and are as follows :

3.1 FORM

Return decisions, decisions of entry ban and expulsions should be issued in writing, giving reasons in facts and in law as well as information about available legal remedies.¹⁰³

It is important that a return decision is submitted in writing so proves its existence and sets out the grounds for why the migrant is being expelled. It is an essential tool to exercise the migrant’s right to a defence by himself or asking legal assistance. Also, it prevents potentially authorities from making mistakes in processing removals.

The information on factual reasons may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national

¹⁰⁰Cfr. Supra footnote 1, Preamble, Recital 8.

¹⁰¹ Article 33 (1) of the 1951 Convention relating to the Status of Refugees

¹⁰²Cfr. Supra footnote 1, Preamble, Recital 11

¹⁰³ Cfr. Supra footnote 1, Article 12.1

security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.¹⁰⁴

If the Directive allows the reasons of the return decision not to reveal completely, by "national security", "defence" and "public safety", what arguments would the migrant use to appeal his decision? How can the migrant access an effective remedy if the "charges" against him are not known in their entirety? This measure could result in arbitrary resolutions being issued or not all of the authorities being involved in reviewing the merits, all in the name of "national security". These facts would result in a violation of Article 13 of the European Convention on Human Rights, which states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."¹⁰⁵ The Article 13 is not independent, it should be applied in connexion with other article from the European Court of Human Rights.¹⁰⁶

For example, this situation occurred in **Chahal vs. the United Kingdom** when the UK government decided to expel an asylum seeker, a Sikh Indian political activist, based on national security concerns. Given that the issue of national security was involved, the domestic courts, including those that examined the rejected decision for asylum, did not have access to the information on which government authorities relied to take the decision to expel the applicant. Therefore, the authorities had limited power to review the Home Security's decision to reject the asylum seeker.

The European Court of Human Rights explains: "the effect of Article 13 is thus to require the provision of a domestic remedy allowing the competent national authority both to deal

¹⁰⁴ Cfr. Supra footnote 1, Article 12.2

¹⁰⁵ Article 13 Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁰⁶ Alto Comisionado para Refugiados "El Artículo 13 del Convenio Europeo para la Protección de los Derechos Humanos y las Libertades Fundamentales (CEDR)", 23 March 2003,

with the substance of the relevant Convention complaint and to grant appropriate relief...”¹⁰⁷

Referring to the scope of national courts’ powers of review, the Court held that:

“the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exists substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State”¹⁰⁸

This case shows that for a court, or other body, to be considered effective it must have sufficient competence to review the merits of the request, access to all the material and testing, and have the ability to, eventually, reverse the authorities’ decision.

Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return [...] in a language the third-country national understands or may reasonably be presumed to understand.¹⁰⁹

A migrant who does not understand the language is at a disadvantage. In this regard the Inter-American Court of Human Rights established that:

“119. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have

¹⁰⁷ Case of Chahal V. The United Kingdom. November 11, 1996. Paragraph 145.

¹⁰⁸ Cfr Supra footnote 107, Paragraph 151

¹⁰⁹ Cfr. Supra footnote 1, Article 12.2

the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.”¹¹⁰

Under these considerations, member states should ensure that migrants understand – and are not just ‘presumed to understand’ - all the reasons why they were expelled. Translating the reasons into a language that the migrant is "presumed to reasonably understand" is an option that is subject to the authority’s discretion - it does not guarantee access to justice for migrants. In this logic, the translation must be given in writing to prove its existence or its accurate interpretation. It also constitutes a tool to exercise the migrant’s right to defence. Although in cases which migrants claim to have a nationality when they really belong to a different one, the authority should act under the principle of good faith, and evaluate under case- by -case principle.

Only translating the "main elements" of the return decision is not an effective guarantee for the migrant. This measure allows the authorities to decide what is important in a resolution and what is not, which may be subject to arbitrariness. Also this situation acquiesces to omit arguments that could be used by the migrant to exercise its right to defence or appeal against the return decision.

Member States may decide not to apply a written or oral translation of the main elements of decisions related to returning third-country nationals who have illegally entered the territory of a Member State, and who have not subsequently obtained an authorisation or a right to stay in that Member State.¹¹¹

¹¹⁰ Inter-American Court of Human Rights. Advisory Opinion OC-16/99 of October 1, 1999 requested by the United Mexican States ‘the Right to information on consular assistance in the framework of the guarantees of the due process of law’. Paragraph 118; Cf. the American Declaration, Arts. II and XVIII; the Universal Declaration, Arts. 7 and 10; the International Covenant on Civil and Political Rights (supra footnote 77), Arts. 2(1), 3 and 26; the Convention on the Elimination of All Forms of Discrimination against Women, Arts. 2 and 15; the International Convention on the Elimination of All Forms of Racial Discrimination, Arts 2(5) and 7; the African Charter on Human and Peoples’ Rights, Arts. 2 and 3; the American Convention, Arts. 1, 8(2) and 24; the European Convention on Human Rights and Fundamental Freedoms, Art. 14

¹¹¹Cfr. Supra footnote 1, Article 12.3

Since it has the power to decide whether or not to apply a written or oral translation for a migrant who illegally entered the EU territory, the Directive categorises migrants into groups based on what rights they do or do not deserve, which results in discrimination. It also denies thousands of people in vulnerable situations the right to have an interpreter and thus the right to defence. The Inter-American Court of Human Rights has also considered “that the right to due process of law should be recognized within the framework of the minimum guarantees that should be provided to all migrants, irrespective of their migratory status. The broad scope of the preservation of due process applies not only *ratione materiae* but also *ratione personae*, without any discrimination”¹¹²

3.2 REMEDIES

The right to an effective remedy is provided in article 47 of the Charter of Fundamental Rights of the EU and Article 13 of the European Convention on Human Rights.

With respect to such a remedy, the European Court of Human Rights has reiterated that

“123. ...the Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order...[...].The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State¹¹³

For this argument, I will analyse if the migrant has effectively access to an effective remedy in theory and practice, not only the resources must be available nationwide in theory, but if such resources are available in practice.

¹¹² Interamerican Court on Huma Rights, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No.18 (2003).

¹¹³ Case Keenan vs. the United Kingdom.2001. Paragraph 123.

These authorities or bodies shall have the power to review decisions related to return including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.¹¹⁴

The authorities' "consideration" to suspend the effects of the return decision was also previously observed in the voluntary departure section (art.6.5). As has been explained, suspending a decision should not be subject to the discretion of the authorities, it should be mandatory. This is due to the fact that if authorities resolve a resolution positively, in favour of the irregular migrant who was just returned to his country, it is less likely that they will attempt to locate the individual.

This measure may primarily affect asylum seekers. The fact that suspension is at the discretion of the authorities, and is not compulsory, it can be a risk to asylum seekers whose applications have been rejected. It is possible that the asylum seeker is sent back to its country of origin where there is a risk of persecution, torture or degrading treatment, which is precisely what he/she was trying to avoid by leaving the country. In the case of T.I.C vs. United Kingdom, the ECHR maintained that "the state which expels a person must ensure that the receiving state does not send him to a third country, if there is risk to life or physical integrity".¹¹⁵ Consequently, this section would violate the principle of non-refoulement, precisely the Return Directive seeks to protect.

The third-country national concerned shall have the possibility of obtaining legal advice, representation and, where necessary, linguistic assistance. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge and in accordance with relevant national legislation or rules regarding legal aid.¹¹⁶

¹¹⁴Cfr. Supra footnote 1, Article 13.2

¹¹⁵ Demanda N° 43844/98, decisión de admisibilidad, del 07/03/2000 CHECK

¹¹⁶Cfr. Supra footnote 1, Article 13.3 and Article 13.4

According to the human reports and the interviews for this dissertation, in practice and in most cases, migrants do not have free legal representation, mainly due to "lack of funds" of Member States and the increase in the number of migrants. If the Return Directive states that the migrant **may have** legal aid and/or linguistic assistance, it means the Directive provides this possibility, the member states can argue that as it is not compulsory and they don't have fund they don't feel have to do it. how can the migrant be informed and protected?

One of the persons interviewed described legal assistance for migrant in Italy “ the way it should act in theory it is different from the practise. there is a lack of legal assistance for irregular migrants that are not in detention centers. They have to look them by their own, basically as they are “outside” they can go to the tents that are in front of predetention center, or to the centers for asylum seekers which are not detainees but they meet there. In the tenst are human rights activists that can give them certain orientation or information of their rights. Also the migrants can coordinate with the members of the church, for instance the prist to contact a lawyer to assist him/her.”¹¹⁷ It means that the migrant also have to look their informal all channels to receive the assistance that they suppose they have the right to.

The Asylum Procedures Directive establishes the right to free legal assistance for all asylum seekers whose applications have been rejected in the first instance. The Directive says that if there is an international standard applicable, beyond the directive itself, it must be fulfilled. Asylum seekers should not stop receiving this assistance.

¹¹⁷ Interview with Ms. Tina Catania., researcher on detention center in Italy, Luxembourg, 30 June 2013.

In this regard, The European Council on Refugees and Exiles¹¹⁸ (ECRE) suggests that Member States should give priority to promoting the application of Article 13 (4) in deciding their priorities and programmes for the use of the European Return Fund.¹¹⁹

Member States shall ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure.

- (a) family unity with family members present in their territory is maintained;**
- (b) emergency health care and essential treatment of illnesses are provided;**
- (c) minors are granted access to basic education subject to the length of their stay;**
- (d) special needs of vulnerable persons are taken into account**

In this section the wording "as far as possible" or "taken into account" means that it is not required to give guarantees to those migrants who return home or are waiting for a resolution. Welfare of vulnerable groups is not ensured either. Those groups are 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.¹²⁰ Under this stipulation, Member States risk violating their obligations to subject no one to inhuman or degrading treatment or punishment¹²¹ and respect for private and family life.¹²² Also, specific provisions for the protection of groups in a vulnerable situation should be prioritised to ensure their protection.

¹¹⁸ European Council on Refugees and Exiles (ECRE) ECRE Information Note on the Directive 2008//115//EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third--country nationals at www.ecre.org

¹¹⁹ Ibidem

¹²⁰ Cfr Supra footnote ,Article 3.9

¹²¹ European Convention on Human Rights, Article 3

¹²² Cfr Supra footnote 121, Article 8

CHAPTER IV: DETENTION OF MIGRANTS

I would like to scrutinize, in one of the most controversial aspects of the Return Directive, the possibility of migrant detention. This is the most coercive measure of the directive because it deprives migrants of their liberty. From this point the questions arise: is it legal to detain a migrant? What crime has been committed? Is it an arbitrary measure by nature? Before reviewing what the policy says about the "internment", which is really an arrest, I will try to resolve these issues and determine we are before a criminalization of migration.

4.1 CRIMINALISATION OF INMIGRATION.

Migrants must not be considered “illegal” because human beings are not “illegal” or “legal”. To think the opposite would contradict the contents of the Universal Declaration of Human Rights, which in its first article states that “all persons are born free and equal in dignity and rights. All are equal before the law”. The acts committed by these persons should be classified as legal or illegal. In addition, as it was mentioned above, in Italy for instance, irregular migrant is considered a criminal offence, punishable by a fine of 5,000 to 10,000 Euros.¹²³

Migrants who are undocumented, do not have residence permits or have not complied with consular regulations are in a situation of administrative irregularity. They have not committed any illegal act against the law or a crime. Consequently, they must be considered as "irregular migrants" or “migrants in an irregular situation” - terminology which has been encouraged by the European Parliament. It "calls on the EU institutions and member states to stop using the term ‘illegal immigrants’, which has very negative connotations, and instead to refer to migrants as ‘irregular/undocumented workers/migrants.’"¹²⁴

¹²³Cfr Supra footnote 51.

¹²⁴ European Parliament “resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008” at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0019+0+DOC+XML+V0//EN> (consulted on 4 July 2013).

The denomination "illegal" migrant, stigmatises this group of people who have been linked as criminals or delinquents by society. For this, migration has been considered as a negative effect and a danger, facts which can lead to racism and xenophobic acts.

Irregular entry and stay is considered a criminal offence in some countries such as Italy. The Special Rapporteur for on the Human Rights of Migrants stressed that "irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property or national security. It is important to emphasize that irregular migrants are not criminals per se and should not be treated as such".¹²⁵

Migrants are particularly vulnerable to criminal detention, which is punitive by nature. This situation may occur because the migrant does not have the relevant documents, their residence is not authorised, their stay has been irregular or he/she has breached or overstayed their conditions of stay. If authorities automatically stop migrants for these reasons, it should be considered an arbitrary detention in violation of international law. The deprivation of a migrant's liberty, like any other person, is justified when there is a risk of avoiding future judicial or administrative proceedings or when a person is a danger to their own safety or to the public's.

The international human rights instruments protect the right to liberty and protect individuals from arbitrary and unlawful detention in the immigration context. The Human Rights Committee has approached the notion of arbitrariness in a broad and progressive manner. Arbitrary actions can either be those which contravene existing laws,¹²⁶ or those

¹²⁵ Human Rights Council Twentieth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Report of the Special Rapporteur on the human rights of migrants, François Crépeau. 2012, Paragraph 13

¹²⁶ See Shaw, Antony and Butler, Andrew, "Arbitrary Arrest and Detention Under the New Zealand Bill of Rights: The New Zealand Courts Stumble in Applying the International Covenant", New Zealand Law Journal, 139 (1993), p. 140.

which are prima facie legal, but are in fact inappropriate, unjust, unpredictable and consequently arbitrary.¹²⁷

In effect, the deprivation of a person's liberty is a condition that can occur in different contexts; therefore, the States' obligations to respect and ensure human rights transcend into merely prison and police-related situations.¹²⁸

Right to Liberty and Protection against Arbitrary Detention:

The Universal Declaration of Human Rights guarantees “everyone”, the right to life, liberty and the security of person¹²⁹ and states that “no-one” shall be subjected to arbitrary arrest, detention or exile¹³⁰. Article 9, paragraph 1, of the International Covenant on Civil and Political Rights guarantees the right to liberty and security of person. Everyone has the right to liberty and security of person, no-one shall be subjected to arbitrary arrest or detention and no-one shall be deprived of their liberty except on such grounds, and in accordance with such procedures, as are established by law.¹³¹ The Human Rights Committee, which monitors the implementation of the Covenant, stated, in its general comment No. 8 (1982) on right to liberty and security of persons, that this provision is applicable to all deprivations of liberty, including immigration control.¹³²

Migrants are specifically protected by the international human rights instruments. The International Convention on the Protection of the Rights of All Migrant Workers and

¹²⁷ See UN Human Rights Committee Communication 305/1988: Van Alphen v the Netherlands (23 July 1990) CCPR/C/39/D/305/1988

¹²⁸ Inter- American Commission on Human Rights. Report on the Human Rights of Persons Deprived of Liberty in the Americas. December 31 2011. Paragraph 38. This broad concept of the deprivation of liberty is reflected in several international instruments. Thus, for example, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) provides that for its purposes deprivation of liberty is understood to mean “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.” (Article 4.2)

¹²⁹ Universal Declaration of Human Rights, Article 3

¹³⁰ Universal Declaration of Human Rights, Article 9

¹³¹ International Convention on Civil and Political Rights Art. 9 (1).

¹³² Paragraph 1 ICCPR General Comment No. 08: Right to liberty and security of persons (Art. 9) : . 30/06/1982. Sixteenth Session.

Members of Their Families also protects the right to liberty and security of person and provides all migrant workers, regardless of their status, with the right not to be subjected individually or collectively to arbitrary arrest or detention and the right not to be deprived of liberty except on such grounds, and in accordance with such procedures, as are established by law (art. 16, paras. 1 and 4).

Irregular Migrants Administrative Detention

Unlike criminal detention, administrative detainees are not under indictment or convicted by a criminal offence. Detained migrants are under a "retained" status, even though their detention is an arrest, because they are deprived of their freedom of movement and exposed to a coercive regime that, among other things, prevents them from receiving visitors or enforces their fundamental right to have a legal defence.

The European Convention on Human Rights provides a list of the situations in which migrant detention may be permitted. The detention of migrants is only permitted in two specific situations: "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".¹³³ The European Court of Human Rights noted that the list of exceptions to the right to liberty secured in article 5, paragraph 1, "is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty".¹³⁴ Additionally in terms of proportionality, it must be noted that mandatory detention is by nature a disproportionate response to deportation and is consequently arbitrary. The United Nations Working Group on Arbitrary Detention¹⁹⁴ and the UN Human Rights Committee have both stated so.¹³⁵

¹³³ European Convention on Human Rights, Article 5, paragraph 1 (f),

¹³⁴ *Vasileva v. Denmark*, European Court on Human Rights, 2003.

¹³⁵ *A v Australia*, Case No 560/1993, Views adopted on 3 April 1997, UN Doc. A/52/40, Vol. II, Annex VI Sec. L.

States have the right to control immigration, but the widespread preventive detention of migrants in an irregular situation should not become an immigration policy. Several reports from human rights organizations show that immigrants and asylum seekers are detained for long periods of time in an irregular and automatic way.¹³⁶ I personally believe that migrants have the right to freedom and that other, less restrictive, measures than detention should be imposed upon them.

For me the migrant has the right to freedom and there are less restrictive measures than detention to impose.

I agree with the Special Rapporteur on the Human Rights of Migrants when he emphasizes that: “there is no empirical evidence **that detention deters irregular migration or discourages persons from seeking asylum**. Despite increasingly tough detention policies being introduced over the past 20 years in countries around the world, the number of irregular arrivals has not decreased. This may be due, inter alia, to the fact that migrants possibly see detention as an inevitable part of their journey.”¹³⁷

Now I will analyse what the Return Directive has established regarding the detention of migrants.

4.2 DETENTION IN THE RETURN DIRECTIVE

The Return Directive indicates that the Member States may only keep migrants in detention if there are removal proposals in place or when there is a risk of absconding.

According to the Return Directive, unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep an

¹³⁶ Amnesty International .Punishment without a crime Detention of Migrants and Asylum Seekers In Cyprus at <http://www.amnesty.org/es/library/info/EUR17/001/2012/en> (consulted 9 July 2013)

¹³⁷ Cfr Supra footnote, Paragraph 8

irregular migrant who is the subject of return procedures in detention in order to prepare the return and/or carry out the removal process, in particular when:¹³⁸

(a) there is a risk of absconding

‘Risk of absconding’ means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that a third-country national who is the subject of return procedures may abscond.¹³⁹ The definition remains rather vague, as the Member States are free to determine which ‘objective criteria’ should apply. This makes the possibility risk exist for the sole reason that a person has failed to comply with the immigration laws.

(b) Migrant concerned avoids or hampers the preparation of the return or removal process.

The Return Directive stipulates that detention is applied only if there are no other less coercive measures applicable. It means that authorities are required to examine alternative measures and demonstrate that in each case the alternatives were not effective. In other words, the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued.¹⁴⁰

According to the Special Rapporteur of the Human Rights of Immigrants, States must ensure that these alternative measures are not discriminatory¹⁴¹.

These measures could result, for instance, in: passport retention, the obligation to report to the police or reside in certain parts of the country, measured bail, bond or guarantee, or official appointments before authorities. These measure would be consistent with the

¹³⁸Cfr. Supra footnote 1, Article 15.1

¹³⁹Cfr. Supra footnote 1, Article 3.7

¹⁴⁰Cfr. Supra footnote 1, Preamble, Recital 16

¹⁴¹Cfr Supra footnote 125

obligations that, for the same reason, can be imposed upon returnees who have been granted a period for voluntary departure.

Detention shall be ordered by administrative or judicial authorities. When detention has been ordered by administrative authorities, Member States shall (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention; (b) or grant the third-country national concerned the right to take proceedings, by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings.¹⁴²

Within this measure it seems that if the detention was authorized by administrative authorities, Member States would not be obliged to provide an ex officio judicial review . This possibility creates an obvious lack of protection for migrants and because they must know the lawfulness of detention. By not setting a specific time period, it is up to the will of the authorities to check their condition.

In every case, detention shall be reviewed at “reasonable intervals” of time either on application by the third-country national concerned or the ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.¹⁴³

The review of the cases should be performed periodically in order to assess whether the migrant is justifiably detained or not; or whether the period of detention has expired. If these revisions are made on "reasonable intervals" it is possible that the migrants will face an unreasonably or unduly prolonged detention. Therefore the detention which may have been initially legal may become arbitrary. The Working Group for Arbitrary Detention considers an arbitrary deprivation of liberty is "when asylum seekers, immigrants and

¹⁴² Cfr. Supra footnote 1, Article 15.2

¹⁴³ Cfr. Supra footnote 1, Article 15.3

refugees are subjected to prolonged administrative detention without the possibility of administrative and judicial review" (A/HRC/16/47, annex).

The European Union Agency for Fundamental Rights states that reviews should be carried out by a court at regular intervals, preferably not less than once a month.¹⁴⁴

In its report about "Detention of third-country nationals in return procedures" it states that almost half of the Member States have not yet introduced timelines for automatic reviews of detention. Even if national law in these countries establishes a duty by the administration to confirm ex officio the continuing existence of grounds for detention throughout the entire period,¹⁴⁵ this guarantee cannot be considered as effective as automatic periodic reviews in ensuring that detention is kept as short as possible. A situation, such as the one that currently exists in Italy, where after the initial 60 days, the deprivation of liberty is either terminated or extended for 90 days (and subsequently for a further 90 days) does not facilitate that detention is maintained for as short a period as possible.¹⁴⁶

Length of Detention: According to the Return Directive, each Member State shall set a limited period of detention, which may not exceed six months.¹⁴⁷

When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

The European Court on Human Rights has pronounced on regarding the term "reasonable prospect of removal" in the famous case *Kadzoev*.¹⁴⁸

¹⁴⁴ European Union Agency for Fundamental Rights FRA "Detention of third-country nationals in return procedures" 2010, pp 56

¹⁴⁵ Czech Republic, Article 126 FORA. Slovak Aliens Act, Article 63(e) and Germany, General Administrative Regulations to the Residence Act [Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz], 26 October 2009, at 62.3.0.1 and 62.3.3.

¹⁴⁶ Italy, LD 286/98 at Article 14.

¹⁴⁷ Cfr. *Supra* footnote 1, Article 15.4 and Article 15.5

Mr Saïd Kadzoev, of Chechen origin, arrived in Bulgaria in October 2006 and applied for asylum. He was placed in a detention centre. All his applications for asylum were turned down and his appeals against these rejections were unsuccessful. The Bulgarian authorities considered that he did not fulfil the conditions for protection to be granted under asylum and ordered his expulsion as an illegal immigrant. However, his expulsion to Russia was not possible, as he had no identity documents issued by the Russian authorities. Pending a solution allowing his return to Russia or to another third country, Mr Kadzoev has been detained in a detention centre for more than 3 years.

The Court was questioned on the interpretation of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. Article 15 of this Directive sets out the conditions on detention for the purpose of removal of foreigners and provides in particular that the detention may not exceed a maximum period of 18 months.¹⁴⁹

The term “reasonable prospect of removal” only exists when a real prospect of removal is possible taking into consideration the maximum period of detention. This will vary in the different Member States depending on their implementation of the Directive but has a maximum limit of 18 months. Moreover, the Court goes on, ‘that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods’. Hence, when a Member State faces a situation similar to the one in Kadzoev, where the country of origin does not recognise the person as being its citizen, the third country national has to be immediately released since there is no reasonable prospect of removal in the period laid down by the Directive. That should also be the case when the practice has proven the impossibility to send third-country nationals

¹⁴⁸ C-357/09 PPU Saïd Shamilovich Kadzoev (Huchbarov), judgment of 30 November 2009 at http://ec.europa.eu/dgs/legal_service/arrets/09c357_en.pdf (consulted 23 June 2013)

¹⁴⁹ Ibidem

back to certain countries of origin due, for example, to the lack of a readmission agreement.¹⁵⁰

Member States may extend this for a limited period, not exceeding a further twelve months, if the following conditions comply (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries.¹⁵¹

The possibility of extending the detention of migrants to 18 months has been one of the most heavily criticised proposals of the Return Directive. The High Commissioner for Human Rights has described it as "excessive" measures. I consider 18 months of detention for a migrant who has committed no crime to be an extreme sanction. Detaining migrants for a period of up to 18 months is, in many countries, a far harsher measure than the penalty for committing a criminal act. For instance, in Spain sexual assault with violence or intimidation (no penetration) is punishable by 12 months imprisonment; sexual harassment is three to five months; promoting, facilitating, inducing or encouraging the prostitution of minors or incompetents is one year; stealing is one year and scamming someone is six months.

The reasons previously shown occur relatively frequently, so the possibility that the migrant is detained for up to 18 months could become a concern, since this scenario is not an exception to the rule.

For the second point consider it to be unfair and disproportionate to the criterion, which therefore makes it arbitrary. Migrants should not be punished by the unwillingness or inability of a country to provide documentation because it is out of their control and they

¹⁵⁰ Ibidem

¹⁵¹ Cfr. Supra footnote 1, Article 15. 6 (a), b)

cannot personally acquire it. The reluctance of the countries of origin to accept their own nationals back constitutes one of the main obstacles to return.¹⁵²

In practice, detention of migrants may take more than one year or the Member States may use the maximum period of 18 months not as an exception but a rule. This contradicts what the Return has established: “the implementation of this Directive should not be used in itself as a reason to justify the adoption of provisions less favourable to persons to whom it applies.”¹⁵³

The administrative detention of migrants cannot be indefinite, and after the maximum period of detention, the detainee should be automatically released.¹⁵⁴

In this regard, the International Covenant on Civil and Political Rights states that indefinite detention may result in a violation of Article 14, which guarantees the right of every person to a fair and prompt hearing before a competent and impartial tribunal, Article 7, which prohibits torture and inhuman or degrading treatment or punishment, and Article 10, which states that all persons deprived of liberty shall be treated with humanity.

4.3 SCENARIO OF DETENTION CENTRES

In practice, the condition of detention centres for migrants are “deficient”, poor and far from what has been stated in Return Directive. The objective of this thesis is not to analyse every condition of detention centres, but to expose an extract for the reader to get an idea of conditions of the detention centres.

Migrants who are deprived of their liberty due to their irregular status should be treated with dignity and humanity and the conditions of their detention must be in harmony with

¹⁵² European Commission, Communication on a Community Return Policy on Illegal Residents, COM(2002) 564 final, 2002, p. 9.

¹⁵³ Cfrs. Supra footnote, Article 4.1

¹⁵⁴ Report of the Working Group on Arbitrary Detention A/HRC/13/30. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30.Add2.pdf>, 2013 (consulted on 17 June 2013)

these principles. Migrants should enjoy the conditions necessary to develop a dignified life; otherwise it would imply that deprivation of freedom deprives a person of the respect to the human rights that they are entitled to.

In compliance with the international human rights instruments, and the administrative category known as the **special relationship of subordination** states that “by virtue of which the State, by depriving a person of their liberty, becomes the guarantor of all those rights not restricted by the very act of deprivation of liberty; and the prisoner, (any person deprived of their liberty) for his or her part, is subject to certain statutory and regulatory obligations that he or she must observe”¹⁵⁵.

The state is the guarantor of all measures and conditions that must be adopted in order to respect and ensure the rights of detainees who have been deprived of their liberty, including migrants. The duty of the State to respect and ensure the rights of the persons deprived of liberty is not limited to what happens within the institutions mentioned, [psychiatric hospitals and institutions for persons with disabilities; institutions for children and older adults; centres for migrants, refugees, asylum seekers, stateless persons, and undocumented persons; and any other similar institution that deprives persons of liberty] but also extends to circumstances such as the transfer of prisoners from one establishment to another; their transfer to judicial proceedings; and their transfer to hospital centres outside the confines of the institution in question.¹⁵⁶

The respect for human rights – based on the recognition of the dignity inherent to human beings – constitutes a limit on State activity, which applies to any branch or official who exercises power over the individual.¹⁵⁷

¹⁵⁵ Inter-American Commission on Human Rights. “Report on the Human Rights of Persons Deprived of Liberty in the Americas. December 31 2011” at <http://www.oas.org/es/cidh/ppl/default.asp> (consulted 9 July 2013)

¹⁵⁶ Cfr Supra footnote, Paragraph 55.

¹⁵⁷ I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and

The Return Directive takes into account the criteria and indicated that the conditions for detention of migrants are as follows:¹⁵⁸

- 1. As a rule, third-country nationals should be placed in specialised detention facilities, or separated from ordinary prisoners if detained in prisons.**
- 2. Detainees are allowed - on request - to establish, in due time, contact with legal representatives, family members and consular authorities.**
- 3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.**
- 4. Visits to detention facilities by relevant and competent national, international and nongovernmental organizations are to be allowed but may be subject to authorization.**
- 5. Relevant information must be provided to the detainee.**

Human rights organizations have reported that migrants are in "deplorable" conditions both in the centres and in prisons. One of the experts interviewed for this paper noted that "due to degrading and inhuman conditions of detention, migrants even prefer to be kept in prisons."¹⁵⁹

Regarding the conditions that migrants should enjoy, according to the Directive:

Specialised Detention Facilities:

The Directive states that migrants should be retained in specialized centres or prisons in exclusive spaces. However, migrants are detained in a wide range of places, including

46(2)(b) American Convention on Human Rights. Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 34.

¹⁵⁸ Cfr. Supra footnote 1, Article 16

¹⁵⁹ Cfr. Supra footnote 117

prisons, police stations, dedicated immigration detention centres, unofficial migration detention centres, military bases, private security company compounds, disused warehouses, airports, ships, etc.¹⁶⁰

In Italy, for instance, there are three kinds of detention centres for migrants: CDAs are reception camps (literally “Centre for First Assistance”) where immigrants are taken upon arrival, identified and the legitimisation of their possible stay is controlled. Here, the authorities decide whether immigrants can remain or if they have to go to a CIE for deportation. All five CDAs are in southern Italy. CARAs are identification centres for “immigrants (without documents) asking for political refugee status”, where the legitimisation of their requested refugee status is controlled. There are eight CDAs, mostly in southern Italy.¹⁶¹ CIEs are “centres for identification and expulsion”. Every immigrant caught without a residency permit, or not recognized as an asylum seeker, is taken to a CIE, identified and deported to his/her country of origin.¹⁶²

Given the high number of detainees and the fact that prison capacity has reached its limit, States often turn to places that do not meet the correct conditions. As of early 2013, Spain operated a network of seven dedicated facilities *called centros de internamiento de extranjeros* (CIEs or “foreigners’ internment centres”), which are under the responsibility of the Interior Ministry. Additionally, Spain also makes use of several facilities it calls “ad hoc” because they are typically only used during the annual immigration surges in the Canary Islands and the North African exclaves of Melilla and Ceuta. These facilities, which are otherwise not used as detention centres, include former military bases, retrofitted abandoned buildings, and tarps placed over parking lots). The government representative in the “ad hoc” Centro de Estancia Temporal de Inmigrantes (CETI) in Melilla indicated

¹⁶⁰ Cfr Supra footnote 125, Paragraph 13

¹⁶¹ Centro di Accoglienza (CDA) at <http://strugglesinitaly.files.wordpress.com/2012/08/cdacara.gif> (consulted 12 June 2013)

¹⁶² Ibidem

that 900 persons were hosted in the facility in November 2012, some of whom were sheltered in military tents in the courtyard.¹⁶³

Also, “the Ombudsman in Spain required that some detention centres, such as Malaga, should be replaced because of serious structural problems, building’s old age, suffering from lack of moisture and heating in winter or cooling in summer and appropriate agencies for recreation and leisure.”¹⁶⁴

Detainees are allowed - on request - to establish, in due time, contact with legal representatives, family members and consular authorities

From the time of their arrest, migrants have the right to speak to authorities to vocalise their situation to their consulates. It is also the authority’s duty to allow migrants to communicate with their families and with their attorneys at the time in which they enter the detention centre. Moreover, migrants are often detained in facilities which are located far from urban centres, making access difficult for family, interpreters, lawyers and NGOs, which in turn limits the right of the migrant to effective communication.

Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

In the case of vulnerable groups, detention should be banned. In every case, the possibility of an alternative measure to detention should be evaluated. Some studies have shown that

¹⁶³Global Detention Project, “Spain Profile” at <http://www.globaldetentionproject.org/countries/europe/spain/introduction.html> 2012, (consulted 17 May 2013)

¹⁶⁴Informe Pueblos Unidos “Informe sobre los Centros de Internamiento en España.” 2012 at <http://solidaridad.net/noticia/7728/informe-sobre-los-centros-de-internamiento-de-extranjeros-cie-en-espana> (consulted 8 July 2013)

the internment of some groups increases their vulnerability, and increases the damage to their physical and mental health.¹⁶⁵

The Special Rapporteur received several complaints that the **mental and physical health** of migrant detainees is often neglected. Doctors and nurses are not always available and may not have the authority to properly treat the patients. Some prisoners suffering from psychiatric illnesses are placed in solitary confinement or in the disciplinary block, or are subjected to stricter detention regimes (where differentiated regimes exist)¹⁶⁶

Another example of this scenario are the conditions of detention centres in Cyprus. Amnesty International delegates saw the devastating effect that prolonged and unlawful detention had on mental and physical health. Detainees had difficulty with focusing and remembering key dates, and demonstrated signs of anxiety and stress, including scars caused by self-harming. The delegates were told that in the months before their visit, some such detainees had attempted suicide and one had died as a result¹⁶⁷.

Substandard detention conditions may potentially amount to inhuman or degrading treatment, and may increase the risk of further violations of economic, social and cultural rights, including the right to health, food, drinking water and sanitation.

Pregnant women: In my view, pregnant women should not be detained because of the danger that may occur to the fetus and the mother, and also because reproductive health care for women is not available in all detention places.

“Médicos del Mundo” suggests that placement in a CIE is not suitable for pregnant women, due to stress and the risk of spreading disease. In addition, the food is deficient and does not include the necessary vitamins. Just give them a bottle of water a day for four persons. Therefore, it is customary to release pregnant women. However, at CIE there was a case of

¹⁶⁵ Jesuit Refugee Service Europe (2010) Becoming vulnerable in detention

¹⁶⁶ Memorandum by the Council of Europe Commissioner for Human Rights following his visit to France in May 2008, CommDH(2008)34, Strasbourg, 20 November 2008 Pp 93- 97

¹⁶⁷ Amnesty International .Punishment without a crime Detention of Migrants and Asylum Seekers In Cyprus at <http://www.amnesty.org/es/library/info/EUR17/001/2012/en> (consulted 9 July 2013)

a pregnant girl who was bleeding and had a medical report that said there was external risk to the fetus. Finally the authorities of the centre proceeded to the expulsion of the girl after a favourable report was produced. A campaign for the “closure of the CIE” requested a copy of the medical report, but it was not provided.”¹⁶⁸

In addition to this, some reports have revealed the extent of differing treatment based on gender: Female migrants enjoy a shorter outdoor recess than male migrants. There are fewer and poorer leisure spaces in the women’s area. Female migrants are responsible for cleaning their own area. Although the right to health care is also violated in the case of men, due to the reproductive life cycle of women, they have specific needs for sexual and reproductive health that are not taken into account in the centre, which generates a differential impact on women.¹⁶⁹

Unaccompanied minors and minors accompanied by their parents: I previously referred to the special protection that should be given for children, where protecting the best interests of the child should be the state’s priority. The European Court of Human Rights established that “a child’s stay in a detention centre may violate Art. 3 of the European Convention on Human Rights.” The Court based its decision on the physical and mental state of children showing serious physical and psychosomatic symptoms as a result of trauma, aggravated as a result of the arrest.”¹⁷⁰

Visits to detention facilities by relevant and competent national, international and nongovernmental organizations are to be allowed but may be subject to authorisation

Monitoring the conditions of a migrant’s detention is an essential mechanism for human rights protection. The frequent visits comes from the following organizations: Office of the High Commissioner for Human Rights (**HCHR**), **UN Refugee Agency (UNHCR)**, the

¹⁶⁸ Mujeres en los centros de internamiento de extranjeros (CIE) realidades entre rejas. Women’s Link Worldwide Pp 76. Year 2012 Pag 76.

¹⁶⁹ Ibidem

¹⁷⁰ Muskhadzhiyeva and others v. Belgium, ECtHR, Applic. No. 41442/07, 19 January 2010. la detención

International Committee of the Red Cross (ICRC) and the Subcommittee on Prevention of Torture.

However, due to the number of detention centres and prisons, it is evident that these organizations are not able to visit all of these installations. Therefore, the role of the local and national human rights organizations is important to monitor the situation. The Directive should demand that the organizations or other human rights institutions have access to every place of detention and are able to interview the detainees. In practice, however, the authorities have invented excuses, such as "to maintain the privacy of migrants" or "security", to prevent the entrance of national human rights non-governmental institutions and organizations.¹⁷¹

In addition, the Special Rapporteur of the UN Migrant Workers and their Families indicated that some of those complaints related to men, women and children who had suffered violence including sexual violence and abuse.¹⁷² Another legal consequence of imprisonment is the rebuttable presumption that the State is internationally responsible for violations of rights to life or personal integrity committed against people in their custody. Thus, the State has the responsibility to ensure the rights of individuals in their custody, such as providing information and evidence relating to what happens to them.¹⁷³

From this perspective, the State is also responsible for the actions and reactions of migrants protesting against the conditions of the detention centres and the direct removal they suffered, or other issues, such as suicide attempts, self-mutilation, hunger strikes, rioting, arson and even death. For example, in 2011 migrants burnt down the Lampedusa detention

¹⁷¹ Cfr Supra footnote, 164

¹⁷² Cfr Supra footnote 125, Paragraph 24

¹⁷³ I/A Court H.R., Case of Tibi V. Ecuador. Judgment of September 7, 2004. Series C No. 114, para. 129; I/A Court H.R., Case of Bulacio V. Argentina. Judgment of September 18, 2003. Series C No. 100, para. 126

centre and 800 Tunisians managed to escape. In 2008, a Belgian detention centre in the town of Steelnokkerzee was also burnt down by migrants.¹⁷⁴

Critics to the Return Directive:

The Return Directive has been hardly criticized since its issue by Human Rights organizations, international organizations, governments, academics among others. The most controversy points are related to exclusion of some irregular migrants from its scope; the possibility to detain a migrant for a period up to 18 months; the possibility of a re-entry ban into the EU for a period of 5 years and; the chance to detain and return unaccompanied minors.

➤ **UN Special Rapporteur on the Human rights of migrants .¹⁷⁵**

During Special Rapporteur's visit to Italy to know about the situation of the human rights of the migrants at the border described as “excessive” detention period. “the application of a maximum period of detention of 18 months, although provided for under the EU Return Directive, is excessive in order to identify someone”.

Also, he refers to the “conditions of detention in CIEs (Foreign Internment Center) vary considerably, with two of the CIEs visited exhibiting significantly substandard conditions. Lack of proper activities, arbitrariness of decision making, insufficient medical care, lack of access to lawyers and NGOs, and poor facilities add to detainees’ frustrations. Overall, a nation-wide comprehensive regulatory framework must be strengthened, taking advantage of the best practices observed in the present network of CIEs and in other facilities in Europe and around the world, and in accordance with international human rights law.

¹⁷⁴ ANDMUNDO “Inmigrante ilegales incendian cenntro de detencion Belgica” at <http://www.adnmundo.com/contenidos/inmigrantes-ilegales-incendian-centro-detencion-belgica-huir-expulsion-pi-240808.html> (consulted 27 June 2013)

¹⁷⁵ UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E> (consulted 11 July 2013)

➤ **Amnesty International and European Council on Refugees and Exiles (ECRE):**

Nicholas Beger, Director of Amnesty International's EU Office Directive considered that "We need a Directive on returns, but not at all costs ... By accepting this compromise text, the European Parliament will undermine its own mandate to protect human rights and allow EU law to erode existing international human rights standards".

"Detention for up to 18 months of people who have committed no crime is excessive and disproportionate. International law states clearly that detention in order to return irregular migrants should be exceptional and as short as possible. If this compromise text goes through, the Directive would allow families with children and unaccompanied minors to be detained for up to 18 months and in some circumstances in ordinary prisons. The prolonged detention of persons in sometimes appalling conditions should never be sanctioned by Community law".

Amnesty International and ECRE also consider entry bans prohibiting deportees from returning to Europe for up to five years to be a blunt and inappropriate instrument. They do not take account of changing circumstances in countries of origin and consequent changes in individual's need for international protection. Entry bans are also likely to interfere with the right to family life, and risk encouraging the use of irregular migration channels in order to reach the EU.

➤ **Critics from Latinoamerica:**

I consider critics coming from this continent are relevant considering the high number of latinoamerican migrants to Europe. Portugal is another major destination country for Latin American immigration, especially for Brazilians. Brazilians in fact constitute the biggest number of immigrants with around 100,000 out of fewer than 500,000.¹⁷⁶

¹⁷⁶ Cfr. Supra footnote 64

The critics came from different spheres: organizations, human rights institutions and organizations, from presidents.

The Interamerican Commission on Human Rights expressed his concerned “specifically with respect to the absence of sufficient safeguard for integral respect for the rights of asylum-seekers and migrants. The organisation exhorted the Parliament and Council of the EU to modify the Directive to bring it into conformity with international human rights standards for the protection of migrants.”¹⁷⁷

In addition, some days prior to the examination of the text by the European Parliament, the president of Bolivia, Evo Morales, encouraged the deputies not to adopt this measure. He reminded them that Europe was a continent of emigration, where inhabitants were welcome in Latin America. This diplomatic reaction was not isolated and more governments, especially from the Americas, condemned this text.

At a parliamentary level, the Latin American Parliament (Parlatino),¹⁷⁸ the MERCOSUR Parliament (PARLASUR),¹⁷⁹ the Central American Parliament (PARLACEN)¹⁸⁰ and the Andean Parliament criticised the Directive for what they termed as restrictive and inhuman provisions. MERCOSUR¹⁸¹ ; The Union of South American Nations (UNASUR)¹⁸² Finally, the foreign ministries of the Andean Community addressed a letter to the European

¹⁷⁷Interamerican Commission on Human Rights, Resolution 03/08 at <http://cidh.oas.org/Migrantes/Default.htm>, 2008 (consulted 8 April 2013)

¹⁷⁸Parlatino, “Declaración de la Mesa Directiva sobre la Directiva del Parlamento Europeo y el Consejo para el retorno de nacionales ilegales”, 4 July 2008, at <http://www.parlatino.org/web/presidencia/declaraciones/699declaracion-mesa-directiva-parlatino.html> (consulted on 14 June 2013).

¹⁷⁹Mercosur, “Declaración en Defensa de los Derechos Humanos de los Migrantes”, at <http://www.parlamentodelmercosur.org/archivos/DECL.10%202008.pdf> (consulted on 14 June 2013).

¹⁸⁰Parlamento Centro Americano. “Pronunciamento del Parlamento Centroamericano”, 30 June 2008 at <http://www.migrante.com.mx/pdf/pronunciamento.pdf> (consulted on 14 June 2013)

¹⁸¹ Mercosur, “Declaración de los países del MERCOSUR ante la Directiva de Retorno de la Unión Europea”, 1 July 2008. (consulted on 14 June 2013)

¹⁸²Comunidad Andina “Declaración de la Unión de Naciones Suramericanas sobre la ‘Directiva de Retorno’ de la Unión Europea”, 4 July 2008 at <http://www.comunidadandina.org/unasur/4-7-08directivaUE.htm> (consulte on 7 July 2013)

Union in which they declared the need for a common reflection on the negative consequences that this Directive would have on Latin American migrants in the European Union.

I would like to finish the present research, mentioning that in the last years, Europe's economic crisis has reversed the trend of migration flows. For example, more and more Europeans are seeking work in Latin America and the Caribbean, and less Latin America emigrants are travelling to Europe. Taking into account what has been established by human rights instruments for dignified treatment of migrants, does it make sense that those countries issue- their own procedure for the returning of these new migrants?

CONCLUSIONS

After many years of negotiations, the Return Directive has attempted to improve the protection of human rights and dignity of migrants during return procedures. However, as has been seen through the present document, this attempt has been unsuccessful as the Directive has failed to harmonize these criteria. On the contrary, the Directive has exacerbated the vulnerable situation in which irregular migrants find themselves due to, among other things, not living in their country of origin, the difficulties they encounter because of language differences, possibly being subjected to internment and deprived of their liberty.

The number of irregular migrants has been increasing over the years. The Directive establishes the removal process, including the possibility of applying coercive measures against migrants such as entry bans and the detention of removal purposes. In my view, the strengthening of these measures does not necessarily constitute a deterrent. In this sense, the voluntary departure seems to be the best option for the migrant since it offers a more dignified departure and does not expose him/her to such a coercive measure as the entry ban, nor does it place him/her in a detention centre. According to the information gathered, the migrant who returns to his/her country of origin under such a measure of voluntary departure, would not necessarily remain there, if the reasons they left remain unchanged then they would possibly consider leaving again.

Although Member States decide how to implement the Return Directive, and decide who enters or leaves the country, the Directive does not provide enough legal clarity to ensure that an irregular status will in any circumstance be resolved with fairness and humanity for the migrant.

While the European Court of Human Rights defines the act of the Member States, in practise, Member States, in an effort to apply the Directive discretionally, would possibly

violate the obligations to provide minimum guarantees to all migrants, regardless of their immigration status.

Procedural Safeguard

The Directive allows the possibility for Member States to implement, or not implement, certain procedural safeguard, which ensure the protection of migrants' rights to an effective remedy. The possibility of having legal assistance, the possibility that the arguments by which removal will be fully contained, and in particular, the possibility of applying suspensions to pending procedures, put the migrant in a vulnerable position once again because access to an effective remedy has not been ensured. This measure may primarily affect asylum seekers. The fact that suspension is at the discretion of the authorities, and is not compulsory, can be a risk to asylum seekers whose applications have been rejected. It is possible that the asylum seeker is sent back to its country of origin where there is a risk of persecution, torture or degrading treatment, which is precisely what he/she was trying to avoid by leaving the country.

Discretion of the Authorities and Exceptions

Each Member State retains the power to decide how to implement the Directive under its own legislation, which has given rise to States subordinating guarantees of migrant protection.

Detention Centers

Undocumented migrants who do not have residence permits or have not complied with consular regulations are in a situation of administrative irregularity. They have not committed any illegal act or crime; consequently, they must be considered as "irregular migrants" or "migrants in an irregular situation" - terminology which has been encouraged by the European Parliament.

The detention of migrants should not be allowed. There are far fewer coercive measures to locate migrants for return purposes and avoid the risk of them absconding. Deprivation of liberty, even if it is only for removal purposes, is an extreme punishment for someone who has committed an irregular infraction.

Detaining migrants for a period of up to 18 months is, in many countries, a far harsher measure than the penalty for committing a criminal act. For instance, in Spain sexual assault with violence or intimidation (no penetration) is punishable by 12 months imprisonment; sexual harassment is three to five months; promoting, facilitating, inducing or encouraging the prostitution of minors or incompetents is one year; stealing is one year and scamming someone is six months.

On behalf of the fight against the illegal immigration policy, the period of 18 months may be used by countries as the rule, rather than the exception. Immigration detention should not become an immigration policy of immigration control.

It is clear that the Directive and how countries implement it are two different subjects; however the relationship between them is linked. -

What the Directive states regarding the conditions of detention centres is often not implemented and so in practice it becomes another thing. However, the Directive does not set out all the conditions for detention centres according to international standards, so Member States do not feel pressured to implement these conditions, which is a problem. It is worth noting that after five years of issuing the directive, the conditions of detention undermine the dignity and humane treatment of migrants. This shows that the conditions of immigration detention centres that necessitate the Directive in theory are completely different from those in practice.

Europe's economic crisis has reversed the trend of migration flows. For example, more and more Europeans are seeking work in Latin America and the Caribbean, and less Latin America emigrants are travelling to Europe. Taking into account what has been established

by human rights instruments for dignified treatment of migrants, does it make sense that those countries issue- their own procedure for the returning of these new migrants?

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