



# UNHCR

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

## UNHCR Annotated Comments on COUNCIL DIRECTIVE 2001/55/EC

Of 20 July 2001

**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**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point 2(a) and (b) of Article 63 thereof,

Having regard to the proposal from the Commission <sup>1</sup>,

Having regard to the Opinion of the European Parliament <sup>2</sup>,

Having regard to the Opinion of the Economic and Social Committee <sup>3</sup>,

Having regard to the Opinion of the Committee of the Regions <sup>4</sup>,

Whereas:

- (1) The preparation of a common policy on asylum, including common European arrangements for asylum, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union.
- (2) Cases of mass influx of displaced persons who cannot return to their country of origin have become more substantial in Europe in recent years. In these cases it may be necessary to set up exceptional schemes to offer them immediate temporary protection.

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<sup>1</sup> OJ C 311, 31.10.2000, p. 251.

<sup>2</sup> Opinion delivered on 13 March 2001 (not yet published in the Official Journal).

<sup>3</sup> OJ C 155, 29.5.2001, p. 21.

<sup>4</sup> Opinion delivered on 13 June 2001 (not yet published in the Official Journal).

- (3) In the conclusions relating to persons displaced by the conflict in the former Yugoslavia adopted by the Ministers responsible for immigration at their meetings in London on 30 November and 1 December 1992 and Copenhagen on 1 and 2 June 1993, the Member States and the Community institutions expressed their concern at the situation of displaced persons.
- (4) On 25 September 1995 the Council adopted a Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis <sup>1</sup>, and, on 4 March 1996, adopted Decision 96/198/JHA on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis <sup>2</sup>.
- (5) The Action Plan of the Council and the Commission of 3 December 1998 <sup>3</sup> provides for the rapid adoption, in accordance with the Treaty of Amsterdam, of minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and of measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons.
- (6) On 27 May 1999 the Council adopted conclusions on displaced persons from Kosovo. These conclusions call on the Commission and the Member States to learn the lessons of their response to the Kosovo crisis in order to establish the measures in accordance with the Treaty.
- (7) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.
- (8) It is therefore necessary to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons.
- (9) Those standards and measures are linked and interdependent for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements. They should therefore be enacted in a single legal instrument.
- (10) This temporary protection should be compatible with the Member States' international obligations as regards refugees. In particular, it must not prejudice the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, ratified by all the Member States.
- (11) The mandate of the United Nations High Commissioner for Refugees regarding refugees and other persons in need of international protection should be respected, and effect should be given to

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<sup>1</sup> OJ C 262, 7.10.1995, p. 1.

<sup>2</sup> OJ L 63, 13.3.1996, p. 10.

<sup>3</sup> OJ C 19, 23.1.1999, p. 1.

Declaration No 17, annexed to the Final Act to the Treaty of Amsterdam, on Article 63 of the Treaty establishing the European Community which provides that consultations are to be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy.

**Note:** Both paragraphs 10 and 11 are important clarifications since they clearly set the Directive within the context of the 1951 Convention framework and UNHCR's responsibilities towards refugees of concern to the Office. Ideally, national legislation will include similar references.

- (12) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons.
- (13) Given the exceptional character of the provisions established by this Directive in order to deal with a mass influx or imminent mass influx of displaced persons from third-countries who are unable to return to their country of origin, the protection offered should be of limited duration.
- (14) The existence of a mass influx of displaced persons should be established by a Council Decision, which should be binding in all Member States in relation to the displaced persons to whom the Decision applies. The conditions for the expiry of the Decision should also be established.
- (15) The Member States' obligations as to the conditions of reception and residence of persons enjoying temporary protection in the event of a mass influx of displaced persons should be determined. These obligations should be fair and offer an adequate level of protection to those concerned.
- (16) With respect to the treatment of persons enjoying temporary protection under this Directive, the Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.
- (17) Member States should, in concert with the Commission, enforce adequate measures so that the processing of personal data respects the standard of protection of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data <sup>1</sup>.
- (18) Rules should be laid down to govern access to the asylum procedure in the context of temporary protection in the event of a mass influx of displaced persons, in conformity with the Member States' international obligations and with the Treaty.
- (19) Provision should be made for principles and measures governing the return to the country of origin and the measures to be taken by Member States in respect of persons whose temporary protection has ended.

- (20) Provision should be made for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx. The mechanism should consist of two components. The first is financial and the second concerns the actual reception of persons in the Member States.
- (21) The implementation of temporary protection should be accompanied by administrative cooperation between the Member States in liaison with the Commission.
- (22) It is necessary to determine criteria for the exclusion of certain persons from temporary protection in the event of a mass influx of displaced persons.
- (23) Since the objectives of the proposed action, namely to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons, cannot be sufficiently attained by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (24) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 27 September 2000, of its wish to take part in the adoption and application of this Directive.
- (25) Pursuant to Article 1 of the said Protocol, Ireland is not participating in the adoption of this Directive. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Directive do not apply to Ireland.
- (26) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

### General provisions

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

## Article 1

The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

## Article 2

For the purposes of this Directive:

- (a) **"temporary protection"** means a procedure of exceptional character to provide, in the event of a **mass influx** or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection;  
**See comment under (d)**
- (b) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;
- (c) **"displaced persons"** means **third-country** nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:  
**See also comment under (d)**
- Note:** The term "displaced persons" is not ideal since it could be understood to mean that such persons are not refugees. For UNHCR, beneficiaries of temporary protection are refugees of concern to the Office. This is particularly obvious in relation to sub-para. c(ii) since persons fleeing such risks would squarely come within the purview of the 1951 Convention.
- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;
- (d) **"mass influx"** means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme;

**UNHCR comment:** What constitutes a "mass or large-scale influx" cannot be defined in absolute terms, but must be defined in relation to the resources of the receiving country. The expression should

be understood as referring to a significant number of arrivals in a country, over a short time period, of persons from the same home country who have been displaced under circumstances indicating that members of the group would qualify for international protection, and for whom, due to their numbers, individual refugee status determination is procedurally impractical.

- (e) "refugees" means **third-country nationals** or stateless persons within the meaning of Article 1A of the Geneva Convention;  
**See comment under (c).**

**Note:** The Reception Conditions Directive defines a "refugee" as a person who fulfils the requirements of Art. 1 (A) of the Geneva Convention.

- (f) **"unaccompanied minors"** means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States;

**Note:** The terminology currently commonly used is 'unaccompanied and separated child'.

- (g) "residence permit" means any permit or authorisation issued by the authorities of a Member State and taking the form provided for in that State's legislation, allowing a third-country national or a stateless person to reside on its territory;
- (h) "sponsor" means a third-country national enjoying temporary protection in a Member State in accordance with a decision taken under Article 5 and who wants to be joined by members of his or her family.

### Article 3

**Note:** UNHCR welcomes this provision. UNHCR has stressed the fundamental importance of the provisions of the 1951 Refugee Convention and 1967 Protocol, and the exceptional character of the use of the device of temporary protection. While accepting that the suspension of status determination procedures may be necessary in situations of mass influx, EXCOM has affirmed that the implementation of temporary protection must not diminish the protection afforded to refugees under the above instruments (see Conclusion No. 74, paragraph (t)). EXCOM has further stressed the need for constant advice by UNHCR on the practical application of the above international instruments by countries exposed to a large-scale influx of refugees (Conclusion No. 19, paragraph (d)).

1. Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.
2. Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement.

**UNHCR comment:** The Executive Committee of UNHCR (EXCOM) has affirmed that asylum-seekers forming part of large-scale influxes triggered by conflict or persecution must be admitted to the State in which they first seek refuge, without any distinction as to race, religion, political opinion, nationality, country of origin or physical incapacity. EXCOM has stressed that the principle of *non-refoulement*, including non-rejection at the frontier, must be scrupulously observed in all cases (see Conclusion no. 19, paragraph (a), Conclusion no. 22, part II (A), paragraphs (1) and (2), Conclusion no.74, paragraph (r)). EXCOM has further affirmed that,

if the first State is unable to admit such asylum-seekers on a durable basis, it should always admit them at least on a temporary basis and provide them protection. EXCOM has declared that in such situations, and pending arrangements for a durable solution, it is imperative (i) to ensure that asylum-seekers are fully protected and enjoy basic minimum standards of treatment, and (ii) to establish effective arrangements in the context of international solidarity and burden-sharing for assisting receiving countries (see Conclusion no. 15, paragraph (f), Conclusion no. 19, paragraph (l), Conclusion no. 22, Part I, paragraph (3) and Part II (A), paragraph (1)).

The draft Directive does not explicitly deal with the admission to the territory of asylum-seekers. UNHCR, though acknowledging the specific scope of the Directive, considers that given the fundamental importance of the principles of admission to the territory and non-refoulement, including non-rejection at the frontier, these principles should have been explicitly recalled in the text. In any event, this obligation is based *inter alia* on preambular paragraph 10 (recalling Member States' international obligations as regards refugees and the 1951 Convention/1967 Protocol).

UNHCR further wishes to recall that measures for the control of illegal migration may sometimes also prevent refugees from reaching safety. For this consideration, EXCOM has on a number of occasions urged States to ensure that national law and administrative practices, including migration control measures, are compatible with the principles and standards of applicable refugee and human rights law, as set out in relevant international instruments (Cf. Conclusions No. 85 (XLIX) of 1998, paragraph (s) and No. 87 (XLX) of 1999, paragraph (k)).

Accordingly, UNHCR recommends the inclusion in national legislations transposing this Directive of a provision to the effect that, as regards countries in relation to which a temporary protection arrangement is in place:

- No visa requirement shall be introduced, or, if this has already been done, it will be lifted; and
- No sanctions shall be applied to carriers for bringing improperly documented asylum-seekers from countries, the nationals of which have been designated as beneficiaries of temporary protection.

3. The establishment, implementation and termination of temporary protection shall be the subject of regular consultations with the Office of the United Nations High Commissioner for Refugees (UNHCR) and other relevant international organisations.

**Note:** UNHCR welcomes this provision.

4. This Directive shall not apply to persons who have been accepted under temporary protection schemes prior to its entry into force.

5. This Directive shall not affect the prerogative of the Member States to adopt or retain more favourable conditions for persons covered by temporary protection.

## CHAPTER II

### Duration and implementation of temporary protection

#### Article 4

1. Without prejudice to Article 6, the duration of temporary protection shall be one year. Unless terminated under the terms of Article 6(1)(b), it may be extended automatically by six-monthly periods for a maximum of one year.

2. Where reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend that temporary protection by up to one year.

#### Article 5

1. The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Commission proposal shall include at least:

- (a) a description of the specific groups of persons to whom the temporary protection will apply;
- (b) the date on which the temporary protection will take effect;
- (c) an estimation of the scale of the movements of displaced persons.

3. The Council Decision shall have the effect of introducing temporary protection for the displaced persons to which it refers, in all the Member States, in accordance with the provisions of this Directive. The Decision shall include at least:

- (a) a description of the specific groups of persons to whom the temporary protection applies;
- (b) the date on which the temporary protection will take effect;
- (c) information received from Member States on their reception capacity;
- (d) information from the Commission, UNHCR and other relevant international organisations.

4. The Council Decision shall be based on:

- (a) an examination of the situation and the scale of the movements of displaced persons;
- (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures;
- (c) information received from the Member States, the Commission, UNHCR and other relevant international organisations.

5. The European Parliament shall be informed of the Council Decision.



## Article 6

1. Temporary protection shall come to an end:

- (a) when the maximum duration has been reached; or
- (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement. The European Parliament shall be informed of the Council Decision.

**Note:** In deciding upon the termination of a temporary protection regime, UNHCR calls on Member States and the Commission to verify whether the conditions in the country of origin are conducive to return, by assessing whether guarantees related to the physical safety, legal security and respect for basic rights of potential returnees are fulfilled in practice. In the absence of such guarantees, beneficiaries of temporary protection should be offered a long-term solution such as asylum or resettlement.

## Article 7

1. Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom the Council Decision provided for in Article 5 applies, where they are displaced for the same reasons and from the same country or region of origin. They shall notify the Council and the Commission immediately.

2. The provisions of Articles 24, 25 and 26 shall not apply to the use of the possibility referred to in paragraph 1, with the exception of the structural support included in the European Refugee Fund set up by Decision 596/2000/EC<sup>1</sup>, under the conditions laid down in that Decision.

## CHAPTER III

### Obligations of the Member States towards persons enjoying temporary protection

**UNHCR comment:** The standards of treatment included in the directive are to be applied with due respect for human rights as guaranteed by the ECHR. This applies in particular to the right to freedom of movement within a member state which should not be restricted unless necessary in the interest of public health and public order.

**UNHCR comment:** National legislations should include a reference to the principle of non-discrimination, specifying that there should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity.<sup>2</sup> Such a provision had been included in earlier drafts of the directive, but was later omitted.

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<sup>1</sup> OJ L 252, 6.10.2000, p. 12.

<sup>2</sup> Conclusion No. 22, Part II (b), paragraph (2)(3).

## Article 8

1. The Member States shall adopt the necessary measures to provide persons enjoying temporary protection with residence permits for the entire duration of the protection. Documents or other equivalent evidence shall be issued for that purpose.
2. Whatever the period of validity of the residence permits referred to in paragraph 1, the treatment granted by the Member States to persons enjoying temporary protection may not be less favourable than that set out in Articles 9 to 16.
3. The Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.

## Article 9

The Member States shall provide persons enjoying temporary protection with a document, **in a language likely to be understood by them**, in which the provisions relating to temporary protection and which are relevant to them are clearly set out.

**UNHCR comment:** UNHCR considers it necessary to provide information to persons in need of international protection in a language which they understand. As a matter of principle, every effort to do so should be made by host countries. Assumptions, for example, that an asylum –seeker speaks or understands the official language of his or her country of origin, may prove incorrect.

## Article 10

To enable the effective application of the Council Decision referred to in Article 5, Member States shall register the personal data referred to in Annex II, point (a), with respect to the persons enjoying temporary protection on their territory.

## Article 11

A Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision referred to in Article 5. Member States may, on the basis of a bilateral agreement, decide that this Article should not apply.

## Article 12

The Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience. For reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit. The general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

**UNHCR comment:** UNHCR has regularly appealed to States to provide beneficiaries of temporary protection the right to employment, since they may include a significant number of persons who would be recognised as refugees if their applications were processed individually. Early access to the labour market may help to diminish dependency on social assistance and also facilitate reintegration upon eventual return to the country of origin. The Directive in this respect allows Member States to discriminate against those under temporary protection in favour of nationals or long-term resident third-country nationals which includes refugees. It would be highly welcome if national legislations applied equal treatment of beneficiaries of temporary protection and recognised refugees as regards access to employment (which has been restricted in the Directive) as well as remuneration, social security and other conditions of employment.

## Article 13

1. The Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing.
2. The Member States shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care. Without prejudice to paragraph 4, the assistance necessary for medical care shall include at least emergency care and essential treatment of illness.
3. Where persons enjoying temporary protection are engaged in employed or self-employed activities, account shall be taken, when fixing the proposed level of aid, of their ability to meet their own needs.
4. The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as **unaccompanied minors** or persons who have undergone **torture, rape or other serious forms of psychological, physical or sexual violence**.

See comment under article 2(f).

**Note:** UNHCR welcomes the provision relating to the specific needs of separated children and victims of torture and other forms of violence.

## Article 14

1. The Member States shall grant to persons under 18 years of age enjoying temporary protection access to the education system under the same conditions as nationals of the host Member State. The Member States

may stipulate that such access must be confined to the state education system.

2. The Member States may allow adults enjoying temporary protection access to the general education system.

#### Article 15

1. For the purpose of this Article, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx, the following persons shall be considered to be part of a family:

- (a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted;
- (b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time.

**UNHCR comment:** The Directive does not achieve harmonisation in the interpretation of the definition of 'family', to the extent that unmarried couples are only accorded full rights in those Member States which have legislation that ensures equal treatment between unmarried and married couples. UNHCR encourages Member States to extend the concept of the family to unmarried partners, children of unmarried couples and adult family members who are objectively unable to meet their own needs or are in a particularly vulnerable situation and hence dependent on other members of the family.

2. In cases where the separate family members enjoy temporary protection in different Member States, Member States shall reunite family members where they are satisfied that the family members fall under the description of paragraph 1(a), taking into account the wish of the said family members. Member States may reunite family members where they are satisfied that the family members fall under the description of paragraph 1(b), taking into account on a case-by-case basis the extreme hardship they would face if the reunification did not take place.

**Note:** EXCOM Conclusion No. 85 (XLIX) of 1998 paras. (u) to (x) calls on States to implement measures to facilitate family reunion of refugees in a positive and humanitarian spirit and without undue delay, and, where necessary, to consider developing the legal framework to give effect to a right to family unity for all refugees. Such a policy should also be applied to beneficiaries of temporary protection on the understanding that many of them qualify as refugees.

3. Where the sponsor enjoys temporary protection in one Member State and one or some family members are not yet in a Member State, the Member State where the sponsor enjoys temporary protection shall reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(a). The Member State may reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(b), taking into account on a case by case

basis the extreme hardship which they would face if the reunification did not take place.

**UNHCR comment:** UNHCR encourages Member States in their national legislations to incorporate the following elements from earlier versions of this directive, namely: (i) that the absence of documentary evidence of the family relationship should not be an obstacle for the reunification, (ii) that applications for reunification should be examined as quickly as possible and (iii) that decisions rejecting the application should be accompanied by a statement of reasons and be open to legal challenge.

4. When applying this Article, the Member States shall taken into consideration the best interests of the child.

5. The Member States concerned shall decide, taking account of Articles 25 and 26, in which Member State the reunification shall take place.

6. Reunited family members shall be granted residence permits under temporary protection. Documents or other equivalent evidence shall be issued for that purpose. Transfers of family members onto the territory of another Member State for the purposes of reunification under paragraph 2, shall result in the withdrawal of the residence permits issued, and the termination of the obligations towards the persons concerned relating to temporary protection, in the Member State of departure.

7. The practical implementation of this Article may involve cooperation with the international organisations concerned.

8. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person receiving temporary protection which is needed to process a matter under this Article.

#### Article 16

1. The Member States shall as soon as possible take measures to ensure the necessary representation of **unaccompanied minors** enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.

**See comment under article 2(f).**

2. During the period of temporary protection Member States shall provide for unaccompanied minors to be placed:

(a) with adult relatives;

(b) with a foster-family;

(c) in reception centres with special provisions for minors, or in other accommodation suitable for minors;

(d) with the person who looked after the child when fleeing.

The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The **views** of the child shall be taken into account in accordance with the age and maturity of the child.

**Note:** UNHCR welcomes the provision requiring that the views of the child be taken into account.

## CHAPTER IV

### Access to the asylum procedure in the context of temporary protection

#### Article 17

1. Persons enjoying temporary protection must be able to lodge an application for asylum at any time.

**Note:** UNHCR welcomes the recognition that temporary protection is not an alternative to refugee status under the 1951 Convention, but only a practical device aimed at meeting urgent protection needs during a mass influx situation until the individuals concerned have their asylum requests determined on a case-by-case basis.

**Note:** UNHCR welcomes the explicit guarantee of access to asylum procedures by beneficiaries of temporary protection.

2. The examination of any asylum application not processed before the end of the period of temporary protection shall be completed after the end of that period.

**Note:** The examination of such applications should also take into account compelling reasons arising out of previous persecution, since there may be beneficiaries of temporary protection who could perhaps return due to changed circumstances, but whose life would be so intolerable upon return given the nature of past persecution (e.g., severely traumatised persons).

#### Article 18

The criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. In particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory.

#### Article 19

1. The Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration.

2. Where, after an asylum application has been examined, refugee status or, where applicable, other kind of protection is not granted to a person eligible for or enjoying temporary protection, the Member States shall, without prejudice to Article 28, provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of protection.

## CHAPTER V

### Return and measures after temporary protection has ended

#### Article 20

When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23.

#### Article 21

1. The Member States shall take the measures necessary to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended. The Member States shall ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity.

The Member State shall ensure that the decision of those persons to return is taken in full knowledge of the facts. The Member States may provide for exploratory visits.

2. For such time as the temporary protection has not ended, the Member States shall, on the basis of the circumstances prevailing in the country of origin, give favourable consideration to requests for return to the host Member State from persons who have enjoyed temporary protection and exercised their right to a voluntary return.

3. At the end of the temporary protection, the Member States may provide for the obligations laid down in CHAPTER III to be extended individually to persons who have been covered by temporary protection and are benefiting from a voluntary return programme. The extension shall have effect until the date of return.

#### Article 22

1. The Member States shall take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity.

**Note:** Since this is the first instrument in which reference is made to 'returns', it would have been useful to set out the procedure and rights of those being 'forced' to return.

2. In cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

**UNHCR comment:** UNHCR suggests that the possibility of granting beneficiaries of temporary protection permits to remain for compelling humanitarian reasons, after the end of temporary protection, be also extended to cases where return would be inappropriate for compelling reasons arising out of previous persecution or experiences (e.g, traumatised cases).

### Article 23

1. The Member States shall take the necessary measures concerning the conditions of residence of persons who have enjoyed temporary protection and who cannot, in view of their state of health, reasonably be expected to travel; where for example they would suffer serious negative effects if their treatment was interrupted. They shall not be expelled so long as that situation continues.

2. The Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.

## CHAPTER VI

### Solidarity

**Note:** Articles 24 to 26 acknowledge the link between temporary protection and solidarity, a link which has been recognised in various EXCOM Conclusions (see Conclusion No. 15, para. (f), Conclusion No. 19, para. (ii), Conclusion N. 22, Part IV, paragraph (1)). UNHCR supports the solidarity scheme as put forward by the Directive which allows for financial compensation as well as, if necessary, the transferral of persons, provided those concerned agree. Any burden-sharing arrangements for the redistribution of persons must, however, respect specific international protection needs of the persons concerned, as well as basic protection principles, such as family unity or humanitarian concerns. The existence of such arrangements must not be made a pre-condition for extending protection, just as they should not result in what would be in effect burden-shifting.

### Article 24

The measures provided for in this Directive shall benefit from the European Refugee Fund set up by Council Decision 596/2000/EC, under the terms laid down in that Decision.

### Article 25

1. The Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity. They shall indicate – in figures or in general terms – their capacity to receive such persons. This information shall be set out in the Council Decision referred to in Article 5. After that Decision has been adopted, the Member States may indicate additional reception capacity by notifying the Council and the Commission. This information shall be passed on swiftly to UNHCR.

2. The Member States concerned, acting in cooperation with the competent international organisations, shall ensure that the eligible persons defined in the Council Decision referred to in Article 5, who have not yet arrived in the Community have expressed their will to be received onto their territory.

3. When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the reception capacity referred to in paragraph 1, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected.



## Article 26

1. For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral.
2. A Member State shall communicate requests for transfers to the other Member States and notify the Commission and UNHCR. The Member States shall inform the requesting Member State of their capacity for receiving transferees.
3. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person enjoying temporary protection which is needed to process a matter under this Article.
4. Where a transfer is made from one Member State to another, the residence permit in the Member State of departure shall expire and the obligations towards the persons concerned relating to temporary protection in the Member State of departure shall come to an end. The new host Member State shall grant temporary protection to the persons concerned.
5. The Member States shall use the model pass set out in Annex I for transfers between Member States of persons enjoying temporary protection.

## CHAPTER VII

### Administrative cooperation

## Article 27

1. For the purposes of the administrative cooperation required to implement temporary protection, the Member States shall each appoint a national contact point, whose address they shall communicate to each other and to the Commission. The Member States shall, in liaison with the Commission, take all the appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.
2. The Member States shall, regularly and as quickly as possible, communicate data concerning the number of persons enjoying temporary protection and full information on the national laws, regulations and administrative provisions relating to the implementation of temporary protection.

## CHAPTER VIII

### Special provisions

## Article 28

1. The Member States may exclude a person from temporary protection if:

(a) there are serious reasons for considering that:

(i) he or she 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;

(ii) he or she has committed a serious non-political crime outside the Member State of reception prior to his or her admission to that Member State as a person enjoying temporary protection. The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;

(iii) he or she has been guilty of acts contrary to the purposes and principles of the United Nations;

(b) 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 judgment of a particularly serious crime, he or she is a danger to the community of the host Member State.

3. The grounds for exclusion referred to in paragraph 1 shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality.

**UNHCR comment:** To the extent that beneficiaries of temporary protection are recognised as refugees following an examination of their asylum claims, exclusion from protection on the basis of Article 28(1)(b) would be at variance with international refugee law principles (unless Article 1F(a) or (c) of the 1951 Convention applies).

## CHAPTER IX

### Final provisions

## Article 29

Persons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned.

## Article 30

The Member States shall lay down the rules on penalties applicable to infringements of the national

provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

#### Article 31

1. Not later than two years after the date specified in Article 32, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. The Member States shall send the Commission all the information that is appropriate for drawing up this report.

2. After presenting the report referred to at paragraph 1, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every five years.

#### Article 32

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002 at the latest. They shall forthwith inform the Commission thereof.

2. When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

#### Article 33

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

#### Article 34

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the Council  
The President

Model pass for the transfer of persons enjoying temporary protection

PASS

Name of the Member State delivering the pass

Reference number (\*):

Issued under Article 26 of Directive / /EC of ..... on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of effort between Member States in receiving such persons and bearing the consequences thereof.

Valid only for the transfer from .....(1) to .....(2). The person in question must present himself/herself at ..... (3) by .....(4)

Issued at:

.....

SURNAME:

.....

FORENAMES:

.....

PLACE AND DATE OF BIRTH:

.....

In case of a minor; name(s) of responsible adult

.....

SEX: .....

NATIONALITY:

.....

Date issued:

.....



SEAL

Signature of  
the beneficiary: ....

For the competent

authorities: .....

The pass-holder has been identified by the authorities ..... (5)(6)

The identity of the pass-holder has not been established.....

This document is issued pursuant to Article 26 of Directive / /EC of ..... only and in no way constitutes a document which can be equated to a travel document authorising the crossing of the external border or a document proving the individual's identity.

(\*) The reference number is allocated by the country from which the transfer to another Member State is made.

<sup>(1)</sup> Member State from which the transfer is being made.

<sup>(2)</sup> Member State to which the transfer is being made.

<sup>(3)</sup> Place where the person must present himself/herself on arrival in the second Member State.

- (<sup>4</sup>) Deadline by which the person must present himself/herself on arrival in the second Member State.
  - (<sup>5</sup>) On the basis of the following travel or identity documents, presented to the authorities.
  - (<sup>6</sup>) On the basis of documents other than a travel or identity document.
-

## **ANNEX II**

The information referred to in Articles 10, 15 and 26 of the Directive includes to the extent necessary one or more of the following documents or data:

- (a) personal data on the person concerned (name, nationality, date and place of birth, marital status, family relationship);
- (b) identity documents and travel documents of the person concerned;
- (c) documents concerning evidence of family ties (marriage certificate, birth certificate, certificate of adoption);
- (d) other information essential to establish the person's identity or family relationship;
- (e) residence permits, visas or residence permit refusal decisions issued to the person concerned by the Member State, and documents forming the basis of decisions;
- (f) residence permit and visa applications lodged by the person concerned and pending in the Member State, and the stage reached in the processing of these.

The providing Member State shall notify any corrected information to the requesting Member State.