



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05.12.2001
COM(2001) 743 final

COMMISSION WORKING DOCUMENT

**The relationship between safeguarding internal security
and complying with international protection obligations and instruments**

This Working Document is the Commission response to Conclusion 29 of the Extraordinary Justice and Home Affairs Council Meeting of 20 September 2001, in which: “The Council invites the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments”.

INDEX

Introduction

Chapter 1: Mechanisms for excluding those not deserving protection from Refugee Convention status and other forms of international protection

1.1. Application of exclusion clauses

1.1.1 Terrorism in relation to the grounds for exclusion from Refugee Convention

1.1.2 Definition of terrorism

1.1.3 Membership of a terrorist group

1.2 Cancellation of Refugee Convention status

1.2.1 Re-examination of refugee status granted

1.3. Crimes committed on the territory of the country of refuge

1.4 Asylum procedure

1.4.1 Access to the asylum procedure

1.4.2. The processing of asylum requests in extradition cases

1.4.2.1 Suspension of the examination of an asylum claim

1.4.2.2 Inadmissible asylum claims

1.4.3 Treatment within asylum procedures

1.4.3.1 Assessment of the asylum claim in a regular asylum procedure

1.4.3.2 Assessment of the asylum claim in an accelerated asylum procedure

1.4.4 Standard of proof

1.4.5 Right to appeal the exclusion decision

1.5 Administrative treatment of potential article 1(F) cases

1.5.1 Special units in the asylum system for dealing with exclusion clauses

1.5.2 Guidelines on the use of the exclusion clauses

1.5.3 Information exchange mechanisms

1.6 Treatment of security risk cases

1.7 Exclusion from other forms of international protection

Chapter 2: Legal follow up to the exclusion of persons from Refugee Convention status or other forms of international protection

2.1 Prosecution or extradition

2.2 Prosecution

2.2.1 Universal jurisdiction

2.2.2 Future International Criminal Court

2.3 Extradition

2.3.1 Legal obstacles to extradition or removal

2.3.2 Legal guarantees in extradition cases

2.4 The legal position of persons excluded from protection regimes but who are non-removable

2.4.1 Harmonisation of basic rights granted to persons excluded from protection regimes but who are non-removable

2.4.2 Detention and alternatives to detention of persons excluded from protection regimes but who are non-removable

Chapter 3: Approximation of relevant legislation, regulation and administrative practices against the background of the Common European Asylum System

3.1 General framework

3.2 Legislative harmonisation, accompanying measures, administrative co-operation and the Open Co-ordination Method

Chapter 4: Analysis of “internal security”-related provisions in EC legislation and (future) Commission Proposals for EC legislation in the immigration and asylum field

4.1 General analysis

4.2 EC legislation in the field of asylum

4.2.1 Temporary Protection

4.2.2 Eurodac

4.3 Proposals for EC legislation in the field of asylum

4.3.1 Asylum procedures

4.3.2 Reception conditions

4.3.3 State determination

4.3.4 Qualification for international protection

4.4 Proposals for EC legislation in the field of immigration

4.4.1 Economic migration

4.4.2 Family reunification

4.4.3 Long term residency status

4.5 Future Proposals for EC legislation in the field of immigration

4.5.1 Students and other third country nationals

4.5.2 Victims of trafficking

INTRODUCTION

At the Extraordinary Justice and Home Affairs Council Meeting of 20 September 2001, flowing from the tragic events of the 11th of September in the USA, Conclusion 29 invited *“the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments”*. This specific subject has been and will remain a permanent concern to the Commission, and may result in the mid to long term to Proposals for (amended) legislation. In answering to the above invitation this Working Paper however aims at providing for both a rapid reaction as well as a comprehensive review of the issue.

The European Council has in the aftermath of and in response to the 11th September events decided to develop an *“Action Plan on the fight against terrorism”*. This Plan covers several policy areas, including external, economic/financial, transportation and Justice and Home Affairs policy. With regard to the latter strand, Justice and Home Affairs, a separate plan of action has been developed, covering more particularly the policy areas of: judicial co-operation, co-operation between police and intelligence services, financing of terrorism, measures at the border and other measures. In the *“measures at the border”* Chapter of the Conclusions of the extraordinary JAI Council of 20 September 2001, in which Conclusion 29 is framed, other specific Conclusions relate to border control, issuing of identity documents, residence permits and visa, and the functioning of the Schengen Information System (SIS).

These specific Conclusions are very relevant in the fight against terrorism, and more generally they provide tools for States to strengthen national security. In particular pre-entry screening, including strict visa policy and the possible use of biometric data, as well as measures to enhance co-operation between border guards, intelligence services, immigration and asylum authorities of the State concerned, could offer real possibilities for identifying those suspected of terrorist involvement at an early stage. The functioning of Europol, Eurodac and the SIS can also substantially assist in the identification of terrorist suspects. However, these specific Conclusions are subject of separate actions and follow up to be taken at European and Member States level, and therefore fall outside the scope of this Paper. With this Paper, the Commission focuses on the mandate formulated in Conclusion 29.

This Document takes a fourfold approach. Firstly, the Paper will analyse the existing legal mechanisms for excluding those persons from international protection who do not deserve such protection, focusing in particular on those suspected of terrorist acts. Subsequently, the Paper will consider which legal steps can possibly be taken by governments who are confronted with a person who is excluded from international protection regimes. The Paper will then elaborate in more detail on what actions can be initiated and taken at European level regarding the issue at stake, in the short as well as in the mid to long term. Finally, the Paper will assess the adequacy of the internal security related provisions in EC legislation and (future) Commission Proposals for Directives in the asylum and immigration field

The two main premises on which this Document is built are, firstly, that bona fide refugees and asylum seekers should not become victims of the recent events, and secondly that there should be no avenue for those supporting or committing terrorist acts to secure access to the territory of the Member States of the European Union. It is therefore legitimate and fully understandable that Member States are now looking at reinforced security safeguards to prevent terrorists from gaining admission to their territory through different channels. These could include asylum channels, though in practice terrorists are not likely to use the asylum channel much, as other, illegal, channels are more discreet and more suitable for their criminal practices. Any security safeguard therefore needs to strike a proper balance with the refugee protection principles at stake. In this context the Commission fully endorses the line taken and expressed by UNHCR that, rather than through major changes to the refugee protection regime, a scrupulous application of the exceptions to refugee protection available under current law, is the appropriate approach.

Chapter 1: Mechanisms for excluding those not deserving protection from the Refugee Convention status and others forms of international protection

1.1 Application of the exclusion clauses

After the 11th September events, UNHCR has publicly called on States to “scrupulously and rigorously” apply the exclusion clauses, as contained in Article 1(F) of the Refugee Convention, as that Convention was never intended to be a “safe haven” for criminals, nor was it designed to protect them from criminal prosecution, but quite the opposite: to protect the persecuted and not the persecutors.

Article 1(F) of the Refugee Convention states that refugee status can not be granted to any person with respect to whom “ *there are serious reasons for considering that:*

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations”

This Paper is not the appropriate framework for analysing in full detail the application of the three grounds listed in Article 1(F) of the Refugee Convention. In addition to guidelines issued by Member States, UNHCR has issued special guidelines on the application of this particular article. The Commission also likes to refer to other relevant documents issued by UNHCR, including background papers and notes for the UNHCR Standing Committee and within the context of UNHCR’s Global Consultations process.

1.1.1 Terrorism in relation to the three grounds for exclusion from Refugee Convention

In line with several United Nations General Assembly- and Security Council Resolutions, most recently Resolution 1373 of 28 September 2001, and following international refugee law jurisprudence, exclusion of persons involved in terrorist acts from refugee status may be based on either of the three grounds listed in the exclusion clause under Article 1(F), depending on the circumstances of the case.

- Art 1F (a): as it has been recognised that terrorist acts may constitute “war crimes” if committed in a war context
- Art.1F (b): in so far as particular cruel actions, even if committed with an allegedly political objective, can be classified as serious non-political crimes, and fall within the realm of extraditable offences.
- Art. 1F (c) following UN General Assembly Resolutions “Relating to measures combating terrorism”, which declare that “*acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations*” and that “*knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations*”.

1.1.2 Definition of terrorism

Rather than attempting to adopt a general definition of what constitutes terrorism, States have, until now, preferred to declare certain specific acts as terrorist crimes. They have identified a number of crimes within this category, such as those related to hijacking, hostage-taking and bomb attacks. Though within the United Nations context work is accelerated with regard to the preparations for an international instrument on terrorism, there is no internationally agreed definition of terrorism as yet.

In this particular context it is even more relevant that the European Commission has recently adopted the *Proposal for a Council Framework Decision on combating terrorism*¹ (which includes the establishment of minimum rules relating to the constituent elements of criminal acts) and the *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*.² In particular an EU common definition of what constitutes terrorists offences, if incorporated in EU extradition treaties, may be a basis for relying on Article 1(F)(b). EU standards will also be a helpful way of illuminating UN standards of eg “terrorist acts”, and hence serve as an interpretative aid to application of Article 1 (F) (a) or 1(F) (c).

1.1.3 Membership of a terrorist group

Mere, voluntary, membership of a terrorist group may, in some cases, amount to personal and knowing participation, or acquiescence amounting to complicity, in the crimes in question, and hence to exclusion from refugee status. In this assessment the purpose of the group, the status and level of the person involved, and factors such as duress and self-defence against superior orders, as well as the availability of a moral choice should be taken into consideration. If it has been determined that the person is still an actual, active, present and willing member, the fact of mere membership may be difficult to dissociate from the commission of terrorist crimes.

1.2 Cancellation of Refugee Convention status

Refugee Convention’s status can be withdrawn, for instance if it is discovered that the person had committed serious crimes, including terrorist acts, before having been recognised as a refugee. In such cases refugee status may be cancelled, following the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

1.2.1 Re-examination of refugee statuses granted

Active re-examination of “closed files” of persons granted a refugee status could be considered by Member States. However, such a re-examination should only be undertaken if there is a clear inducement for doing so, for instance based upon intelligence services information, identifying security risks. A review of cases based solely on the grounds of nationality, religion or political opinion is not considered appropriate. If this re-examination would lead to the conclusion that someone indeed has committed crimes falling under the scope of the exclusion clauses, his/her refugee status could be cancelled.

1.3. Crimes committed on the territory of the country of refuge

In cases where a refugee has committed a serious crime, including terrorist acts, on the territory of the country of refuge, protection against expulsion can be withdrawn, in conformity with Article 32 (1), “*The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order*”, and Article 33 (2) (on prohibition of expulsion or return - “refoulement”): of the Refugee Convention. The purpose of this latter article is to safeguard the receiving country from persons who present a danger to the public safety or the security of the country, and states that: “*The benefit of the present provision may not, however, be claimed by a*

¹ Brussels, 19.9.2001 COM (2001) 521 final

² Brussels, 19.9.2001 COM (2001) 522 final

refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

Article 33(2) therefore provides an exception to the principle of *non-refoulement*, laid down in Article 33(1). This means in essence that refugees can exceptionally be returned in case of threat to the national security of the host country, and in case their proven criminal nature and record constitute a danger to the community. The various elements of these extreme and exceptional circumstances need, however, to be interpreted restrictively and require a high standard of proof. However, any person **within** the terms of Art. 33(2) may lawfully be expelled, even if the only option is to return him or her to the country in which persecution is feared, without prejudice to other international legal obligations of States, in particular Article 3 of the European Convention on Human Rights.

1.4 Asylum Procedure

1.4.1 Access to the asylum procedure

In order to implement in good faith, and “full and inclusively”, the 1951 Refugee Convention it is indispensable to determine who fulfils the requirements of the Convention. Therefore all persons requesting for asylum in the Member State responsible for assessing the claim, should be granted access to a procedure, enabling such assessment. *Automatic bars* to accessing an asylum procedure, even of suspected criminals, for instance by rejection at the border, without providing such persons access to an asylum procedure, could result in “refoulement”. In addition this would not be in conformity with article 4 of the *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*³.

Channelling all asylum seekers through an asylum procedure with a view to granting or denying refugee status is also necessary from a practical security perspective. It effectively provides the opportunity to identify possible suspects of crimes. Asylum seekers will be known and identified, their background thoroughly investigated in one or more interviews, and checked against all available information on countries, groups and events. In addition they will be easily “tracked” during the procedure, even if they are not detained.

1.4.2 The handling of asylum request in extradition cases

1.4.2.1 Suspension of the examination of an asylum claim

After access to the asylum procedure has been granted, it could however be considered to allow for the immediate suspension, the “freezing” of the actual examination of the asylum request in the following two situations. Firstly, in cases in which an international criminal tribunal has indicted the individual who has claimed asylum. In such cases, the appropriate response would be to hand over the individual concerned to that tribunal for prosecution. The second possible ground for a suspension of the examination of the asylum request would be where an extradition request from a country other than the country of origin of the asylum seeker, relating to serious crimes, is pending. In both cases the criminal proceedings would take priority over the actual conducting of the asylum procedure. Following the criminal prosecution of these cases, and following the serving of an eventual punishment, the old situation of the asylum request would be “unfrozen”. This would effectively mean that the asylum seeker would be transferred back to the country where he had an asylum request pending. If opted for this approach the *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*⁴ would need to be changed to allow for such an approach.

³ Brussels, 20.09.2000 COM(2000) 578 final

⁴ Id at 3

1.4.2.2 Inadmissible asylum claims

An alternative legislative approach for dealing with asylum claims in cases where an extradition request or an indictment by an International Criminal Court has been made, could consist in the dismissal of an asylum claim as being “inadmissible”. In this option it would be necessary to add to article 18 of the *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*⁵, dealing with the inadmissibility of certain claims for asylum, two new grounds for inadmissibility: namely in cases where an extradition request has been made by a country, other than the country of origin of the asylum seeker, or in cases of an indictment by an International Criminal Court. In the case of extradition request, and if following criminal prosecution the asylum seeker wants to re-apply for asylum, the revised article 18 should include a rule to the effect that the merits of such a renewed asylum claim is to be assessed by the Member State to whom the person has been extradited.

The advantage of both such approaches would be that the possibilities for criminal prosecution of alleged criminals would not be hindered by the mere fact of the filing of an asylum request. It would also be an appropriate response to the several UN General Assembly Resolutions *on “Measures to Eliminate International Terrorism”* which provide that, before considering to grant refugee status, States should take appropriate measures to ensure that the asylum-seeker has not participated in terrorist acts, taking into due account any relevant information as to whether the asylum-seeker is subject to investigation for, is charged with, or has been convicted of offences connected with terrorism.

1.4.3 Treatment within asylum procedure

The procedure assessing the claim for refugee status, based on the Refugee Convention, also includes the examination of the applicability of the exclusion clauses, contained in article 1(F) of that Convention. The rationale underlying these exclusion provisions is that certain acts are so grave as to render their perpetrators undeserving of protection as refugees. However, because exclusion from refugee status may have potentially life-threatening consequences, such decisions should be made *within* the asylum procedure, by the authority with expertise and training in refugee law and status determination, in the context of a comprehensive consideration of the refugee claim.

1.4.3.1 Assessment of the asylum claim in a regular asylum procedure

The standard rule for assessing claims for asylum should be that this is being done in a comprehensive, holistic and integral manner.

This means that there should be a comprehensive examination of all relevant facts underlying a claim for asylum. However, the possible applicability of the exclusion clauses should not be explored in all cases, as a matter of routine. It should only be explored in cases where there are specific reasons to believe that the person may fall under one of these clauses. Indeed facts justifying an examination of the applicant’s excludability will normally emerge in the course of the “inclusion phase” of the refugee status determination process, checking the reasons for recognising someone as a refugee, and may then be referred to during the “exclusion phase” of the case.

1.4.3.2 Assessment of the asylum claim in an accelerated asylum procedure

There may however be cases in which it has been **prima facie** established that someone falls under the scope of the exclusion clauses. In such situations States should be entitled to channel such claims through an accelerated procedure. In such an procedure States are entitled to start with and, **if found applicable**, limit themselves to the particular examination of the applicability of the exclusion clauses, as a preliminary matter at the commencement of a hearing, without having the need to examine the

⁵ Id at 3

“inclusion clauses” of the Refugee Convention. “Translated” legally, such cases could be considered to allow for a dismissal of the asylum claim as being “manifestly unfounded”, as to be then provided for in a revision of the *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*⁶. If this option would be pursued, the issue of whether or not an appeal against a dismissal of such a claim as manifestly unfounded should automatically have suspensive effect, needs to be further examined.

1.4.4 Standard of proof

In determining the applicable standard of proof in exclusion procedures, it has to be acknowledged that exclusion proceedings do not amount to a full criminal trial. The term “*serious reasons for considering*”, used in the chapeau to article 1 (F), should be interpreted as meaning that the rules on the admissibility of evidence and the high standard of proof required in criminal proceedings do not need to apply in this respect. There is therefore no need to prove that the person has committed the act, which may justify the exclusion from refugee status. It is sufficient to establish that there are serious reasons for considering that the person has committed those acts. The basis for such a conclusion must be clearly established. Thus, an investigation should be undertaken, checking the claimant’s potential links with or involvement with violent acts. In order to consider the possibility of exclusion of refugee status as a result of individual liability for terrorist acts, the measure of personal involvement required must be assessed carefully. A person whose actions contribute to the crime, through orders, incitement or significant assistance, may be excluded from refugee status.

1.4.5 Right to appeal the exclusion decision

The application of any exclusion clause must be individually assessed. The grounds for exclusion should be based solely on the personal and knowing conduct of the person concerned, and on available evidence and conform to legal standards of fairness and justice. The person concerned should be entitled to lodge a legal challenge in the Member State concerned, as also provided for and according to the standards laid down in the *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*.⁷

1.5 Administrative treatment of potential article 1(F) cases

1.5.1 Special units in the asylum system for dealing with exclusion cases

Without prejudice to paragraph 1.4.5, and the right to appeal a denial of refugee status in front of an independent Court, Member States may have different logistical arrangements for dealing with claims of suspected war criminals or terrorists. In some Member States special Units have been set up to which all security risk cases and cases of suspected involvement in serious violent acts or violations of human rights are forwarded. Other Member States are considering introducing standard “front-security checks”, by which all claims for asylum would be checked upon potential security risks, running the personal data through the available and relevant databases. Such logistical measures are fully compatible with the legal international obligations impending upon Member States and could potentially prove useful.

Given the complexities involved, Member States that have no specialised “Exclusion/Security Unit” within their asylum system could consider introducing it. Referral to such a Unit could either be called for where there are immediate suspicions of involvement in war or other serious crimes, such as terrorist involvement (for instance, where an asylum-seeker is alleged to be a member of an extremist group practising violence), or where these suspicions emerge during the course of assessment under the normal asylum procedure. Although it is likely that only a relatively small number of cases would be involved, the specialised “Exclusion Unit” could pursue examination. In order to function properly

⁶ Id at 3

⁷ Id at 3

and effectively such a unit should possess expertise in both refugee as well as criminal law and have an in-depth knowledge of terrorist organisations. Equally important for such a Unit would be its access to all regularly available country of origin, and if necessary, classified information, and efficient working links with intelligence and criminal prosecution and enforcement bodies.

A specialised Unit would be able to undertake priority, expedited processing of cases with a potential exclusion element. Its resources and expertise would enable it to undertake a more thorough assessment of any asylum claim made by someone suspected of involvement in terrorist acts. The Unit could subsequently refer such cases to the office of the public prosecutor for criminal prosecution as the appropriate avenue for bringing suspected terrorists to justice. Its increased specialist expertise and clearly focused resources would enable prompt and quality decision-making.

1.5.2 Guidelines on the use of the exclusion clauses

Some Member States have issued special internal guidelines on the application of the exclusion clauses of the Refugee Convention. These could assist in an identification of cases with a potential exclusion element as early in the process as possible. It could be considered to establish such guidelines at a European level, making use of the best practises at national level.

1.5.3 Information exchange mechanisms

It could also be considered to set up information exchange mechanisms to help those Member States which do not have sufficient resources to benefit from the already existing expertise on these issues in some other Member States, in order to get information and support once they have a potential case. Such information exchange mechanisms could involve the setting up of contact lists and explore the usefulness of creating Intranet sites.

It could also serve to inform each other of the presence of an exclusion case, in order to avoid the person trying to get protection in another Member State. Within this context the establishment of a European list of “Refugee Convention-excluded persons” could also be considered. In the framework of information sharing it needs to be stressed that the normal rules with regard to the confidentiality of personal data, in particular as regards possible communication between a Member State and the country of origin of the person need to be respected.

1.6 Treatment of security risk cases

Member States have at their disposal a range of measures to ensure asylum-seekers on their territory do not abscond during the procedure. These include holding asylum-seekers in reception centres, reporting requirements, regulations on informing the authorities about any change of address, and detention. Which measures are appropriate will depend on individual circumstances, although where there is evidence to show that an individual asylum-seeker has criminal affiliations likely to pose a risk to public order or national security, detention would be an appropriate tool. It must however be acknowledged that in most systems there are limits to the detention of asylum applicants; also the legality and necessity of detention is subject to judicial review.

1.7 Exclusion from other forms of international protection

The findings of this Chapter 1 should be considered equally relevant in cases where someone has requested, respectively has been granted another form of international protection, such as subsidiary protection.

Chapter 2: Legal follow up to the exclusion of persons from Refugee Convention status or other forms of international protection

2.1. Prosecution or extradition

Following a denial of an appeal against the decision to exclude a person from refugee or subsidiary protection status, and according to the international law principle known as *aut dedere aut judicare*, the State is obliged to either surrender or prosecute the person excluded from protection regimes. The above principle provides for a solution of the inherent contradiction between the State's need, and indeed obligation, to combat criminal acts such as terrorism, and the individual's entitlement to protection against refoulement. This principle is formulated inter alia in Article 7 of the European Convention on the Suppression of Terrorism.

2.2 Prosecution

2.2.1 Universal jurisdiction

On the implementation of the above principle, the situation differs from one Member State to the other. Some Member States attempt to actively try such a person, if they have specific criteria to have jurisdiction on the case, or if their national criminal law provides for an universal competence. In such a legal system the State can actively prosecute and punish persons suspected of crimes of universal jurisdiction, without having regard to the territoriality of the crime committed or the nationality of the person suspected. However, it has to be acknowledged that it is often, de facto, not possible to prosecute the person for a criminal offence, given the strict rules on the admissibility of evidence and the high standard of proof required in the criminal justice systems of the Member States of the European Union. These standards are much higher than for refugee exclusion and or expulsion proceedings. In particularly the availability of (reliable) witnesses has proved in practice to be a very serious obstacle for Member States in pursuing successful criminal prosecution of those persons excluded from the Refugee Convention.

2.2.2 Future International Criminal Court

The future International Criminal Court (ICC) could play an important role in the context of prosecution of persons covered by the exclusion clauses of the Refugee Convention. However, the current mandate of the Court, laid down in its Statute, does not cover terrorism as such, except if it is associated with the other serious crimes (of concern to the international community) regarding which the Court does have jurisdiction. These crimes are also of direct relevance to the interpretation and application of Article 1 (F) of the 1951 Convention. The future ICC could also help address problems where national refugee status determination procedures may lack access to relevant intelligence information and/or resources and tools, such as are available to a judge or prosecutor investigating such crimes. It is also envisaged that co-operation between the ICC and UN agencies, such as UNHCR, will be established. It could therefore be useful to consider establishing formal and confidential co-operation agreements between Member States and the ICC in potential Article 1F cases.

2.3 Extradition

If there is no possibility to bring the person to trial in the country of refuge, nor to have the person indicted by the International Criminal Court, then in principle such a person needs to be extradited; that is if extradition is legally and practically possible to either the country of origin, another Member State or another third country. In connection with extradition requests made against persons accused of having committed terrorist crimes, both the 1977 European Convention on the Suppression of Terrorism and the International Convention for the Suppression of the Financing of Terrorism provide that States Parties are not obliged to accede to the extradition, if they have substantial grounds for believing that such request has been made for the purpose of prosecuting or punishing the person on

account of his/her race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

2.3.1 Legal obstacles to extradition or removal

Extradition may however be impossible because of legal obstacles. The protection against refoulement as a consequence of the prohibition of certain treatments or punishments, provided for in human rights instruments such as the United Nations Convention against Torture, the International Covenant on Civil and Political Rights and the European Convention on Human Rights (ECHR) is namely absolute in nature, that is to say, admits no exceptions. The European Court of Human Rights has repeatedly affirmed that the European Convention on Human Rights, even in the most difficult circumstances, such as the fight against terrorism and organised crime, prohibits, in absolute terms, torture and inhuman or degrading treatment or punishment. The European Court of Human Rights has emphasised that, unlike most of the substantive clauses of that particular Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation. Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a “balancing act” between the protection needs of the individual, set off against the security interests of a state.

2.3.2 Legal guarantees in extradition cases

Extradition must be considered legal when it is possible to obtain legal guarantees from the State that is going to trial the person, addressing the concerns connected to the potential violations of the European Convention of Human Rights. Such “guarantees” by third States could for instance relate to the non-application of capital punishment in that particular case, though the law of that State allows for such punishment.

2.4 The legal position of persons excluded from protection regimes but who are non-removable

The question that remains unresolved -and which falls outside the scope of refugee /international protection law- relates to the status that must be accorded to persons who disqualify for refugee status or other forms of international protection, who cannot be successfully prosecuted, and yet who cannot be expelled because of the absolute nature of the prohibition of refoulement as laid down in some international and regional human rights instruments. There are no international legal instruments, which regulate the status and rights of persons who are excluded from any protection status but cannot be expelled because of legal obstacles. However, the UN Committee on Human Rights elaborated on the obligation of State parties to “keep” some aliens with long links in the country, despite their criminal activities.

The current situation of Member States having limited policy options for dealing adequately with excludable but non-removable persons is a very unsatisfactory one. The issue is therefore urgently in need of further examination, and eventual resolution at European level. In this context it again has to be stressed that, despite the serious obstacles referred to earlier on, criminal prosecution by the international community, both at global level as well as Member States level, of those persons having committed crimes against humanity, war crimes or terrorist attacks, and excluded from protection regimes, is an appropriate response. In addition to their possible criminal prosecution it may also be necessary to harmonise the basic rights granted to this category of excludable but non-removable persons, and to assess the different means for dealing with these persons if they pose a security risk.

2.4.1 Harmonisation of basic rights granted to persons excluded from protection regimes but who are non-removable

The 15 Member States of the European Union deal differently with the excludable but non-removable persons. Some Member States do not grant any rights whatsoever to these persons except for the right not to be refouled. In other Member States, persons do get access to basic human rights, such as urgent medical health care and education for children. In again other Member States these persons are entitled to even more socio- and economic rights and benefits. This difference in treatment may call for a harmonised approach at European level in order to take away potential “pull factors” for persons not deserving international protection.

2.4.2 Detention and alternatives to detention of persons excluded from protection regimes but who are non-removable

Persons, who are excluded from protection regimes, yet who can not be removed, do not necessarily and automatically pose a risk to the national security. For instance many of the war criminals, rightly excluded from the protection regimes by Member States, are not being automatically detained by these States. Indeed, so far an administrative unlimited detention system is not made use of in the Member States, and it may also be useful to further explore alternatives to full detention measures, such as “residence surveille”.

However there may be cases in which there is a need for the public to be protected against persons rightly excluded from the protection regimes, such as terrorists, who do pose a risk to the security of the State. In this context it is relevant to note legislation recently proposed at Member State level with regard to *the detention of foreign nationals whose presence is believed to constitute a risk to national security and who are being suspected of being international terrorists*. This legislation has been proposed in anticipation of situations where Article 3 of the ECHR prevents removal or deportation of the above cases to a place where there is risk that the person will suffer treatment contrary to that Article. If no alternative destination is immediately available then removal may not, for the time being, be possible, even though the ultimate intention remains that removal, once satisfactory arrangements have been made. Notwithstanding this continuing intention to remove a person who is being detained, it is not possible to say that “action is being taken with a view to deportation” within the meaning of Article 5 (1) (f) ECHR, interpreted by the European Court of Human Rights. To the extent therefore that the envisaged detention of the above cases may be inconsistent with the obligations under Article 5(1) ECHR the right of derogation conferred by Article 15 (1) of the ECHR could be invoked, provided that the strict conditions laid down in Article 15 (1) are met, and the envisaged “measures are not inconsistent with (States) other obligations under international law”.

Chapter 3: Approximation of relevant legislation, regulation and administrative practices against the background of the Common European Asylum System

3.1 General framework

Continuing working on these issues at the EU level can be done following the method and means explained in the Commission's Communication "*Towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum*"⁸ and followed up by the recent "*Communication on the common asylum policy, introducing an open co-ordination method-First Report by the Commission on the application of Communication COM(2000)755 final of 22 November 2000*"⁹.

The establishment of the Common European Asylum System will follow a 2-step approach. The relationship between safeguarding internal security and complying with international protection obligations must be fed into both steps. Indeed it is necessary to work on more efficient, well-informed and common procedures, more convergent interpretation and application of exclusion possibilities and on enhancing prosecution and detention possibilities, including alternatives to detention. It is also necessary to ensure that terrorists, against the background of international protection, face a comparable treatment in all Member States. If a terrorist is not granted an international protection status in one Member State or if the status is withdrawn or cancelled, he/she should expect the same treatment of his/her case in all other Member States.

3.2 Legislative harmonisation, accompanying measures, administrative co-operation and the Open Co-ordination Method

Quick progress should be made on the negotiation of the different Commission's Proposals for Directives on the Council's table, and appropriate attention should be given to the provisions dealing with examination and decision making, exclusion, cancellation of status and withdrawal of benefits. Appropriate and quick transposition of the EC legislative instruments at the national level will also be necessary. The Commission will prepare regular reports on the implementation of these instruments. The **Contact Committees** created for monitoring the implementation will facilitate consultation between Member States and the Commission with a view to reaching similar interpretations of the relevant provisions and comparing national rules and practices. In addition caselaw developed by national and European courts or review bodies will need to be further analysed. A meeting with representatives of determining authorities and review bodies could be organised in 2002 in order to study trends and caselaw and discuss common problems and solutions.

A continuing investment on enhancing common analysis tools is needed. In this context National points of contact could be nominated for developing co-operation and exchange of information. The new programme **ARGO**, *an Action programme for co-operation in the fields of external borders, visas, asylum and immigration*¹⁰, could be used in order to support such administrative co-operation.

The Commission has recommended the use of the **open co-ordination method**. Illustration of such a method specially designed for the asylum policy can be found in the "*Communication on the common asylum policy, introducing an open co-ordination method*"¹¹ Attention is drawn to the Second European Guideline proposed on the development of an efficient asylum system, offering protection for those in need, based on the full and inclusive application of the Geneva Convention and in particular on points G ("*by identifying principles and techniques for improving the identification of individuals, covered by the exclusion provisions, who do not deserve international protection.*") and J ("*by evaluating.....the use of cessation and exclusion clauses....*"). In order to implement this

⁸ Brussels, 22.11.2000 COM (2000) 755 final

⁹ Brussels, 28.11.2001 COM (2001) 710 final

¹⁰ Brussels, 16.10.2001 COM (2001) 567 final

¹¹ Id at 9

Guideline, Member States have to identify in their national action plans means and objectives to meet the European goal and analyse implementation of national and EC instruments. This will also facilitate comparing and identifying good practices and analysing real impact and results of choices made. Finally, appropriate consultation of and co-operation with the UNHCR, relevant international organisations and third countries will also be required to efficiently and comprehensively address the issue subject of this Paper.

All the above instruments will greatly assist in the identification of the necessary improvements, leading to the adoption of additional rules within the framework of the second step of the harmonisation of asylum polices in the European Union.

Chapter 4: Analysis of “internal security”- related provisions in EC legislation and (future) Commission Proposals for EC legislation in the asylum and immigration field

4.1 General Analysis

The current EC legislation or Commission Proposals for such legislation in the field of asylum and immigration all contain, currently, sufficient standard provisions to allow for the exclusion of any third country national who may be perceived as a threat to national/public security from the right to international protection, residency or access to certain benefits. However, in the framework of current and future discussions and negotiations of the different Proposals, these relevant provisions will be revisited in the light of the new circumstances, without prejudice to the relevant international obligations underlying the Proposals. The relevant provisions in the different Proposals are shortly analysed below, and, where appropriate, possibilities for clarifying or enhancing these provisions have been identified.

4.2 EC legislation in the field of asylum

4.2.1 Temporary Protection

The formally adopted Council *Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*¹² allows Member States in its Article 28 (1) (b) to exclude a person from temporary protection if, amongst other grounds, there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgement of a particularly serious crime, he or she is a danger to the community of the host Member State.

4.2.2 EURODAC

The formally adopted *Council Regulation concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention*¹³ allows for the prompt taking of the fingerprints of all fingers of every applicant for asylum of at least 14 years of age. For the purposes of applying the Dublin Convention, it is necessary to establish the identity of applicants for asylum and of persons apprehended in connection with the unlawful crossing of the external borders of the Community. However this will simultaneously assist Member States in knowing who is entering their territory, and subsequently enhance their national security.

4.3 Proposals for EC legislation in the field of asylum

4.3.1 Asylum procedures

The *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*¹⁴ allows in Article 26 for “Cancellation of refugee status” on the grounds that circumstances have come to light that indicate that this person should never have been recognised as a refugee in the first place. Article 33 (2) (c) also allows Member States to derogate from the rule of suspensive effect for appeals in cases where there are grounds of national security or public order.

¹²Directive (2001/55/EC) 20.07.2001

¹³Regulation (2725/2000/EC) 11.12.2000

¹⁴Id at 3

As also referred to in paragraph 1.4.2.1, within the context of the forthcoming revision of this particular Proposal it could be considered to include rules allowing for a **suspension** of the asylum procedure in situations where an extradition request, relating to a serious crime, for an asylum seeker has been made by a State, other than the country of origin, or in cases of an indictment by an International Criminal Court. Alternatively, as explained earlier in paragraph 1.4.2.2, Article 18 of the Proposal, on the inadmissibility of certain claims for asylum, could be amended to the effect that it would allow in the above cases for the dismissal of an asylum claim as being **inadmissible**.

As elaborated upon in paragraph 1.4.3.2, the Commission is also considering, deleting article 28 (2) (b) of the Proposal, which states that cases where there are serious reasons for considering that the grounds of article 1 (F) of the Refugee Convention apply can not be considered to constitute grounds for the dismissal of applications for asylum as **manifestly unfounded**. Following this possible deletion an additional ground would then need to be added to article 28 (1) allowing for the dismissal of asylum claims as manifestly unfounded in those cases where it has been prima facie established that the exclusion clauses of the Refugee Convention apply.

4.3.2 Reception conditions

Following Article 22(1)(d) of the *Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States*¹⁵, Member States may reduce or withdraw reception facilities if an applicant is regarded as a threat to national security or there are serious grounds for believing that the applicant has committed a war crime or a crime against humanity or if, during the examination of the asylum application, there are serious and manifest reasons for considering that the grounds of Article 1 (F) of the Geneva Convention may apply with respect to the applicant.

It could be considered to add a new paragraph (4)(a) in Article 22, regarding the reduction or withdrawal of reception conditions, to the following extent: *“Should the applicant’s involvement in terrorist activities be established, either by his having taken an active part therein or by his having aided and abetted or provided financial support to terrorist organisations as defined by the European Union, before or after the application for asylum has been lodged, Member States must withdraw the routine reception conditions in respect of the applicant and enforce the legal protection measures provided for in their respective legislation.”*

It is also relevant to mention in the context of this Paper that the current text of Article 7 of the Proposal allows, where appropriate, for a limitation of the freedom of movement of asylum seekers to a specific area of the national territory of the Member States.

4.3.3 State determination

In the Proposal for a Council regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national¹⁶ there are no specific provisions relating to national security. However, such articles are not necessary given that the Proposal contains no provisions relating to the granting / refusing of rights or status.

¹⁵ Brussels, 3.4.2001 COM (2001) 181 final

¹⁶ Brussels, 26 .7.2001 COM(2001) 447 final

4.3.4 Qualification for international protection

In Article 14 of the recent *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*¹⁷ Member States have to ensure that an applicant who comes within the terms of the exclusion clauses of the Refugee Convention is excluded from refugee status. This Proposal equally obliges in Article 17 Member States to ensure that an applicant who comes within the terms of those exclusion clauses is also excluded from subsidiary protection status.

In the framework of the future discussion on this particular Proposal an additional paragraph (2) to article 19, relating to “Protection from refoulement and expulsion” could be considered. This additional paragraph, in accordance with article 33(2) of the Refugee Convention, holds that the benefit of that provision (the non-refoulement obligation), “*may not be claimed by a persons enjoying international protection whom there are reasonable grounds for regarding as a danger to the security of the Member State in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State*”.

The provisions in the above mentioned articles 14, 17 and the possibly to be proposed new provision to Article 19, are all without prejudice to Member States other international obligations, in particular those deriving from article 3 of the European Convention on Human Rights and Fundamental Freedoms.

4.4 Proposals for EC legislation in the field of immigration

In the field of legal immigration, all three Commission Proposals for Council Directives submitted so far on the right to family reunification, the status of third-country nationals who are long-term residents, and the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities already contain “public order” clauses. These clauses allow Member States to refuse admission of third country nationals for reasons of public policy or domestic security. It appears that a scrupulous application of these clauses is a more appropriate way of enhancing security than to substantially change the different Proposals at stake.

Invocation of these grounds must be based exclusively on the personal conduct of the third country national concerned. In practice this means that current or past membership to a certain – terrorist – association might be interpreted to be linked to the “personal conduct” of a person and might therefore justify the use of this “public order” clause. Within the scope of the Directives, any discrimination based on race, ethnic origin, religion or beliefs, political opinions or membership of a national minority is explicitly excluded. The mere ethnic origin or nationality of a person could never justify use of the “public order” clause, also, as this would be contrary to the principle of non-discrimination enshrined in Article 21 of the Charter of Fundamental Rights of the European Union.

4.4.1 Economic migration

Following Article 27 of the *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities*¹⁸: “Member States may refuse to grant or to renew or revoke permits in accordance with this Directive on grounds of public policy, public security or public health. The grounds of public policy or public security must be based exclusively on the personal conduct of the third country national concerned.”

This provision gives Member States a large degree of discretion. The current drafting of Article 27 of the Proposal can therefore be considered as sufficient and it is not deemed necessary to envisage a modification.

¹⁷ Brussels, 12.9.2001 COM (2001) 510 final

¹⁸ Brussels, 11.7.2001 COM (2001) 386 final

4.4.2 Family reunification

The *Proposal for a Council directive on the right of family reunification*¹⁹ contains in its article 8 a provision on public order allowing Member States to refuse: “*the entry and residence of family members on grounds of public policy, domestic security or public health. The grounds of public policy or domestic security must be based exclusively on the personal conduct of the family member concerned.*”

The same logic as set out in 4.4.1 applies equally in the context of this particular Proposal, and amendment of the text is therefore not considered necessary.

4.4.3 Long term residency status

The *Proposal for a Council Directive concerning the status of third country nationals who are long term resident*²⁰ contains several national security related provisions. The Commission is considering amending these provisions in the following manner:

Following Article 7 on *Public policy and domestic security* Member States may refuse to grant long-term resident status where the personal conduct of the person concerned constitutes an actual threat to public order or domestic security. It is considered to delete in paragraph 1 the word **actual**. It is also proposed to delete in paragraph 2 of Article 7 the reference to the fact that “*Criminal convictions shall not in themselves automatically warrant the refusal referred to in paragraph 1*”. The same applies to Article 19, regarding the right to settle in another Member State.

With regard to Article 13 *Protection against expulsion* the Commission is considering deleting paragraph 7 in which emergency expulsion procedures are prohibited against long term residents. This provision applies once the third country national has obtained the long-term resident status, he/she should therefore benefit from a higher level of protection. Nevertheless, emergency expulsion procedures can be justified in case of a terrorism threat.

Finally, in Article 25 on the Withdrawal of residence permit it is stated that: (1) “*During a five-year transitional period, the second Member State may take a decision to expel a long-term resident and/or family members: on grounds of public policy or domestic security as defined in Article 19; (2) Expulsion decisions may not be accompanied by a permanent ban on residence*”. In such cases, the second Member State shall expel the long-term resident **only** to the Member State that has granted him/her the status. In cases of serious threat, as defined in art. 13 (1), the second Member State should expel the long-term resident directly to his/her country of origin or to another country outside the European Union. The Commission is considering adding an article 2 bis: “*In case of an actual and sufficiently serious threat the procedure of article 13 may apply*”.

4.5 Future Proposals for EC legislation in the field of immigration

4.5.1 Students and other third-country nationals

The objectives of the future Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of study and self-employed economic activities are considered to be best achieved by guaranteeing simultaneously the possibility for Member States to cater for their domestic security concerns. The Proposal will therefore include a clause allowing Member States to refuse admission of a third-country national, the renewal of a residence permit or to revoke such a permit on grounds of public policy, public security or public health based exclusively on the personal conduct of the third-country national concerned. This drafting seems sufficiently large to give Member States the necessary margin of maneuver to refuse admission or put an end to the stay of a third-

¹⁹ Brussels, 10.10.2000 COM (2000) 624 final

²⁰ Brussels, 13.3.2001 COM (2001) 127 final

country national if objectively needed. Same provisions will be included in the Proposal for a Directive on the conditions of entry and residence of third-country nationals for other purposes.

4.5.2 Victims of trafficking

The Commission services are currently preparing a Proposal for a Directive on short-term permit to stay for the victims of trafficking. There is no right to this permit to stay as such, its issuing is subject to a set of conditions being met. One of the conditions for the delivery is that “*no considerations regarding public order or national security oppose this delivery*”. The same applies to the renewal and consequently the withdrawal of the permit. This wording seems wide enough to enable Member States to protect their public order and national security.