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PICUM
PLATFORM FOR INTERNATIONAL COOPERATION
ON UNDOCUMENTED MIGRANTS



Quaker
Council for
European
Affairs



Save the Children

SENSOA

Common principles on removal of irregular migrants and rejected asylum seekers

Preamble

Over the years, non-governmental organisations have documented evidence of serious human rights violations linked to detention and removal operations of irregular migrants and rejected asylum-seekers across Europe. Similar concerns have been expressed by international human rights monitoring bodies, such as the UNHCR, the UN Special Rapporteur on the Human Rights of the Migrants, and the Council of Europe. The undersigned NGOs deplore the increasing use of detention to deter asylum-seekers and migrants. Governments often justify detention as the only way to ensure an effective removal policy. The undersigned organisations question the validity of such an approach. Indeed, individuals are often detained even where the prospect of removal is unlikely because of the lack of co-operation from countries of origin or otherwise.

The undersigned organisations urge the European Union and its Member States to ensure that return policies (including removal and detention operations) fully respect the needs and the dignity of individuals.

The present document highlights the core principles that should be reflected in any policy on return, including in any EU return directive.

Standards on removal should be applicable to all areas of the member states of the European Union territory including so-called transit, border or airport zones.

Principles

1. Voluntary return should always be the priority

The option of consensual compliance with mandatory return, including through counselling and material assistance, should be available and prioritised over reliance on forced removal. A distinction in the procedure between the ending of a leave to remain and carrying out of the removal order should be provided in order to allow the person a limited period of time to organise voluntary return.

2. Vulnerable persons should be protected against removal

Non-refoulement: Any forced removal must be carried out in accordance with the European Convention on Human Rights (ECHR)¹, the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention), and other obligations under international human rights law. The principle of non-refoulement must be respected.

Collective expulsions are prohibited by international law.²

Return decisions or removal orders should only be issued when any claim for international protection, including those based on the Refugee Convention, ECHR (particularly articles 3 and 8), and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), have been rejected and all remedies exhausted.

Children³ should neither be forcibly removed nor detained. In accordance with the UN Convention on the Rights of the Child 1989 separated children⁴ should only be sent back to their country of origin where it is safe and in their best interests. This must be assessed on a case-by-case basis and should never be a forced removal.

Seriously ill people: No action should be taken to remove any person who suffers from a serious illness, unless it can be established that he/she has real access⁵ to appropriate treatment and medical care in his/her country of origin upon return.

Victims of trafficking should be protected as defined in the European Convention on action against trafficking in Human Beings⁶ and as proposed in the opinion of the EU expert group on trafficking⁷. In addition, other vulnerable persons whose best interests are infringed upon by forced removal should be protected against such removal, including elderly persons, pregnant women.

Victims of human rights violations like labour exploitation, sexual abuse, and criminal offences in general, should be able to obtain guarantees for redress before any return decision or removal order is executed.

¹ Article 5 of the ECHR

² International Covenant on Civil and Political Rights, article 13; ECHR Protocol 4, article 4; EU Charter of Fundamental Rights, article 19.

³ Children should be defined as under 18 years of age (UN Convention on the Rights of the Child)

⁴ Children under 18 years of age who are outside their country of origin and separated from both parents or their previous legal or customary care giver.

⁵ "Real access" means "accessibility" as defined in UN Committee on Economic, Social and Cultural Rights - CESCR General Comment no.14, article 12 (Accessibility: Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions: Non-discrimination, physical accessibility, economic accessibility (affordability) and information accessibility)

⁶ Convention on action against trafficking in Human Beings, Council of Europe, May 2005; UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (November 2000), Article 7; States also have a duty to take measures to prevent human rights violations. UN Commission on Human Rights: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 2005/35 (April 19, 2005), Annex 3(a).

⁷ Report of the experts group on trafficking in Human Beings, December 2004, annex 2

3. Persons subject to a removal order should always have access to effective remedies

Every person subject to a removal order or a deportation order should have the right to an individual in-country suspensive appeal against these decisions before an independent judicial body, including the possibility to raise fears of *refoulement* or ill-treatment upon return contrary to article 3 of the European Convention on Human Rights and the Convention Against Torture, or potential breaches of article 8 of the ECHR. A sufficient delay to make this appeal effective should be provided by law.

The right to appeal a return decision with suspensive effect is especially crucial in order to prevent the *refoulement* of asylum seekers who may not have had access to an appeal procedure with suspensive effect following a negative first instance decision on their asylum claim.

Appropriate mechanism should be in place to ensure that trafficked persons are not removed.

Interpreters, access to free legal aid and legal representation during the whole process of detention and removal should be provided by law.

4. Detention for the purpose of removal should be the last resort

The NGO's that are signatories to this present position wish to demonstrate their disagreement with the principle of detaining foreigners in irregular situation who have not committed any crime. As far as it is permissible under international refugee and human rights law we recall that detention should be the absolute exception and the last resort.

Detention should be carried out only where a less restrictive alternative or unconditional release is shown to be insufficient and where non-custodial measures have been proven on individual grounds not to achieve the stated, lawful and legitimate purpose.

In accordance with ECHR article 5(1)(f), such detention is only permissible where action is being taken towards removal with due diligence. A maximum time limit, which should be as short as possible, should be determined by law. When the removal order is not executed in that time period, the detainee shall be released.

Persons belonging to vulnerable categories including: separated children; families with children, pregnant women in their final months and nursing mothers, and torture and trauma victims, should never be detained.⁸

The continued necessity of detention should be regularly reviewed by a judge in a hearing at which the detained person is present. The review procedure should provide the detainee with the possibility to apply for bail at any time. When the detention is judged unlawful, the person concerned should be released immediately and have an enforceable right to compensation, in accordance with Article 5 (5) of the ECHR.

Persons awaiting removal should be detained in special facilities separate from ordinary criminals, in which men and women are separated and couples are accommodated together.

The right to have access to free legal, medical, psychological and social assistance, as well as the right to be visited by families, NGOs and representatives of faith communities should be guaranteed by the law and by internal regulations in each centre. Internal regulations should also provide detainees with freedom of movement within the centre, as well as norms of security and hygiene.

⁸ Detention is a clear infringement of the Article 37 of the UN Convention on the Rights of the Child to which all EU member states are signatories. See also, UNHCR Revised Guidelines on applicable criteria and standards relating to the detention of asylum seekers (February 1999) Guideline 6: "Minors who are asylum-seekers should never be detained." Guideline 7: Detention of vulnerable persons. Active consideration of alternatives should proceed any order to detain asylum-seekers falling into the following categories "Unaccompanied elderly persons; torture or trauma victims; persons with a mental or physical disability". Guideline 8: Detention of Women: "As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided."

5. Family Unity should be strictly respected

Parents and their children should never be separated. A family should not be returned to the country of origin if not all members can return⁹.

Families with children should not be forcibly removed if it is the child's best interest to stay, for example if the child has experienced extreme trauma, has serious health problems, or has started an educational process. Children should be entitled to complete the school year they have started.

6. Independent monitoring and control bodies should be created

Independent inspection bodies at national and European Union level should be mandated to make regular, unannounced and unrestricted visits to all places of detention and removal, including those located in "transit zones." They should also establish independent monitoring systems for forced return procedures. Such systems could include the appointment of observers or ombudspersons to conduct impartial and in-depth enquiries at all levels into allegations of ill-treatment.

7. Use of force should comply with Council of Europe recommendations

Involuntary removal should always take place in safety and dignity, and with adequate safeguards to ensure that the right to life and mental and physical integrity are respected; removal must be in accordance with Recommendation 1547 of the Council of Europe.

8. Re-entry ban should be prohibited

The execution of a removal should not be followed by a re-entry ban, and/or a recording in the Schengen Information System, as it could amount to double penalty and may have potentially far-reaching consequences for the principle of *non-refoulement*.

9. A legal status should be granted to persons who cannot be removed

The execution of the removal order or the return decision should be carried out within a reasonable period fixed by law. Where removal cannot be effected within this period, the removal order or return decision should be cancelled or suspended.

Once a removal order or a return decision is cancelled or suspended, the person subject to the order or to the decision must immediately be granted a legal right to remain that allows for the exercise of rights. If, after a reasonable period defined by law, the removal or the return decision cannot be executed, the person subject to the order should have the opportunity to apply for a residence permit. Those persons should never be detained.

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Amnesty International, EU Office
Caritas Europa
Churches' Commission for Migrants on Europe (CCME)
European Council for Refugees and Exiles (ECRE)
Human Rights Watch
Jesuit Refugee Service –Europe (JRS)
Platform for International Cooperation on Undocumented Migrants (PICUM)
Quaker Council for European Affairs
Save the Children
Cimade (France)
Iglesia Evangelica Espanola
Federazione delle Chiese Evangeliche in Italia (FCEI)
SENSOA (Belgium)

Contact: Caroline Intrand, CIMADE, 176 rue de Grenelle, F-75007 Paris, Tel: +33 1 44 18 72 65, e-mail: caroline.intrand@cimade.org

⁹ Article 8 of ECHR: right to family life.