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UNHCR's Comments (October 2000)

Commission staff Working Paper: the relationship between safeguarding internal security and complying with international protection obligations and instruments, COM (2001) 743 final, 5 December 2001

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European Commission Communication on a Community Immigration Policy COM (2000) 757 final of 22 November 2000

UNHCR's Observations (November 2001)

Commission Communication on a Common Policy on Illegal Immigration, COM (2001) 672 final of 15 November 2001

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Council Directive on the Right to Family Reunification

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Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees (June 2001)

Council Directive defining the facilitation of unauthorised entry, transit and residence, 2002/90/EC, 28 November 2002

Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, 2002/946/JHA, 28 November 2002

UNHCR's Comments (September 2000)

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Council Directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 ('Carriers Sanctions' Directive), 2001/51/EC, 28 June 2001

UNHCR's Comments on the Commission draft Directive

Council Directive concerning the status of third-country nationals who are long-term residents

UNHCR's Comments (October 2001)

Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities

Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (ARGO programme) 2002/463/EC, 12 June 2002

Commission Green Paper on a Community Return policy on Illegal Residents, COM (2002), 175 final, 10 April 2002

UNHCR's Comments (July 2002)

Communication on a Return Policy of illegal Residents, October 2002

Commission Communication on Migration and Development "Integrating migration issues in the EU's relations with third countries", COM (2002), final, 3 December 2002

UNHCR Preliminary Positions: protection and durable solutions for refugees in the contex of migration and development (September 2002)

Introduction: The EU Acquis on Asylum

The acquis communautaire

The European integration process has been marked by the adoption of a constantly expanding body of European Community legislation, joint policies and actions which have accumulated, and been constantly revised over the past four decades. It comprises more than 100,000 pages of regulations, directives and decisions, in addition to non-binding recommendations and opinions. This body has been expanded with the introduction under the Maastricht Treaty, later revised by the Amsterdam Treaty, of new – mostly non-binding – instruments of common policy and joint actions adopted within the framework of the common foreign and security policy and intergovernmental co-operation in justice and home affairs.

This body is commonly called the acquis communautaire when reference is made to the Community standards developed according to the Community method within the so-called First Pillar. It represents the sum of legislation, standards and practices which govern Member States' actions in matters within the competence of the Community and which cannot be disassociated from the achievements of the Community. This body includes the founding Treaty of Rome as revised by the Single European Act and subsequently by the Maastricht, Amsterdam, and Nice Treaty as well as judgements of the European Court of Justice, which has jurisdiction over the application of the treaty provisions.

If one also includes the results of co-operation within the Second and Third Pillar the body of standards is normally called the acquis of the European Union and its Member States or the EU acquis. Under the third pillar, Member States can adopt conventions (example the 1990-1997 Dublin Convention), common positions, decisions and framework decisions (exempla the Framework Decision on Combating Trafficking in Human Beings in 2002). Most of the JHA acquis (Third Pillar) elements of this wider set of standards is therefore of non-binding nature. With the entry into force of the Amsterdam Treaty, the present non-binding EU asylum standards will be gradually codified into binding legislation and become part of the acquis communautaire. This process is called 'communautarisation' or 'communitisation'.
International Conventions and other binding international and regional instruments are also part of the acquis as they are inseparable from the attainment of the objectives of the Treaty on European Union. In the asylum field the 1951 Convention and the 1967 Protocol, as well as the European Convention on Human Rights (ECHR), are part of the EU asylum acquis. As per Article 63 of the Amsterdam TEC, the various EU asylum instruments are to be adopted in accordance with relevant provisions of the 1951 Geneva Convention. According to Article 6 of Amsterdam TEU, the fundamental rights enshrined in the ECHR are considered to be general principles of Community law.

The EU Acquis on Asylum

The first identification of the asylum acquis was made in May 1998, when COREPER (Council) agreed to a list of the EU acquis in the field of JHA which was made available to EU candidate countries for the first screening / evaluation exercise. This list was usually referred to as the 'TAIEX list' and was divided into three categories :

- International Conventions to be regarded as indissociable from the achievements of the objectives of the EU related to asylum ;
- Instruments adopted by Member States before the entry into force of the Maastricht Treaty (example 1992 London Council Resolutions on a harmonised approach to questions of host third country, on manifestly unfounded applications for asylum, on countries in which there is generally no serious risk of persecution,..)
- Instruments adopted by the Council after the entry into force of Maastricht (1995 Council Resolution on minimum guarantees for asylum procedures, 1997 Joint Position on harmonised application of the refugee definition, 1997 Council Resolution on unaccompanied minors who are nationals of third countries..)

This list codifying the JHA acquis has been regularly updated and recently has been made accessible to the public. It comprises also the instruments adopted by the Council after the entry into force of the Amsterdam Treaty (example; 2000 Regulation on the European Refugee Fund, 2001 Directive on Temporary Protection..), the adoption of which renders obsolete previous existing instruments in the same area (i.e. in the case of temporary protection, the 1995 Council Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis).

In June 2002, the European Commission published an updated list of EU legislation on justice and home affairs on its website : www.europa.eu.int/comm/justice_home/acquis_en.htm.

The EU acquis on asylum and EU candidate countries

The EU acquis on asylum contains instruments relevant for the development of asylum systems in candidate countries. Candidate countries to the European Union must accede to these instruments without reservations, in order to honour the international obligations to which Member States are – and future ones should be- committed.

Since the issuance of the 1998 'Taiex' list of the JHA acquis, each year the Commission has updated it and forwarded it to candidate countries for information and for the adoption and implementation of the new elements of the acquis.

In this folder, you will find all relevant texts related to the asylum and migration policy of the European Union. It comprises Directives, Regulations and Decisions adopted under the First pillar structure as of early 2003. Relevant instruments adopted under the third pillar structure are also integrated in the folder. When a new instrument is adopted, the folder structure allows you to insert the final text after each binder.

TREATY OF AMSTERDAM

CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION

TITLE I: COMMON PROVISIONS

Article 1

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union'.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Article 7

1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

3. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their being imposed.

4. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 2.

5. For the purposes of this Article, the European Parliament shall act by a two thirds majority of the votes cast, representing a majority of its members.

CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

TITLE IV, VISAS, ASYLUM, IMMIGRATION AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS

Article 61

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;

(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;

(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;

(d)

(a) appropriate measures to encourage and strengthen administrative cooperation, as provided for in Article 66;

(b) measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.

Article 62

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;

(2) measures on the crossing of the external borders of the Member State which shall establish:

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

(b) rules on visas for intended stays of no more than three months, including:

(i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;

(ii) the procedures and conditions for issuing visas by Member States;

(iii) a uniform format for visas;

(iv) rules on a uniform visa;

(3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

Article 63

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,

(b) minimum standards on the reception of asylum seekers in Member States,

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third ountries who cannot return to their country of origin and for persons who otherwise eed international protection,

(b) promoting a balance of effort between Member States in receiving and bearing the onsequences of receiving refugees and displaced persons;

(3) measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,

(b) illegal immigration and illegal residence, including repatriation of illegal residents;

(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above.

Article 64

1. This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

2. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

Article 65

Measures in the field of judicial cooperation in civil matters having cross‹border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:
- the system for cross‹border service of judicial and extrajudicial documents;
- cooperation in the taking of evidence;
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Article 66

The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this Title, as well as between those departments and the Commission.

Article 67

1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

   - the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;

   - the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

3. By derogation from paragraphs 1 and 2, measures referred to in Article 62(2)(b) (i) and (iii) shall, from the entry into force of the Treaty of Amsterdam, be adopted by the Council acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

4. By derogation from paragraph 2, measures referred to in Article 62(2)(b) (ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.

Article 68

1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

Article 69

The application of this Title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted.

6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

UNHCR'S POSITION

AMSTERDAM TREATY: UNHCR calls for a fair and coherent EU asylum policy

1 May 1999

With entry info force of the Amsterdam Treaty on 1 May, the United Nations High Commissioner for Refugees (UNHCR) urges EU Member States to develop a consistent and coherent asylum policy at European level, ensuing protection to those who need it.

UNHCR believes that the Amsterdam Treaty represents a unique opportunity for refugee protection in the EU, as it enables Member States to resolve considerable differences in their asylum systems. At the same time, the danger exists that new EU-wide arrangements may be based on the lowest common denominator, or, failing common agreement, emptied of meaningful substance.

In Europe, like on other continents, Governments have taken measures to reinforce their borders and are increasingly reluctant to bear the costs of asylum. A failure to distinguish refugees who flee persecution from economic migrants seeking better economic opportunities has increasingly characterised both official policy and public attitudes. While the States of the European Union continue to provide effective protection to very significant numbers of refugees, Governments have progressively resorted to a wide range of control and deterrence measures. Instead of being the precision tools required to distinguish those in need of international protection from those who are not, these have generally taken the form of drag nets catching both irregular immigrants and persons in need of protection.

- Common EU measures to combat irregular border-crossing must not obstruct access for asylum-seekers to Member States' territory. Mechanisms for sharing the responsibility for processing an asylum claim, based on the Dublin Convention, the "safe third country" notion, or readmission agreements, need to contain appropriate safeguards to ensure that the asylum applicant will receive a fair examination of his or her claim by an identified State.

- UNHCR urges EU Member States to take a strategic and principled approach to the development of a common EU asylum policy, agreeing first on a common interpretation of the refugee definition according to the 1951 Convention, before developing various procedural instruments and complementary schemes of protection.

- Many of today's and victims of internal conflicts and civil war can and should be offered protection under the 1951 Convention, which is to be considered as the cornerstone of any future EU asylum regime. UNHCR urges that the Convention be applied in a way which is responsive to all forms of persecution -- irrespective of whether it is due to state or non-state actors -- and which gives due recognition to the persecutory nature of much contemporary conflict. The spirit and intention of the Convention are seriously undermined when those with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership of a social group are not afforded international protection just because that persecution is inflicted by a non-State agent or because it is directed towards an entire community rather than individually targeted.

- UNHCR recognises the need to develop complementary forms of protection for those who fall outside the scope of the 1951 Convention, properly applied. It would, however, be unacceptable if complementary forms of protection were to be little more than a

pretext for granting a lesser degree of protection to victims of persecution who meet the criteria for recognition as Convention refugees. The organisation also supports recourse to temporary protection in cases of sudden and large-scale influx of asylum-seekers displaced by war and generalised violence, when it may be impractical to apply individual status determination procedures. UNHCR is strongly of the view that beneficiaries of temporary protection arrangements need to be accorded a consistent standard of rights throughout the EU, which takes due account of the fact that many of them meet all the criteria for 1951 Convention status.

- Procedures for examining individual asylum claims are in crisis in many EU countries. In the view of UNHCR, a fair, and efficient asylum procedure serves a dual objective: it identifies individuals in need of protection and it separates out those who do not and who can, in principle, be safely returned home. Problems of the capacity of asylum procedures need to be urgently addressed. At the same time, there is scope for streamlining procedures, while ensuring that fundamental safeguards are respected.

- Moreover, the European Union must resolve the considerable differences in procedural legislation and practice amongst Member States. Only this will ensure that asylum seekers enjoy an equal chance of obtaining protection throughout the Union, which is far from currently the case.

- Further erosion of the asylum systems in Member States hosting a relatively large number of asylum-seekers need to be counteracted by a fair sharing of the responsibilities among Member States and a harmonisation of the reception conditions in EU countries. Common standards of treatment, including legal security, socio-economic benefits and freedom of movement, need to be adopted in order to prevent secondary movement of asylum-seekers and refugees. Moreover, a common EU asylum policy should deal effectively with those screened out after a fair and satisfactory procedure, in order to preserve the integrity of Member States' asylum systems.

- UNHCR calls on the EU Commission and Member States to develop protection standards which could be a model for other regions, and which will influence positively the developing asylum systems in applicant countries of Central Europe. To achieve this, political vision and leadership will be required from the EU. Europe must continue squarely to face its responsibility to offer protection to those in need of it.

A total of 353,000 asylum seekers arrived in Western Europe in 1998, 304,000 of them in EU Member States.

Protocols

Protocols annexed to the Treaty on European Union and to the Treaty establishing the European Community

Protocol integrating the Schengen acquis into the framework of the European Union

THE HIGH CONTRACTING PARTIES,

NOTING that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, are aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice,

DESIRING to incorporate the abovementioned agreements and rules into the framework of the European Union, CONFIRMING that the provisions of the Schengen acquis are applicable only if and as far as they are compatible with the European Union and Community law,

TAKING INTO ACCOUNT the special position of Denmark,

TAKING INTO ACCOUNT the fact that Ireland and the United Kingdom of Great Britain and Northern Ireland are not parties to and have not signed the abovementioned agreements; that provision should, however, be made to allow those Member States to accept some or all of the provisions thereof,

RECOGNISING that, as a consequence, it is necessary to make use of the provisions of the Treaty on European Union and of the Treaty establishing the European Community concerning closer cooperation between some Member States and that those provisions should only be used as a last resort,

TAKING INTO ACCOUNT the need to maintain a special relationship with the Republic of Iceland and the Kingdom of Norway, both States having confirmed their intention to become bound by the provisions mentioned above, on the basis of the Agreement signed in Luxembourg on 19 December 1996,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty establishing the European Community,

Article 1

The Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden, signatories to the Schengen agreements, are authorised to establish closer cooperation among themselves within the scope of those agreements and related provisions, as they are listed in the Annex

to this Protocol, hereinafter referred to as the 'Schengen acquis'.

This cooperation shall be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community.

Article 2

1. From the date of entry into force of the Treaty of Amsterdam, the Schengen acquis, including the decisions of the Executive Committee established by the Schengen agreements which have been adopted before this date, shall immediately apply to the thirteen Member States referred to in Article 1, without prejudice to the provisions of paragraph 2 of this Article. From the same date, the Council will substitute itself for the said Executive Committee.

   The Council, acting by the unanimity of its Members referred to in Article 1, shall take any measure necessary for the implementation of this paragraph. The Council, acting unanimously, shall determine, in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions which constitute the Schengen acquis.

   With regard to such provisions and decisions and in accordance with that determination, the Court of Justice of the European Communities shall exercise the powers conferred upon it by the relevant applicable provisions of the Treaties. In any event, the Court of Justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security.

   As long as the measures referred to above have not been taken and without prejudice to Article 5(2), the provisions or decisions which constitute the Schengen acquis shall be regarded as acts based on Title VI of the Treaty on European Union.

2. The provisions of paragraph 1 shall apply to the Member States which have signed accession protocols to the Schengen agreements, from the dates decided by the Council, acting with the unanimity of its Members mentioned in Article 1, unless the conditions for the accession of any of those States to the Schengen acquis are met before the date of the entry into force of the Treaty of Amsterdam.

Article 3

Following the determination referred to in Article 2(1), second subparagraph, Denmark shall maintain the same rights and obligations in relation to the other signatories to the Schengen agreements, as before the said determination with regard to those parts of the Schengen acquis that are determined to have a legal basis in Title IV of the Treaty establishing the European Community. With regard to those parts of the Schengen acquis that are determined to have legal base in Title VI of the Treaty on European Union, Denmark shall continue to have the same rights and obligations as the other signatories to the Schengen agreements.

Article 4

Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen acquis, may at any time request to take part in some or all of the provisions of this acquis.

The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.

Article 5

1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties.

   In this context, where either Ireland or the United Kingdom or both have not notified the President of the Council in writing within a reasonable period that they wish to take part, the authorisation referred to in Article 11 of the Treaty establishing the European Community or Article 40 of the Treaty on European Union shall be deemed to have been granted to the Members States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.

2. The relevant provisions of the Treaties referred to in the first subparagraph of paragraph 1 shall apply even if the Council has not adopted the measures referred to in Article 2(1), second subparagraph.

Article 6

The Republic of Iceland and the Kingdom of Norway shall be associated with the implementation of the Schengen acquis and its further development on the basis of the Agreement signed in Luxembourg on 19 December 1996. Appropriate procedures shall be agreed to that effect in an Agreement to be concluded with those States by the Council, acting by the unanimity of its Members mentioned in Article 1. Such Agreement shall include provisions on the contribution of Iceland and Norway to any financial consequences resulting from the implementation of this Protocol.

A separate Agreement shall be concluded with Iceland and Norway by the Council, acting unanimously, for the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland on the one hand, and Iceland and Norway on the other, in domains of the Schengen acquis which apply to these States.

Article 7

The Council shall, acting by a qualified majority, adopt the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council.

Article 8

For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.

ANNEX SCHENGEN ACQUIS

1. The Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

2. The Convention, signed in Schengen on 19 June 1990, between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, with related Final Act and common declarations.

3. The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) and Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations.

4. Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers.

Protocol on asylum for nationals of Member States of the European Union

Protocol annexed to the Treaty establishing the European Community

THE HIGH CONTRACTING PARTIES;

WHEREAS pursuant to the provisions of Article 6(2) of the Treaty on European Union the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950;

WHEREAS the Court of Justice of the European Communities has jurisdiction to ensure that in the interpretation and application of Article 6(2) of the Treaty on European Union the law is observed by the European Community;

WHEREAS pursuant to Article 49 of the Treaty on European Union any European State, when applying to become a Member of the Union, must respect the principles set out in Article 6(1) of the Treaty on European Union, BEARING IN MIND that Article 309 of the Treaty establishing the European Community establishes a mechanism for the suspension of certain rights in the event of a serious and persistent breach by a Member State of those principles;

RECALLING that each national of a Member State, as a citizen of the Union, enjoys a special status and protection which shall be guaranteed by the Member States in accordance with the provisions of Part Two of the Treaty establishing the European Community;

BEARING IN MIND that the Treaty establishing the European Community establishes an area without internal frontiers and grants every citizen of the Union the right to move and reside freely within the territory of the Member States;

RECALLING that the question of extradition of nationals of Member States of the Union is addressed in the European Convention on Extradition of 13 December 1957 and the Convention of 27 September 1996 drawn up on the basis of Article 31 of the Treaty on European Union relating to extradition between the Member States of the European Union;

WISHING to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended;

WHEREAS this Protocol respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees;

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community,

Sole Article

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following
cases:

(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to in Article 7(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;

(c) if the Council, acting on the basis of Article 7(1) of the Treaty on European Union, has determined, in respect of the Member State which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article 6(1);

(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

UNHCR's position on the proposal of the European Council concerning the treatment of asylum applications from citizens of European Union Member States

1. At the Dublin Summit of 13 and 14 December 1996, the European Council called upon the Intergovernmental Conference to develop the important proposal to amend the Treaties to establish it as a clear principle that no citizen of a Member State of the Union may apply for asylum in another Member State, taking into account international treaties. This proposal raises the following concerns from the viewpoint of international refugee law.

2. Access for all asylum seekers - without any discrimination as to country of origin - to fair and efficient procedures for the determination of refugee status is a basic prerequisite of international refugee protection, which has repeatedly been affirmed by the UNHCR Executive Committee and by the United Nations General Assembly. Unless asylum seekers are afforded access to determination procedures, it is impossible for States to know who is a refugee requiring international protection, and for a refugee to enjoy the minimum guarantees of safety and security to which such person is entitled.

3. The decision as to whether a person qualifies as a refugee is taken by each State in accordance with its own established procedures, consistent with international standards, on the basis of the criteria laid down in Article 1 of the 1951 Convention. The implementation of the 1951 Convention/1967 Protocol requires the individual determination of refugee status, including an assessment of the subjective element of fear of persecution. It is impossible, realistically speaking, to exclude the possibility that an individual could have a well-founded fear of persecution in any particular country however great its attachment to human rights and the rule of law. While a highly sophisticated democratic order and an elaborate system of legal safeguards, as well as of judicial and administrative remedies, allow for a general presumption of safety, the need for international protection cannot be excluded absolutely and categorically in every case. Nor, regrettably, can fundamental changes in the political system or in the human rights situation of any State. The only exception made to the requirement of individual determinations, as a matter of practicality, is in situations of positive group determination in case of large-scale influxes.

4. All Member States of the European Union are States parties to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and have thus adopted a refugee definition without any limitations as to country of origin. Such an automatic bar to refugee status determination, introduced by a provision in another legally binding treaty, could result in a partial but essential modification of Article 1 of the 1951 Convention, as revised by the 1967 Protocol. The proposed modification would, in effect, introduce a posteriori a geographical limitation to the application of the refugee definition, as contained in Article 1 A (2) of the 1951 Convention. This is incompatible with the 1967 Protocol and the fact that any such previously existing limitation has been removed by the Member States of the Union. The proposed amendment would, furthermore, be inconsistent with Article 3 of the 1951 Convention that requires States to apply its

provisions without discrimination as to country of origin. The above-mentioned concerns can, however, not be remedied by mere reference to the need to take international treaties into account.

5. In short, the modification of the Treaties as proposed would affect the very essence of international refugee law since the provision to be adopted in a subsequent international convention between fifteen Contracting States alone would restrict the definition of its beneficiaries. Any such partial derogation from the refugee definition, as contained in Article 1 of the 1951 Convention/1967 Protocol, to which reservations are prohibited in accordance with Article 42 of the 1951 Convention, would be incompatible with the object and purposes of these instruments as a whole. The essential purpose of these two international conventions is to provide for a universally applicable legal regime that ensures protection to an internationally defined group of persons who are in a particularly vulnerable situation. The universal and unconditional application of the international refugee instruments has repeatedly been emphasised by the international community. The UNHCR Executive Committee and the General Assembly only last year invited States parties to these instruments to review any reservations with a veiw to their withdrawal.

6. In addition, the precedent value of such a development is cause for concern. The ripple effects may be considerable, and this concept may well be followed by other regions, with the inherent danger of undermining the scope of the applicability of the international refugee instruments universally. It may also erode the humanitarian nature of asylum by complicating relations with non-EU States.

7. Finally, the Office has consistently opposed the use of the notion of safe country of origin as an automatic bar to access to asylum procedures. Where the notion of safe country of origin is used as a procedural tool to channel certain applications into accelerated procedures, or where its use has an evidentiary function, the Office has had no objection, as long as the presumption of safety is rebuttable in a fair procedure. This understanding is generally followed in the state practice of most EU Member States, as inter alia, exemplified by the Conclusion of the EC Immigration Ministers adopted at their meeting of 30 November and 1 December 1992 on countries where there is generally no serious risk of persecution. The assessment, on the basis of objective and verifiable information, of conditions prevailing in a particular country may give rise to a rebuttable presumption concerning the general absence of a serious risk of persecution, but should not automatically result in the refusal of all asylum applications from its nationals or their exclusion from individualized determination procedures (paragraph 3 of this Conclusion). The proposed amendment would, in effect, detract substantively from this position and codify the opposite view in an international treaty.

8. In conclusion, the Office hopes that any changes in the European Union Treaty will inter alia facilitate the adoption of a coherent and comprehensive European asylum policy, promoting common standards of protection that are consonant with internationally agreed standards. For the above reasons, UNHCR advises against introducing such an amendment, which would be at variance with international obligations that all Member States of the Union have undertaken.

9. The position of the Office here parallels the position of the Council of Ministers of Justice and Home Affairs in its Resolution adopted at its meeting of 20 June 1995 on minimum guarantees for asylum procedures. It was agreed in this position that a particularly rapid or simplified procedure will be applied to an asylum application lodged by a national of

another Member State, in accordance with each Member State's rules and practice. The Council specified in this regard that the Member States continue to be obliged to examine individually every application for asylum, as provided by the Geneva Convention to which the Treaty on European Union refers (paragraph 20 of this Resolution). It would clearly be preferable to address the treatment of asylum requests from nationals of other Member States by operation of this Resolution than through altering the scope of application of the international refugee instruments between EU Member States alone.

Office of the United Nations High Commissioner for Refugees
Geneva, January 1997

Protocol on the application of certain aspects of Article 14 (ex Article 7a) of the Treaty establishing the European Community to the United Kingdom and to Ireland

Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community.

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the existence for many years of special travel arrangements between the United Kingdom and Ireland,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing the European Community and to the Treaty on European Union,

Article 1

The United Kingdom shall be entitled, notwithstanding Article 14 of the Treaty establishing the European Community, any other provision of that Treaty or of the Treaty on European Union, any measure adopted under those Treaties, or any international agreement concluded by the Community or by the Community and its Member States with one or more third States, to exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose:

(a) of verifying the right to enter the United Kingdom of citizens of States which are Contracting Parties to the Agreement on the European Economic Area and of their dependants exercising rights conferred by Community law, as well as citizens of other States on whom such rights have been conferred by an agreement by which the United Kingdom is bound; and

(b) of determining whether or not to grant other persons permission to enter the United Kingdom.

Nothing in Article 14 of the Treaty establishing the European Community or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the United Kingdom to adopt or exercise any such controls. References to the United Kingdom in this Article shall include territories for whose external relations the United Kingdom is responsible.

Article 2

The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories ('the Common Travel Area'), while fully respecting the rights of persons referred to in Article 1, first paragraph, point (a) of this Protocol. Accordingly, as long as they maintain such arrangements, the provisions of Article 1 of this Protocol shall apply to Ireland under the same terms and conditions as for the United Kingdom. Nothing in Article 14 of the Treaty establishing the European Community, in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them, shall affect any such arrangements.

Article 3

The other Member States shall be entitled to exercise at their frontiers or at any point of entry into their territory such controls on persons seeking to enter their territory from the United Kingdom or any territories whose external relations are under its responsibility for the same purposes stated in Article 1 of this Protocol, or from Ireland as long as the provisions of Article 1 of this Protocol apply to Ireland.

Nothing in Article 14 of the Treaty establishing the European Community or in any other provision of that Treaty or of the Treaty on European Union or in any measure adopted under them shall prejudice the right of the other Member States to adopt or exercise any such controls.

Protocol on the position of the United Kingdom and Ireland

Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community.

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland,

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community and to the Treaty on European Union,

Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title IV of the Treaty establishing the European Community. By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2). The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland, shall be necessary for decisions of the Council which must be adopted unanimously.

Article 2

In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title IV of the Treaty establishing the European Community, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the acquis communautaire nor form part of Community law as they apply to the United Kingdom or Ireland.

Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV of the Treaty establishing the European Community, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State

shall be entitled to do so. By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2).

The unanimity of the members of the Council, with the exception of a member which has not made such a notification, shall be necessary for decisions of the Council which must be adopted unanimously. A measure adopted under this paragraph shall be binding upon all Member States which took part in its adoption.

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland. In that case Article 2 applies.

Article 4

The United Kingdom or Ireland may at any time after the adoption of a measure by the Council pursuant to Title IV of the Treaty establishing the European Community notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article 11(3) of the Treaty establishing the European Community shall apply mutatis mutandis.

Article 5

A Member State which is not bound by a measure adopted pursuant to Title IV of the Treaty establishing the European Community shall bear no financial consequences of that measure other than administrative costs entailed for the institutions.

Article 6

Where, in cases referred to in this Protocol, the United Kingdom or Ireland is bound by a measure adopted by the Council pursuant to Title IV of the Treaty establishing the European Community, the relevant provisions of that Treaty, including Article 68, shall apply to that State in relation to that measure.

Article 7

Articles 3 and 4 shall be without prejudice to the Protocol integrating the Schengen acquis into the framework of the European Union.

Article 8

Ireland may notify the President of the Council in writing that it no longer wishes to be covered by the terms of this Protocol. In that case, the normal Treaty provisions will apply to Ireland.

Protocol on the position of Denmark

Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community.

THE HIGH CONTRACTING PARTIES,

RECALLING the Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 12 December 1992, concerning certain problems raised by Denmark on the Treaty on European Union,

HAVING NOTED the position of Denmark with regard to Citizenship, Economic and Monetary Union, Defence Policy and Justice and Home Affairs as laid down in the Edinburgh Decision,

BEARING IN MIND Article 3 of the Protocol integrating the Schengen acquis into the framework of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty establishing the European Community and to the Treaty on European Union,

PART I

Article 1

Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title IV of the Treaty establishing the European Community. By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2). The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the decisions of the Council which must be adopted unanimously.

Article 2

None of the provisions of Title IV of the Treaty establishing the European Community, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of Denmark; and no such provision, measure or decision shall in any way affect the acquis communautaire nor form part of Community law as they apply to Denmark.

Article 3

Denmark shall bear no financial consequences of measures referred to in Article 1, other than administrative costs entailed for the institutions.

Article 4

Articles 1, 2 and 3 shall not apply to measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas.

Article 5

1. Denmark shall decide within a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen acquis under the provisions of Title IV of the Treaty establishing the European Community, whether it will implement this decision in its national law. If it decides to do so, this decision will create an obligation under international law between Denmark and the other Member States referred to in Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union as well as Ireland or the United Kingdom if those Member States take part in the areas of cooperation in question.

2. If Denmark decides not to implement a decision of the Council as referred to in paragraph 1, the Member States referred to in Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union will consider appropriate measures to be taken.

PART II

Article 6

With regard to measures adopted by the Council in the field of Articles 13(1) and 17 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between Member States in this area. Therefore Denmark shall not participate in their adoption. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures.

PART III

Article 7

At any time Denmark may, in accordance with its constitutional requirements, inform the other Member States that it no longer wishes to avail itself of all or part of this Protocol. In that event, Denmark will apply in full all relevant measures then in force taken within the framework of the European Union.

Declarations

Relevant Declarations annexed to the final act of Amsterdam

DECLARATION (No 17) on Article 63 (ex Article 73k) of the Treaty establishing the European Community

Consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy.

DECLARATION (No 48) relating to the Protocol on asylum for nationals of Member States of the European Union

The Protocol on asylum for nationals of Member States of the European Union does not prejudice the right of each Member State to take the organisational measures it deems necessary to fulfil its obligations under the Geneva Convention of 28 July 1951 relating to the status of refugees.

DECLARATION (No 49) relating to subparagraph (d) of the Sole Article of the Protocol on asylum for nationals of Member States of the European Union

The Conference declares that, while recognising the importance of the Resolution of the Ministers of the Member States of the European Communities responsible for immigration of 30 November/ 1 December 1992 on manifestly unfounded applications for asylum and of the Resolution of the Council of 20 June 1995 on minimum guarantees for asylum procedures, the question of abuse of asylum procedures and appropriate rapid procedures to dispense with manifestly unfounded applications for asylum should be further examined with a view to introducing new improvements in order to accelerate these procedures.

DECLARATION (No 56) by Belgium on the Protocol on asylum for nationals

of Member States of the European Union In approving the Protocol on asylum for nationals of Member States of the European Union, Belgium declares that, in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State.

PRESIDENCY CONCLUSIONS

Presidency Conclusions: TAMPERE

UNHCR'S POSITION

Setting the European asylum agenda: UNHCR recommendations to the Tampere Summit (October 1999)

I. Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) attaches great importance to the convening of the European Council at Tampere in order to give impetus to the establishment of an area of freedom, security and justice under the new provisions of the Treaty on European Union, as revised by the Amsterdam Treaty. The Summit should give priority attention to the asylum issue as one of the important areas of justice and home affairs being subject to "communitarization" or increasing cooperation among Member States according to the relevant provisions of the Amsterdam Treaty.

2. UNHCR would like to see the Tampere summit stake out the political space within which a protection-based approach to asylum can be anchored and the fundamental rights of refugees and asylum-seekers secured. This will require political will in face of current trends. In manifesting such resolve, European States, which have traditionally been in the forefront of refugee law development, would remain a positive example to follow the world over. The significance of the future EU asylum standards and policy orientations go well beyond the European context - they are bound to influence the attitude of non-EU asylum countries.

3. In accordance with Declaration No. 17 to the Amsterdam Treaty, UNHCR hopes to be fully associated with the preparation and subsequent implementation of the relevant parts of the EU migration and asylum strategy to be adopted at the Summit.

II. Implementing the Amsterdam Treaty provisions

4. UNHCR hopes that the Tampere Summit will mark the beginning of a process resulting in the establishment of a comprehensive, concerted and outward-looking asylum and migration strategy for the future - enlarged - European Union. The various EU legislative instruments and measures to be formulated during the next five years following the entry into force of the Amsterdam Treaty must be developed within a strategic framework which takes account of their inter-relationship and relative importance and establishes the sequence in which these instruments can best be prepared. In the view of UNHCR, a coherent approach requires that common standards for the application of substantive asylum law be developed first, followed by measures for the harmonisation of asylum procedures, complementary protection schemes and temporary protection arrangements

5. Such an integrated strategy must keep a distinct focus on asylum policy and its protection dimension and ensure that asylum is preserved as a legal concept and not subordinated to the political, security and socio-economic dimensions of migration

policy. Asylum is a right rooted in international human rights standards, and not a political offer subject to discretionary administrative measures, such as the establishment of admission quotas.

6. The implementation of the asylum provisions of the Amsterdam Treaty should be aimed ultimately at the full harmonization of procedural and material asylum law. UNHCR calls on Member States to ensure that future binding EU asylum instruments are in accordance with international refugee law and human rights law standards, such as those laid down in the 1951 Convention and its 1967 Protocol, as well as in the European Convention on Human Rights, as stated in Article 6 and Article 63 of the Amsterdam Treaty.

7. In codifying the present set of soft law asylum instruments, the present weaknesses of these instruments - which have led to problems in their implementation - need to be revisited with a view to adopting remedial measures and additional safeguards in order to render the future binding instruments truly protection-oriented. There is also a need to ensure coherence between the legal instruments to be developed under Title IV, in order to avoid that common measures in the areas of immigration and border control impact negatively on the right to seek and enjoy asylum.

8. UNHCR calls on the Summit to commit itself to giving meaningful substance to the asylum provisions of the Amsterdam Treaty. In implementing these provisions, the danger of downward harmonization should be avoided; there is a risk that the unanimity voting procedure may result in movement towards the lowest common denominator unless there is a strong commitment to work by consensus and adopt standards which are in accordance with related international standards of refugee law.

9. Moreover, difficulties of reaching unanimous agreement may lead Member States to empty the asylum provisions of Amsterdam of meaningful substance and to limit their contents to harmonisation of procedural issues of interest to States to the exclusion of substantive protection issues relating to the rights of the refugee. Recently this potential loss of substance has been in evidence in discussions of the European Commission's proposal on temporary protection.

III. Towards a Harmonised EU Asylum Policy

10. EU Member States have made substantial efforts to harmonise their asylum policies and practices, but much remains to be done. A harmonised European asylum policy should, in UNHCR's view, encompass the following five key elements: (i) a proper, common interpretation of the international definition of who is a refugee as contained in the 1951 Convention; (ii) accessible, fair and expeditious asylum procedures, complemented by new approaches to particular refugee situations (such as temporary protection in cases of sudden and large-scale influx); (iii) proper sharing of responsibility for receiving asylum-seekers without shifting the burden to those least able to accept such responsibility; (iv) appropriate systems and procedures for effecting the return of persons not in need of international protection; and (v) a preventive policy to address the human rights violations and other causes of refugee flight and forced displacement.

11. In the view of UNHCR, a future EU asylum policy should take as a starting point the full and inclusive application of the 1951 Convention refugee definition. A future EU instrument aimed at harmonizing the application of the refugee definition should

acknowledge that asylum claims resulting from persecution by third parties come within the ambit of the 1951 Convention, and that the essential criterion for extending international protection is the risk of serious harm befalling the person - the presence of a well-founded fear of persecution - irrespective of the agent of persecution. Those who fulfil the criteria for refugee status under the 1951 Convention should enjoy the full set of rights contained in that Convention and not be given a second-class form of subsidiary protection as a substitute.

12. UNHCR accepts the rationale for developing - and harmonizing - complementary forms of protection to cover protection needs which cannot be addressed by a proper application of the 1951 Convention. Every person determined to be in need of protection should benefit from an appropriate level of legal security and socio-economic well-being derived from a status granted in accordance with objective criteria and not on the basis of administrative discretion. EU Member States, in determining needs for complementary protection are encouraged to consider how best to draw upon UNHCR's expertise in protection matters, taking due account of both the Office's supervisory role under the 1951 Convention and of its mandated activities.

13. UNHCR generally favours the adoption between States of agreements aimed at identifying the country responsible for examining an asylum request, as such agreements may help to avoid the problem of "refugees in orbit" and provide guarantees that an asylum request will be examined in substance by one of the contracting parties. UNHCR therefore has welcomed the entry into force of the Dublin Convention, provided its application is governed by fair and transparent procedures and due respect of protection principles, such as the protection of the family unit.

14. A transposition of the present Dublin mechanism in an EU legal instrument as foreseen by the Amsterdam Treaty needs to be conditioned on the maintenance of an agreed set of criteria to allocate responsibility for the examination of an asylum application in order to guarantee access to the asylum procedure in one of the EU Member States. Such a new mechanism should also provide for a humanitarian clause in order to avoid separation of family members or other situations impacting negatively the protection needs of asylum-seekers as a result of a strict application of the allocation criteria.

15. Harmonization of the criteria and procedures for the determination of refugee status can positively influence the fair and equitable application of the "Dublin" mechanism and ensure non-discriminatory treatment of all asylum applications irrespective of the country determined to be responsible for the examination of the claim.

16. UNHCR expects the Summit to reaffirm that fair and satisfactory asylum procedures, based on international standards of procedural asylum law, are a cornerstone of Member States asylum systems. Such procedures serve the dual purpose of identifying those who need international protection and those who do not and can, in principle, be safely returned home. UNHCR recommends that each Member State adopt a comprehensive procedure for determining in a holistic way all protection needs.

17. UNHCR favours the adoption of a single, unified asylum procedure in the EU in the medium-term. The Office sees this as a means to guarantee the effective harmonization of Member States' asylum procedures and to resolve the existing considerable differences and exceptions which may result in discriminatory treatment and encourage secondary movement of asylum-seekers.

18. A future common asylum system in the EU should result in a streamlining and simplifying of procedures - this being in the interest of asylum-seekers and the authorities alike. The speeding up of the processing of asylum claims can be achieved by, inter alia, a streamlining of the appeal procedure. A well-resourced, fair and efficient first instance determination procedure may provide quicker results and, consequently, ensure legal safety and material security for deserving applicants. By eliminating unnecessary delays, it may also provide less opportunity for misuse and limit the risk that drawn-out procedures becomes in themselves a pull factor.

19. UNHCR supports recourse to temporary protection as a practical device which allows for a principled response by States to an urgent protection need in cases of sudden and large-scale influx of asylum-seekers displaced by war, mass expulsion or generalised violence. In such cases it may be impractical to apply individual status determination procedures. UNHCR believes that it should have a mandatory consultative role in any arrangements regarding the phasing in, review or termination of temporary protection regimes.

20. Temporary protection schemes should be distinguished clearly from complementary forms of protection, the former being applicable in situations of sudden and large-scale influx, whereas the latter are to be the result of individual status determination procedures. Temporary protection arrangements must not be conceived and implemented as an substitute for refugee protection under the 1951 Convention left to administrative discretion, but rather as a variation of admission and temporary refuge based on prima facie or group determination of the need for international protection.

21. Any future temporary protection coordination mechanism established at EU level should include an agreement on standards of treatment for its beneficiaries, and not be limited to procedural and organizational matters only. UNHCR is strongly of the view that beneficiaries of temporary protection need to be accorded a standard of rights which takes due account of the fact that many of them meet all the criteria for 1951 Convention status.

22. European asylum policy should be guided by the notions of international solidarity and burden- sharing. Any future EU burden-sharing mechanism should be complementary to, not at the expense of, global burden-sharing efforts, such as contributing to UNHCR programmes and providing for the resettlement of refugees. Account should be taken of the burden shouldered by countries in the immediate vicinity of the crisis region. While burden sharing can help ensure respect for the basic principles of refugee protection, it cannot be made a prerequisite to providing such protection. It should also take due account of humanitarian factors, such as the protection of the family unit or of cultural considerations which may call for exceptions to the application of distribution criteria.

23. A regional burden-sharing mechanism should be comprehensively conceived to include action at the pre-departure stage (prevention, emergency preparedness, political and military/peace-keeping action), through the influx (protection and assistance to refugees and displaced persons), on to durable solutions (voluntary return, local integration, or resettlement).

24. As with the implementation of a successor instrument to the Dublin Convention, the fair and effective implementation of a burden-sharing mechanism would benefit from the harmonization of conditions for the admission and standards of treatment of its beneficiaries. This can help to avoid discriminatory treatment and subsequent secondary movements.

25. In order to preserve the integrity of the asylum systems in EU Member States, appropriate procedures for effecting the return of persons not in need of international protection need to be developed, provided these persons have been screened out through a formal refugee status determination procedure which properly applies the refugee criteria. Such return programmes can be promoted through the conclusion of readmission agreements and readmission clauses in cooperation agreements. In so far these arrangements include also the return of asylum-seekers whose cases have not been heard to third countries where they could have found protection, they must contain sufficient safeguards that the persons returned can effectively seek asylum in those countries.

26. The European asylum challenge cannot be addressed in Europe alone. It is clearly in the interest of European States to situate their asylum and migration policy within a broader approach which addresses political, human rights and developmental issues in countries and regions of origin. Such a comprehensive approach to asylum and migration must encompass the entire continuum of forced population movements, from their causes to their eventual solutions. Preventive action addressing human rights violations and other causes of refugee flight and forced displacement is a key element of such an approach.

27. UNHCR supports efforts to move the asylum debate out of a framework premised on restrictiveness and deterrence into one which engages more constructive foreign policy initiatives. In the view of UNHCR there are strong grounds to institutionalise the inter-pillar cooperation on migration and asylum issues that has recently been tested in the work of the High Level Working Group on Migration and Asylum.

28. UNHCR hopes that sufficient attention will be given to the protection dimension of the country plans which have been developed by the High Level Working Group so far, as well as those to be designed and implemented in future. Programmes for reception in the region, and/or return to countries of origin, need to be inspired by a number of protection principles such as physical safety, legal security and socio-economic well-being.

29. Measures to strengthen the protection capacities of countries in the region of origin do not absolve Member States of their responsibility to fulfil their protection obligations towards those who are seeking asylum on their territory.

IV. Concluding remarks

30. It is UNHCR's strong belief that a future harmonised European asylum policy must be firmly rooted in the proper and inclusive application of the 1951 Convention. The right to seek and enjoy asylum must be maintained as a human right and its further development and enforcement in Europe should be strengthened by the EU harmonisation process.

31. A comprehensive and forward-looking asylum policy in Europe that respects international standards for refugee protection will be to the benefit of refugees, asylum-seekers and States alike. The implementation of the relevant provisions of the Amsterdam Treaty represent an important opportunity to achieve this goal.

32. An important factor in the process to harmonise asylum policy and practice in the European Union is the future enlargement of the Union through the accession of candidate countries in Central Europe. These countries need to be further assisted in developing sustainable and comprehensive asylum systems which meet the requirements of EU membership as well as international standards for the protection of the refugee. Preparations for future EU membership are a unique opportunity to help these countries to adopt and implement the necessary legislative and administrative arrangements to develop the required institutional capacity, and, hence, to turn from transit countries for asylum-seekers into countries of destination for refugees.

23 July 1999

TAMPERE, October 1999

Presidency Conclusions - Tampere, 15 and 16 October 1999

The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. At the start of proceedings an exchange of views was conducted with the President of the European Parliament, Mrs Nicole Fontaine, on the main topics of discussion.

The European Council is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam. The European Council sends a strong political message to reaffirm the importance of this objective and has agreed on a number of policy orientations and priorities which will speedily make this area a reality. The European Council will place and maintain this objective at the very top of the political agenda. It will keep under constant review progress made towards implementing the necessary measures and meeting the deadlines set by the Treaty of Amsterdam, the Vienna Action Plan and the present conclusions. The Commission is invited to make a proposal for an appropriate scoreboard to that end. The European Council underlines the importance of ensuring the necessary transparency and of keeping the European Parliament regularly informed. It will hold a full debate assessing progress at its December meeting in 2001.

In close connection with the area of freedom, security and justice, the European Council has agreed on the composition, method of work and practical arrangements (attached in the annex) for the body entrusted with drawing up a draft Charter of fundamental rights of the European Union. It invites all parties involved to ensure that work on the Charter can begin rapidly.

The European Council expresses its gratitude for the work of the outgoing Secretary-General of the Council, Mr. Jürgen Trumpf, and in particular for his contribution to the development of the Union following the entry into force of the Treaty of Amsterdam.

Given that one of the focal points of the Union's work in the years ahead will be to strengthen the common foreign and security policy, including developing a European security and defence policy, the European Council expects the new Secretary-General of the Council and High Representative for the CFSP, Mr. Javier Solana, to make a key contribution to this objective. Mr. Solana will be able to rely on the full backing of the European Council in exercising his powers according to Article 18(3) of the Treaty so he can do full justice to his tasks. His responsibilities will include cooperating with the Presidency to ensure that deliberations and action in foreign and security policy matters are efficiently conducted with the aim of fostering continuity and consistency of policy on the basis of the common interests of the Union.

TOWARDS A UNION OF FREEDOM, SECURITY AND JUSTICE: THE TAMPERE MILESTONES

1. From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.

2. The European Union has already put in place for its citizens the major ingredients of a shared area of prosperity and peace: a single market, economic and monetary union, and the capacity to take on global political and economic challenges. The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives.

3. This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.

4. The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respondto humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.

5. The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.

6. People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.

7. The area of freedom, security and justice should be based on the principles of transparency and democratic control. We must develop an open dialogue with civil

society on the aims and principles of this area in order to strengthen citizens' acceptance and support. In order to maintain confidence in authorities, common standards on the integrity of authorities should be developed.

8. The European Council considers it essential that in these areas the Union should also develop a capacity to act and be regarded as a significant partner on the international scene. This requires close co-operation with partner countries and international organisations, in particular the Council of Europe, OSCE, OECD and the United Nations.

9. The European Council invites the Council and the Commission, in close co-operation with the European Parliament, to promote the full and immediate implementation of the Treaty of Amsterdam on the basis of the Vienna Action Plan and of the following political guidelines and concrete objectives agreed here in Tampere.

A. A COMMON EU ASYLUM AND MIGRATION POLICY

10. The separate but closely related issues of asylum and migration call for the development of a ommon EU policy to include the following elements.

I. Partnership with countries of origin

11. The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.

12. In this context, the European Council welcomes the report of the High Level Working Group on Asylum and Migration set up by the Council, and agrees on the continuation of its mandate and on the drawing up of further Action Plans. It considers as a useful contribution the first action plans drawn up by that Working Group, and approved by the Council, and invites the Council and the Commission to report back on their implementation to the European Council in December 2000.

II. A Common European Asylum System

13. The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.

14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. To that end, the Council is urged to adopt, on the basis of Commission proposals, the necessary decisions according to the timetable set in the Treaty of Amsterdam and the Vienna Action Plan. The European Council stresses the importance of consulting UNHCR and other international organisations.

15. In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. The Commission is asked to prepare within one year a communication on this matter.

16. The European Council urges the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States. The European Council believes that consideration should be given to making some form of financial reserve available in situations of mass influx of refugees for temporary protection. The Commission is invited to explore the possibilities for this.

17. The European Council urges the Council to finalise promptly its work on the system for the identification of asylum seekers (Eurodac).

III. Fair treatment of third country nationals

18. The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia.

19. Building on the Commission Communication on an Action Plan against Racism, the European Council calls for the fight against racism and xenophobia to be stepped up. The Member States will draw on best practices and experiences. Co-operation with the European Monitoring Centre on Racism and Xenophobia and the Council of Europe will be further strengthened. Moreover, the Commission is invited to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty on the fight against racism and xenophobia. To fight against discrimination more generally the Member States are encouraged to draw up national programmes.

20. The European Council acknowledges the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission. These decisions should take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.

21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of

time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

IV. Management of migration flows

22. The European Council stresses the need for more efficient management of migration flows at all their stages. It calls for the development, in close co-operation with countries of origin and transit, of information campaigns on the actual possibilities for legal immigration, and for the prevention of all forms of trafficking in human beings. A common active policy on visas and alse documents should be further developed, including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices.

23. The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime. The Council is invited to adopt by the end of 2000, on the basis of a proposal by the Commission, legislation to this end. Member States, together with Europol, should direct their efforts to detecting and dismantling the criminal networks involved. The rights of the victims of such activities shall be secured with special emphasis on the problems of women and children.

24. The European Council calls for closer co-operation and mutual technical assistance between the Member States' border control services, such as exchange programmes and technology transfer, especially on maritime borders, and for the rapid inclusion of the applicant States in this co-operation. In this context, the Council welcomes the memorandum of understanding between Italy and Greece to enhance co-operation between the two countries in the Adriatic and Ionian seas in combating organised crime, smuggling and trafficking of persons.

25. As a consequence of the integration of the Schengen acquis into the Union, the candidate countries must accept in full that acquis and further measures building upon it. The European Council stresses the importance of the effective control of the Union's future external borders by specialised trained professionals.

26. The European Council calls for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States.

27. The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission.

B. A GENUINE EUROPEAN AREA OF JUSTICE

28. In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. V. Better access to justice in Europe

29. In order to facilitate access to justice the European Council invites the Commission, in cooperation with other relevant fora, such as the Council of Europe, to launch an information campaign and to publish appropriate "user guides" on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities.

30. The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States.

31. Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union.

32. Having regard to the Commission's communication, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.

VI. Mutual recognition of judicial decisions

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

34. In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.

35. With respect to criminal matters, the European Council urges Member States to speedily

ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

VII. Greater convergence in civil law

38. The European Council invites the Council and the Commission to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, e.g. provisional measures, taking of evidence, orders for money payment and time limits.

39. As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001.

C. A UNIONWIDE FIGHT AGAINST CRIME

40. The European Council is deeply committed to reinforcing the fight against serious organised and transnational crime. The high level of safety in the area of freedom, security and justice presupposes an efficient and comprehensive approach in the fight against all forms of crime. A balanced development of unionwide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators.

VIII. Preventing crime at the level of the Union

41. The European Council calls for the integration of crime prevention aspects into actions against crime as well as for the further development of national crime prevention programmes. Common priorities should be developed and identified in crime prevention in the external and internal policy of the Union and be taken into account when preparing new legislation.

42. The exchange of best practices should be developed, the network of competent national authorities for crime prevention and co-operation between national crime prevention organisations should be strengthened and the possibility of a Community funded programme should be explored for these purposes. The first priorities for this co-operation could be juvenile, urban and drug-related crime.

IX. Stepping up co-operation against crime

43. Maximum benefit should be derived from co-operation between Member States' authorities when investigating cross-border crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity.

44. The European Council calls for the establishment of a European Police Chiefs operational Task Force to exchange, in co-operation with Europol, experience, best practices and information on current trends in cross-border crime and contribute to the planning of operative actions.

45. Europol has a key role in supporting unionwide crime prevention, analyses and investigation. The European Council calls on the Council to provide Europol with the necessary support and resources. In the near future its role should be strengthened by means of receiving operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States.

46. To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. EUROJUST should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of co-operating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001.

47. A European Police College for the training of senior law enforcement officials should be established. It should start as a network of existing national training institutes. It should also be open to the authorities of candidate countries.

48. Without prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime.

49. Serious economic crime increasingly has tax and duty aspects. The European Council therefore calls upon Member States to provide full mutual legal assistance in the investigation and prosecution of serious economic crime.

50. The European Council underlines the importance of addressing the drugs problem in a comprehensive manner. It calls on the Council to adopt the 2000-2004 European Strategy against Drugs before the European Council meeting in Helsinki.

X. Special action against money laundering

51. Money laundering is at the very heart of organised crime. It should be rooted out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime.

52. Member States are urged to implement fully the provisions of the Money Laundering Directive, the 1990 Strasbourg Convention and the Financial Action Task Force recommendations also in all their dependent territories.

53. The European Council calls for the Council and the European Parliament to adopt as soon as possible the draft revised directive on money laundering recently proposed by the Commission.

54. With due regard to data protection, the transparency of financial transactions and ownership of corporate entities should be improved and the exchange of information between the existing financial intelligence units (FIU) regarding suspicious transactions expedited. Regardless of secrecy provisions applicable to banking and other commercial activity, judicial authorities as well as FIUs must be entitled, subject to judicial control, to receive information when such information is necessary to investigate money laundering. The European Council calls on the Council to adopt the necessary provisions to this end.

55. The European Council calls for the approximation of criminal law and procedures on money laundering (e.g. tracing, freezing and confiscating funds). The scope of criminal activities which constitute predicate offences for money laundering should be uniform and sufficiently broad in all Member States.

56. The European Council invites the Council to extend the competence of Europol to money laundering in general, regardless of the type of offence from which the laundered proceeds originate.

57. Common standards should be developed in order to prevent the use of corporations and entities registered outside the jurisdiction of the Union in the hiding of criminal proceeds and in money laundering. The Union and Member States should make arrangements with third country offshore-centres to ensure efficient and transparent co-operation in mutual legal assistance following the recommendations made in this area by the Financial Action Task Force.

58. The Commission is invited to draw up a report identifying provisions in national banking, financial and corporate legislation which obstruct international co-operation. The Council is invited to draw necessary conclusions on the basis of this report.

D. STRONGER EXTERNAL ACTION

59. The European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.

60. Full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of Common Strategies as well as Community agreements and agreements based on Article 38 TEU.

61. Clear priorities, policy objectives and measures for the Union's external action in Justice and Home Affairs should be defined. Specific recommendations should be drawn up by the Council in close co-operation with the Commission on policy objectives and measures for the Union's external action in Justice and Home Affairs, including questions of working structure, prior to the European Council in June 2000.

62. The European Council expresses its support for regional co-operation against organised crime involving the Member States and third countries bordering on the Union. In this context it notes with satisfaction the concrete and practical results obtained by the surrounding countries in the Baltic Sea region. The European Council attaches particular importance to regional cooperation and development in the Balkan region. The European Union welcomes and intends to participate in a European Conference on Development and Security in the Adriatic and Ionian area, to be organised by the Italian Government in Italy in the first half of the year 2000. This initiative will provide valuable support in the context of the South Eastern Europe Stability Pact.

UNHCR'S POSITION

ASYLUM AFTER TAMPERE
The EU asylum agenda following the Tampere Summit

The Tampere Summit Conclusions represent an important landmark in the development of a European asylum and migration strategy. The Conclusions in themselves do not prescribe the contents of the future European Union asylum and migration instruments to be developed pursuant to the entry into force of Title IV of the Amsterdam Treaty. Yet they give political impetus to, and set the main orientations for, the future EU policy in the area of asylum and migration.

Asylum vs. Migration

The Conclusions include a reaffirmation of the right to seek asylum and call for the full and inclusive application of the Geneva Convention. This is to be welcomed as a positive signal that the future EU asylum system is to be developed on the basis of international protection standards. It is refreshing to see that asylum policy is dealt with up-front in the Conclusions rather than as a final afterthought. Also, protection considerations precede those of border control and measures aimed at stemming illegal immigration.

The separate chapter aimed at improving the integration of third country nationals residing legally on the territory of Member States also includes a number of positive intentions, including efforts to step up the fight against racism and xenophobia. The Conclusions also underline the need for approximation of national legislations on the conditions for admission and residence of aliens.

The Conclusions refer to asylum and migration policies as distinct, although inter-related areas, and contain separate paragraphs on asylum, legal migration, illegal immigration and cooperation with source countries. The Conclusions affirm that asylum is an absolute human right, while migration is seen as being conditioned by socio-economic, demographic, judicial and police cooperation factors. Yet the close relationship between asylum and migration calls for a reflection over the inter-linkage of the various legal instruments and common policies to be developed in these areas, as well as the sequence of their development.

While the Conclusions affirm the need for guarantees for those who seek access to and protection in the EU Member States, they also call for vigorous measures to stem illegal immigration, reinforce border controls and combat trafficking in human beings. The Conclusions do not spell out how to balance guarantees to offer protection to those in need of it with measures to stem illegal immigration. There is, therefore, a risk that access to territory and to the asylum procedure will be undermined if stringent controls are put in place without sufficient guarantees addressing the situation of persons seeking protection.

Towards a single or a common asylum system?

The Tampere Conclusions spell out a clear commitment to iron out the differences between the asylum policies and laws of individual EU Member States. The Conclusions establish the main

elements of a common European asylum system, in terms of asylum procedures, reception conditions and, eventually, a uniform refugee status. The intention as expressed in the Conclusions to establish a common asylum system should be taken as a clear signal that EU Member States want to move beyond minimum levels of harmonisation and approximation of their asylum laws and policies. Whether this will be realised remains to be seen.
In this context it is important to note that the Summit Conclusions call for a common asylum system, not a single system. This is probably more than merely a semantic issue, since clear differences of opinion on the future of the Union's competence in asylum matters underlie this question. A single, uniform system implies full harmonisation of standards and procedures.

Yet a number of Member States have expressed doubts about the feasibility or desirability of establishing such a system and prefer to identify a set of common standards arising from a comparison of the standards governing their asylum policies and practices. While UNHCR would certainly see advantages in a single system, the key issue for the Office is that the sights of Governments remain firmly fixed on high protection standards.

What level of protection?

Despite their overall positive tone, the Tampere Conclusions do not actually set the detail nor the level of future protection standards for the future common asylum system. While Conclusions of this kind cannot be expected to do so, it is now up to the drafters of the future asylum instruments (the Commission), as well as for those who will have to negotiate their adoption (the Council, and to a certain extent, the European Parliament) to agree on the contents of the protection offered in the future instruments.

Some Member States have already announced that they will stick to a strict interpretation of the language of the asylum provisions of the Amsterdam Treaty, that is the adoption of minimum standards. This entails the risk that the minimum will develop into the maximum, particularly if the rule of unanimity voting is to be maintained during the next five years of negotiations on draft instruments.
In order to avoid the acceptance of the lowest common denominator, Member States should be called upon to negotiate a consistent set of common standards for each instrument, to be developed within a coherent framework, and not by comparing the standards and singularities of their present policies and practices. Moreover, the Commission may need some encouragement to develop comprehensive proposals setting high protection standards, prior to putting these on the negotiating table.

Partnership with countries of origin

The Tampere Conclusions include a brief chapter endorsing a comprehensive approach to migration and asylum addressing political, human rights and development issues in countries and regions of origin and transit, as pioneered recently by the EU High Level Working Group on Migration and Asylum. Partnership with countries of origin and third countries concerned will be a key element for the success of such a policy. The Conclusions call for a continuation of the mandate of the High Level Working Group and the drawing up of further Action Plans following the adoption of a first set of such Plans as elaborated by the Group. UNHCR has welcomed the establishment of the Group and has provided inputs into the drawing up of the Action Plans.

Now that the implementation phase has begun, UNHCR will see to it that the protection dimension of the Action Plans receives at least as much attention as the control measures spelled out in the Plans. Implementing the Action Plans needs to be predicated upon Member States' continued acceptance of asylum-seekers and migrants on their territory, combined with efforts to address effectively the root causes of flight and migration, measures strengthening the reception and protection capacities of countries neighbouring countries of origin, and increased political and financial support for voluntary return programmes, provided the security and political situation in countries of origin allows for sustainable reintegration.

The post-Tampere asylum agenda

Now that the Tampere Summit has promulgated its political guidelines for the EU asylum law-making process, the Commission and Member States are preparing for an intensive period of elaborating and negotiating proposals for Regulations and Directives. The Commission is at present drawing up its "scoreboard" in order to set an agreed agenda and time-table for the introduction and adoption of the various legal instruments. The 1998 Vienna Action Plan of the Council and Commission identified a time-table of two and five years for the adoption of the various asylum and migration instruments, yet this has proven to be too ambitious. A revision of this time-table offers an opportunity to re-think the sequence with which the various asylum instruments can best be prepared and adopted.

UNHCR reiterates its call that the EU Member States and the Commission seize the opportunity to rethink the order of priority for developing the various asylum instruments. A coherent, protection-based asylum strategy should start with a common understanding of the interpretation and application of the definition of a "refugee" and the content and legal basis of the refugee status. Following agreement on the scope and contents of the refugee status, a common approach to complementary forms of protection can be developed. Simultaneously, the Council and Commission should work towards common standards for asylum procedures. Once these core elements of material and asylum law have been adopted, the Council and Commission can elaborate a common approach to practical devices such as a common temporary protection regime in situations of mass influx, a functioning "Dublin" mechanism regulating allocation of responsibility for examining asylum applications, or a European burden-sharing mechanism. It should be recalled that the Tampere Conclusions contain rather timid language on these subjects.

It is in the hands of the Council, Commission and the European Parliament to ensure that the asylum-related provisions of the Amsterdam Treaty do not simply reinforce the restrictive trends of the 1990's, but that they place refugee protection on a proper footing in harmony with the aims of freedom, security and justice to which the European Union aspires. The Tampere Conclusions constitute a positive point of departure towards achieving this end.

The Tampere Conclusions affirm that asylum is an absolute human right, while migration is seen as being conditioned by socio-economic, demographic, judicial and police cooperation factors.

A coherent, protection-based asylum strategy should start with a common understanding of the interpretation and application of the definition of a "refugee" and the content and legal basis of the refugee status.

EU Declaration On the 50th Anniversary of the 1951 Geneva Convention

EU DECLARATION ON THE 50th ANNIVERSARY OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

On the occasion of the 50th anniversary of the 1951 Convention relating to the Status of Refugees, the European Union, founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, reaffirms its commitment to this unique instrument as the foundation of the international regime for the protection of refugees.

The European Union recalls its solemn declaration made at the Tampere Summit that the future Common European Asylum System must be based on the full and inclusive application of the 1951 Convention, and reaffirms its attachment to the absolute respect of the right to asylum, as recognised in particular in the EU Charter of Fundamental Rights.

The European Union calls on all States that have not yet done so to ratify the 1951 Convention and 1967 Protocol, and calls on those States which have made geographical limitations and others reservations to reconsider these, so as to ensure universal application of its provisions.

The European Union recognises the unique mandate of UNHCR and the importance of its efforts to protect, and promote durable solutions for, refugees and other people in need of international protection who are of its concern. It notes the significant importance for Contracting States to cooperate with UNHCR in order to facilitate its duty of supervising the application of the provisions of the Convention. The European Union stands ready to continue its partnership with UNHCR in order to ensure effective refugee protection and assistance.

On this auspicious day, the European Union reaffirms its strong commitment to assist and protect all those, men, women and children, who are compelled against their will to leave their homes and their country in order to escape fear of persecution and severe human rights violations

Presidency Conclusions: LAEKEN

UNHCR'S POSITION

STRENGTHENING THE TAMPERE PROCESS UNHCR's recommendations to the Laeken Summit

I. INTRODUCTION

1. The special meeting of the European Council on 15-16 October 1999 in Tampere was a landmark in the development of common asylum and migration policies. The Tampere Council underscored that the freedom, security and justice enjoyed by citizens of the European Union must be accessible to "those whose circumstances lead them justifiably to seek access to [the Union's] territory."

2. The United Nations High Commissioner for Refugees (UNHCR) hopes that the Laeken European Council will give further impetus to the development of a common European asylum system based on, as proclaimed by the Tampere Council, the "full and inclusive application of the Geneva Convention" and "the absolute respect of the right to seek asylum." In this 50th anniversary of the 1951 Convention, UNHCR calls on the Laeken Summit to reaffirm the primacy of the Convention and its 1967 Protocol for the international refugee protection regime.

3. The Laeken Summit takes place at a time of mobilisation of concerted action at the European and global levels to combat effectively international terrorism. UNHCR recalls that the 1951 Convention does not offer a safe haven for terrorists, nor does it extend immunity from criminal prosecution. In fact, the Convention offers States the necessary tools to exclude from refugee protection those guilty of terrorist acts.

II. DEVELOPING THE COMMON ASYLUM SYSTEM

4. UNHCR notes with appreciation that the Commission has put forward the entire set of legislative proposals in the field of asylum set out in Article 63 of the Amsterdam Treaty. UNHCR also welcomes the adoption in Council of two asylum-related Community measures, namely, a Council Decision establishing a European Refugee Fund and a Council Directive on minimum standards for giving temporary protection. With the Laeken Summit taking place half way the five-year transition period set by the Amsterdam Treaty for the establishment of the area of freedom, security and justice, greater political resolve is required to achieve the Treaty's objectives and timetable.

5. In its comments to the various asylum-related legislative proposals from the Commission, UNHCR has indicated how full compatibility between the key provisions of the proposed instruments and international standards could be ensured. UNHCR therefore reiterates its call on Member States to show strong commitment so that the instruments to be adopted in Council will be based on high protection standards meeting the requirements of justice for refugees. The result of Council negotiations must avoid the lowest common denominator of protection.

6. The development of a common asylum system should have as its priority focus a harmonised interpretation of the refugee definition within a full and inclusive application

of the 1951 Convention. A common understanding of who qualifies as a refugee and who does not should inform all other elements of the common asylum system. UNHCR hopes that the Laeken Conclusions will provide policy guidance for the negotiations of the future Community instrument on minimum standards for the qualification as a refugee or as a beneficiary of subsidiary protection.

III. MANAGING MIGRATION FLOWS

7. Irregular migration is of concern to both receiving countries and countries of origin. The issue of irregular migration is also currently entangled with that of asylum. UNHCR therefore has a legitimate interest in ensuring that the problem of irregular migration is effectively dealt with in a way that upholds refugee protection principles while addressing the legitimate concerns of European States.

8. UNHCR hopes that the Laeken Summit will provide political guidance and set policy orientations for constructive immigration policies for labour, family reunification or studies. In UNHCR's view, such policies could result in an easing of the pressure on asylum systems and switch the approach to where it should be: managing migration through migration policies and managing the asylum system through asylum policies.

9. UNHCR also hopes that, as the European Union develops a common policy for labour admission, attention will be given to the skilled and talented refugees in first countries of asylum who can make a positive contribution to the labour market of the Union. A special resettlement quota would simultaneously serve economic, humanitarian and migration management objectives.

IV. THE EXTERNAL DIMENSION

10. UNHCR notes the increased attention for the development of the external dimension of the European Union's policies and practices. UNHCR welcomes such development and calls on the Union to include a meaningful asylum component in EU assistance programmes for third countries. UNHCR believes that assistance to, and co-operation with, third countries in asylum and migration matters must be based on a proper identification of the needs and priorities of these partner countries. UNHCR stands ready to assist in developing more successful programmes aimed at ensuring protection and achieving solutions.

11. UNHCR hopes that the Laeken Summit will call on the candidate countries in Central Europe to strengthen their legislative and administrative arrangements in order to ensure that their asylum systems meet European and international standards. Since the candidate countries may not have adequate means to achieve these objectives and thereby transform themselves from mere transit points to truly refugee-receiving countries, further pre-accession assistance from the EU is needed -- including increased financial support to UNHCR's current and planned capacity-building activities in those countries.

12. As acknowledged by the Tampere Summit, a comprehensive approach is key to a common European asylum and migration policy. UNHCR believes that the EU High Level Working Group on Asylum and Migration can contribute to the implementation of comprehensive, cross-pillar EU strategies to address irregular migration and mixed

population movements in a protection-oriented manner. UNHCR calls upon the Laeken Summit to provide the High Level Working Group with the necessary political and financial support for a successful continuation of its work.

13. Achieving durable solutions for protracted refugee situations is a central element of an integrated approach to forced population displacement. UNHCR has appealed to States world-wide to support its efforts towards durable solutions for refugee situations: voluntary repatriation to the country of origin, local integration in the countries of first asylum or resettlement in other countries. The political, financial and humanitarian costs of not finding durable solutions to the problems of refugees are much greater: refugees will be degraded having to stay in camps for many years or they will be forced to go on the move illegally using criminal networks. UNHCR therefore calls on the Laeken Summit to reserve a certain percentage of EU development budgets for durable solutions in countries of origin or of first asylum in the region, and to promote the ownership of host governments to support these solutions.

14. UNHCR calls on the Laeken Summit to recognise the role of UNHCR as a partner in meeting the challenges of effective refugee protection and solutions. UNHCR and the European Union have a range of common interests: the European asylum agenda, the asylum dimension of European enlargement, the interface between asylum and migration, the prevention and management of humanitarian crises and the provision of humanitarian aid, as well as the active search for durable solutions. It is hoped that the Laeken Summit will give due consideration to the policy and funding considerations of strengthened partnership between the Union and UNHCR.

UNHCR Geneva
November 2001

LAEKEN, December 2001

EUROPEAN COUNCIL MEETING IN LAEKEN 14 AND 15 DECEMBER 2001

IV. STRENGTHENING THE AREA OF FREEDOM, SECURITY AND JUSTICE

37. The European Council reaffirms its commitment to the policy guidelines and objectives defined at Tampere and notes that while some progress has been made, there is a need for new impetus and guidelines to make up for delays in some areas. Holding Justice and Home Affairs sessions at shorter intervals will help speed work up. It is also important that decisions taken by the Union be transposed speedily into national legal systems and that conventions concluded since the Maastricht Treaty came into force be ratified as soon as possible.

A true common asylum and immigration policy

38. Despite some achievements such as the European Refugee Fund, the Eurodac Regulation and the Directive on temporary protection, progress has been slower and less substantial than expected. A new approach is therefore needed.

39. The European Council undertakes to adopt, on the basis of the Tampere conclusions and as soon as possible, a common policy on asylum and immigration, which will maintain the necessary balance between protection of refugees, in accordance with the principles of the 1951 Geneva Convention, the legitimate aspiration to a better life and the reception capacities of the Union and its Member States.

40. A true common asylum and immigration policy implies the establishment of the following instruments:
    - the integration of the policy on migratory flows into the European Union's foreign policy. In particular, European readmission agreements must be concluded with the countries concerned on the basis of a new list of priorities and a clear action plan. The European Council calls for an action plan to be developed on the basis of the Commission communication on illegal immigration and the smuggling of human beings;
    - the development of a European system for exchanging information on asylum, migration and countries of origin; the implementation of Eurodac and a Regulation for the more efficient application of the Dublin Convention, with rapid and efficient procedures;
    - the establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures where justified. These standards should take account of the need to offer help to asylum applicants;
    - the establishment of specific programmes to combat discrimination and racism.

41. The European Council asks the Council to submit, by 30 April 2002 at the latest, amended proposals concerning asylum procedures, family reunification and the "Dublin II" Regulation. In addition, the Council is asked to expedite its proceedings on other drafts concerning reception standards, the definition of the term "refugee" and forms of subsidiary protection.

UNHCR'S POSITION

UNHCR : ASYLUM AFTER THE LAEKEN SUMMIT

On 14 and 15 December 2001, Heads of State and Government gathered in Laeken, Belgium, to prepare for the future of the European Union. The Summit's Conclusions on asylum and migration do not go beyond the ambitions set by the Tampere Conclusions, and call for new impetus in implementing the asylum agenda. The Conclusions are silent on the need for integrated, comprehensive strategies to address refugee challenges in the world at large.

One of the main agenda items for the Laeken Summit was a review of progress made in the establishment of the area of freedom, security and justice as called for by the Amsterdam Treaty. Back in 1999, the Tampere Summit had set the political orientations and identified the key elements of this process. The Laeken Summit was to provide the necessary impetus to the negotiations on a number of important dossiers. It was also expected to comment on the developing external dimension of the Union's migration and asylum policy.

The Laeken Conclusions include, indeed, various paragraphs on the common asylum and migration policy. The Conclusions reaffirm the EU's commitment to the policy guidelines and objectives defined at the Tampere Summit. They also acknowledge the need for new impetus and guidelines to complete the building of the common asylum system in the short term. A separate report evaluating progress since Tampere and submitted by the Presidency in advance of the Summit had confirmed that the Amsterdam timetable and the Tampere orientations must continue to serve as the basic guidance for developing the common policy and strategy in justice and home affairs.

The Presidency report had acknowledged that in certain specific matters impetus must be given to unblock the current stalemate in negotiations. This, it was recognised, is particularly the case of some of the asylum instruments, such as those on asylum procedures, reception conditions for asylum-seekers and the successor instrument to the Dublin Convention, as well as for the instruments regulating family reunion and the status and right of long-term residents.

The Laeken review of the Tampere process took place at a time when some Member States were questioning the extent to which harmonisation in asylum and migration is to needed. Some observers had also expressed doubts whether the package of individual asylum instruments as proposed by the Commission was the way forward to put in place a coherent and complete system. In the end, the Laeken Summit endorsed the approach decided on in Tampere, by calling on the Council to continue negotiating the proposed legislative instruments in asylum and migration, albeit on the basis of some modified proposals, including revised draft Directives on asylum procedures and family reunion.

The asylum legislative agenda

Prior to the Laeken Summit UNHCR had submitted a list of recommendations arguing that the quality and detail of the asylum instruments as proposed by the Commission must be preserved, as well as the timetable for their adoption. Following the Laeken Summit, it remains to be seen whether the Council will live up to the expectations to put the common asylum system in place by 2004. In the view of UNHCR, the main challenge will be to adopt

common standards of sufficient quality and detail, in accordance with standards developed at the international level during the last decade. Member States should avoid adopting a minimalist approach based on the lowest common denominator by scaling down their ambitions through a mere approximation of national policies and practices.

Some Member States appear to favour the adoption of asylum instruments setting out general principles of law and policy and leaving them a large margin of discretion to regulate the detail of their asylum systems. UNHCR believes there is need for a more prescriptive approach, through the adoption of a set of binding common standards which are sufficiently detailed to ensure a consistent implementation of key elements of procedural and material asylum law throughout the Union. Failing this, some Member States will continue to be confronted with serious pressures on their systems as a result of a disproportionate number of applications, whereas others will be much less affected. The adoption of a coherent set of common standards and guidelines is both in the interest of asylum administrations and to the benefit of asylum-seekers, ensuring a similar level of protection and efficiency in asylum practice throughout the Union. The adoption of the various elements constituting the common asylum system could best follow an agreed sequence, based on a common understanding of who qualifies as a refugee and who does not. Otherwise there is a risk that the common asylum system will be built in a fragmentary manner and ultimately will lack the necessary coherence.

Asylum vs. Migration

The Laeken Conclusions refer to the need to balance Member States' protection obligations with the need to adopt sound and manageable admission policies for migrants. According to the Conclusions, the capacities of Member States to admit third-country nationals must be a factor in developing common asylum policies. UNHCR recalls that, while burden-sharing arrangements are essential to preserve the viability of asylum and protection systems, the number of applicants seeking asylum on the territory of the European Union has been limited so far in comparison to other regions in the world at large. Moreover, Member States have an obligation, as reiterated at the Tampere Summit, to ensure access and offer protection to those who seek safety on their territory.

The need to develop common asylum standards and common migration policies in parallel remains one of the important challenges for the Union. The Union's preoccupation with illegal immigration, migrant smuggling and human trafficking is legitimate and common measures are needed to address these phenomena. Recently, the risk of abuse of admission policy - for asylum or migratory purposes - by those involved in terrorism has been highlighted. Common measures addressing irregular movement and criminal behaviour must, however, include protection safeguards in order to ensure that those with legitimate protection needs will not be prevented from seeking access to safety.

The Laeken Conclusions call for an action plan to prevent and combat illegal immigration and smuggling and trafficking in human beings, to be based on a recent Commission Communication on the issue. The Conclusions also emphasise the need to conclude readmission agreements with third countries. The various measures aimed at preventing and controlling irregular movement should be balanced, however, with Member States' obligations to provide protection to all those whose movements, while often irregular, are propelled for refugee-related reasons. Migration instruments must include protection safeguards and practitioners must be trained to implement these in practice.

The external dimension

The Laeken Conclusions emphasise the integration of migration policy into the European Union's foreign policy, yet remain silent on how this is to be achieved. There is no mention of the external dimension of the developing common asylum and migration policy. Nor is there a critical analysis of the work undertaken so far by the High Level Working Group on Migration and Asylum, aimed at improving the Union's migration management from an integrated, cross-pillar policy perspective.

UNHCR had called on the Summit to highlight the need for asylum capacity-building in EU assistance programmes for third countries, particularly candidate countries, based on a proper identification of the needs and priorities of these partner countries. Such assistance should include support for developing fair and efficient asylum procedures, as well as facilities for humane reception of asylum-seekers and sustainable reintegration of refugees. The current interest of the Union to support countries in Eastern Europe, the Western Balkans and the Mediterranean basin in improving their capacity to control migratory flows, strengthening their border management and combating various forms of organised crime, including human trafficking and the terrorist threat, must be complemented with support for institution-building in asylum.

Towards comprehensive approaches

The Tampere Summit recognised the need for the Union to develop a comprehensive approach to migration addressing political, human rights, and development issues in countries of origin and transit. It also called for greater coherence of internal and external Union policies, based on strengthened partnership with third countries, in order to bring the Union's foreign policy, trade and aid, social policy and action in justice and home affairs together when addressing particular refugee and migration challenges.

The Laeken Conclusions do not comment on this essential element of the Union's developing migration and asylum strategy. Comprehensive strategies are however needed to address the cycle of (internal) displacement, reception in the region, admission in industrialised countries, and return to the country or region of origin. Such strategies include preventative action, measures to address root causes of forced migratory flows and support for durable solutions, inter alia through the promotion of respect for human rights, participatory democracy and strengthening of the rule of law, the delivery of humanitarian aid, reconstruction and development assistance and economic support as well as co-operation in societal, judicial and law enforcement matters. The involvement of the European Union in the crisis recently experienced in the former Yugoslav Republic of Macedonia shows that such an integrated approach, based on the use of the various policies and instruments as well as the involvement of various actors, is possible and have the desired results.

Achieving durable solutions for protracted refugee situations remains a central element of any comprehensive strategy to address forced population displacement. The political, financial and humanitarian costs of not finding durable solutions to such situations are much greater: refugees having to stay in camps close to their country of origin for many years see no other solution than to go on the move illegally, often using criminal networks, and bearing increasing societal and financial pressure on asylum systems in the industrialised world.

UNHCR had proposed to the Laeken Summit to reserve a certain percentage of EU development budgets for durable solutions in the countries of origin or of first asylum in the

region, and to promote the ownership of host governments to support these solutions. In addition, UNHCR has called on the Union to develop a common policy for resettlement of refugees with special needs or skills from refugee camps to EU countries, provided this is considered as complementary and without prejudice to proper treatment of asylum applications lodged spontaneously at the borders or on the territory of EU Member States.

UNHCR believes that the High Level Working Group can contribute to the implementation of comprehensive strategies, provided its mandate and its activity undertaken so far be reviewed. Its action should include a distinct focus on refugee protection and assistance to balance the various activities aimed at better management and control of migratory flows. Increased co-ordination between involved departments is needed, and, generally, sufficient political and financial support for a successful continuation of its work.. Also, meaningful partnership with third countries can be achieved only if the latter are involved in drawing up joint operational strategies at an early stage.

UNHCR has called on the European Union to strengthen its partnership with UNHCR in the search for durable solutions of refugee problems. A range of common interests tie the Union and UNHCR together: the European asylum agenda, the asylum dimension, the inter-face between asylum and migration, the prevention and management of humanitarian crisis and the provision of humanitarian aid, and last but not least the search for durable solutions to often protracted refugee problems. It is hoped that the Union will show the necessary political will and release the financial and human resources needed to realise this common agenda.

EUROPEAN CHARTER ON FUNDAMENTAL RIGHTS

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
December 2001

Article 18
Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19
Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

ASYLUM

European Commission Communication "Towards a common asylum procedure and uniform status, valid throughout the European Union, for persons granted asylum", COM (2000) 755 final of 22 November 2000

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT TOWARDS A COMMON ASYLUM PROCEDURE AND A UNIFORM STATUS, VALID THROUGHOUT THE UNION, FOR PERSONS GRANTED ASYLUM

COM(2000) 755 final

Brussels, 22.11.2000

PREFACE

Point 15 of the Presidency Conclusions of the Tampere European Council (15 and 16 October 1999) states: 'In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'. The Commission was asked to prepare a communication on this matter.

In June 2000 the Portuguese Presidency organised a European Conference on the issue of a common European asylum system. The discussions on a common asylum procedure and a uniform refugee status provided many leading political figures, including a number of Ministers, the Office of the United Nations High Commissioner for Refugees (HCR) and other international organisations, representatives of the academic world and NGOs, with an opportunity to explore a variety of avenues on an informal basis.

This Communication sets out the Commission's thinking on this procedure and this status. Its purpose is not to propose one or more ready-made systems but to launch a debate in the Community on the longer-term prospects. The range of solutions and tools is quite extensive. The Commission's intention is to take an ambitious approach to all the questions and certain possible scenarios so that the Council, Parliament and the various organisations concerned by asylum policy can engage in a full discussion and come up with precise guidelines.

The Communication begins by looking at the context and objectives of the common procedure and the uniform status; it is important to take account of the flows confronting the Member States and the nature of the legal environment before considering common objectives and proposing a scope suitable for the European Union.

It goes on to consider the possibilities of a common procedure, either through a limited procedural approach or through a more fully integrated approach, and the possibilities of a uniform status. It stresses the need to reach common analysis underlying the procedure and the status. Finally, the Commission proposes a general structure and a method for examining the communication.

In asylum matters, the Commission recalls that since May 1999 it has laid the following initiatives before the Council and Parliament: EURODAC Regulation on finger-printing asylum-

seekers (which the Council will be adopting in the coming weeks), Directive on family reunification, Decision on a European Refugee Fund (adopted by the Council in September 2000), Directive on temporary protection in the event of a mass influx of displaced persons, Directive on asylum procedures (grant and withdrawal of refugee status). Its intention is to add the following items to this legislative package by the end of 2001: reception of asylum-seekers, criteria and mechanisms for determining the State responsible for examining an asylum request (Community instrument to succeed the Dublin Convention), rules on the recognition and content of refugee status and subsidiary forms of protection offering an appropriate status.

CONTENTS

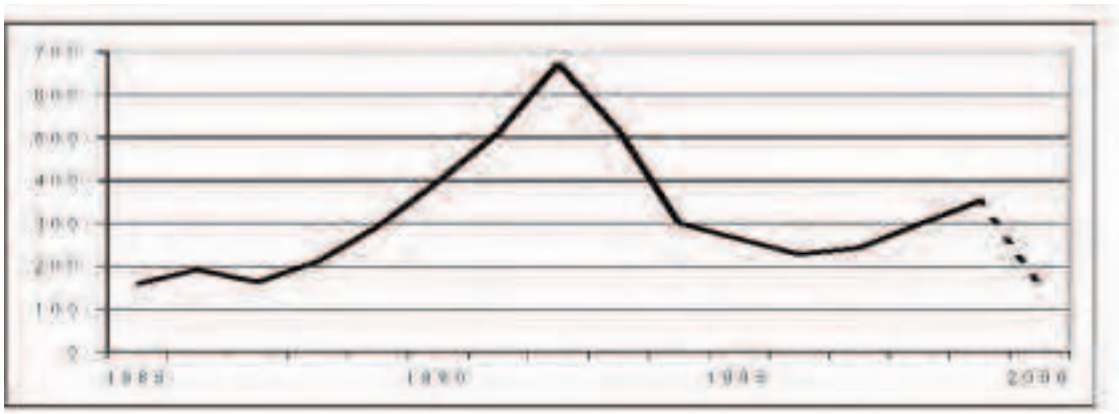
PART I: THE CONTEXT AND OBJECTIVES OF A COMMON PROCEDURE AND A UNIFORM STATUS VALID THROUGHOUT THE UNION

1.1 The asylum situation in the European Union

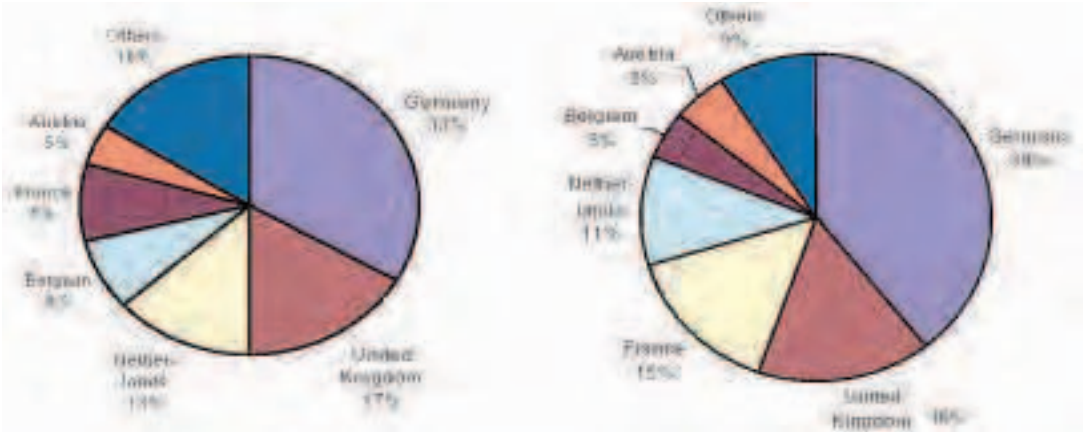
The sources of international protection in the Member States of the European Union are, of course, the Geneva Convention of 1951 on the status of refugees and the 1967 Protocol, national constitutional and legislative provisions and other international Conventions and the consequences in asylum terms of compliance with the European Human Rights Convention (ECHR - Article 3) and the Convention against Torture (Article 3 again), and in certain cases the Convention on the Rights of the Child. In some Member States administrative practices are of considerable importance in terms of the general offer of protection. The role of national court and of the European Court of Human Rights decisions are vital in developing the law relating to asylum in the Member States. Generally speaking, the presence of individual persecution (the key element of the Geneva Convention) is not in fact the sole ground on which asylum is granted in Europe, even if the Geneva Convention is the central pillar of the edifice.

Article 18 of the Charter of Fundamental Rights in the European Union provides that the right of asylum is guaranteed in compliance with the rules of the Geneva Convention and in accordance with the Treaty establishing the European Community, and Article 19(2) provides that 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. Any attempt to grasp the reality of the phenomenon of asylum in Europe has to be based on a medium- and long-term analysis. The number of asylum requests in the Union declined sharply from its peak in 1992-93, but rose again from mid-1996. The Member States, moreover, are affected by incoming flows in varying degrees: while some experienced stable or even declining demand (Germany's share fell to no more than 25% of the EU total in 1999), others (UK, B, for example) have faced a sharp rise in demand in the last two years or so.

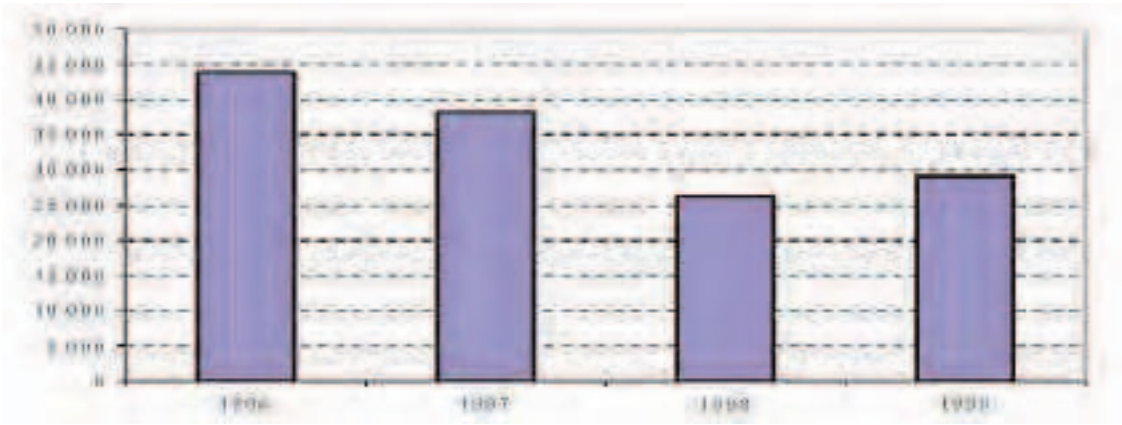
Graphs – Eurostat Estimates: Sources -Member States and Eurostat



Asylum requests (thousand), EU-15, 1985-2000



left: Percentage of asylum requests by Member State, right: Percentage of cases recognised under the average between 1997 and 1999 (total = 892 381) Geneva Convention between Member States, average between 1997 and 1999 (total: 89 576)



Cases of recognition under the Geneva Convention, EU-15, 1996-1999

Admissions to refugee status as defined in the Geneva Convention were fairly stable in absolute terms in the early 1990s, despite variations in demand, but in the last few years there has been something of a decline. This may be explained by the following reasons:

- measures adopted by the Member States or the European Union which diverted certain flows of refugees to other destinations or deterred certain refugees from seeking asylum;
- the hypotheses put forward by some that migratory flows are actually mixed, witheconomic migration underlying asylum requests and inevitably raising the rejection rate;
- a growing mismatch between the nature of demand and the criteria of the Geneva Convention. The major cause for this is the proliferation of armed conflicts generating situations of widespread insecurity and human rights violations that are difficult to fit within the definition of persecution as traditionally interpreted for the purposes of the Geneva Convention in Europe. It would be unreliable to try to explain the decline in admissions to refugee status as a proportion of total admissions in the Union by a more and more restrictive interpretation of the Geneva Convention in such situations. For one thing, requests emanating from countries where individual persecution comes in easily identifiable forms continue to correspond to high rates of admission to refugee status. For another, trends in decisions given by appellate courts suggest that new situations are

being brought within the Geneva Convention. But these trends generate problems of divergence in case-law that are not conducive to the emergence of a European area. In any event, consideration also has to be given to the other means whereby the Member States meet expressed needs for protection. The Member States have developed additional or subsidiary forms of protection so as to give asylum-seekers proper protection where they are not covered by the Geneva Convention but still need international protection. Article 3 of the ECHR plays a vital role here. These forms of protection have emerged without any coordination, and are constantly evolving in all the Member States. In many of them, subsidiary forms of protection are more numerous than the number of cases of recognition of refugee status under the Geneva Convention.[1]

1.2 The challenges and objectives of a common asylum procedure and a uniform status

The definition of guidelines for a common procedure and a uniform status demands a consensus on the challenges and objectives to be met. The Commission proposes the following as a basis:

- Following on from the Tampere conclusions, adopt clear principles offering guarantees to those who are legitimately seeking protection in the European Union and seeking access to its territory. These principles must remain firmly attached to respect for the Geneva Convention and other relevant human rights instruments and supply the basis for a capacity to meet humanitarian needs on the basis of solidarity;
- Absolutely respect the right to seek asylum; apply the Geneva Convention in full and inclusively; ensure that nobody will be sent to a country where he faces the renewed risk of persecution, in other words maintain the principle of non-refoulement.
- Allow the Member States to identify those who genuinely need protection and respond properly to situations of vulnerability. The rules adopted must be fair and effective and underlie rapid high-quality decision-making;
- Develop a procedure and a status within the context of common migration policy that covers all aspects (partnership with countries of origin, fair treatment for third-country nationals, management of migratory flows). In particular:
  - preserve the specificity of humanitarian admission and asylum in the European Union as distinct from other grounds for admission;
  - balance absolute respect for the specificity of humanitarian admission against the legitimate objectives of preventing and combating illegal immigration.

1) For example, in 1998 and 1999, the proportion of subsidiary statuses in relation to Geneva Convention statuses at least doubled in the Netherlands, Greece, Finland, Sweden, Denmark and Portugal. In other Member States that have recently introduced subsidiary forms of protection (Austria, France, Spain), there has been a steady increase. In Germany and the United Kingdom, subsidiary statuses account for a constant substantial proportion of positive protection decisions.

In this context, the Commission believes that the Member States would be better placed to combat what is presented as a real abuse of the asylum system if they had a wide range of open and transparent immigration management policies taking better account of the economic and demographic situations of the Member States. The complex links between these dimensions will be explored in a separate communication.

- Limit secondary movements influenced solely by the diversity of applicable rules. Divergent asylum policies in the different Member States must disappear and an effort must be made to harmonise conditions in order to avoid negative effects for the Member States' interests. Refugees and persons seeking protection must be eligible overall for the same conditions as to examination of their request and for the same conditions as to protection and residence, whichever Member State is concerned. Those who do not need protection or no longer need it must also receive equivalent treatment.
- Consider the first stage referred to in paragraphs 14, 16 and 17 of the Tampere conclusions and in the scoreboard presented in spring 2000 as the pillar on which a common procedure and a uniform status can be built.
- Base the rules on the Treaty and respect the principles of subsidiarity and proportionality. Since these rules fall within the general context of the development of the European Union as an area of freedom, security and justice, they must help to secure the broadest possible freedom of movement of persons.
- Consult the relevant international organisations, in particular the HCR on the basis of Declaration No 17 annexed to the Amsterdam Treaty.

1.3 Scope

Given the available information on migratory flows, the elements set out at point 1.1, the different types of needs for international protection, the very terms of the Treaty and the Tampere conclusions regarding a common European asylum system, the objectives set out above, and in particular the objective of efficiency and balance, the common procedure and uniform status must be applied to all international protection needs and not only those covered by the Geneva Convention.

The Commission believes it is important to begin by clarifying one point in particular: the purpose of the common procedure and the uniform status is not to organise the recognition of Geneva-Convention refugee status or subsidiary protection by means of individual positive or negative decisions taken by a Community body. This option would be utterly incompatible with the proportionality and subsidiarity principles. And it would entail the establishment of a specific judicial body to hear appeals against individual decisions.

In the context of a common procedure and a uniform status, it might be possible at a second stage to envisage deepening the mechanisms and content of temporary protection in the event of a mass influx of displaced persons. The objective of the directive proposed in May 2000 is to establish fair and balanced minimum rules and mechanisms enabling the Member States to deal with a mass influx. The Commission nevertheless addresses these issues in this communication.

PART II: FROM A LIMITED COMMON PROCEDURE TO AN INTEGRATED COMMON PROCEDURE

2.1 Second-stage procedural standards

The purpose of the proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing refugee status is to establish in the short term a minimum level of harmonisation of the rules applicable in the matter in the Community. It does not require the Member States to apply uniform procedures. They thus retain their national systems subject to respect for certain norms and conditions regarding competent authorities and the applicable procedures. This is an initial measure in that it also leaves the Member States free to decide whether or not to apply the norms in subsidiary protection procedures for persons who have been determined not to be refugees.

At a second stage, the definition of a common procedure implies restricting the possibilities for options in the areas where the first stage allows a degree of flexibility or the possibility of derogating from certain provisions. With a view to laying down a common procedure, it would be necessary to restrict the scope for flexibility given to the Member States as regards powers at first instance and on appeal (common concept of independence from political authorities, for example), procedures governing admissibility, expedited procedures and procedures at borders. And it might be possible to achieve some convergence in national interpretations of flexible norms, such as those governing time limits.

Certain concepts, such as those of safe countries of origin and third countries, would remain to be defined at a future date. Several options are possible: the adoption of common lists or the abandonment of the concepts. Enlargement of the European Union is one factor to be taken into account.

Finally, the need to legislate on other aspects not covered by the first stage will have to be considered (e.g. rules on the quality of the examination of requests and of decisions, treatment of documents filed by the applicant, translation of documents, method and duration of interviews, hearing on appeal).

2.2 The single procedure

Certain Member States have already opted for the "one-stop-shop" type of procedure and many of those that are preparing amendments to their asylum legislation are moving this way. The purpose of the one-stop-shop is to centralise the examination of all protection needs at a single place so as to assure the applicant that no form of persecution or risk is ignored and also to reduce the time taken to examine the request for international protection. In addition to the examination of the asylum application under the Geneva Convention, if the application is rejected, the body will examine the application in terms of one or other complementary form of protection. This is in distinction to a practice whereby the examination under the Geneva Convention, if the result is rejection at the final appeal stage, is followed by fresh examination in terms of subsidiary protection, in many cases by another authority. Thus could be seen as a great contribution to the common procedure.

Even so, establishing a procedure such as this entails consideration of several questions:

- Is there a risk of downgrading recognition of refuge status under the Geneva Convention, and if so, how can this be avoided: perhaps through obligations to examine applications at various hierarchical levels (obligation to examine an application first of all on the basis of the Geneva Convention's criteria and to close the case if they are met, followed by other forms of protection if they are not), accompanied by obligations as to the reasons to be given?
- How should the appeal procedure and the procedure for objections by the applicant if his request under the Geneva Convention is rejected be handled, even where subsidiary protection is granted?
- Should certain obstacles to removal from the territory be excluded from this procedure?

The Commission will launch a study to serve as a basis for further reflection.

2.3 Access to the territory

2.3.1 Visas and external border controls

Certain common approaches could be adopted to policies on visas and external border controls to take account of the specific aspects of asylum. The questions to be looked at in depth include re-introducing the visa requirement for third-country nationals who are normally exempt, in order to combat a sudden mass influx, facilitating the visa procedure in specific situations to be determined, and taking account of international protection needs in legitimate measures to combat illegal immigration and trafficking in human beings, along the lines of the protocols to the United Nations Convention on transnational organised crime.

2.3.2 Requests for asylum made outside the European Union and resettlement

Processing the request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by a resettlement scheme are ways of offering rapid access to protection without refugees being at the mercy of illegal immigration or trafficking gangs or having to wait years for recognition of their status. Only four Union Member States currently operate resettlement schemes, in conjunction with the HCR. The USA has a typical two-tier asylum procedure: one for spontaneous arrivals and one, very different, based on a resettlement scheme, based on tight internal coordination between the various public authorities involved and cooperation with NGOs and the HCR. This option, as the Commission sees it, must be complementary and without prejudice to proper treatment of individual requests expressed by spontaneous arrivals. The examination of these options in the context of a common asylum procedure requires prior consideration of a number of questions: role of the authorities in the Member States, diplomatic missions in regions of origin, Community institutions and the HCR, resultant costs and investments, conditions for examination of requests, choice of regions or countries of origin, scope in terms of protection (confined to refugees within the meaning of the Geneva Convention or extension to persons needing another form of international protection), quotas and distribution over the Member States, relationship with requests made in the context of the resettlement programme and spontaneous requests made in a Member State of the European Union, etc. The Commission will conduct feasibility studies.

2.4 The consequences for the conditions for reception of asylum-seekers

A common procedure as such does not mean a uniform system of conditions for the reception of asylum-seekers. The Commission considers that the need to harmonise reception conditions is tied up with two main objectives: offering asylum-seekers an equivalent level of living conditions throughout the Community (irrespective of the Member State where they are) and avoiding secondary movements based on a difference in the conditions in different Member States. The Commission will make a first-stage legislative proposal early in 2001.

At a second stage, it will be necessary to consider whether, if the objectives considered above have been attained by the adoption of minimum standards regarding reception conditions, it is also necessary to embark on further stages of standardisation of national reception systems on the basis of the same method as described at point 2.1 (limitation of options, convergence of national interpretations of flexible rules, introduction of new elements). A common procedure will bring more people than before within the scope of reception systems upstream of a final decision on the need for protection, particularly if the option of a single procedure is selected.

All applicants for international protection (and not just asylum-seekers under the Geneva Convention) would follow an identical procedure and receive the same treatment in reception terms.

2.5 The criteria and mechanisms for responsibility for examination of asylum requests

The adoption of a common procedure and a uniform status should help to put the question of solidarity between Member States in a new perspective. It would reduce the impact of the phenomenon of "asylum shopping" that is widely criticised in many quarters and the frequency of the secondary movements that are associated with it. But the Commission is aware that the demand for solidarity is present today. An initial response was offered by the establishment of the European Refugee Fund, and the debate should continue in the negotiations on the proposal for a directive on temporary protection in the event of a mass influx of displaced persons.

Establishing common standards regarding reception conditions, asylum procedures and rules for admission to international protection will thus help to reduce secondary movements. But this will not remove the need to set up clear and efficient mechanisms governing responsibility for examining asylum requests. There will still be factors that cause flows of asylum-seekers to be unequal as between Member States, such as the language factor and the presence of relatives or a national community. The Commission is currently engaged in evaluating the implementation of the Dublin Convention and in spring 2001 will be proposing a first-stage Community instrument to replace it. Several solutions are possible; they were described in Commission working document SEC(2000)522.

The instrument to replace the Dublin Convention is likely to follow the same underlying principles as the current Convention with improvements based on experience. But in the context of establishing a common procedure and a uniform status, a system where the only criterion is the place where the request was made, backed up by a simple mechanism for taking applicants back with support from Eurodac, would be easier to envisage than it is now.

2.6 Returns

A policy on returns or effective removal from the territory is an absolute necessity for the credibility of the common asylum system and the common procedure. Where an applicant for protection has had the benefit of a fair and full procedure in which all forms of need for international protection and all obstacles to return have been considered, his application has been rejected and he has no other right of residence, he must leave the territory and return to his country of origin or go to a third country. Otherwise the entire procedure for admission and examination of the asylum request is in jeopardy, especially when a large number of persons file unwarranted asylum requests. The effective implementation of this principle of return will contribute to the effectiveness of the asylum system and protect its integrity. Common principles could, if necessary, be developed for the European Union. Priority must be given to voluntary returns. The Commission's hope is that the use of the European Refugee Fund will provide an incentive to the development of programmes here. But voluntary returns must be accompanied by enforced returns where this is necessary, to lend credibility to the asylum system and the policy of effective removal. It may be that recognised refugees and persons enjoying forms of international protection wish to return voluntarily although they are still legally entitled to remain in the host country.
While bearing in mind that the return is based on the personal wish to leave the host country, the returnee's efforts can be given proper support by the Community. Common guidelines could also be adopted at Union level to accompany such returns in coordinated fashion where appropriate.

PART III: ONE OR MORE UNIFORM STATUSES VALID THROUGHOUT THE UNION

3.1 Common interpretation of refugee status and of the need for international protection

In 2001 the Commission will present legislative proposals to approximate the rules governing the recognition and content of refugee status and forms of subsidiary protection offering an appropriate status. At the end of this first stage, and whatever the result, it will be necessary to consider whether mechanisms can be developed to correct certain differences that might remain or to prevent the phenomenon of divergent interpretation of Community rules. An applicant for protection must be able to be reasonably certain that, whichever Member State he approaches, he will enjoy equivalent chances of obtaining proper protection.
Part IV suggests a number of elements that could help to limit differences of interpretation. However one of the status options would be for the Member States to have at their disposal at least one form of subsidiary protection enabling a person to obtain this status while he would be able to obtain refugee status in another Member State and thus ensure that he will not be seriously penalised. The level of the rights attaching to this subsidiary protection is thus of capital importance.

The Member States will have to bring their arrangements for identifying needs for protection and their conditions for ceasing to provide it into line if the common system is to work, especially if there is a movement towards mutual recognition of negative decisions and common forms of cooperation for implementing such decisions. A common interpretation of the grounds for removing protection is therefore crucial. Taking the case of subsidiary protection given to a major category of persons from the same third country and then

removed in one Member State but not in another, there would be a negative effect in terms of secondary movements and the whole concept of a uniform status valid throughout the Union would be distorted. The global consultations process on which the HCR recently embarked will, of course, influence the European Union's process.

3.2 The outlines of one or more uniform personal statuses

3.2.1 Transpose the Geneva refugee status into Community law?

Recognition of refugee status is mandatory for all parties to the Geneva Convention. The rights and entitlement enjoyed by refugees within the meaning of the Geneva Convention are prescribed by the Convention, and all the Member States are bound to respect them. The point is not to replace them with a regional scheme but to transpose them as appropriate into Community law, in particular in the light of the harmonisation of third country nationals' rights, the objective of uniform application of these rights, freedom of movement and the right of residence in another Member State and progress in constructing a Community corpus of fundamental rights.

3.2.2 One or more subsidiary statuses?

Although refugee status is not necessarily definitive under the Geneva Convention, the needs for protection that subsidiary forms of protection meet are generally available for shorter time-spans. They also commonly meet individual protection needs that can be highly specific and, in parallel, collective situations (situations of widespread violence, for example). Several uniform forms of protection, modulated as to the terms on which they cease, can thus be envisaged. The point will be to consider whether the form or forms of subsidiary protection should contain rights that vary according to the grounds or duration of admission or whether such variations would make the asylum system unnecessarily complicated.

3.2.3 A single status?

A single status, conferring the same types of rights on refugees recognised under the Geneva Convention and on persons enjoying subsidiary protection might be an option as a means of simplifying the system and practice and of amplifying the one-stop-shop option in order to avoid systematic appeals against rejection of requests for recognition on the basis of the Geneva Convention. The point will be to consider how to avoid such a status distorting the rights attaching to conventional refugee status, the obvious option being to confer the same type of rights as are conferred by, in particular, the Geneva Convention. Consideration might also be given to the question of modulating the duration.

3.3 Documents, rights, freedom of movement and right of residence in another Member State

The basic reference set of rights conferred on persons enjoying protection must be the rights conferred on third country nationals residing lawfully in the European Union, which must in their turn be comparable to the rights of the citizens of the Union. But it will be necessary to consider to what extent the rights conferred on persons enjoying protection should reflect specific considerations in view of the protection situation, the vulnerability of these persons and the fact that they have not left their community of origin of their own free will. Access to employment or to self-employed activities, conditions for acquisition of a work permit or exemption from it, access to social rights (social protection and assistance), education and

health care (sometimes calling for a special approach in view of the vulnerability of certain protected persons due to the experience of political persecution or prison, torture and the circumstances of their flight) are components of the status to be harmonised, along with family reunification and the type of status to be given to reunited family members. The Commission made proposals here in December 1999. One or more uniform statuses would also entail residence and travel documents with harmonised duration, format and renewal conditions.

The conditions for residence in a Member State will have to be considered. For example, in the case of a refugee in the conventional sense who is eligible for long-term residence, the uniform status valid throughout the Union might entail the possibility of settling in another Member State after a certain number of years or travelling there to pursue studies or training. The conditions should be equivalent to those imposed on European Union citizens (conditions as to resources or employment might be imposed). Questions concerning transfers of protection between Member States or cessation of protection will have to be studied in this context, as will mechanisms for the provision of information and the transmission of documentation built up during the examination of the refugee's request if he changes his place of residence. In the context of a uniform status valid throughout the Union, there are legitimate questions about the need for the continued existence of all the mechanisms for transferring responsibility established by the European Agreement on Transfer of Responsibility for Refugees or by bilateral agreements between Member States. The Commission will launch a study.

These rights do not exclude the application of measures linked to preservation of public order and national security in the Member States, always in compliance with the principle of non-refoulement. In the context of the uniform status, it is also necessary to consider the problem of combating discrimination on the basis of Article 13 of the Treaty establishing the European Community.

The Commission recalls in particular that, following the Council agreement on the package of non-discrimination measures, the Community has undertaken to give effect to the principle of equal treatment without distinction on the basis of race, ethnic origin, religion or beliefs, disability, age or sexual orientation. The two Directives implementing the principle apply also to third-country nationals and stateless persons residing lawfully in the Union and thus supply a sound basis for protection of persons enjoying international protection.

3.4 Integration and access to nationality

Refugees and persons enjoying protection should benefit from and contribute to integration policies in such conditions that there is equivalent equality of opportunities in all the Member States, taking account of the diversity and specific features of initiatives in local communities and civil society. The right to employment is obviously crucial here, but sometimes there will have to be targeted measures to help persons enjoying protection to integrate into the labour market, for example special education and training measures. Community initiatives such as the Equal programme and the European Refugee Fund could accompany national measures. The European Union must take advantage of the talents that refugees have to offer, including their professional skills.

At the same time, integration measures need to be balanced with the need for certain refugees and persons enjoying protection to prepare their return to their country of origin. Common approaches could be adopted in order to offer a long-term solution where it is not possible to return, even after several years.

There are no provisions in the EC Treaty relating to access to nationality. But the Tampere conclusions state that the European Council 'endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident'. The Geneva Convention requires States parties to Council of Europe, Strasbourg, 1980; the Member States of the European Union are not all parties. Facilitate the acquisition of nationality (article 34). The Commission is favourably disposed towards the development of a common thinking on this. In the longer term, this common thinking could extend to offering a form of civic citizenship, based on the EC Treaty, inspired by the Charter of Fundamental Rights and consisting of a set of rights and duties offered to third-country nationals.

Successful integration of refugees and other persons enjoying protection demands a propitious political environment. Some Member States have recently experienced racist and xenophobic reactions against refugees and asylum-seekers. Political leaders and the media have a crucial role in leading public opinion and must avoid all statements that might provoke racist feeling.

PART IV: COMMON ANALYSES

The points set out at Parts II and III will call for a large-scale effort in terms of information, evaluation, statistics and integration of certain aspects of external policies so that common analyses can underlie the common procedure and the uniform status.

4.1 Information, exchanges and common evaluations

The national authorities and appellate bodies must have access to a great variety of sources of information and evaluation in order to apply the norms and principles adopted by the Community and to gain a convergent awareness of the risks, protection needs and situations in countries of origin, to review the quality of their decisions in depth, to compare practices and to adopt the best of them. This depends on development of common rules on the exchange of information on countries of origin and transit, a harmonised policy on the purpose of such information in individual decisions and the asylum procedure in general, and the conclusions to be drawn from the information in the examination of requests. Common information exchange rules would enable the authorities in the Member States to share in full trust information gathered in countries of origin and transit on the general situation and human rights violations observed there. To that end, networks will have to be set up to facilitate permanent contacts and, where necessary, day-to-day relationships between basic authorities responsible for examining asylum requests in the Member States and the Member States' embassies in third countries. Subsequent initiatives for joint reporting on the basis of a range of information sources, including international and non-governmental organisations, could also help prepare the ground for a common approach.

If this exchange of information is to serve a useful purpose, the result must be available to case-workers in basic authorities as a basis for decisions in individual cases. Common rules could be devised on confidentiality and references to sources in the decisions. Looking beyond the gathering, dissemination and utilisation of all this information, thought might be given to developing mechanisms for the joint evaluation of its consequences for the treatment of cases. A common assessment of the risks for certain categories of asylum-seekers could engender guidelines for action at European level. This would require close cooperation between national authorities. These mechanisms might then generate Council

decisions identifying the groups or situations where there are or are not special risks. The effect of these decisions would not be to confer an automatic right to protection or to prompt automatic rejections, but they would enlighten the daily practice of the authorities responsible for processing requests.

New mechanisms for cooperation between national authorities, bodies responsible for the examination of requests and appeals will be indispensable. The functions of these mechanisms could be: compiling and exchanging information (using computerised tools), analysing statistics, early warning systems, rapid information on national and Community administrative and judicial decisions, the exchange of good practice, and case-studies extending to "sentencing",[3] the ongoing training of staff processing requests, common evaluation of the situation in countries of origin and transit and specific situations of persecution or otherwise generating a need for international protection. A long-term objective might be a database coupled with a translation facility. The Commission would take these objectives into account when preparing the administrative cooperation instrument to succeed the Odysseus programme in 2002.

In 1992, the Council set up an informal information exchange and consultation group (with no decision-making powers) called CIREA.4 Its objective is to facilitate the coordination and harmonisation of asylum policies and practices. The Commission is actively involved. There are good grounds for wondering whether the CIREA still meets the need of a common European asylum system and a fortiori a common asylum procedure and a uniform status. Clearly it is becoming more and more difficult to achieve common evaluations, and the results so far have rarely filtered through to the staff who actually process requests.

4.2 An area for priority action: statistics

Establishing and implementing the common European asylum system require an in-depth analysis of the scale of migratory flows, their origins and the characteristics of requests for protection and the response to them. These analyses must be a tool in the service of asylum policy as a means of preparing the requisite instruments or reacting to flows more quickly and even in advance, or of making such reforms as are found to be necessary. In the European Union, statistics on asylum have been gathered gradually in the CIREA context. In mid-1998, the Council called on the Commission to do the actual gathering and to give greater depth to the work of bringing the underlying concepts into closer convergence. The work is done on a restricted-access basis, but Eurostat publishes all public data in its New Cronos database, which is universally accessible.

Although data-gathering is gradually improving, much remains to be improved. For one thing, it inevitably reflects the lack of a common procedure and of comparable statuses. But there is more to it than that. The statistical exercise has not yet been acknowledged to deserve priority in many Member States. In some Member States, even in the purely national context, the national authorities have only a superficial perception of the data on asylum, since they lack the tools or have not gathered certain data. The Commission receives data that come late or are incomplete, or sometimes not at all. The first stages of implementation of the European Refugee Fund as regards the allocation of funds as between the Member States have highlighted a large number of difficulties in supplying data and then in drawing meaningful comparisons.

Apart from improvements to the process of gathering data on the basis of the evaluation already made by the Commission, the time now seems ripe for strategic thinking on the

needs for statistics in support of decision-making and the development of analytical capacities. In this context, sound cooperation with international organisations such as the HCR or the Centre for Information, Reflection and Exchange on Asylum
Geneva-based Inter-Governmental Consultations (IGC) that are also working on the statistical aspect would also be helpful for the European Union.

4.3 External policy aspects

A common procedure and a uniform status entail even greater mobilisation of the external policy means of action available to the Union, for example in gathering and exchanging information on countries of origin, monitoring flows and the human rights situation, monitoring reconstruction and humanitarian aid in countries and regions of origin. The Union's diplomatic missions could be asked to play a role here.

The examination of the specific situation in a given country or area of origin, following an integrated method, can offer valuable new insights for the authorities that examine requests. And the common procedure and the uniform status could have the effect of further developing the Community's external powers.

PART V: A POSSIBLE ARCHITECTURE AND AN EXAMINATION METHOD

5.1 The concept of "the longer term"

In the run-up to the Tampere European Council, the Commission supported the establishment of a single European asylum system. The European Council saw fit to specify that the European asylum system should begin with a first (short-term) stage, followed by a second stage ('in the longer term'). Beginning in 2001, the Union's legislative agenda, based on Commission proposals, should provide the Council with the opportunity to demonstrate its capacity to give effect to its short-term commitments under the Treaty, the Vienna action plan and the Tampere conclusions. The instruments must be adopted before 1 May 2004, but they must also be transposed into national law. The life expectancy of the provisions currently proposed or in preparation must be long enough to permit an initial pattern of convergence and to found a certain number of conclusions, possibly proceeding from an initial series of Community court decisions. This is not to say that the first-stage instruments will ignore the longer-term objective. The ambitiousness of the first series of proposed minimum standards is and will remain high. In each of its proposals, the Commission plans possible links with subsequent stages.

The duration of the first stage will be predicated on the rhythm of the work done. But the Council will always, if it so wishes, be able to move to the second stage ahead of time. Can a common procedure and a uniform status be devised on the basis of the current text of the Treaty? As the Commission sees it, the concept of minimum standards does not necessarily imply an unambitious approach as to the scope of the measures taken on the basis of the Treaty. But it must be borne in mind that responding adequately to the Tampere European Council's mandate will depend on a broad interpretation of the concept of minimum standards.

5.2 Means

The Commission believes that a common procedure and a uniform status cannot be based on legislative instruments and techniques alone. It has identified a series of instruments and actions whose development will enable the content of the common procedure and the uniform status to be built up gradually. These instruments and actions include:

- the first-stage initiatives. The harmonisation that is sought will, at this first stage, have the typical features of Community law. Implementation reports (provided for by the basic instruments) must be prepared at regular intervals. The Commission can also organise ad hoc meetings of experts;

- the operation of contact committees or coordination groups set up to monitor the application of the legislative instruments (see the recent proposals on temporary protection in the event of a mass influx of displaced persons and on asylum procedures). These committees can facilitate the transposal and harmonised application of the relevant provisions by means of regular consultations on possible practical problems. They can facilitate consultations between Member States on more stringent or additional national measures which they may have taken;

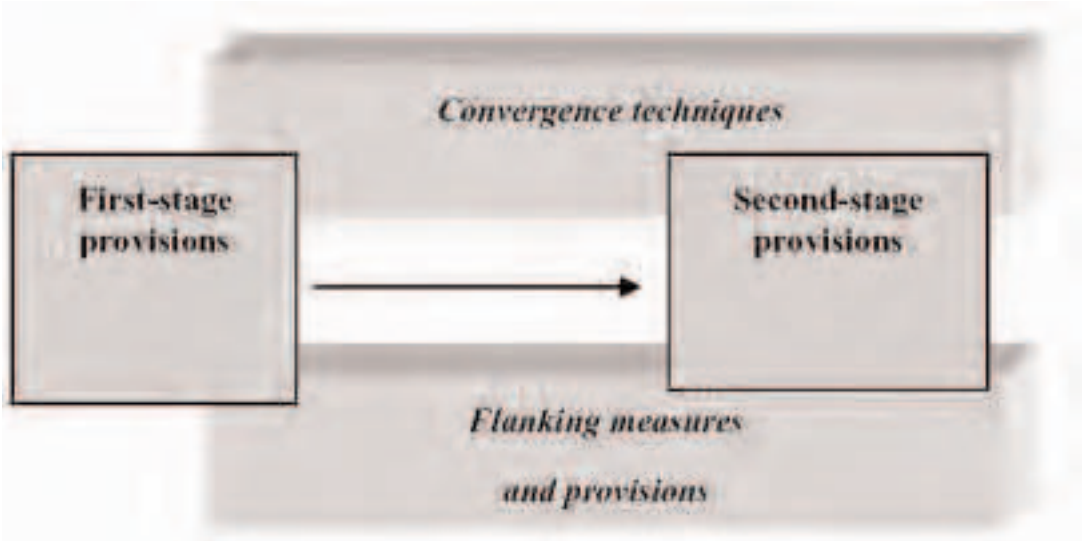
- the development of the case-law of the national and European courts. Monitoring the application of Community law (notification of national measures by the Member States, followed by complaints, infringements and caselaw of the European Court of Justice) will inspire a process of convergence and harmonisation in the service of the common procedure and the uniform status;

- studies on a number of options;

- the development of analytical tools;

- the development of forms of administrative cooperation.

The Commission could undertake to take stock each year of progress in implementing these various actions and to produce recommendations for future action. The objective of preserving the specific features of humanitarian admission to the European Union must be safeguarded, but that does not prevent the Community from using, in its rules and measures, common instruments governing the admission and residence of third-country nationals where there is no valid reason for making a distinction. This has always been the spirit behind Community action, for example when refugees were brought into the scope of the 1971 Social Security Regulation5 and when the Commission recently presented its proposal for a directive on family reunification. This could be done either by including them within the scope of an instrument or by a form of cross-reference. 5 Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ No L 28, 30/01/97 (consolidated version).



5.3 Partnership with the Office of the High Commissioner for Refugees and civil society

The HCR will have to be consulted on European Union initiatives for a common procedure and a uniform status. The Commission notes that the HCR has started a global consultations process on reinforcing the international protection system and that European thinking on the common procedure and uniform status is relevant to that process. Thought will have to be given to the role of the HCR in implementing the various components (rules or mechanisms) of the common procedure and uniform status.

A common procedure and a uniform status should be the occasion for reconsidering the relationship between the Community, the Geneva Convention and the international organisations that draft the basic documents on protection (e.g. the HCR Executive Committee, International Committee of the Red Cross). Common positions will have to be worked out in all cases. The effect of the common procedure and the uniform status could be to extend the Community's external powers.

Representatives of civil society, associations, non-governmental organisations and local authorities and communities must also be partners in the new system as actors and vectors of asylum values in Europe.

5.4 Resolute follow-up to the communication

The adoption of a common asylum procedure and a uniform status, valid throughout the Union, for persons who are given asylum, is one of the most ambitious objectives set by the Heads of State or Government and is a core component of the area of freedom, security and justice. The aim is to give practical expression to the fundamental values that are so attractive to those who are deprived of them elsewhere in the world. Based on the international human rights instruments, in particular the Geneva Convention, they will round off the establishment of a common European asylum system reconciling the needs for simplification, fairness, transparency, effectiveness and speed, the contradictions between which are often no more than superficial. There will inevitably be an impact on other aspects of asylum policy, particularly in terms of the way in which solidarity between Member States is expressed and of the conditions for reception and integration. Assuming that new analytical tools are

developed and that administrative cooperation is enhanced, the new architecture can draw valuable input from the first efforts at alignment that began immediately after the Tampere conclusions. Careful basic preparation will be needed, but it should then be possible to move rapidly towards the objective, especially as it has become apparent that the right of asylum badly needs consolidating in the changing world at the start of this new millennium. With this communication the Commission is seeking to respond to the mandate given by the European Council in paragraph 15 of the Tampere conclusions. It wishes the debate to be conducted resolutely and regularly in all the proper forums so that clear guidelines can emerge. The European Council, which gave the mandate, should in any event return to the question when the time comes for the mid-term review at Brussels in December 2001 and, if appropriate, before the end of the transitional stage provided for by Article 67 of the EC Treaty. There should also be an annual strategic review by the Council, as described at point 5.2, on the basis of a Commission report.

In parallel with these follow-up activities, the Commission will embark on a series of practical measures:

- very early in 2001, a joint technical and political initiative with the Member States, at the instigation of the Swedish Presidency, in conjunction with other relevant organisations, to substantially improve the quality of statistics on asylum;
- in 2001 an initiative for a new Community programme to succeed ODYSSEUS in 2002, focusing primarily on cooperation between national authorities with responsibilities for asylum in particular;
- studies on the "one-stop-shop" option; asylum requests made outside the European Union and a resettlement scheme at EU level; the question of transfers of responsibility for protection between Member States.

The Commission accordingly proposes that for the development of the common procedure and uniform status there should be a method involving the establishment of strategic guidelines, the definition of "landmarks", the setting of objectives and agreement on an assessment procedure for progress reporting, without prejudice to the exercise of Community legislative powers, following as closely as possible the policy objectives set. In this context, the Commission could prepare annual reports containing recommendations. This method presupposes not only mobilising the Community institutions and the Member States but also the development of close partnership with international and national governmental and non-governmental players concerned with the common asylum policy.

To conclude, the Commission emphasises that in asylum matters, short-term measures must always be set in the context of a stable, foreseeable policy that is guided by long-term objectives. The framework designed at Tampere, for both the first and the second stages, provides the possibility of doing so. This process must also be guided by a concern for transparency so that there can be a wide-ranging public debate involving the European Parliament and civil society, which will reinforce support for the measures adopted.

ANNEX

Towards a common European asylum system

- EURODAC Regulation on finger-printing asylum-seekers, which should be adopted in the coming weeks (Commission proposal: spring 1999);

- Directive on family reunification, which also covers refugees (Commission proposal: December 1999);

- Decision on a European Refugee Fund (adopted by the Council in September 2000, proposed by the Commission in December 1999);

- Directive on temporary protection in the event of a mass influx of displaced persons (Commission proposal: May 2000);

- Directive on asylum procedures (granting and withdrawal of refugee status), (Commission proposal: September 2000);

- Directive on reception conditions for asylum-seekers (Commission proposal: before March 2001);

- Regulation on criteria and mechanisms for determining the State responsible for examining asylum requests (Community instrument to replace the Dublin Convention), (Commission proposal: spring 2001);

- Directive on recognition and content of refugee status (Commission proposal: second half of 2001);

- Directive on subsidiary forms of protection offering appropriate status (Commission proposal: second half of 2001);

- Third countries of origin and transit: follow-up to Nice European Council report;

- Mobilisation on collection of statistics relating to asylum on the basis of the collection which started in late 1998 (first half of 2001);

- Initiative on a new Community programme to replace the ODYSSEUS programme in 2002 (end of current programme: 2001), focusing principally on cooperation between national authorities in the field of asylum (Commission proposal: in 2001);

- Launching of studies on: the one-stop-shop option; requests for asylum outside the European

Union and an EU-level resettlement programme; the question of transfers of responsibility for protection between Member States.

UNHCR'S POSITION

United Nations High Commissioner for Refugees towards a common asylum procedure and uniform status, valid throughout the European Union, for persons granted asylum

Geneva
November 2001

UNHCR observations on the European Commission Communication "Towards a common asylum procedure and uniform status, valid throughout the European Union, for persons granted asylum" (COM (2000) 755 final)

Introduction

1. UNHCR welcomes the publication of the Commission Communication on a common asylum procedure and uniform status for persons granted asylum, issued by the European Commission on 22 November 2000. UNHCR believes the document, published jointly with a Communication on the prospects of a common European immigration policy, contributes to the development of a more strategic and outward-looking approach to the development of a principled, coherent asylum policy in Europe.

2. UNHCR agrees with the stated objectives and challenges of the common asylum procedure and uniform status, emphasising the imperative to maintain a rights-based approach to asylum and the need to develop a common asylum system in parallel to common measures reinforcing the Union's capacity for migration management. UNHCR cautions that the basic principles of a common asylum procedure and uniform status should not be subjugated to the social, economic and demographic requirements of a common migration policy. Nor should any measures to fight against forms of serious organised and trans-national crime, including terrorism, interfere with fundamental rights and freedoms, including the right to seek and enjoy asylum.

3. UNHCR recalls that harmonisation of procedural and material asylum law not only serves the interests of Member States in limiting secondary movements, but also contributes to fair and non-discriminatory treatment of refugees and asylum-seekers. Where asylum-seekers have only once chance to have their application examined by one of the EU Member States, the standards , tools and mechanisms governing Member States' procedures and systems need to be harmonised if equal treatment is to be assured.

4. UNHCR welcomes the general approach of the Communication by presenting the further harmonisation of Member States' asylum systems as a necessary contribution to the process of strengthening the international protection framework, by reaffirming and where necessary complementing the 1951 Convention, streamlining asylum procedures, and achieving more uniformity in refugee status.

The single procedure

5. In its preliminary observations to the Communication , UNHCR welcomed the proposal to consider the establishment of a single procedure in each of the Member States in order to determine all protection needs in their totality rather than in a compartmentalised fashion. UNHCR reiterates its view that a fair operation of such a single procedure is to be premised on a common understanding of what constitutes a valid asylum claim. From UNHCR's perspective, a valid asylum claim can be lodged by persons coming within the scope of the 1951 Convention and 1967 Protocol as well as persons fleeing the indiscriminate effects of armed conflict or generalised violence (even where no specific element of persecution is recorded).

6. Furthermore, in implementing such a single procedure, each application for asylum must be assessed in a certain sequence, starting with an examination in respect of the provisions of the 1951 Convention, to be followed by an analysis of the possible application of provisions of other international human rights instruments, as well as, where appropriate, an assessment of humanitarian grounds militating against return. The examination of all needs for protection should be undertaken by a single qualified and competent body, and include a possibility to review the decision not to grant Convention status and, instead, offer a subsidiary status. UNHCR agrees that the examination of circumstances not related to protection needs yet which render return impossible is best left to the discretion of Member States and does not need to be part of the single procedure, or, generally, of the harmonisation of procedural asylum law.

7. UNHCR believes that the establishment of a single procedure will contribute to rendering asylum procedures swifter, more efficient and more cost-effective. This is also to the benefit of the asylum-seeker who otherwise may have to wait for a sometimes unacceptable long period before a decision on his application is to be taken and, should such decision be negative, will have difficulty to leave the country where asylum was sought.

Access to territory and admission to the procedure

8. Among the key elements of the common asylum procedure, the Communication raises the issues of access to territory and admission to the asylum procedure, in combination with visa policy and external border controls. UNHCR reiterates its concern that the Tampere European Council's commitment to the absolute respect of the right to seek asylum is in jeopardy if no adequate safeguards are put in place to mitigate the negative effects of migration control measures on people who need protection and are seeking access to safety in the European Union. The question of access to territory is indeed key to any asylum process; having the best asylum procedure and the most generous refugee status is of no use unless refugees can actually gain access to territory and admission to the procedures.

9. The Commission proposes that certain common approaches can be adopted to Member States' visas and border control measures as a contribution to better manage access to their asylum systems, including the imposition of visas in case of actual or imminent large scale influx. UNHCR, however, would caution against linking the issue of visas, and generally measures related to border control and management, and the need for providing access to safety by those fleeing persecution or conflict. In situations of large-scale influx, asylum-seekers should be admitted into safety at least on a temporary

basis and be offered protection as long as required, and visa policy should not interfere with such measures for protection .

10. The Communication also refers to the possibilities for facilitating the visa procedure in specific situations. In the view of UNHCR, this could include the delivery of humanitarian visa to individuals who are at risk in their country of origin and in need of international protection. UNHCR would welcome the adoption of a common European approach to the delivery of such humanitarian visa as a means to help persons at risk to seek safety on EU territory, yet such approach should be developed as a protection measure rather than an instrument of migration management and border control.

Processing in the region

11. UNHCR believes there is merit in the Commission's proposal to explore the possibilities for future EU support for the establishment of processing schemes in countries neighbouring countries producing larger groups of refugees. In so far such processing in the region would, as the Communication suggests, be undertaken as a prelude to resettlement towards EU Member States, it should be recalled that screening in the region - like organised refugee reception through resettlement - is a complement to, not a replacement of, Member States obligations to examine asylum applications of those who seek protection on their territory. Processing protection needs with a view to subsequent resettlement should not be limited to an assessment of applications in regard to the 1951 Convention and 1967 Protocol but should include applications in relation to the extended definition of a refugee as applied by UNHCR under its mandate. This means that, in addition to those who qualify for protection under the 1951 Convention and 1967 Protocol, those who have fled indiscriminate violence arising in situations of war or conflict could also be accepted as refugees and as eligible for resettlement.

12. In so far EU support for processing in the region is intended as an element of asylum capacity-building in countries in the region enabling these countries to examine asylum applications and offer protection as long as required, it should be recalled that refugee status determination is and remains the responsibility of host Governments, and that such activity is to be based on agreed standards and be guided by tools and mechanisms as developed in inter alia the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Conclusions of the UNHCR Executive Committee. Programmes of co-operation aimed at assisting host Governments to process asylum applications should include the involvement of UNHCR and implementing partners.

13. EU support for processing asylum applications as part of asylum system development in the region should be complemented with assistance to enhance the capacities of host countries to provide reception and protection, as long as required, to those who have received a positive decision, in order to ensure their physical safety, legal security and socio-economic well-being. Processing schemes should be developed as part of a comprehensive approach to asylum capacity-building which includes the adoption of a comprehensive legislative framework, institution-building activity and the enhancement of practitioner capacity.

Determining responsibility for examining an asylum application

14. The Communication calls for a reflection on the need for a revision of the Dublin mechanism in the context of establishing a common procedure for the admissibility of asylum claims, yet so far this has not resulted in a change in approach taken in the Commission's proposal for a Community legislative instrument which is to succeed the Dublin Convention. UNHCR has advocated a system where the responsibility for considering an asylum application lies with the Member State with which and in whose jurisdiction the claim is lodged, and where, in case of transfer to another Member State, such transfer is only justified in cases where the asylum applicant has meaningful links or connections with that Member State. Such a system is considered to be fairer and more cost-effective than the present one as is also borne out by the recent evaluation of the Dublin system conducted by the Commission..

15. Where EU Member States, in operating a system for allocating responsibility for the examination of asylum request, allow an asylum-seekers only one chance to have his or her application processed, the applicant should be ensured fair and non-discriminatory treatment throughout the European Union. UNHCR emphasises that the credibility of any mechanism for transfer of responsibility is contingent upon the existence of harmonised standards in several substantive and procedural areas of asylum, such as a common procedure and a uniform interpretation of the "refugee" definition .

Common standards, tools and mechanisms for the asylum procedure

16. UNHCR agrees with the Commission that the adoption of the legislative package of common minimum standards in asylum policy and practice, as required by Article 63 of the Amsterdam Treaty, can be considered as a significant step forward in the EU harmonisation process, provided a broad interpretation and detailed content is given to the notion of "minimum standard". UNHCR believes that the proper implementation of the Amsterdam asylum proposals, once adopted, will require regular review and, where necessary, supplementary legislation and implementing regulations. UNHCR therefore welcomes the establishment of review and co-ordination bodies (such as Contact Committees) which can facilitate consultations between Member States on the proper application of the Community legislative instruments in asylum. UNHCR also believes the development of case-law by national courts and the European Court of Justice in relation to the interpretation and application of Community asylum instruments can contribute to further harmonisation.

17. The Communication does not include much detail as regards possible options and scenarios for further harmonisation or even standardisation of the tools and mechanisms used in Member States' asylum procedures. Where this will be undertaken in future, e.g. through studies, the development of analytical tools, or strengthening of administrative co-operation, UNHCR hopes that future proposals will be based on high standards of protection and represent a sufficient level of detail. It should be recalled that the proposal for a Directive on minimum standards for asylum procedures allows Member States a large margin of discretion whether or not to use certain procedural concepts and devices, which may undermine the carefully construed body of international principles of procedural asylum law .

18. UNHCR believes that the new areas of competence of the EC Court of Justice under Article 68 of the Amsterdam Treaty may help to further standardise asylum processes in

EU Member States, provided the EC Court of Justice will reinforce and expand doctrine and jurisprudence in key elements of procedural and material asylum law as established by inter alia the European Court of Human Rights. Should national courts or the EC Court of Justice be seized for a ruling on the interpretation or application of any of the Community asylum instruments, UNHCR stands ready to submit its views in the exercise of its supervisory role as regards the interpretation and application of refugee instruments.

19. UNHCR supports the Commission's proposal to improve, initially through the strengthening of networks at the level of both senior policy makers and practitioners, the collection and dissemination of comprehensive, accurate, objective and up-to-date information on asylum statistics, country of origin information and the application of legal and protection principles in Member States' asylum processes and their consequences for the treatment of individual applications. UNHCR would expect to be closely associated with any future such networks and contribute actively to the joint evaluation of country situations and the application of specific protection or legal principles.

20. In the longer term, UNHCR would favour the establishment of a European documentation centre for the collection, dissemination and evaluation of country of origin information, as well as legal and protection issues and trends. Such a centre should, to the extent possible, work in all openness and transparency and be accessible to policy-makers, practitioners, international organisations, NGO representatives and academics. UNHCR may be given a role in the governing structures of such a centre and participate in expert meetings, and its information and guidance should be made available through this centre to the administrative and judicial asylum bodies in all Member States.

21. UNHCR supports the Commission in its efforts to promote closer co-operation between EU Member States, EU institutions and international organisations in the area of data collection and trends analysis. It stands ready to assist in the drafting of Action Plans and the proposed EU Annual Report in this area, as well as in the preparation of future Community legislation to improve the exchange, analysis and comparability of these statistics. Moreover, UNHCR is willing to co-operate with the EU Commission and Member States in training officials in candidate countries for the collection, analysis and dissemination of asylum statistics. UNHCR calls on the Commission and the Member States to explore the possibilities for the standardisation of the collection and analysis of Member States' asylum and migration data, possibly through the establishment of a central, specialised statistical office.

The uniform status

22. Where the European Union would consider introducing in the longer term a uniform refugee status for all who qualify as being in need of protection, such status should not dilute, let alone replace, refugee status based on the 1951 Convention. UNHCR would have difficulty with the introduction of a uniform status which would insufficiently respect the specificity and distinct nature of the Convention refugee status, which has an international dimension and produces extra-territorial effects. Refugee status must be formally declared if States are to fulfil their obligations under the Convention specificity and distinct nature of the Convention refugee status .

23. UNHCR supports EU proposals, as part of efforts to harmonise the rights and benefits of persons in need of protection yet not covered by the provisions of the 1951 Convention, to assimilate as much as possible the standards of treatment of persons falling under the broader refugee definition to those applicable to Convention refugees . The question of what rights and benefits refugees should be accorded in order to live in dignity until a durable solution is found for them should be based on their needs rather than on the grounds on which their refugeehood has been established. UNHCR recalls that any differences which may occur between the treatment of Convention refugees and others in need of protection can - in the case of Convention refugees - only stem from the direct applicability of international refugee instruments rather than national - or, in future, Community - law provisions.

24. UNHCR supports the call of the Tampere Summit to offer long-term residents the opportunity to obtain the nationality of the Member State in which they have such status. To the extent that corresponding legislative instruments will address the situation of refugees among long-term residents, such a call is in line with Article 34 of the 1951 Convention, which urges asylum states to facilitate assimilation and naturalisation of refugees.

25. A future EC legislative instrument on the resident status and rights of long-term third-country nationals within the EU should, in UNHCR's view, include provisions on the treatment of those benefiting from subsidiary protection, similar to provisions safeguarding the rights of refugees. The needs of persons benefiting from subsidiary protection are, in many ways, similar to those of refugees. This is particularly relevant where persons exercise their right to freedom of movement within the EU. Both refugees and beneficiaries of subsidiary protection should be entitled to equal and non-discriminatory treatment as regards their resident status, rights and entitlements once they have moved to another Member State.

Resettlement

26. UNHCR welcomes the proposal to explore the possibilities for a common EU resettlement scheme as a significant initiative aimed at achieving a more orderly and balanced intake of refugees by EU Member States. Such a scheme should particularly heed the protection needs of vulnerable groups and, in addition to refugees within the meaning of the 1951 Convention and 1967 Protocol, cover for the needs of those who fall within the extended "refugee" definition as applied under the UNHCR mandate.

27. A common resettlement policy must be considered on its own merits, as one of the durable solutions for refugee challenges, and, hence, must not be confused with mechanisms aimed at regulating access to the territory of Member States. UNHCR would have preferred to see the issue of resettlement referred to in a separate chapter of the Communication rather than listed under the heading of "access to the territory". Resettlement and asylum are two distinct and separate responsibilities, and, as the Communication states, resettlement must be considered as complementary and without prejudice to proper treatment of asylum applications lodged spontaneously at the borders or on the territory of EU Member States.

28. In developing a common resettlement policy a number of questions need to be addressed, such as the method of selection, the identification of categories of persons eligible for resettlement, and registration of those to be resettled in countries of first

asylum. Moreover, agreement needs to be reached on a number of measures to be implemented within Member States such as on immediate and essential services to be provided to resettled refugees, criteria governing placement of resettled refugees, the role of Government departments, NGOs and others in the delivery of resettlement programmes, the level and scope of standards of treatment, financing arrangements, and integration programmes for groups with special needs.

External policy aspects

29. UNHCR agrees with the increased attention for the external dimension of the developing common asylum system, as also referred to in the Communication. UNHCR favours the inclusion of a meaningful asylum component in EU programmes for assistance to, and co-operation with, third countries. Such assistance and co-operation must be based on a proper identification of the needs and priorities of beneficiary countries. This is particularly the case for pre-accession assistance to candidate countries.

30. UNHCR believes the external policy aspects of the common asylum system must be addressed within a comprehensive strategy framework, which should include addressing the root causes of refugee flight, strengthening emergency preparedness and response, providing effective protection and achieving durable solutions. Partnership with countries of origin and in the neighbouring region is an essential element of such strategies, which must involve all relevant actors, including international organisations and civil society.

31. UNHCR believes that the issue of responsibility-sharing and solidarity deserves particular attention in developing the external dimension of the future EU common asylum system. The issue should not be limited to situations of large scale influx or to seeking a balance in the intake of asylum-seekers and refugees within the European Union only - it should also be addressed from a global perspective and in a comprehensive manner. This should include Community measures towards countries of origin and transit, such as preventative action, emergency preparedness, as well as asylum capacity-building in the region; Community support for EU Member States faced with considerable numbers of asylum-seekers seeking protection on their territory; and Community contributions to durable solutions, aimed at the integration of refugees and resettlement in EU Member States.

32. Developing a common approach to burden-sharing and solidarity both within the European Union and between the European Union and other regions should be aimed at strengthening the respect for principles of refugee protection and the maintenance of the integrity of States' asylum systems, and should not be used as an instrument of migration control. Any EU contribution to enhance the protection capacities of countries neighbouring countries of origin is to be part of a concerted effort of all relevant actors, including States, international organisations, regional bodies, financial institutions, non-governmental organisations and civil society. Access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place.

Return

33. Where the outcome of the asylum procedure is rejection of the application, UNHCR supports efforts to develop a common approach to return, which can contribute to

preserve the integrity of States' screening procedures. UNHCR agrees that priority must always be given to voluntary return. Member States' fulfilment of their obligations towards refugees cannot be made dependent of the existence or effective implementation of return programmes.

34. UNHCR supports EU efforts to raise the importance of the return issue on the agenda of dialogue with countries of origin where these countries are responsible - but often unwilling - to take back their citizens, including unsuccessful asylum-seekers, and where they should do so with due respect for the fundamental rights and basic needs of the persons to be returned. Such dialogue may have to include the brokering of return agreements including monitoring arrangements and reintegration assistance. Proper implementation of such agreements should allow for sustainable reintegration in the country of origin and not cause frictions with members of the local community who have stayed behind.

Institutional aspects

35. UNHCR welcomes the references in the Communication to the need for strengthened partnership in developing the European asylum agenda further. UNHCR has appreciated the fruitful co-operation with the Commission so far in preparing for the various legislative instruments, and looks forward to continued co-operation in regard to the proposed Community asylum initiatives for the longer term. UNHCR partnership with the European Commission is based on Declaration No. 17 to the Amsterdam Treaty and has been given a more formal status through an exchange of letters concluded in July 2000.

36. UNHCR counts on close co-operation with the European Union where the latter will be implementing the various elements of the Commission Communication, given UNHCR's responsibilities vis-à-vis asylum-seekers and its long-standing co-operation with asylum bodies. It also expects to support the drawing up of expert studies, and participate, where appropriate, in future Community programmes in asylum, including those in support of common resettlement schemes, in preparations for additional legislative instruments as part of the common procedure and uniform status, or in monitoring the development of a body of Community case-law in asylum. Such participation, however, is conditional on the availability of sufficient financial support from the European Union.

37. UNHCR is also prepared to participate, on an ad-hoc basis, and in an expert capacity, in any Contact Committees or co-ordination groups to be established to monitor the application of future Community framework legislation in the asylum law and practice of Member States. These committees, tasked with facilitating the transposal and harmonised application of relevant legislative provisions, could benefit from policy guidance and expert advice from UNHCR, whether requested or offered spontaneously.

38. UNHCR agrees with the Commission that further harmonisation of EU asylum policy will raise questions regarding the relationship between the developing Community asylum legislation and international standards for refugee protection, including the 1951 Convention. It will also put forward the question of the representation of the Community in international and regional organisations active in the field of asylum, including UNHCR's Executive Committee. UNHCR believes that the developing Community legislation can contribute considerably to the advancement of international refugee protection principles. Conversely, UNHCR hopes that the developing EU asylum policy will be constructively informed by inter alia the present process of the Global

Consultations launched in the 50th anniversary year of the 1951 Convention and aimed at revitalizing the international protection framework..

39. In the longer term the question of accession by the European Community to the 1951 Convention and 1967 Protocol may come to the fore as a consequence of the delegation of significant part of Member States' responsibilities in asylum to the Community. At the moment it remains unclear whether Community law actually permits the Community to accede to the 1951 Convention and 1967 Protocol. Moreover, for such accession to take place, an amendment of the 1951 Convention would be required as, under Article 39 of that instrument, only States can become parties to it.

UNHCR
Geneva, November 2001

European Commission Communication on the common asylum policy and the Agenda for protection, COM (2003) 152 final, 26 March 2003

Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for protection

(Second Commission report on the implementation of Communication COM(2000) 755 final of 22 November 2000)

Brussels, 26.03.2003
COM(2003)152 final

CONTENTS

INTRODUCTION

The report period (December 2001 to February 2003) was an important period in getting the common European asylum system up and running. As can be seen from the Annex to this Communication, significant progress was made in implementing the legislative programme for the first phase, determined by the conclusions of the Tampere European Council, and in developing support measures to flesh out this new policy. But progress still lagged behind, even if it met the deadlines set by the Seville European Council. Moreover the price to be paid for it was sometimes a reduction in the effectiveness of the harmonisation or a very low level of agreed standards. The need for unanimous adoption of Community instruments is the main cause, while the difficulty met by the Member States in abandoning their national agendas is another. Beyond the progress made with the Nice Treaty, proceedings at the Convention and the Commission's contribution particularly highlighted this problem. It is very highly desirable that the Council learn the lessons of this stage of the negotiations so that the instruments still on the table can be adopted in 2003. The Directive on asylum procedures is a major item here.

Achievement of the commitments given at Tampere is well in hand. The bases for the second stage of harmonisation, which is ultimately to yield a common asylum procedure and a uniform status, are now being laid by an important series of studies, the reinforcement of forms of administrative cooperation and the establishment of convergence tools such as the Immigration and Asylum Committee and EURASIL. But the crisis in the asylum system is more and more striking in certain Member States, and there is a growing malaise in public opinion. Abuse of asylum procedures is on the rise, as are hybrid migratory flows, often maintained by trafficking practices involving both people with a legitimate need for international protection and migrants using asylum procedures to gain access to the Member States to improve their economic situation. The number of negative decisions after examination of needs for international protection remain significant. This phenomenon, which is a real threat to the institution of asylum and more generally for Europe's humanitarian tradition, demands a structural response. There is a priority need for more resolute action on the underlying causes; the Commission presented its proposals on 3 December 2002 with its Communication on the integration of migration-related questions in the European Union's relations with third countries. And the Commission has made proposals for controlled legal immigration channels on the basis of its Communication of 22 November 2000 on a Community immigration policy. The Commission will shortly be offering new suggestions on the different forms of interaction between immigration, integration policies and social and employment policies.

Regarding asylum policy, there is now a manifest need to explore new avenues to complement the stage-by-stage approach adopted at Tampere. The question arises whether the Member States could better deploy the major human and financial resources which, partly supported by the European Refugee Fund, they devote to receiving displaced persons in the context of often lengthy procedures that regularly culminate in negative decisions requiring repatriation after a long wait. Three complementary objectives should now be pursued to improve the management of asylum in the context of an enlarged Europe: improvement of the quality of decisions ("frontloading") in the European Union; consolidation of protection capacities in the region of origin; treatment of protection requests as close as possible to needs, which presupposes regulating access to the Union by establishing protected entry schemes and resettlement programmes.

Thinking here falls in the context of the implementation of the Agenda for Protection, established by the international community after two years' worldwide consultations. It aims

to offer a response to today's challenges in the governance of the refugee problem around the world faced with difficulties of applying international protection rules in a situation where there are hybrid migratory flows and ongoing persecutions, risks and dangers forcing millions of people to go into exile where they need protection. Now that the European asylum system has reached critical mass, and thanks to its capacities for external action and search for new channels, the European Union now has significant tools with which to improve its responses to the new challenges and to implement the multilateral Agenda for protection in which the Commission identifies three major priorities: access to protection, durable solutions and better responsibility-sharing with third countries. The European Union ought to be a key actor for the Agenda's long-term success.

1. THE BACKGROUND TO THE ADOPTION OF THE AGENDA FOR PROTECTION AND ITS IMPACT ON THE EUROPEAN UNION

The relevance and primacy of the Geneva Convention confirmed

The worldwide consultations launched in December 2000, just before the 50th anniversary of the 1951 Geneva Convention on refugee status, are a response to the new challenges facing international protection and the HCR. There was a particularly urgent need for solutions reaffirming the relevance and universality of the Convention at the dawn of the XXIst Century, and for clarification as regards the application of certain of its provisions and identification of what elements were missing from the Convention which would help to develop better protection and management of migratory flows and durable solutions. The outcome of this process was the approval by the HCR Executive Committee in autumn 2002 of an Agenda for Protection, a multilateral instrument standing on two pillars. The first is a declaration by the States Parties to the Geneva Convention and its Protocol at the Ministerial Conference in Switzerland in December 2001 to mark the 50th anniversary of the Convention.

The Declaration reasserts the central role played by the Convention in the international protection system. The second establishes an action programme covering six Goals, each subdivided into several objectives:

(1) Strengthening the implementation of the 1951 Convention and 1967 Protocol;
(2) Protecting refugees within broader migratory movements;
(3) Sharing burdens and responsibilities more equitably and building capacities to receive refugees;
(4) Addressing security-related concerns more effectively;
(5) Redoubling the search for durable solutions;
(6) Meeting the protection needs of refugee women and refugee children.

Beyond certain differences, the first of which is obviously the number of refugees received, many southern or medium-developed countries are facing the same problems of managing hybrid migratory flows and matching protection systems to needs as exist in the western countries. Particular attention has been drawn to the interaction between questions of crisis prevention and management, respect for human rights, development, integration or reintegration of refugee populations.

The proposals of the High Commissioner for Refugees for the Convention Plus

In the context of the adoption of the Agenda for Protection, the United Nations High Commissioner for Refugees rapidly called on the international community to consider his ideas, assembled under the name "Convention Plus". Following up the Agenda, the objective of this concept is to improve the operation of the Geneva Convention, boost solidarity and extend the management of asylum-related migratory flows by means of modernised instruments or policies. It acknowledges that the asylum and international protection system can come under serious threat if it is used for other purposes or repeatedly misused, notably by networks of traffickers in human beings. The High Commissioner more particularly developed this topic when addressing European Ministers and the Commission at the informal Council meeting in Copenhagen in September 2002. Among other things he proposed:

(1) The conclusion of special agreements with a view to:
   – Plans of action to ensure more effective and predictable responses to mass influx;
   – Targeted development assistance to achieve more equitable burden–sharing and to promote self–reliance of refugees and returnees in host countries and communities, facilitating local integration in remote areas and countries of origin in the context of reintegration;
   – Multilateral resettlement commitments;
   – Roles and responsibilities of countries of origin, transit and destination in "irregular" or "secondary movement" situations (multilateral readmission arrangements; capacity–building; extraterritorial protection arrangements in a responsibility–sharing framework);
(2) Cooperation from the HCR to help States expedite asylum procedures and improve the quality of the examination of asylum requests by:
   – Identifying safe countries of origin and safe third countries;
   – Information on countries of origin;
   – Monitoring the case-law in the Member States.

The HCR accepts that the concept of special agreements is still rather vague and will have to be clarified, particularly in the Forum set up for the purpose, which is to meet for the first time in Geneva in June 2003.

The issues involved for the European Union and the multilateral protection system

The EU Member States and the Commission were involved in the work and supported the adoption of the Agenda. They welcomed the spirit of the High Commissioner's proposals, and in particular the pro-active approach to finding solutions to difficulties that sometimes tarnished the credibility of the institution of asylum. The European harmonisation process and the Agenda for Protection were mutually boosting. The Tampere conclusions, the negotiations for Community legislation, and the Commission proposals in the communications of November 2000 on the long-term objectives of asylum policy and on the European immigration policy all operated as input for the Agenda.

Today the critical mass attained by the Community in protection policy enable it to implement a large number of objectives already identified by the Agenda. The European Community can continue to upgrade its body of rules and practice in the near future. For the HCR and third

countries, useful precedents can be established on the basis of it. Difficulties met in negotiating or applying it will also provide food for thought.

The second stage of harmonisation in Europe as developed by the Commission in November 2000 calls for more modern means of action and an ever more important interface between the internal process and the external aspect of the governance of refugees. The European common asylum system cannot basically be improved without integrating overall problems and deepening the multilateral protection system. By the same token, the Commission is convinced that the success of the Agenda for Protection depends heavily on Europe's ambition as regards its common asylum policy and the results it generates.

In this context, the question of burden and responsibility-sharing must not be seen solely in terms of spreading financial or physical burdens but also of multifaceted solutions and in qualitative terms. The objectives here should be to better manage the asylum system in general and to offer effective and appropriate protection solutions on the basis of mastering and regulating asylum-related flows in their European territorial dimension and in regions of origin. It will be decisive that the European Union develop a genuine policy of partnership with third countries and relevant international organisations. Protected entry schemes in the European Union for persons in need of international protection could be developed in parallel.

The concept of protection in the region of origin, which has hitherto been behind a large number of misunderstandings and controversies, could be integrated into an overall architecture offering solutions that are not mutually exclusive. Respect for the European Union's international obligations and those of its Member States should also underlie such solutions.

2. PRIORITIES FOR THE EUROPEAN UNION

The point now is to implement the Agenda so as to bring about the practical and operational conditions for a better international protection system. Each country, region or organisation concerned must incorporate the programme's objectives in its policy and legislative agenda. But priorities for action need to be defined. The various aims, objectives and measures identified in the action programme are interdependent, but the Commission is proposing three priority themes for the European Union. They should make it possible to deal with most of the questions raised by the Agenda for Protection and the Convention Plus concept and to lay a basis for the development of a better responsibility-sharing with third countries.

2.1 Access to protection

The Agenda for Protection includes a wide range of measures to promote access to protection in order to:

– better apply the Geneva Convention and offer suitable forms of international protection to meet all protection needs;
– improve asylum procedures, reception conditions and registration and identification schemes, respect for refugees and their protection in the management of hybrid migratory flows;

– enhance the fight against trafficking in human beings and knowledge of migratory flows;
– reinforce institutional capacities in cooperation and solidarity and responses to largescale influxes;
– offer a better response to questions of security and the needs of women and children.

The basic components put in place by the European Community for access to protection, directly relevant for the implementation of the Agenda for Protection, are:

– more harmonised, integrated and comprehensive application of the Geneva Convention and a reduction of differing interpretations of the concept of refugee;
– parallel provision of subsidiary protection to cover all the needs for international protection;
– fairer, faster and more efficient asylum procedures;
– basic standards for the reception of asylum-seekers;
– a better identification system using EURODAC, but also a better registration system applying a number of standards included in legislative instruments (asylum procedures, reception conditions, temporary protection);
– a policy against discrimination, racism and xenophobia, through legislation and awareness measures;
– clearer sharing of responsibilities between Member States for the examination of asylum requests;
– a determined fight against trafficking in human beings through Community accession to the Protocols to the UN Convention of Palermo on transnational organised crime and the adoption of legislative and financial instruments;
– establishment of analysis and exchange tools on migratory flows;
– solidarity mechanisms and reinforcement of asylum capacities and, ultimately, capacities for external border controls and the management of illegal migratory flows;
– stronger dialogue and partnership with third countries;
– a common mechanism to manage large-scale influxes of displaced persons through temporary protection;
– domestic security requirements and the situation of minors and gender questions to be taken into account in legislative instruments and in programmes.

Better access to protection in Europe must go hand in hand with a regulated and more transparent framework for a policy on admissions, including for employment purposes. The Commission restates the importance it attaches to practical progress on the basis of its proposals here, both for legislation and for the coordination of employment and admission policies, in partnership with third countries.

Various developments are conceivable in a dynamic perspective for the months ahead to promote synergies between the reinforcement of the common European asylum system as an integrated regional system in context of enlargement from 2004, and the universal implementation of the Agenda for Protection and the practical realisation of the ideas of the High Commissioner for Refugees summed up as the Convention Plus concept.

Regarding the application of the Geneva Convention, the Commission recalls that the establishment of the common European asylum system is based primarily on the adoption of Community legislative instruments. One of the objectives of the main Community instrument is to narrow divergences of interpretation in the implementation of the convention's rules on recognition of refugee status. There are different ways of doing this: meetings of contact committees to review the application of the directive on the definition and status of refugee, prerogatives of the Commission and the European Court of Justice in

ensuring compliance with Community law. Here the HCR could intervene in cases before the national courts and the European Court of Justice in preliminary ruling proceedings under Article 234 of the EC Treaty. If it is pointed out that there remain wide divergences of interpretation of the rules governing refugee status under the directive, that would be clear evidence that there is inadequate harmonisation in terms of the objective of a uniform status. The Commission should draw the conclusions and produce a legislative proposal. The Eurasil Network (see Annex, point 4) of representatives of appeal bodies in the Member States could also lay a role under Commission guidance. The Commission will consider ways and means of involving the HCR in this.

Regarding asylum procedures, and without prejudice to the outcome of the current negotiations on the first phase of harmonisation here, the European Community must go more thoroughly into its response to two major challenges: the quality of the examination of applications, and the speed of procedures. The Commission will intensify its work on "frontloading", in particular through further study of the question of the one-stop-shop begun in November 2000. It will be mindful of the results of a study launched by the Commission, the results of which have been available since January 2003. This study describes the current practices of Member States and a few other countries (Switzerland, Canada) and observes a tendency to include subsidiary protection among the procedures for determining refugee status in the past decade. The study examines the advantages and disadvantages of the one-stop-shop method. It emphasises that there is growing support for this concept in the Member States, the HCR and elsewhere, despite substantial differences of detail between national practices.

The use of the concepts of safe countries of origin and safe third countries to expedite procedures and focus on the persons with the greatest needs, should be given a legislative basis for the first time by the end of 2003 on the basis of the Commission's amended proposal. The Council adopted conclusions on the two concepts in October and November 2002. On 13 November 2002, Austria took the initiative of proposing a Regulation establishing the criteria for determining the States which qualify as safe third States for the purpose of taking the responsibility for examining an application for asylum lodged in a Member State by a third country national and drawing up a list of safe third States[1] in Europe. The Council has agreed to consider the initiative in connection with its work on the amended Commission proposal on asylum procedures.

As it is stated in its Communication of November 2000, the Commission has an open mind on this question as harmonisation is necessary in the context of the common asylum procedure. The harmonisation method proposed by the Commission in the first phase was realistic in view of the divergent practices of the Member States. But the Commission would be glad if discussions in the Council revealed a greater degree of political maturity in this respect and a more ambitious vision of harmonisation. Closer cooperation between the Community and the HCR regarding information about countries of origin and transit is essential. These concepts have been devised hitherto from a purely procedural angle. It is necessary to consider the link between them and the external policy on protection and relations with identified third countries. Thought might be given to adding, on a case-by-case basis, certain forms of partnership with these countries.

The problem of access to protection raises the core question of access to the territory.

The implementation of the Agenda for Protection should enable the European Union to study in closer detail the degree of compatibility of reinforcing the protection given to those who need it and respect for the principle of non-refoulement with the measures taken to combat

illegal immigration and trafficking in human beings and external border control measures. The Commission made its views on this known in its communication on illegal immigration and its Green Paper and Communication on a Community return policy on illegal immigrants. The question should be on the agenda of the Committee on Immigration and Asylum.

At the same time the Commission is planning to raise in the Council and the European Parliament the question of protected entry procedures, to complement the treatment of spontaneous arrivals by asylum-seekers in Europe, dealt with in the communication of November 2000 as possible scenarios in the context of an ambitious and integrated concept of the common asylum procedure.

A study launched for the Commission on external processing was delivered in December 2002. The study suggests that EU Member States should consider "protected entry procedures" as part of a comprehensive approach, complementary to existing territorial asylum systems. According to the authors, these procedures would constitute the most adequate response to the challenge of reconciling control objectives with the obligation of protecting refugees. It proposes to enrich existing visa policies with a protection dimension and to jointly create protection places. It also suggests offering a platform for the regional presence of the EU, integrating different dimensions of migration (determination procedures, protection solutions, labour migration and return as well as assistance to the region of origin) into a single tool, thus allowing the EU to manage them in a coordinated way. The study suggests disseminating best practices on an EU level and regulating the allocation of responsibility to process applications for protection visas among member states. The suggestions in this study should be examined and evaluated most carefully, particularly as regards the role of the Member States, who have not yet come to a consensus. The question of the precise role of the HCR will also have to be high on the agenda.

Presently, one third of the fifteen EU Member States practise Protected Entry Procedures on a formalised basis as a complementary channel. Six Member States allow access in exceptional cases and in an informal fashion. However, the present diversity and incoherence of Member States practice diminishe their actual impact. There is therefore a strong case for harmonisation in this area.

In conjunction with work on resettlement (see point 2.2) and more adequate external assistance to countries that first receive refugees, in consultation with the HCR among others, European developments in regulated management of access to international protection in the territory of the Member States should make it possible to make better use of public finances of which a sizeable proportion is currently devoted to meeting needs which go beyond those involved in receiving persons in need of international protection. At the same time, these developments would be powerful weapons in the fight against trafficking in human beings as traffickers would lose much of their competitive advantage in terms of access to the European Union. The regional platform idea might be worth exploring further as a means of providing effective protection and a response to genuine requests for international protection with offers of durable solutions. The conclusion of special agreements could also be considered here. The Commission will put the topic on the agenda for the Committee on Immigration and Asylum.

2.2 Durable solutions

The search for durable solutions is the objective that unites the Agenda for Protection and the Convention Plus. There are three durable solutions that have traditionally been identified

by the international community to the problem of refugees: voluntary return, integration and resettlement.

Return policy

The Agenda for Protection states very clearly that priority is to establish the conditions in countries of origin by removing the reasons for leaving and allowing those forced into exile to return safely and durably, priority being given to voluntary returns. That demands both action in countries of origin and transit and a consistent approach in host countries. At the same time, returns may not be the only durable solution, particularly in the event of a protracted refugee situation. The Agenda also states that the long-term credibility of the asylum system must be based on the return of people who no longer need international protection and have no other grounds for residing legally.

The first elements of a common European approach were adopted in the plan of action against illegal immigration in February 2002 and the plan on returns in November 2002 following the Commission's Green Paper and Communications[2] and in the policy on readmission followed by the European Community; the Green Paper and communication on the policy on returns specified conditions for durability and laid the bases for an integrated approach including preparation for the return, training and assistance with employment, various forms of assistance with the journey back to the country of origin and or reintegration, and follow-up and assistance after the return.

The plan of action on returns confirms that the European Union must establish an approach of its own to integrated returns. These programmes should cover all stages of the return procedure, namely the stage preceding departure, return itself, reception and integration in the country of return. These integrated return programmes should be devised country by country, so as to reflect specific situations, the number of persons concerned and the needs of the relevant countries. The adoption of the EU return plan for Afghans in November 2002 must be seen as a first practical attempt to tackle a specific geographical problem. The Commission is particularly attentive to the sustainability of the planned returns, to consistency between Community support and a broader international perspective regarding the reconstruction of Afghanistan and cooperation with the relevant third countries and international organisations, in particular HCR. The results of applying this plan will have to be studied to see what can be learnt in terms of efficiency and partnership with third parties, particularly in the context of the debate on the concept of special agreements.

Hitherto priority has generally been given to repatriation of illegal residents, but the concept of the return as a durable solution is obviously a broader one. The Commission considers that the European Union must go into further detail as to its approach here in the context of the common asylum policy. This component will have to be taken into account in the discussion on a possible Community financial instrument for returns. With an eye to a common asylum procedure and a uniform status, it would also be worth developing common analyses on the persistence of major obstacles to the return of certain groups of people in the Union to ensure that members of such groups are not repatriated from certain Member States when they probably would not have been from others. The participation of the European Union in genuine international strategies and partnerships for returns could be further developed.

Integration in the host society

The Agenda for Protection provides for measures to promote local integration through socio-economic measures, attention for the specific needs of refugees though also of host populations, with the possibility that rights as to status and residence could go so far as naturalisation in countries of asylum and support for autonomy.

A distinction must be made between the problems of integration in host societies in the European Union and in regions of origin. At the same time, if the European Union wishes to remain consistent with its interest in reception policies in regions of origin, it must be attentive to integration needs in host countries there (see point 2.3).

Internally, the basic elements put in place by the Union for the integration of people enjoying protection in the Member States begin with a Community legislative framework consolidating the status and residence rights of persons given protection, plus elements of long-term residence and family reunification. At the present stage of the harmonisation process the need has not been felt to establish wholly comparable norms for refugees and persons enjoying subsidiary protection. This will have to be borne in mind in work on the uniform status. Moreover, the objectives of the European Union set at Tampere and fleshed out in the Council conclusions of 14 October 2002 are fair treatment for third-country nationals residing legally and harmonisation of their legal status on that of Member-State nationals in terms of both rights and obligations.

Although the fact that persons enjoying international protection have been forced into exile, certain specific needs generated by the reasons for which they have opted for exile and the rights conferred by the Geneva Convention are all factors that must be taken into account, the challenges of integration are much the same as for other migrants from third countries and for host societies in relation to questions such as nationality, citizenship and respect for diversity, social policy and access to the employment market, education and training. In spring 2003 the Commission will make some proposals for an integration policy, setting it in the context of the European social and employment policy. The necessary equilibrium between horizontal measures and specific measures for the integration of these people will have to be examined here.

In 2003, with a view to further facilitating the movement of refugees in the European Union and to feed reflections on the long-term objective of a uniform status valid throughout the Union, the Commission will launch the final study announced in its Communication of November 2000 on the transfer of protection status. Results should be available early in 2004.

Resettlement schemes

Resettlement consists of transferring refugees from a first host country to a second, generally a developed country, where they enjoy guarantees of protection, including legal residence, and prospects for integration and autonomy. The Agenda for Protection calls for more strategic use of resettlement schemes to meet objectives of better protection for certain specific individual needs, durable solutions for groups of refugees, greater solidarity in the reception of refugees and better organisation of the legal entry of refugees in host countries.

The Commission contemplates the resettlement option as one of the instruments of the common asylum policy and procedure. It has launched a study, the results if which are

expected for the autumn of 2003. In the European Union, less than half the Member States have set up structural resettlement schemes, whereas others can be described as emerging resettlement countries. A third group of Member States agree to receive refugees for resettlement on an ad hoc basis in very limited numbers. There are no common guidelines in the Union for the moment.

The Commission accordingly proposes to launch two new lines of activity. First, it propose using the financial instruments for European solidarity and cooperation in asylum matters. In the implementation of Community financial instruments it will seek to provide support and encouragement for national and Community projects (priority action in the 2003 call for proposals for Community action in the ERF, special budget remark in the 2004 PDB for national ERF programmes, cooperation under the 2003 Argo framework programme, actions under the 2003 call for proposals under line B7-667 for cooperation with third countries on asylum and migration). At the same time the Commission will take the initiative in the Immigration and Asylum Committee of launching a policy debate on the contribution made by resettlement to the common asylum policy, the exchange of good practices and even the feasibility of specific European instruments, including legislative instruments. The role of the HCR and other partners will be considered. The question of resettlement will also have to be taken into account in the debate on integration policy.

The Commission considers that only a common approach will create the necessary political and operational basis that will produce beneficial effects on terms for access to European territory and allow resettlement to be used for strategic purposes both to assist the European Union and to attain the objectives of the Agenda for Protection. It will enable it to enter into such agreements as may be needed. The Commission will announce more detailed conclusions in a communication at the end of 2003.

2.3 Towards shared responsibilities with third countries

Sharing burdens and responsibilities more equitably in managing refugees is another objective of the Agenda for Protection. Responsibility-sharing arrangements are mentioned as a means of relieving the burdens borne by the first countries of asylum, as well as more effective cooperation to reinforce the protection capacities of countries receiving refugees, stronger partnership with civil society, the involvement of refugee communities, mainstreaming the question of refugees in national, regional and multilateral development agendas and effective use of resettlement.

The instruments of the European external protection policy

Better access to protection for persons in need of international protection, the search for durable solutions and solidarity with third countries all call for the mobilisation of a vast range of external actions, be they political, economic or in the form of more effective financial and technical assistance, in the spirit of the Tampere and Seville conclusions. The European Union already has major trump cards which it can play better and better in the light of the various objectives of the programme of action in the Agenda for Protection. They are set out in the Commission communication of 3 December 2002 "Integrating migration questions in the European Union's relations with third countries",[3] which stresses the burden of receiving refugees borne by developing host countries, particularly in the event of protracted situations. Special attention has been paid to this dimension in the management of external financial instruments such as aid to uprooted persons. Measures to assist certain vulnerable groups or

reinforce protection or re-integration capacities in host countries or countries of origin have also been programmed on the basis of various other instruments. In the framework of the pilot phase of preparatory measures on co-operation with third countries in the areas of asylum and migration (budget line B7-667), a number of projects relating to protection and capacity-building are being supported (such as assistance to Turkey on the development of the asylum system and assistance to Afghanistan on capacity building and a returnee monitoring data base).

The main aim of Community humanitarian aid managed by ECHO is to assist the victims of natural and human disasters in third countries. It is unconditional, neutral and impartial and is supplied solely on the basis of the needs of the populations concerned. One of the specific objectives is to deal with the human consequences of movements of refugees and displaced or repatriated persons in third countries in compliance with the principles set out above. Community action focuses on protection and subsistence needs of refugees so long as the humanitarian needs engendered by the crisis subsist. In appropriate cases Community assistance can also serve to support refuges' voluntary return to their country of origin with safety and dignity. Likewise, schemes for resettling refugees from a country of refuge to another third country that agrees to take them can also be supported. Community action also serves to support the HCR's protection and assistance mandate. In October 2002, the Commission took a major decision worth €11 million to support the HCR in the protection and registration of refugees and safety of humanitarian workers, which is within objectives 1 and 4 of the programme of action of the Agenda for Protection.

The means of achieving more effective cooperation and assistance

Active support for a revamped approach to international protection depends on much heavier involvement of third countries of first reception and transit and more serious consideration for constraints linked to returns and re-integration. This priority will have to be taken into consideration in the general effort announced by the Commission in its Communication of 3 December 2002. Following on from its analyses and proposals in the communication, the Commission will endeavour, when necessary, having regard to the guidelines set out in the communication, to integrate the new dimension brought to the governance of refugees and displaced persons by the Agenda for Protection into the component features of the common European asylum system, the political dialogue with third countries, the examination of Country and Regional Strategy Papers and the programming and targeting of Community aid.

These different areas of activity could be refocused in a consistent and structured approach that would improve international responsibility-sharing in the governance of refugees.

Therefore, it is the intention of the Commission to give migration, including international protection concerns, attention on a case by case basis in the Country and Regional Strategy Papers process, with which Member States are associated. Incorporating asylum in these papers through the normal programming dialogue process should ensure full involvement and commitment by the country or region concerned as well as differentiation and prioritisation according to needs and policy situation. The Country Strategy Papers mid-term review, which will begin in 2003, will give the opportunity to examine the extent to which greater priority should be given to specific programmes dealing with asylum. But it must be borne in mind that that there is only limited room for manoeuvre with the available resources and that competing priorities will have to be offset against each other. In the follow-up to the budget line B7-667, the Commission intends to propose setting up and implementing from 2004 onwards a multi-annual programme designed both to provide a specific, additional

response to the needs encountered by third countries of origin and transit in their efforts to manage more effectively all aspects of migration flows, including those related to international protection.

But the Commission will be at pains to emphasise two factors:

– given the Community financial instruments available and the machinery for dialogue and programming with third countries receiving assistance, the initiative must also come from the national authorities there in connection with their commitments for the implementation of the Agenda;
– the Community's commitment must be accompanied by parallel mobilisation of the EU Member States in the bilateral aid context, and the Commission will see that there is closer coordination and consistency between bilateral and Community action.

The Commission also considers that it is for international financial institutions and United Nations agencies (not only the HCR but also the UNDP, OCHA, OHCHR, UNRWA, UNICEF, the WFP, WHO etc…), under the supervision of the Secretary-General, to better define the functions of each in improving the governance of refugees and to establish a strategic coordinated action plan to make practical improvements to the prospects for durable solutions in the application of each of these functions, having regard both to the fate awaiting refugees and to the capacities of the host countries and countries of origin concerned by flows related to asylum, integration and durable returns.

At any rate the Commission considers that the HCR, in coordination with other partners, should give priority to a clear analysis of the features of the crises linked with forced displacements and identify the management issues this raises and the solutions. The European Union could then identify a number of priorities in relation to the migratory flows that it has to manage but above all geographical priorities for Europe's external action. It considers that the HCR's examination of long-running refugee situations, in particular in Africa, should be dealt with as a matter of urgency.

Lastly, the implementation of the common European asylum system and the European Union's external action are thus powerful vectors for the implementation of the Agenda for Protection and the Convention Plus. The development of internal powers in matters of asylum should also enable the Community to develop external powers and to launch or take part in negotiations with third countries or partners on specific problems or situations. A stronger partnership with the HCR could accompany this process on the basis of existing forms of cooperation. The HCR has much to gain from regarding the European Union as a consistent entity in the medium term: this could be an incentive to make the most efficient use of the human and budgetary resources currently mobilised in the EU and the acceding countries and gradually redeploy them in areas where there is a greater need for protection and support for host countries and countries of origin. This factor could usefully be incorporated in the reflection launched by the High Commissioner in the HCR mandate for 2004. This cooperation could be accompanied by Community participation in special agreements, but the concept as presented by the HCR is at too much an embryonic stage for defining a fully elaborated Community approach. The Forum in June 2003 will be of decisive importance here.

CONCLUSIONS AND RECOMMENDATIONS

2003 will be a crucial year for the consolidation of the common European asylum system on the eve of enlargement of the Union. It will see the end of the first stage of harmonisation on the basis of the Commission's proposals. At the same time the second stage called for at Tampere will be sketched out, with the establishment of a common asylum procedure and a uniform status. In the spirit of the Agenda for Protection and the Convention Plus, the European Union must embark resolutely on a new approach to international protection based on better management of access for persons in need of international protection to the territory of the Member States and on consolidation of the possibilities for dealing with protection needs in the region of origin. The Commission, on the basis of, among other things, the results of a variety of studies already carried out, will embark on this, in close cooperation with the HCR, so as to lay operational proposals before the Council and the European Parliament before the end of the year.

The Commission accordingly requests the Council and the European Parliament to take note of its second report on the common asylum policy and:

– asks the Council to adopt all the first-stage harmonisation proposals in accordance with the deadlines by the Seville European Council, in particular the directive on asylum procedures where the question of safe countries of origin and third countries will demand special attention;
– invites the Council and Parliament to continue considering the question of an instrument to succeed the European Refugee Fund on the basis of the Commission report of 3 December 2002 on the effectiveness of Community financial resources;
– encourages the Member States to make the best use of the machinery for administrative cooperation on asylum (Argo, statistical programme) and to contribute actively to it, and undertakes to pursue the development of the Immigration and Asylum Committee and Eurasil as essential means of comparing analyses and practices to facilitate the identification of new priorities for the establishment of the common European asylum system;
– recommends that a common approach be devised to the implementation of the Agenda for Protection and the Convention Plus and that it be defended in the governing bodies of the Office of the High Commissioner for Refugees and its dialogue with that organisation;
– suggests that serious thought be given to possibilities offered by processing asylum applications outside the European Union and resettlement as instruments to complement a fair and efficient territorial asylum system in compliance with international obligations and with respect for dialogue and partnership with third countries;
– recommends that more detailed serious thought be given to the question of access to the territories of Member States for persons in need of international protection and compatibility between stronger protection for these people and respect for the principle of non-refoulement on the one hand and measures to combat illegal immigration, trafficking in human beings and external border control measures on the other; the Commission will enter this item on the agenda for the Immigration and Asylum Committee, where it will ensure that special attention is paid to the question of protected entry procedures on the basis of the results of the study already available and the separate but related problem of resettlement;
– invites the Council to look beyond the existing European Union action plan and give serious thought to a more operational definition of the content of integrated return programmes in the light of lessons learned from the implementation of the return programme for Afghanistan;

– wishes special attention to be paid to refugees and displaced persons in future work by the Community institutions on integration;
– invites the Council and Parliament to have regard to the contribution of developing countries in receiving refugees and applying international protection instruments and more generally to incorporate the international protection dimension more deeply into Europe's external policy on the basis of the Agenda for Protection; the Commission will consider the question in 2003 in the mid-term review of the country and regional strategy papers and will raise the objectives of the Agenda for Protection in its dialogue on questions of migration and cooperation with the relevant third countries.

ANNEX : IMPLEMENTATION OF THE FIRST-STAGE LEGISLATIVE PROGRAMME AND SUPPORT MEASURES

1. FIRST-STAGE LEGISLATION

Directive on the reception of asylum-seekers

The negotiation of the Reception Conditions Directive was given high priority under the Spanish Presidency. The Council defined a general approach on the text on 25 April 2002. The European Parliament also gave its opinion on the Commission's proposal also on 25 April 2002, proposing some important amendments. A political agreement on the Directive was achieved in December 2002 and the Directive was formally adopted on 27 January 2003[4].

The Directive is a first step in the approximation of standards. It provides for a legally binding Community framework and it will substantially improve the situation of the reception of asylum seekers. It will also contribute to a broader similarity of the national reception systems. However, there is no harmonisation on the issue of family members nor on the issue of access to vocational training. In addition the harmonisation on the issue of access to the labour market is quite minimal.

Dublin II Regulation

The Seville European Council asked for the regulation to be adopted by the end of 2002. On 9 April 2002 the European Parliament supported the Commission's approach. Political agreement was reached on the text of the Regulation in December 2002. The Regulation was formally adopted on 18 February 2003[5].

The Regulation is based on the same principles as the Dublin Convention that it supersedes: responsibility for examining an asylum request lies as a general rule with the Member State that played the greatest role in the asylum-seeker's entry. But, learning the lessons from applying the Convention, the Regulation shortens the procedural deadlines to help make asylum procedures more effective overall, lays responsibility at the door of a Member State that allows illegal residence situations to persist and contains new provisions to improve the possibilities for family unity.

At the same time the Joint Committee set up by Article 3 of the Agreement of 19 January 2001 between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway met twice in the second half of 2002 so that these two countries, now associated with the Schengen acquis and the Dublin Convention, could make their views known on the proposal. And on 12 August 2002 the Commission adopted a proposal for a negotiating mandate for the conclusion of a Protocol between the parties to the Agreement of 19 January 2001 enabling the Kingdom of Denmark to join the Agreement.

Proposal for a 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

The discussions on the Commission's proposal[6] within the Council commenced under the Spanish Presidency in June 2002. The Seville European Council of June 2002 set a deadline for adoption of the Directive by June 2003. Negotiations continued under the Danish Presidency and culminated at the November 2002 Justice and Home Affairs Council in a political agreement on a very substantial part of the rules in the Proposal, relating to the qualification for refugee and subsidiary protection status. It is therefore envisaged that the negotiations on the whole of the Directive will be concluded under the Greek Presidency, including the rules relating to the rights and benefits to be attached to a refugee and subsidiary protection status.

In an Opinion of 29 May 2002, the Economic and Social Committee supported the Commission's proposal, and welcomed in particular the concept of subsidiary protection. On 11 June 2002, the Committee of the Regions welcomed in its Opinion the Commission's commitment to the primacy of the 1951 Geneva Convention. The European Parliament adopted on 22 October 2002 a Resolution which proposes to amend the Directive on a number of issues, in particular in relation to the grounds for persecution, by adding the grounds "sexual orientation", "sex" and "membership of an ethnic group", and the grounds for subsidiary protection, by adding a risk of capital punishment or genital mutilation. Finally, it calls for parity of treatment of beneficiaries of refugee and subsidiary protection status, in particular where it relates to the duration of a residence permit, the issuing of travel documents, permission to work.

Proposal for a directive on asylum procedures

Following negotiations at expert level on the Commission proposal of 2000, the JHA Council adopted Conclusions on 7 and 8 December 2001 on the approach to be taken on the Council Directive. At the Laeken European Council, the Commission was then invited to put forward an amended proposal before the end of April 2002. In-depth consultations with the experts of the Member States enabled the Commission to put forward an amended proposal on 18 June 2002[7].

The amended proposal sets out a different structure for procedures in the first instance, inter alia introducing specific standards for examining applications lodged at the border and a procedure that allows Member States not to re-examine in depth certain repeat applications. Moreover, the obligation to introduce a two level appeal system is replaced with the right to an effective remedy before a court of law. The Council welcomed the amended proposal in an open debate on 15 October 2002. As the Seville European Council called on the Council to adopt a text by the end of 2003, negotiations are expected to continue throughout 2003.

2. Administrative cooperation and accompanying measures

Eurodac

The legal frame for the implementation of the EURODAC information system was completed

with the adoption by the Council of the implementing rules in February 2002[8]. The Commission started operational testing with the Member States in April 2002, the final set of volume tests with all Member States running until the end of 2002. The successful completion of these mandatory tests was a precondition for the declaration of readiness of all Member States, without which EURODAC would not have been able to start operations and to apply the Regulation effectively. The operations started on 15 January 2003. From that date to 2 March 2003, 238 "hits" were obtained and the trend steadily increases week by week.

The European Refugee Fund (ERF)

The resources of the European Refugee Fund (ERF) were increased by the Budgetary Authority in 2002 from the amount originally forecast. Consequently, new requests for cofinancing were presented by Member States at the beginning of 2002, which were approved by the Commission by Decision of 21 March 2002. From the information available on Member States' implementation of their national programmes, the following trends can be identified:

- as regards the calculation of annual allocations to Member States, the calculation methods contained in Article 10 of the Council Decision[9] have allowed an evolution of the share of funds between Member States along the evolution of the number of applications for asylum and of persons being granted refugee status or other form of international protection. The fixed amounts defined in Article 10(1) have had a positive effect in balancing the distribution of funds and taking into account the relative burden born by each country;
- in terms of implementation, after a few difficulties encountered by the Member States at the beginning of the programme, which were due in particular to the adoption of the Council Decision in September 2000, programme and project implementation have attained their full rhythm of implementation;
- overall, between 2000 and 2002, 49.44% of the funds were used by Member States to co-finance projects relating to the reception of asylum seekers, 28% to the integration of refugees and persons benefiting from subsidiary forms of protection, and 22.2% were allocated to voluntary return projects. The share of this last measure has substantially increased between 2000 (15.82%) to 2002 (24.45%).

The Commission has commissioned an independent evaluation of the first three years of the ERF, covering a full cycle of actions, which will be available during the third quarter of 2003. Furthermore, the Commission presented to the Council and the Parliament a mid-term report on the implementation of the ERF,[10] on 3 December 2002. In this report, the Commission underlines that the results of this evaluation and the priorities identified in the course of managing other instruments or preparatory measures will determine the Commission's approach in its proposal on the activities to be pursued after 2004 at Community level for refugees and asylum seekers. The Commission expects the Council and the European Parliament to react in 2003 to this report.

EQUAL

The Community Initiative EQUAL seeks to combat exclusion and inequality in the labour market and includes provision to improve the social and vocational integration of asylum seekers. EQUAL funding runs from 2000-2006 (approximately €113 million for asylum

seekers, i.e. 4% of a total of about €2764 million for the programme) and has two funding rounds, the first of which started in 2001, and the second is expected to be launched in 2004. There are over 1500 Development Partnerships selected by Member States in 2001, 45 of which relate to Asylum Seekers. Initial funding from November 2001 enabled the partnerships to clarify their work programmes and to develop their transnational co-operation agreements, and as of May 2002 further funds were approved for the implementation of the work programmes. The activities being taken forward by the partnerships fall into five areas: reception; advice education and training; employment; reintegration and repatriation; and capacity building. Further information about each Development Partnership is available at the EQUAL website.[11] A European thematic group on Asylum Seekers is being established to identify and disseminate the good practice developed under EQUAL. Reports and outcomes of this EU-wide work will also be made available on the EQUAL website.

ARGO

On 13 June 2002,[12] the Council adopted the ARGO programme aimed at promoting administrative cooperation in the areas of external borders, visas, asylum and immigration. One of the main goals is to harmonise national practices and is therefore an accompanying measure to the legislative effort made by the Community. The 2002 and 2003 annual work programmes have anticipated in their asylum chapter the needs of the national agencies when applying the new Community acquis. The annual objectives and priorities were therefore mainly inspired by the legislative proposals and studies launched by the Commission.

3. OTHER DEVELOPMENTS

Temporary protection in the event of a large-scale influx of displaced persons

At the extraordinary JHA Council of 20 September 2001, the Council agreed to examine urgently the situation in countries and regions where there was a risk of large-scale population movements as a result of heightened tensions following the attacks on the USA. Furthermore it requested the Commission, in consultation with Member States, to examine the scope for provisional application of the Council Directive on temporary protection in case special protection arrangements would be required within the EU. This led to a specific monitoring in particular of the trends of asylum applications from Afghan nationals in EU Member States available at Community level for repatriation of immigrants and rejected asylum seekers, for the management of external borders and for asylum and migration projects in third countries, which was requested by the European Council in Seville. until spring 2002. On the basis of the analysis of the situation, a special arrangement was felt not necessary. Directive 2001/55/EC[13] is required to be transposed into national law by 31 December 2002.

Other legislative initiatives

Several proposals relating to immigration contain provisions that directly or indirectly concern the legal situation of persons under international protection. On 2 May 2002 the Commission adopted an amended proposal on the right to family reunification[14] as requested by the Laeken European Council of 14 and 15 December 2001. The amended proposal includes a chapter on refugees, providing them with more favourable terms for family reunification. The

Council reached political agreement at the end of February 2003. The Seville European Council asked for the Directive to be adopted before the end of 2003, which is also the deadline for the adoption of the proposal for a directive on the status of thirdcountry nationals who are long-term residents.[15] Under this proposal, refugees could enjoy long-term resident status after five years' residence in a Member State. This status will then allow them, on certain conditions, to settle in other Member States. On 11 February 2002 the Commission also adopted a proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities[16]. This directive states that it applies without prejudice to the provisions governing the protection of refugees, beneficiaries of subsidiary protection and applicants for international protection.

Commission working document on the relationship between internal security and international protection obligations

The main conclusion of the December 2001[17] document was that the current EC legislation or Commission Proposals for such legislation in the field of asylum and immigration all contained 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 discussions and negotiations of the different proposals, the relevant provisions are revisited in the light of the new circumstances, such as in the case of the Directive on the qualification as refugee or as a person in need of subsidiary protection. During 2002, the Commission organised consultations with all Member States and Candidate Countries, other European Institutions[18], civil society and UNHCR. It was agreed to continue cooperation at practitioners level in Eurasil (see point 4) and with Argo co-funded activities.

4. OPEN COORDINATION METHOD APPLIED TO ASYLUM, INFORMATION EXCHANGES AND COMMON ANALYSIS

New tools for exchanges and analysis

In December 2001 the Laeken European Council acknowledged the need to intensify the exchange of information on the asylum and immigration policy. The Economic and Social Committee and the Committee of the Regions supported the approach proposed by the Commission in its communication of 28 November 2001,[19] in their Opinions,[20] calling for cooperation with civil society and local authorities.

At the beginning of 2002, the Commission created a Commission-led exchange and consultation procedure with an Immigration and Asylum Committee as a central component. The main aim of this exercise is to identify and analyse common challenges in immigration and asylum policies, spread best practices and achieve greater convergence. The members of the committee are experts of the Member States but also representatives of civil society. Other players are also being invited to participate on a case-by-case basis, depending on the subject matters. In the field of asylum, the following subjects have been discussed during the review period : the relationship between international protection and internal security, the process of transposition of the Temporary Protection Directive, the issue of processing asylum claims outside the EU and the single procedure.

Following the decision by the Committee of the Permanent Representatives in the Council to cease the activities of the CIREA[21] created in 1992 as a specific Council working group, the Commission established EURASIL in July 2002, the EU network for asylum practitioners, chaired by the Commission. The participants who primarily attend these meetings are involved with EU Member States authorities responsible for the adjudication of asylum applications in EU Member States (in first instances and also from appeal bodies). It is therefore a practitioner driven committee. UNHCR, other International or non-governmental organisations and experts on certain issues will be invited when necessary. The aim of the network is to improve convergence in asylum policies, decisions and practice through enhanced exchange of information and best practices among EU Member States asylum adjudicators and the European Commission. The activities should also help practitioners to enhance working relationships with each other. They will focus on information with regards to the situation in countries of origin and transit and treatment of cases by first instances decision-making authorities and review bodies and any other relevant matters of interest for the asylum practice. Its mission and functions will evolve over time, depending in particular on the transposition and implementation of EC legislative instruments. The Commission expects EURASIL to become an essential working tool for the establishment and functioning of the common European asylum system.

The first concrete steps towards the creation of a European Migration Observatory/Network by way of preparatory action, were taken in 2002. The specific network will build up a systematic information basis for monitoring and analysing the multidimensional phenomenon of migration and asylum by covering a variety of its dimensions (political, legal, demographic, economic, social, cultural) as well as by identifying its root causes. A network of national contact points is being set up, consisting of existing agencies or institutions with experience of working in the field of migration and asylum. Austria, Belgium, Greece, Ireland, Italy, the Netherlands, Portugal, Sweden and the United Kingdom were participating in 2002. Spain also designated a national contact point in December 2002. Other Member States will be able to join in the project in 2003.

Statistics

Notwithstanding constant efforts by the Commission to improve the quality, completeness and comparability of statistics on asylum and on migration, in the absence of a legislative framework, the limits of what can be done to improve the statistics have been reached. The Commission is now aiming to ensure that future policy development and implementation is underpinned by a legislative basis for the collection of Community statistics in this field.

The Council Conclusions on 28/29 May 2001 invited the Commission to submit a proposal for a comprehensive and coherent framework for future action on improving statistics. In response, the Commission will adopt a Communication in spring 2003. Enlargement of the Union in 2004 will bring an added geographical and political dimension to the scale of the phenomena associated with asylum, adding impetus to the demand for accurate, timely and harmonised statistical information. The Action Plan is designed to meet the current legal requirements and to implement the Council Conclusions, bringing a new, proactive and dynamic approach to the Commission's activities. In the meantime, asylum data are becoming increasingly available via electronic dissemination, with the introduction in early 2003 of monthly public electronic reports on asylum and with the preparation of the first public annual report on asylum and migration in the EU and the accession countries to be released before mid-2003.

Footnotes:

(1) OJ C 17, 24.1.2003
(2) COM(2002)175, 10.4.2002; COM(2002)564, 14.10.2002
(3) COM(2002)703
(4) Council Directive 2003/9/EC, OJ L 31, 6.2.2003.
(5) Council Regulation (EC) No 343/2003, OJ L 50, 25.2.2003
(6) COM(2001) 510 final, 12.9.2001
(7) COM(2002)326 final/2, 18.6.2002, amending COM(2000)578 final, 20.9.2000
(8) Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L62, 5.3.2002).
(9) OJ L 252, 6.10.2000, p.12.
(10) This report is part of Communication COM(2002)703 on the integration of migration related issues in external relations with third countries which includes a report on the effectiveness of financial resources available at Community level for repatriation of immigrants and rejected asylum seekers, for the management of external borders and for asylum and migration projects in third countries, which was requested by the European Council in Seville.
(11) http://europa.eu.int/comm/employment_social/equal/index_en.html.
(12) OJ L 161, 19.6.2002
(13) Council Directive 2001/55/CE 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. OJ L 212, 7.8.2001, p.12.
(14) COM(2002)225 final, 2.5.2002.
(15) COM(2001)127 final, 17.3.2001.
(16) COM(2002)71.
(17) (COM(2001)743, 5.12.2001, The relationship between safeguarding internal security and complying with international protection obligations and instruments.
(18) Opinions of the Committee of the Regions, CoR 93/2002, and the Economic and Social Committee, C E S 519/2002
(19) COM(2001)710 final.
(20) ESC 684/2002 and CoR 93/2002.
(21) Center for Information, Research and Exchange on Asylum.

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 effort between member States in receiving such persons and bearing the consequence thereof" 2001/55/EC, 20 July 2001

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(1)

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

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.

(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(5), 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(6).

(5) The Action Plan of the Council and the Commission of 3 December 1998(7) 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 prejudge 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 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.

(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(8).

(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

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;

(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:

(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;

(e) "refugees" means third-country nationals or stateless persons within the meaning of Article 1A 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;

(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

1. Temporary protection shall not prejudge 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.

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.

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.

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 2000/596/EC(9), under the conditions laid down in that Decision.

CHAPTER III
Obligations of the Member States towards persons enjoying temporary protection

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

Article 24

The measures provided for in this Directive shall benefit from the European Refugee Fund set up by Decision 2000/596/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.

2. 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.

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, 20 July 2001.
For the Council
The President
J. Vande Lanotte

Footnotes:

(1) OJ C 311 E, 31.10.2000, p. 251.
(2) Opinion delivered on 13 March 2001 (not yet published in the Official Journal).
(3) OJ C 155, 29.5.2001, p. 21.
(4) Opinion delivered on 13 June 2001 (not yet published in the Official Journal).
(5) OJ C 262, 7.10.1995, p. 1.
(6) OJ L 63, 13.3.1996, p. 10.
(7) OJ C 19, 20.1.1999, p. 1.
(8) OJ L 281, 23.11.1995, p. 31.
(9) OJ L 252, 6.10.2000, p. 12.

ANNEX I

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 . . . . . .

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

SEX: . . . . . .

NATIONALITY: . . . . . .

Date issued . . . . . .

PHOTO

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.
(1) Member State from which the transfer is being made.
(2) Member State to which the transfer is being made.
(3) Place where the person must present himself/herself on arrival in the second Member State.
(4) Deadline by which the person must present himself/herself on arrival in the second Member State.
(5) On the basis of the following travel or identity documents, presented to the authorities.
(6) 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.

UNHCR'S POSITION

Overview of the Council Directive on Temporary Protection

The Directive providing for minimum standards for giving temporary protection was the first substantive instrument of the EU's asylum agenda to be adopted in July 2001. The mechanism provides for temporary arrangements when large groups of people, a 'mass influx', fleeing persecution arrive on EU territory. The measure was drawn up with the different responses of European countries to the Bosnian and Kosovo conflict of the 1990s in mind. When faced with this mass influx from this particular region, European countries and the EU as a body could not formulate a collective and coherent response. Virtually all Member States acted independently, adopting special temporary protection measures to grant immediate safety to people in need of protection, since screening of their individual claims risked overwhelming the system. The lack of co-ordination between EU countries meant that different responses resulted in unequal levels of protection and as a consequence secondary movements occurred.

The Directive setting out minimum standards for temporary protection measure should provide for a clear procedure for future such situations, in order to tackle the strain under which individual screening systems may come in the case of a mass influx. The Directive provides for mechanisms to determine when and how to decide to install, review or terminate a temporary protection regime in Member States, and what standards of treatment its beneficiaries should be accorded. It states that the inception, review or lifting of temporary protection regimes shall be decided on the basis of common criteria and assessments which include the input of UNHCR. The return of individuals following the end of temporary protection is an integral part of the policy, but it provides for recognition of those with continuing a need for protection. Importantly, the temporary protection Directive also covers persons who have to be evacuated from their country or region of origin in response to appeals by international organisations, covering 'aided arrival' of displaced persons onto EU territory as well as spontaneous arrivals.

The Directive stipulates that temporary protection is to be provided only as an emergency measure. The right to grant temporary protection must not be used in order to avoid granting full refugee status to those whose applications should be processed under the regular asylum procedure. It applies only to certain groups of people on a collective basis prior to any determination procedure. The Directive safeguards against misuse by ensuring that all individuals under temporary protection must be given access to the asylum system at any time throughout the period of temporary protection, and at the latest upon completion of the regime. The Directive provides for a period of temporary protection of one year, which can be automatically renewed for up to two, and exceptionally, three, years.

An underlying principle of the Directive is the commitment of Member States to share responsibility for those needing temporary protection, in order to avoid a concentration of the mass influx in certain receiving states. Burden-sharing mechanisms include financial aid and the possibility to proceed to physical transfer of the temporary protection beneficiaries to other Member States, if both temporary protection beneficiaries and Member States are in agreement (known as 'double voluntariat'). The fact that many of those receiving temporary protection may be entitled to be recognised as refugees has led to the recognition of the same rights for temporary protection as the rights accorded to refugees recognised under the Geneva Convention. There are, however, some shortfalls in the directive, discussed more fully in the UNHCR Comments on the Temporary Protection Directive.

Temporary Protection – summary of UNHCR comments

Almost all aspects of the European temporary protection regime as regulated by the Directive are very much welcomed by UNHCR. For example, the fact that the Directive proposes temporary protection as a regime which does not prejudge or replace the recognition of refugee status under the 1951 Convention, but only as a practical device aimed at meeting urgent protection needs in a mass influx situation until the individuals concerned have their asylum requests determined on a case-by-case basis. UNHCR is also assured a consultative role throughout the establishment, implementation and termination of the Directive. Also, the limited duration of temporary protection allows for an effective examination of asylum claims but avoids the risk of an indefinite application of this emergency measure.

Nevertheless, there are a few elements in the adopted Directive which may undermine the temporary protection mechanism.

The scope of when 'temporary protection' should be implemented has been extended to cover the event of an imminent mass influx of displaced persons. In other words, Member States can decide to implement the temporary protection measure before a mass influx of persons onto EU territory has taken place, merely on the basis that there is a - albeit high - possibility of such an influx occurring. This would go against the spirit of the Directive, which was designed as a reactive measure to respond to emergency situations rather than anticipating them. If not, the temporary protection regime risks being invoked to avoid processing asylum seekers through the proper channels. UNHCR stresses that use of temporary protection should remain exceptional as an emergency response limited to actual, rather than anticipated mass influxes of persons, where it is established that individual processing systems will be overwhelmed and unable to function properly.

Concerning the rights of those under the temporary protection regime, some key rights have been curtailed in the adopted version: access to the labour market, the right to family reunification and freedom of movement. Regarding access to the labour market, Member States, if their labour market policies allow, can discriminate against those under temporary protection in favour of nationals or long-term resident third-country nationals which includes refugees. Also, there is a strict interpretation of 'family', meaning that unmarried couples are only accorded full rights in those Member States which have legislated to ensure equal treatment between unmarried and married couples. Furthermore, those under temporary protection do not have the right to freedom of movement throughout the EU, and their right to move freely within the host Member State is not stated explicitly, and may be left at individual Member States' discretion.

When the period of temporary protection ends, Member States are allowed to enforce the return of those not qualifying for other forms of protection. This is the first time returns have been dealt with at the EU level, and as such is not as comprehensive as it should be in setting out the procedure and rights for those being 'enforced' to return.

UNHCR COMMENTARY ON THE DRAFT DIRECTIVE ON TEMPORARY PROTECTION IN THE EVENT OF A MASS INFLUX

1. Introduction

The protection of asylum-seekers is a core concern of the United Nations High Commissioner for Refugees (UNHCR). Situations of mass-influx of asylum-seekers raise particular issues which have for some time been the focus of UNHCR attention, and indeed of the United Nations as a whole. The Executive Committee of UNHCR (EXCOM) has over the years dealt with this question, or some aspects of it, in a number of its Conclusions, including No. 15 (XXX) of 1979 concerning Refugees Without an Asylum Country, No. 19 (XXXI) of 1980 concerning Temporary Refuge, No. 22 (XXXII) of 1981 concerning Protection of Asylum-seekers in Situations of Large-scale Influx, No. 35 (XXXV) of 1984 concerning Identity Documents for Refugees, and No. 74 (XLV) of 1994, General Conclusion. In these Conclusions, the Committee has formulated the fundamental protection principles applicable in situations of large-scale influx of asylum-seekers; has defined the scope, nature and purpose of temporary protection regimes; has examined the link between the 1951 Convention regime and temporary protection; has drawn attention to the crucial importance of solidarity between States and of cooperation between States and UNHCR to effectively address the problems posed by situations of mass influx; and has laid down minimum standards of treatment to be accorded to beneficiaries of temporary protection.

The Sections that follow examine the proposal for a Council Directive on temporary protection, issued by the European Commission on 24 May 2000 , in the light of the internationally agreed principles and standards of treatment embodied in the instruments referred to above.

2. Protection principles applicable in situations of large-scale influx of asylum-seekers

UNHCR's position

The Executive Committee of UNHCR 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 discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity. The Committee has stressed that the principle of non-refoulement, including non-rejection at the frontier, must be scrupulously observed in all cases.

The Committee 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. The Committee 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.
To these effects, concerned States should consult with UNHCR as soon as possible.

Draft Directive

The draft Directive does not explicitly deal with the admission to the territory of asylum-seekers forming part of large-scale influxes, as the only aims of the instrument are, on the one hand, to establish standards of treatment applicable to beneficiaries of temporary protection (that is to say, once they have been admitted) and, on the other, to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

Commentary

Though acknowledging the specific scope of the Directive, UNHCR considers that, given the fundamental importance of the principles of admission to the territory without discrimination and of non-refoulement, including non-rejection at the frontier, these principles should be explicitly recalled in the text.

UNHCR further wishes to recall that measures for the control illegal immigration may sometimes also prevent refugees from reaching safety. For this consideration, the Executive Committee 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. The introduction of visa requirements and of sanctions to carriers who bring improperly documented passengers, while legitimate in themselves, may infringe those principles and standards if they are specifically targeted at nationals of countries from which bona fide refugees regularly come.

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

(i) no visa requirement shall be introduced by Members States, or if this has already been done, it will be lifted; and,

(ii) no sanctions to carriers for bringing improperly documented asylum-seekers shall be applied.

3. Scope, nature and purpose of temporary protection regimes

UNHCR's position

Large-scale influxes include persons who are refugees within the meaning of the 1951 Refugee Convention and 1967 Protocol, as well as persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek

refuge outside that country. 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.

The Committee has examined the special problems of international protection which arise in situations of mass or large-scale influxes of asylum-seekers, and has acknowledged the value of temporary protection as a pragmatic and flexible method of affording international protection in such situations.

Draft Directive

According to the draft Directive, temporary protection may be established by a decision of the Council in the event of a mass influx of displaced persons from third countries who have had to leave their country or area of origin because of the situation prevailing there and are unable to return in safe and humane conditions, where there is 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.

Persons forming part of such mass influxes may fall within the scope of the 1951 Convention/1967 Protocol or other international or national instruments giving protection, in particular persons who have fled areas of armed conflict or endemic violence, and persons at serious risk of or who have been the victims of systematic or generalised violations of their human rights.

The Directive allows for exclusion from temporary protection of persons who are regarded as a danger to their national security or who fall within the scope of exclusion clauses of the 1951 Convention. Exclusion decisions shall be based solely on the personal conduct of the person concerned, and further shall be based on the principle of proportionality. The persons concerned shall be entitled to seek redress in the courts of the Member State concerned.

Temporary protection may be brought to an end at any time if the situation in the country of origin is such as to permit the long-term, safe and dignified return, in accordance with Article 33 of the Geneva Convention and the European Convention on Human Rights.

In specific cases, beneficiaries of temporary protection may be allowed to remain in the Member State after the end of temporary protection, if there are compelling humanitarian reasons which may make return impossible or unrealistic.

Commentary

UNHCR considers that both the conditions that the draft Directive lays down for the setting up and for the ending of temporary protection, as well as its definition of the nature and purpose of temporary protection, are generally consistent with internationally agreed principles. Also consistent with those principles are the provisions on exclusion from temporary protection.

As regards the scope of application of the Directive, UNHCR wishes to state that, from a practical point of view, it sees nothing wrong in the fact that the Directive is only made applicable to mass influxes of nationals of third countries. But it would be a matter of the most serious concern for UNHCR if this limitation of the scope of the instrument were to be read as implying that nationals of Member States of the European Union are excluded from international protection. While recognizing as a matter of fact that, under present circumstances, it is most unlikely that conditions for a mass outflow may arise in any Member State of the European Union, such possibility cannot be ruled out as a matter of law. UNHCR, therefore, strongly recommends that a clarification be included in the explanatory memorandum in the sense that nothing contained in the Directive should be construed as impairing the right of nationals of Member States to seek and to enjoy protection in conformity with the relevant international instruments for the protection of refugees and for the protection of human rights.

UNHCR further strongly suggests that the possibility of granting beneficiaries of temporary protection permits to remain 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.

4. Link with the 1951 Convention and Access to Refugee Status Determination Procedures

UNHCR's Position

The Executive Committee 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, the Committee has affirmed that the implementation of temporary protection must not diminish the protection afforded to refugees under the above instruments. The Committee 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.

UNHCR has further insisted that refugees who have benefited from temporary protection must, at some point, be afforded access to protection procedures if they wish to claim continuing protection. Thus if they do not wish to return home when temporary protection ends because of the possibility of voluntary repatriation, beneficiaries of temporary protection must be able to have their protection needs fully and fairly assessed.

Draft Directive

The Draft Directive reaffirms the primacy of the 1951 Convention and its 1967 Protocol as the basic international instruments for the treatment of refugees and declares that temporary protection is an exceptional measure. These statements of principle find concrete expressions in the fact that the draft Directive limits duration of temporary protection to a maximum of two years, and provides its beneficiaries with a guarantee of access to refugee status determination procedures, at the latest at the end of temporary protection. The draft Directive further provides that the criteria and mechanisms for deciding which Member State is responsible for considering the asylum application shall apply.

Commentary

UNHCR welcomes the explicit guarantee of access to asylum procedures by refugees enjoying temporary protection. It, however, takes the view that the responsibility for considering the asylum request should lie with the Member State where the person is enjoying temporary protection. This view is based both on humanitarian and practical considerations. UNHCR therefore suggests that this provision be modified accordingly.
Article 19 should make explicit that the reference to "protection" in fact refers to the asylum law.

5. International solidarity and international cooperation

UNHCR's position

The Executive Committee has stressed that States which, because of their geographical situation or otherwise, are faced with a large-scale influx, should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. In this connection, the Committee has agreed that:

(i) action should be taken bilaterally or multilaterally at the regional or at the universal levels and in co-operation with UNHCR, as appropriate, and primary consideration should be given to the possibility of finding suitable solutions within the regional context;

(ii) action with a view to burden-sharing should be directed towards facilitating voluntary repatriation, promoting local settlement in the receiving country, and providing resettlement possibilities in third countries, as appropriate;

(iii) the measures to be taken within the context of such burden-sharing arrangements should be adapted to the particular situation; they should include, as necessary, emergency, financial and technical assistance, assistance in kind and advance pledging of further financial or other assistance beyond the emergency phase until durable solutions are found, and where voluntary repatriation or local settlement cannot be envisaged, the provision for asylum seekers of resettlement possibilities in a cultural environment appropriate for their well-being; and,

(iv) consideration should be given to the strengthening of existing mechanisms and, if appropriate, the setting up of new arrangements, if possible on a permanent basis, to ensure that the necessary funds and other material and technical assistance are immediately made available.

The Committee has further called upon UNHCR, in close cooperation with the Governments concerned, to continue to coordinate and to provide guidance concerning the implementation of temporary protection and other forms of asylum oriented towards repatriation, in situations where return home is considered the most appropriate durable solution, including advice on voluntary repatriation and on safe return once the need for international protection has ceased.

Draft Directive

The draft Directive affirms the essential role of solidarity among Member States in addressing the problems posed by large-scale influx of asylum-seekers. This solidarity is expressed in the form of a financial mechanism, as well as in the physical distribution of persons enjoying temporary protection. To this latter effect, Member States must make a declaration indicating their capacity to receive such persons. The transfer of beneficiaries of temporary protection cannot, however, take place without the agreement of the persons concerned.

As regards international cooperation, the draft Directive provides that UNHCR should be involved in processes aimed at establishing, implementing and terminating temporary protection regimes, and that UNHCR will be informed of the declarations made by Member States as to their capacity to receive beneficiaries of temporary protection, as well as of the requests for transfers made by Member States.

The draft Directive further provides that the application of the above solidarity measures shall be without prejudice to the Member States' obligations regarding non-refoulement. The explanatory memorandum explains that the meaning of this provision is that observance of the principle of non-refoulement by Member States should not depend on a burden-sharing agreement.

Commentary

UNHCR considers that the provisions on burden-sharing and solidarity contained in the draft Directive are fully in conformity with international recommendations.

UNHCR supports the approach taken by the Commission on this issue, encompassing both financial and physical solidarity.

6. Standards of treatment

UNHCR's position

The Executive Committee has agreed that beneficiaries of temporary protection should be treated in accordance with basic humanitarian standards.

Among the standards adopted by the Committee on the treatment of beneficiaries of temporary protection in matters within the field of civil and political rights, are:

(i) that they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful;

(ii) that they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order;

(iii) that they should be provided with appropriate documentation, where appropriate in cooperation with UNHCR;

(iv) that they should not be subjected to cruel, inhuman or degrading treatment and should generally enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights;

(v) that they should not be discriminated against on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity;

(vi) that they should be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities;

(vii) that the unity of their family should be respected and they should be given all possible assistance for the tracing of relatives.

Standards on their treatment in the field of economic, social and cultural rights, include that they should receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities.

The Committee has further affirmed that adequate provision should be made for the protection of minors and unaccompanied children.
As regards solutions, the Committee has recommended that beneficiaries of temporary protection should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution and, in particular, all steps should be taken to facilitate their voluntary repatriation.

Draft Directive

The draft Directive provides that the standards of treatment of beneficiaries of temporary protection must be consistent with human rights standards as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and further declares that those laid down in the Directive are minimum standards which may be improved by Member States.

Specific provisions of the draft Directive in the field of civil and political rights (apart from the general reference to the standards laid down in the European Convention of Human Rights), include that beneficiaries of temporary protection shall not be discriminated on ground of sex, race, ethnic origin, nationality, religion or convictions, or on a handicap, age or sexual orientation and, that they shall be issued residence permits for the entire duration of the protection, and shall be documented accordingly.

In connection with the right to respect for the unity of the family, the draft Directive provides that when circumstances surrounding the mass influx have led to the separation of families which already existed in the country of origin, beneficiaries of temporary protection shall be entitled to reunite with the following members of their separated family:

(i) their spouse or unmarried partner in a stable relationship, if the legislation of the Member State concerned treats unmarried couples in the same way as married couples;

(ii) the children of the couple referred to above or of the applicant, on condition that they are unmarried and dependent and without distinction according to whether they were born in or out of wedlock or adopted; and,

(iii) other family members if they are dependent on the applicant or have undergone particularly traumatic experiences or require special medical treatment.

Among the substantive and procedural rules applicable to the reunification of families, are:

(i) the absence of documentary evidence of the family relationship is not an obstacle for the reunification;

(ii) families may be reunited at any time during the period of temporary protection until two months before the end of the maximum two-year period;

(iii) concerned members of the family must agree to the reunification;

(iv) the reunification of members of a family who enjoy temporary protection in different Member States, shall take place in the host Member State of the choice of the family group;

(v) reunited family members shall be granted residence permits under the temporary protection scheme;

(vi) applications for reunification shall be examined as quickly as possible; and,

(vii) decisions rejecting the application shall be accompanied by a statement of reasons and be open to legal challenge.

The draft Directive provides that when examining applications, the Member States shall give priority to the interests of minors. In relation to unaccompanied minors, the text provides that:

(i) they must be represented by a legal guardian, by a suitable organisation or by any other appropriate carer; and,

(ii) they will be placed with adult relatives, or in the absence of these, with a person or persons who looked after the child when fleeing; with a foster-family; or in suitable reception centres;

In the field of economic, social and cultural rights the draft Directive provides that beneficiaries of temporary protection:

(i) shall be treated on equal terms with refugees regarding the right to engage in employed or self-employed activities, as well as regarding remuneration, social security related to employed or self-employed activities, and other conditions of employment;

(ii) shall have access to suitable accommodation or, if necessary, receive the means to obtain housing;

(iii) shall receive the necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care; and,

(iv) shall have access to the general education system, as well as to vocational training, further training or retraining, and that minors shall have access to the education system under the same conditions as nationals.

The draft Directive further provides that persons with special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence, shall be entitled to appropriate medical or other assistance.

Extensions of the benefits of temporary protection beyond the period of its duration are possible in respect of certain categories of beneficiaries with special needs, including persons undergoing medical treatment and children attending school.
Finally, the draft Directive makes provision on facilitation of voluntary repatriation and of resettlement.

As regards voluntary repatriation, it provides that Member States:

(i) shall take the measures necessary to facilitate the voluntary return, in a secure and dignified manner, of persons enjoying temporary protection or whose temporary protection has ended;

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

(iii) shall, for as long as the temporary protection has not ended, give favourable consideration to requests for return to the host Member State from persons who have enjoyed temporary protection and exercised their right to voluntary return; and,

(iv) may extend the enjoyment of benefits, after temporary protection has ended, for persons waiting to be repatriated.

In relation with facilitation of resettlement, the draft Directive provides that Member States will take appropriate measures, in agreement with the persons concerned and in cooperation with the international organisations responsible.

(c) Commentary

The draft Directive deals in a very comprehensive manner with the standards of treatment to be accorded to beneficiaries of temporary protection. The standards embodied in the proposal are fully consistent with those required under international protection principles and, therefore, UNHCR strongly supports these proposals. UNHCR notes, however, that the right to freedom of movement is not specifically mentioned in the draft instrument and, even though its recognition is implied by the reference made to the European Convention on Human Rights, it wishes to suggest that such mention be included in the text.

UNHCR also supports the Commission's approach regarding the identification and implementation of solutions, and appreciates the fact that humanitarian considerations are incorporated into this approach.

UNHCR summary observations on the Commission proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx

(COM(2000) 303, 24 May 2000)

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the Commission proposal for a draft Directive on temporary protection in the event of a mass influx as a comprehensive proposal that provides a sound basis for establishing a European approach to temporary protection. UNHCR considers the provisions of the Commission proposal as being largely in accordance with internationally agreed principles embodied in the Conclusions of the Executive Committee of UNHCR (EXCOM) as well as other standards advocated in various UNHCR documents .

UNHCR's detailed commentary on the Commission proposal is annexed. The purpose of this summary note is to highlight those elements of the Commission proposal which UNHCR considers fundamental and to summarise its proposals for amendment.

UNHCR welcomes the emphasis in the Commission proposal to approach temporary protection as an exceptional measure and a pragmatic tool to address particular situations of large-scale influx where national asylum systems may be overwhelmed. As the Commission emphasises in its proposal, temporary protection must not be used as an instrument to circumvent States' obligations pursuant to the 1951 Convention.

UNHCR supports the proposed inclusion of a burden-sharing mechanism in any future European approach to temporary protection. Were such a mechanism – whether financial only or also including a physical distribution of persons – not to be established, the absorption and reception capacities of Member States most affected by the influx are likely to come under undue pressure. This, in turn, could jeopardise the fair and effective functioning of any future co-ordination for the provision of temporary protection at the level of the European Union.

UNHCR appreciates that the Commission has chosen the Directive as the most appropriate legal instrument, which allows it to lay down minimum standards while leaving to the national authorities the choice of the most appropriate form and methods for their implementation. This can include the adoption of more favourable standards and provisions (Article 3 (5)) and leaves unaffected national temporary protection schemes adopted prior to the establishment of a European regime (Article 3 (4)).

UNHCR welcomes the various references to the need to consult and inform the Office at the inception, implementation and termination of temporary protection, as well as the establishment of a burden-sharing mechanism.

II. Fundamental elements of the Commission proposal

Among the elements in the Commission proposal which UNHCR considers fundamental to any Directive to be adopted in Council are the following:

- a reaffirmation of the primacy of the 1951 Convention and its 1967 Protocol as the basic instruments for the treatment of refugees, and an acknowledgement of the fact that many beneficiaries of temporary protection qualify as refugees under the 1951 Convention;

- the establishment of a clear link with the protection regime under the 1951 Convention: according to Article 3 (1) , temporary protection does not prejudge recognition of refugee status under the 1951 Convention and according to Article 16, beneficiaries of temporary protection shall be guaranteed access to the asylum procedure, no later than at the end of the period set for the temporary protection regime

- a comprehensive set of standards of treatment for beneficiaries of temporary protection: Articles 8 – 15 establish State obligations towards beneficiaries, including family reunion, respect for basic social, economic and cultural rights, such as the right to employment, with particular attention to persons with special needs, especially of separated children. The level of obligations is based on the correct understanding that many beneficiaries may qualify for refugee status and, hence, that their rights and benefits should closely resemble those of refugees recognised under the 1951 Convention;

- a limited duration of the temporary protection regime: according to Article 4, the period shall be one year, with a maximum extension of two times six months, thus two years in aggregate. The proposed short duration allows for an individual examination of the asylum application within a reasonable time limit and preserves the temporary nature of the regime;

- solidarity and burden-sharing: Articles 24-26 acknowledge the link between temporary protection and solidarity, a link which has been recognised in various EXCOM resolutions. They also stipulate that any transfer of beneficiaries under a burden-sharing regime should take place with the consent of the persons concerned;

- return and measures after lifting of the temporary protection regime: Articles 19 – 23 emphasise a preference for voluntary return, allow for exploratory visits, the extension of temporary protection for humanitarian cases and the provision of permanent asylum for specific categories of persons who cannot return, including through resettlement to third countries;

- UNHCR's consultative role: according to Article 3 (3), the Commission recognises a need for regular consultations with UNHCR concerning the establishment, implementation and termination of a European temporary protection regime. Article 5 (2) calls for seeking UNHCR's assessment whether a situation of influx should result in the inception of a temporary protection regime, and Article 25 and 26 for notification of UNHCR regarding States' reception capacities in view of establishing a burden-sharing mechanism.

III. Proposals for amendments

Notwithstanding its generally positive assessment of the Commission proposal, UNHCR recommends the following amendments:

- the proposal would benefit from an explicit reference to the principle to admit those arriving in a large-scale influx in the country where they first seek refuge, and the obligation of States to scrupulously observe the principle of non-refoulement, including rejection at the border. These principles have been recognised as core elements of any temporary protection regime . While this omission is undoubtedly linked to the specific scope of the draft Directive (aiming at setting minimum standards of treatment after admission and promoting a balance in State efforts) it would be desirable that these principles be explicitly recalled in the text.

- the proposal could suggest that States should not impose any measures, such as visa requirements or sanctions on carriers transporting improperly documented persons, which may prevent refugees from gaining access to temporary protection.. Where such measures are already in place, their temporary suspension as part of a common European policy should be considered;

- the proposal would benefit from the inclusion of a provision to ensure that a temporary protection system, once declared, is applicable to all those fleeing the same country of origin for the same or similar reason, in order to ensure non-discriminatory treatment between those arriving spontaneously and those who may be admitted under any potential evacuation programme;

- although the standards of treatment proposed are to be applied with due respect for human rights as guaranteed by the European Convention on Human Rights (Article 3 (2)), the proposal could spell out in detail, as it does with a number of other rights and benefits, the right to freedom of movement, stipulating that beneficiaries of temporary protection should not be subjected to restrictions on their movements within a given Member State, other than those which are necessary in the interest of public health and public order ;

- as regards the handling of asylum applications once temporary protection has been terminated, rather than maintaining criteria and mechanisms to determine responsibility for considering the asylum application, as set out at present under the Dublin Convention, the proposal should stipulate that, for humanitarian and practical reasons, the State which has been providing protection under temporary protection also bears responsibility for subsequently determining the asylum claim. Article 17 should be amended accordingly;

- in addition to the provisions referring to the need for continued protection where temporary protection has come to an end, including the recognition of compelling humanitarian reasons which militate against return (Article 20), it should be acknowledged that among these can be reasons arising out of past experience, including past persecution. Where this is the case, a long-term solution – such as the provision of a refugee status - should be sought rather than a mere extension of temporary protection;

- as regards the scope of the proposed Directive, nothing contained in the Directive should be construed as impairing the right of nationals of EU Member States to seek

and enjoy protection – in conformity with relevant international instruments for the protection of refugees and for the protection of human rights.

IV. Specific issues for consideration

UNHCR notes a few specific issues in the Commission proposal which have caused some controversy in the context of discussions with Member States related to previous Commission initiatives and on which the Office would clarify its position.

• Inter-linkage with the 1951 Convention

As any temporary protection regime should be considered as an exceptional measure of a truly temporary nature - resulting in suspension of access to the asylum procedure for a limited period of time – Member States must not avoid their international obligations to examine, at some point, the needs for protection in an individual determination procedure. It is generally understood that many of the beneficiaries of temporary protection qualify for refugee status under the 1951 Convention, and any asylum claim should be determined as soon as possible, but no later than the moment the temporary protection regime is lifted. UNHCR is opposed to practices previously adopted by some States offering those arriving in large-scale influxes a one-time choice of lodging an application for asylum or benefiting from a temporary protection regime. In the view of UNHCR, as also proposed by the Commission, access to the asylum procedure must always be guaranteed.

• Standards of treatment

UNHCR strongly supports the proposal to provide beneficiaries of temporary protection with standards of treatment which approximate to the rights and benefits of recognised refugees, on the understanding that many beneficiaries may qualify for refugee status. Such an approach is all the more justified where the need for protection continues to exist over an appreciable period of time.

UNHCR, as stated above, recommends that the draft Directive expressly provide for the right to freedom of movement – save for those legitimate restrictions set out in international and regional human rights instruments – within each Member State.

As regards the right to employment, UNHCR has regularly appealed to States to provide beneficiaries of temporary protection with this right, since early access to the labour market may help to diminish dependency on social assistance and also facilitate the reintegration upon eventual return to the country of origin. UNHCR supports the Commission proposal in this regard (Article 10) as well as the need to apply equal treatment of beneficiaries of temporary protection and recognised refugees as regards remuneration, social security, and other conditions of employment.

UNHCR welcomes the Commission's intention to harmonise the varying States practice on family unity in regard to temporary protected persons. The Commission's proposal to authorise family reunion for at least spouses and minor children benefiting from temporary protection reflects a trend in many Member States. UNHCR encourages Member States to adopt the Commission's proposal 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.

• Burden-sharing and international solidarity

UNHCR supports the Commission's proposal for allowing, if necessary, financial assistance to States most affected by an influx, as well as physical distribution of persons, provided the beneficiaries of temporary protection and the host country agree with such re-location. Any burden-sharing arrangements for the redistribution of persons must respect the protection needs of the individuals 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.

• Return and other long-term measures

UNHCR would agree with the Commission proposal that following the lifting of temporary protection and in the absence of compelling humanitarian reasons, beneficiaries should be asked to return to their home country, provided that they do not lodge an application for asylum. Such returns should preferably be voluntary and must be implemented in safe and dignified conditions. UNHCR welcomes the references in the Commission proposal to the need to provide accurate information concerning the conditions in which beneficiaries will return, and the possibility of organising exploratory visits.

UNHCR believes that the proposed approach to return is both principled and sufficiently flexible to be applied in a fair and non-discriminatory manner. UNHCR also supports the proposed extension of temporary protection in specific cases where voluntary return cannot be organised immediately following the lifting of the regime, or prolonged stay in the host country is warranted for medical reasons or because children are to complete education.

In deciding upon the termination of a temporary protection regime, UNHCR urges 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 the absence of such guarantees, beneficiaries of temporary protection should be offered a long-term solution such as permanent asylum or resettlement.

15 September 2000

UNHCR WELCOMES EU AGREEMENT ON TEMPORARY PROTECTION, 1 June 2001

Earlier this week, in Brussels, the European Union Ministers of Justice and Home Affairs (JHA) took an important step forward in the process of harmonising asylum in the European Union, by agreeing on a European regime of temporary protection in the event of a mass influx of displaced persons. UNHCR is in agreement with almost all aspects of this Directive. The JHA Council of Ministers also agreed on measures aimed at controlling undocumented arrivals into the European Union by imposing stiff sanctions on individuals and groups facilitating such arrivals. While UNHCR appreciates the need to prevent and combat human smuggling and supports positive initiatives in this respect, it is essential that any such measures be administered with sensitivity and flexibility, lest they inadvertently obstruct refugees and asylum-seekers from reaching safety.

Temporary Protection

The Directive on temporary protection adopted by the JHA Ministers on Monday is the first substantive legal instrument of the developing common European asylum system. The Amsterdam Treaty that came into force in May 1999 gives the EU five years to develop common asylum legislation binding on its Member States.

The Directive on temporary protection is a major step towards a harmonised treatment of refugees and other persons arriving in a mass influx and in need of international protection. UNHCR is in agreement with almost all aspects of the Directive. In particular, 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.

The Directive states that UNHCR must be consulted on the establishment, implementation and termination of the regime of temporary protection. UNHCR welcomes the incorporation of a number of basic protection principles in the Directive, such as the reunification of separated family members. The Directive also provides for basic standards of treatment and affirms the essential role of solidarity among Member States in addressing the problems posed by large-scale influxes.

Measures against unlawful entry or residence

The JHA Council also reached agreement on two legislative initiatives introduced by the French EU Presidency last year. These measures are aimed at preventing and counteracting the unlawful entry or residence in the European Union of third-country nationals by imposing a maximum jail term of eight years or more for individuals and groups who facilitate such illegal entry. UNHCR fully supports the efforts of States in combating criminal and organised smuggling of persons across international borders.

UNHCR's concern, though, is that there may be many genuine asylum-seekers who have no viable way of reaching safety without resorting to the services of smugglers. Therefore, the legislative measures adopted by the EU Ministers need to strike a proper balance between the repression of criminal smuggling and the protection of humanitarian interests and values.

This was achieved at the global level with the adoption in Palermo in December 2000 of the United Nations Convention against Transnational Organised Crime and its two additional Protocols. One principal problem with the Directive adopted by the EU Ministers is that it defines the offence of migrant smuggling differently from the Palermo Protocol. The inclusion of a "humanitarian clause" – which is not even mandatory but left to the discretion of each Member State – does not, in UNHCR's view, sufficiently address the protection needs of refugees or the inconsistency between EU legislation and international law.

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 [1],

Having regard to the Opinion of the European Parliament [2],

Having regard to the Opinion of the Economic and Social Committee [3],

Having regard to the Opinion of the Committee of the Regions [4],

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.

(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 [5], 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 [6].

(5) The Action Plan of the Council and the Commission of 3 December 1998[7] 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 prejudge 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 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[8].

(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

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 prejudge 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 (I), 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) adescription 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) 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 [9], 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.10 Such a provision had been included in earlier drafts of the directive, but was later omitted.

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.

2. 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

Footnotes:

(1) OJ C 311, 31.10.2000, p. 251.
(2) Opinion delivered on 13 March 2001 (not yet published in the Official Journal).
(3) OJ C 155, 29.5.2001, p. 21.
(4) Opinion delivered on 13 June 2001 (not yet published in the Official Journal).
(5) OJ C 262, 7.10.1995, p. 1.
(6) OJ L 63, 13.3.1996, p. 10.
(7) OJ C 19, 23.1.1999, p. 1.
(8) OJ L 281, 23.11.1995, p. 31.
(9) OJ L 252, 6.10.2000, p. 12.
(10) Conclusion No. 22, Part II (b), paragraph (2)(3).

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.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(b) of the first subparagraph of Article 63 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) At its special meeting in Tampere on 15 and 16 October 1! 999, the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus maintaining the principle of non-refoulement.

(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common minimum conditions of reception of asylum seekers.

(4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.

(5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.

(6) With respect t! o the treatment of persons falling within the scope of this D! irective, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

(8) The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception.

(9) Reception of groups with special needs should be specifically designed to meet those needs.

(10) Reception of applicants who are in detention should be specifically designed to meet their needs in that situation.

(11) In order to ensure compliance with the minimum procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, in! formation should be provided on such organisations and groups of persons.

(12) The possibility of abuse of the reception system should be restricted by laying down cases for the reduction or withdrawal of reception conditions for asylum seekers.

(13) The efficiency of national reception systems and cooperation among Member States in the field of reception of asylum seekers should be secured.

(14) Appropriate coordination should be encouraged between the competent authorities as regards the reception of asylum seekers, and harmonious relationships between local communities and accommodation centres should therefore be promoted.

(15) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.

(16) In this spirit, Member States are also invited to apply the prov! isions of this Directive in connection with procedures for de! ciding on applications for forms of protection other than that emanating from the Geneva Convention for third country nationals and stateless persons.

(17) The implementation of this Directive should be evaluated at regular intervals.

(18) Since the objectives of the proposed action, namely to establish minimum standards on the reception of asylum seekers in Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the proposed action, be better achieved by the Community, the Community may adopt measures in accordance with the principles 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.

(19) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on Eu! ropean Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 18 August 2001, of its wish to take part in the adoption and application of this Directive.

(20) In accordance with 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.

(21) 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 neither bound by it nor subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
PURPOSE, DEFINITIONS AND SCOPE

Article 1
Purpose

The purpose of this Directive is to lay down minimum standards for the reception of asyl! um seekers in Member States.

Article 2
Definitions

For the purposes of this Directive:

(a) "Geneva Convention" shall mean the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(b) "application for asylum" shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum unless a third-country national or a stateless person explicitly requests another kind of protection that can be applied for separately;

(c) "applicant" or "asylum seeker" shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) "family members" shall mean, in so far as the family alre! ady existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:

(i) the spouse of the asylum seeker or his or 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;

(ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(e) "refugee" shall mean a person who fulfils the requirements of Article 1(A) of the Geneva Convention;

(f) "refugee status" shall mean the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of tha! t Member State;

(g) "procedures" and "! ;appeals", shall mean the procedures and appeals established by Member States in their national law;

(h) "unaccompanied minors" shall mean persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States;

(i) "reception conditions" shall mean the full set of measures that Member States grant to asylum seekers in accordance with this Directive;

(j) "material reception conditions" shall mean the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance;

(k) "detention" shall mean confinement of an asylum seeker by a Member Sta! te within a particular place, where the applicant is deprived of his or her freedom of movement;

(l) "accommodation centre" shall mean any place used for collective housing of asylum seekers.

Article 3
Scope

1. This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the national law.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.

3. This Directive shall not apply when the provisions of 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 eff! orts between Member States in receiving such persons and bear! ing the consequences thereof(5) are applied.

4. Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees.

Article 4
More favourable provisions

Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive.

CHAPTER II
GENERAL PROVISIONS ON RECEPTION CONDITIONS

Article 5
Information

1. Member States shall inform asylum seekers, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least ! any established benefits and of the obligations with which they must comply relating to reception conditions.

   Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally.

Article 6
Documentation

1. Member States shall ensure that, within three days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territo! ry of the Member State while his or her application is pendin! g or being examined. If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify this fact.

2. Member States may exclude application of this Article when the asylum seeker is in detention and during the examination of an application for asylum made at the border or within the context of a procedure to decide on the right of the applicant legally to enter the territory of a Member State. In specific cases, during the examination of an application for asylum, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

3. The document referred to in paragraph 1 need not certify the identity of the asylum seeker.

4. Member States shall adopt the necessary measures to provide asylum seekers with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain in the territory of the Member State concerned or at t! he border thereof.

5. Member States may provide asylum seekers with a travel document when serious humanitarian reasons arise that require their presence in another State.

Article 7
Residence and freedom of movement

1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

4. Member States may make provision of the mate! rial reception conditions subject to actual residence by the ! applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national legislation.

5. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.
   The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.

6. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

Article 8
Families

Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory! , if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the asylum seeker's agreement.

Article 9
Medical screening

Member States may require medical screening for applicants on public health grounds.

Article 10
Schooling and education of minors

1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.

   The Member State concerned may stipulate that such access must be confined to the State education system.

   Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education fo! r the sole reason that the minor has reached the age of major! ity.

2. Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State may offer other education arrangements.

Article 11
Employment

1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.

2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market ! for the applicant.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals.

Article 12
Vocational training

Member States may allow asylum seekers access to vocational training irrespective of whether they have access to the labour market.

Access to vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market in accordance with Article 11.

Article 13
General rules on material reception conditions and health care

1. Member States shall ensure that material reception conditi! ons are available to applicants when they make their applicat! ion for asylum.

2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.

   Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.

3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been! working for a reasonable period of time.

   If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

5. Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions.
   Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article.

Article 14
Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

(a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;

(b) accommodation centres which guarantee an adeq! uate standard of living;

(c) private houses, flats, ! hotels or other premises adapted for housing applicants.

2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured:

(a) protection of their family life;

(b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) recognised by Member States.

Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres referred to in paragraph 1(a) and (b).

3. Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.

4. Member States shall ensure that transfers of applicants from one housing facility to another take p! lace only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers of the transfer and of their new address.

5. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality principle as defined in the national law in relation to any information they obtain in the course of their work.

6. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.

7. Legal advisors or counsellors of asylum seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the Member State concerned shall be granted access to accommodation centres and other housing facilities in order to assist the said asylum seekers. Limits on such access may be imposed only on grounds relat! ing to the security of the centres and facilities and of the ! asylum seekers.

8. Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:

- an initial assessment of the specific needs of the applicant is required,
- material reception conditions, as provided for in this Article, are not available in a certain geographical area,

- housing capacities normally available are temporarily exhausted,

- the asylum seeker is in detention or confined to border posts.

These different conditions shall cover in any case basic needs.

Article 15
Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness.

2. Member States shall provide necessary medical or other assistance to applicants who have special needs.

CHAPTER III
REDUCTION OR WITHDRAWAL OF RECEPTION CONDITIONS

Article 16
Reduction or withdrawal of reception conditions

1. Member States may reduce or withdraw reception conditions in the following cases:

(a) where an asylum seeker:

- abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or

- does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or

- has already lodged an application in the same Member State.

When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the reception conditions;

(b) where an applicant has concealed financial resources and has therefore unduly benefited from material reception con! ditions.

If it transpires that an applicant had sufficient! means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

2. Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

3. Member States may determine sanctions applicable to serious breaching of the rules of the accommodation centres as well as to seriously violent behaviour.

4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions

referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17, taking into account the principle of proportionality. Member States shall under all circumstances ensure acce! ss to emergency health care.

5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken.

CHAPTER IV
PROVISIONS FOR PERSONS WITH SPECIAL NEEDS

Article 17
General principle

1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.

2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation.

Article 18
Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the p! rovisions of this Directive that involve minors.

2. Member! States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

Article 19
Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors 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. Regular assessments shall be made by the appropriate authorities.

2. Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being ! examined, be placed:

(a) with adult relatives;

(b) with a foster-family;

(c) in accommodation centres with special provisions for minors;

(d) in other accommodation suitable for minors.
Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers.

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

3. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulatio! n of information concerning those persons is undertaken on a ! confidential basis, so as to avoid jeopardising their safety.

4. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.

Article 20
Victims of torture and violence

Member States shall ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts.

CHAPTER V
APPEALS

Article 21
Appeals

1. Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or! a review before a judicial body shall be granted.

2. Procedures for access to legal assistance in such cases shall be laid down in national law.

CHAPTER VI
ACTIONS TO IMPROVE THE EFFICIENCY OF THE RECEPTION SYSTEM

Article 22
Cooperation

Member States shall regularly inform the Commission on the data concerning the number of persons, broken down by sex and age, covered by reception conditions and provide full information on the type, name and format of the documents provided for by Article 6.

Article 23
Guidance, monitoring and control system

Member States shall, with due respect to their constitutional structure, ensure that appropriate guidance, monitoring and control of the level of reception conditions are established.

Article 24
Staff and resources

1. Member States shall take appropriate measures to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with r! espect to the needs of both male and female applicants.

2.. Member States shall allocate the necessary resources in connection with the national provisions enacted to implement this Directive.

CHAPTER VII
FINAL PROVISIONS

Article 25
Reports

By 6 August 2006, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary.

Member States shall send the Commission all the information that is appropriate for drawing up the report, including the statistical data provided for by Article 22 by 6 February 2006.

After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 26
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 February 2005. They shall forthwith inform the Commission thereof.

   When the 1. Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field relating to the enforcement of this Directive.

Article 27
Entry into force

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

Article 28
Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Union.
Done at Brussels, 27 January 2003.

For the Council
The President
G. Papandreou

Footnotes:

(1) OJ C 213 E, 31.7.2001, p. 286.
(2) Opinion delivered on 25 April 2002 (not yet published in the Official Journal).
(3) OJ C 48, 21.2! .2002, p. 63.
(4) OJ C 107, 3.5.2002, p. 85.
(5! 41; OJ L 212, 7.8.2001, p. 12.

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Overview of the Council Directive on Minimum Standards for the Reception of Applicants for Asylum in Member States

The Directive on minimum standards for the reception of asylum seekers was adopted in January 2003 and will come into force as soon as it is transposed into the national law of 13 Member States (all except Ireland and Denmark, who have opted not to participate in this measure under the terms of their Protocols annexed to the Maastricht Treaty) which should be no later than February 2005. The aim of the measure is to ensure that asylum seekers enjoy a dignified standard of living wherever they should arrive across the EU. As well as obliging Member States to provide comparable living conditions for asylum seekers, the Directive should also limit the pull factors of those countries receiving larger proportions of asylum applicants by ensuring equal treatment across the EU.

The measure outlines what asylum seekers should expect both materially and procedurally upon arrival in any EU Member State. It covers what accommodation, healthcare, education, employment and legal rights asylum seekers should be entitled to. On these material needs, it guarantees access to education for minors, and healthcare which at the very minimum must include emergency care, essential treatment of illnesses and treating those with special needs. Member States retain the right to decide whether asylum seekers should be allowed access to the labour market (see infra). Procedurally, the Directive gives a clear indication of what asylum seekers are entitled to across the EU. It stipulates that legal advisors and UNHCR representatives will be guaranteed access to asylum seekers. It also guarantees that all asylum seekers should be made aware of their material and procedural rights by the receiving country upon arrival.

The measure also offers Member States the opportunity to derogate from some of the minimum standards set. It suggests that in exceptional cases, which could be to ensure the effective examination of the application, Member States can set differing material and procedural standards of reception for asylum seekers for a reasonable period, without suggesting what these exceptional circumstances could entail or how long a reasonable period of time may be. These problems and others are discussed further in the Summary of UNHCR's comments on Minimum Standards for Reception.

There are also extensive instructions as to the circumstances under which all reception conditions – except emergency health care - may be reduced or withdrawn from an asylum seeker. They allow Member States the opportunity to reduce or withdraw reception conditions from those who disobey the rules in accommodation centres, without considering what those rules may be. Withdrawal or denial of reception facilities is also allowed in cases of late applications, where the applicant cannot give a reasonable explanation for the delay in applying. This gives Member States a degree of freedom to impose sanctions on the asylum seeker which could potentially be open to misuse in certain circumstances. All sanctions imposed on the asylum seeker are open to appeal or at least review before a judicial body. However, whether or not asylum seekers would receive legal assistance to aid such appeals will remain determined by each Member States' national law.

Provisions exist for asylum seekers with special needs, focusing on the needs of particularly vulnerable groups such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children as well as those who have been subjected to physical, psychological or sexual violence.

Minimum Standards for Reception Conditions of Asylum Seekers – Summary of UNHCR comments

UNHCR has a strong interest in ensuring a high standard of treatment to asylum seekers, and fully supports the overall objective of this Directive.

There are several aspects to the adopted measure on minimum reception standards which are particularly welcome, such as the obligation of Member States to outline to asylum seekers their rights and responsibilities upon arrival and to provide information on legal assistance. The Directive also provides for asylum seekers to be issued with documentation to proving they are in the asylum system and their legal stay in the receiving country. Guaranteed access to education for minors, emergency healthcare for all and recognition of the special needs of vulnerable individuals are all material provisions to be welcomed.

Nevertheless, there are some provisions which are vaguely worded, allowing Member States too much room for interpretation. This is particularly true for the exceptions to some of the measures. Asylum-seekers applying at the border, as well as those applying for forms of subsidiary protection, can be excluded from the benefit of reception conditions. Yet in the view of UNHCR, the basic rights and benefits provided to all asylum applicants should be based on their needs regardless of the grounds on which their claim is based.

As in most of the measures which make up the EU's common asylum and immigration policies, the reuniting of family members is only possible under a narrow definition of family, i.e. the spouses and minor children only. Other family members may be reunited only if individual Member States provide for this.

One of the disappointing omissions from the material benefits of reception conditions is the lack of guaranteed access to the labour market after a set period of time, and the absence of harmonisation in this domain. Member States are left to determine how long they wish to keep asylum seekers outside the labour market. The only guarantee is that those who have not received a first decision within a year will be allowed to seek employment, although this is also subject to conditions set by Member States themselves. In the view of UNHCR, all asylum seekers should be allowed access to the labour market no later than 6 months after lodging their application, which would help integration of asylum seekers in local communities, help to reduce the cost of the procedure as well as benefit preparations for return if the application is eventually rejected.

UNHCR's main concern is with the provisions allowing for withdrawal or ending of reception conditions as a sanction for ill-defined types of behaviour. It regrets the inclusion of a provision barring some asylum-seekers who have submitted their application late from access to reception conditions. UNHCR believes that the Directive insufficiently takes into account individual circumstances which may provide good reasons for such late applications, e.g. by torture victims or applicants not familiar with the requirements of the asylum procedure. UNHCR also remains concerned that the Directive allows for the withholding of all benefits - except emergency health care - from asylum-seekers who have broken the rules of the accommodation centres or who have not complied with certain reporting requirements. In the view of UNHCR, reducing asylum-seekers to a state of destitution serves no useful purpose and may indeed have undesirable humanitarian and social consequences. In such cases, asylum seekers should be subject to the same measures as similarly situated nationals and legally residents migrants.

UNHCR'S POSITION

UNHCR's Comments on the European Commission Proposal for a Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States (COM (2001) 181 final)

Introduction

1. The reception of persons who may be refugees and their living conditions have a direct bearing on the effectiveness of international protection of refugees. Therefore, UNHCR has, within its mandate of providing international protection to refugees and seeking durable solutions to their problems, a legitimate interest in the standards of treatment that asylum-seekers enjoy from the moment of their arrival in the asylum country until a final decision is taken on their claims.

2. At present, the reception conditions of asylum-seekers in the EU Member States vary significantly from country to country. Even with regard to basic necessities of life, such as a means of subsistence, housing and health care, State practice varies considerably. Some States provide subsistence assistance to all asylum-seekers, others only to those residing in a reception centre and still others provide no assistance at all until the asylum-seeker is admitted to the substantive procedure. Many countries have centralised reception facilities with adequate capacity, but there are also countries where many asylum-seekers do not benefit from any State housing. In some countries, asylum-seekers have access to all basic health care services and psychological care on equal footing with nationals, while in many others access is limited to emergency health care only.

3. In the light of this situation, UNHCR appreciates the serious efforts of the European Commission and the Member States to put in place common minimum standards for the reception of asylum-seekers. The advantages of harmonised reception standards are obvious. Where each State pursues its own reception policies and practices, without co-ordinating with other States, the result may be that the States with the best reception systems could attract a higher share of the number of asylum-seekers. It would not be unreasonable for an asylum-seeker to seek out the most welcoming reception systems. However, reception conditions that respect the dignity and fundamental rights of asylum-seekers are but one factor among many influencing an asylum-seeker's decision about his or her preferred destination country. For instance, a person fleeing persecution may want to apply for asylum in a given jurisdiction not because of its high standards of reception conditions, but because the refugee status determination procedure there is more likely to produce a positive outcome in his or her particular case. In many situations, however, the decisive factor in an asylum-seeker's choice of country of destination remains the connections which the asylum-seeker may have with a particular country, whether through the presence of family members or through linguistic, cultural or historical ties.

4. With the present note, UNHCR seeks to further assist in the development of a fair and effective EU reception policy. UNHCR believes that the emerging common EU policy in this area, for which the draft Council Directive proposed by the Commission provides a

solid basis, should be guided by the following basic requirements:

(i) A reception policy should have as its principal objective humane, rights-respecting treatment that ensures that the life of an asylum-seeker is in all the circumstances one of viability and dignity.

(ii) The effective operation of a fair and effective reception policy is dependent on a receptive political environment and public opinion conducive to mutual confidence and trust in the asylum system.

(iii) A reception policy should be organised in relation to the length of the asylum procedures. Where the procedures are unduly prolonged, asylum-seekers should be granted a broader range of social and economic rights and benefits.

(iv) The effectiveness and adequacy of a reception policy should not be judged solely in relation to the immediate material needs of the asylum-seekers, but also in terms of the real prospects it offers for the future – whether for the integration of those who will be recognised as refugees or the return and re-installation of the unsuccessful ones.

(v) A fair and effective reception policy should be premised on an understanding that asylum-seekers are capable -- if provided with the requisite tools of language, skills development and employment opportunities -- of assuming responsibility for their own affairs and contributing towards the financial cost of their reception.

(vi) A fair and effective reception regime must have a correct balance between the rights and benefits granted to asylum-seekers and the obligations and contributions expected of them.

Observations on the Proposed Reception Directive
General remarks

5. UNHCR fully supports the overall thrust of the proposed Directive and welcomes a number of the comprehensive provisions contained therein. The Commission must also be commended for the serious attempt made to strike the proper balance between minimum reception standards that must be embodied in a Community instrument and the latitude left to the Member States as regards the implementation of these standards at the national levels. UNHCR remains committed to working closely with the Member States and the Commission to achieve the proposed Directive's overriding objective, which is to guarantee asylum-seekers with harmonised reception conditions that are "sufficient to ensure them a dignified standard of living" in all EU Member States.

6. UNHCR welcomes the general provisions on reception conditions that the Member States are required to apply in all cases and at all stages of the asylum procedure. These include the obligation to provide asylum-seekers with information and documentation, emergency health and psychological care, material reception conditions that ensure a standard of living adequate for their health and well-being and access to education for children. UNHCR also welcomes the specific provisions for asylum-seekers with special needs, such as unaccompanied minors, disabled persons, the elderly, pregnant women and victims of torture, sexual abuse or other gender-related violence.
7. Furthermore, UNHCR welcomes the link made in the proposed Directive between

reception conditions and the length of the asylum procedures, in order to take account of the needs, hopes, aspirations and potential of asylum-seekers that change over time. Clearly, the inter-linkages between reception conditions and asylum procedures consist of more than the time factor. An adequate standard of reception enables asylum-seekers to present their asylum claims properly and sufficiently, to co-operate with the asylum authorities throughout the procedure and, more generally, to build trust and confidence in the asylum process. In turn, fair and expeditious procedures that quickly and properly identify who is in need of international protection and who is not help reduce the financial costs attached to the implementation of reception schemes. As well, the greater the public confidence in the efficiency and effectiveness of the asylum procedures, the better the chances for strengthened community relations.

8. Likewise, the attention given in the proposed Directive to the need to promote harmonious relationships between asylum-seekers and the local communities receiving them has the strong support of UNHCR. As the Commission put it, "…the political and social perception of asylum-related issues by public opinion in general and by local communities in particular plays a major role in the quality of life of applicants for asylum." As a contribution to the achievement of this aim UNHCR plans, resources permitting, to carry out in the immediate future a comprehensive study on the relationship between the reception and integration policies of EU Member States and the perceptions and attitudes of host societies.

9. The provisions on reduction or withdrawal of reception assistance as punishment for "negative behaviour" are probably the most problematic aspects of the proposed Directive. It is well-established that every applicant for asylum has duties to the country in which he or she seeks asylum, which require in particular that the applicant conform to its laws and regulations as well as to measures taken for the maintenance of public order. Where an applicant has been found guilty of acts contrary to the laws and regulations of the State in which he or she seeks asylum, he or she should be subject to the same penalties prescribed for nationals of that country.

Comments in detail

10. As noted above, most of the provisions contained in the proposed Directive are in line with UNHCR's recommended standards as set out in its July 2000 publication, "Reception Standards for Asylum-seekers in the European Union." UNHCR trusts that these provisions will be retained during the negotiations in Council. The paragraphs that follow will present UNHCR's observations on those few aspects of the proposed Directive that the Office believes would require clarification or amendment. For ease of reference, these observations follow the actual structure of the proposed Directive.

Article 3: Scope

11. Article 3 of the proposed Directive provides for only a non-mandatory application of the Directive to persons seeking the protection of a Member State on grounds not related to the 1951 Convention. In UNHCR's view, Member States should be required, as a matter of Community law, to ensure minimum standards of reception for all asylum-seekers, whether or not their protection claims are based on the 1951 Convention. The question of what basic rights and benefits asylum-seekers deserve in order to live in

dignity while they are awaiting the determination of their protection claims should be based on their needs rather than on the grounds on which their claims are based.

Article 6: Documentation

12. UNHCR welcomes the provision of Article 6, which seeks to ensure that applicants for asylum are provided with documentation certifying their status. Whether such documentation should also include information on the holder's entitlement to the rights and benefits set out in the proposed Directive is left to the discretion of the Member States. If such information is lacking, neither the asylum-seekers nor the service providers may be fully aware of these rights and benefits. It may be desirable, therefore, if the inclusion of this information in the documentation provided to applicants for asylum is also made mandatory.

Article 7: Freedom of Movement

13. Article 7(1) allows Member States to limit the freedom of movement of asylum-seekers to a specific area of their national territory, if this is necessary for implementing the Directive or in order to enable applications for asylum to be processed swiftly. It may be useful if the Directive could go one step further and set the following factors for Member States to take into account when choosing the locale where applicants have to reside during the asylum procedure:

(i) the presence of refugee-assisting NGOs, legal aid providers, language training facilities and, where possible, established community of the asylum-seekers' national or ethnic group;

(ii) the possibilities for harmonious relations between the asylum-seekers and the receiving communities;

(iii) the need for supplementary financial support to cover the cost which the asylum-seekers will incur when they have to travel for the reasons set out in Article 7(4);

14. Article 7(2) enshrines the general rule that detention of asylum-seekers should normally be avoided, save for certain exceptional situations set out in the draft Directive regarding minimum standards on procedures in Member States for granting and withdrawing refugee status. However, neither the asylum procedures draft Directive nor the present proposal deal with the procedural guarantees for detained asylum-seekers, or with the conditions of their detention. To address these shortcomings, there is no, in UNHCR's view, more appropriate instrument under Article 63 of the Amsterdam Treaty than the proposed Directive on reception standards. The provisions contained in the attached extracts from the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-seekers could usefully be incorporated into Article 7 or, if this proves unfeasible, set out as an annex to the proposed Directive.

Article 9: Families

15. UNHCR welcomes the provision of Article 9, which calls for appropriate measures to maintain the unity of the family. However, UNHCR notes with concern that Article 9, when seen together with Articles 2(d) and 2(e), would exclude from its scope applicants for asylum who may form a family in the Member State where they seek asylum, or those who may have family members with lawful residence in that Member State on non-asylum grounds.

Article 11: Medical screening

16. UNHCR would urge that Article 11 be amended to stipulate that any HIV testing will only be carried out at the express request, or the consent, of the applicant for asylum. UNHCR, like WHO and UNAIDS, strictly opposes mandatory HIV testing of refugees and asylum-seekers because of the risk of indirect violation of human rights through discriminatory consequences for individuals who test positive for HIV.

Article 13: Employment

17. UNHCR welcomes the flexible approach to employment, whereby Article 13 sets six months from the date of filing an asylum application as the maximum period beyond which a ban on access to the labour market must not extend. Member States have thus broad latitude to allow asylum-seekers to undertake gainful employment at the earliest possible stage based on the economics of demand and supply. The earlier asylum-seekers have access to the labour market, the quicker they become independent of State welfare and lead an autonomous life.

Article 14: Vocational training

18. Under Article 14, asylum-seekers may be barred from gaining access to vocational training for a maximum period of six months following the submission of their asylum claims. If asylum-seekers are allowed to work after a maximum waiting period of six months, it may be necessary to help them acquire new, employable skills or strengthen and perfect the ones they already have. Thus, early access to vocational training may be a necessary step in maximizing the prospects of employment. UNHCR would therefore recommend that asylum-seekers be granted access to vocational training once they enter the substantive asylum procedure so that they have better prospects of finding a job as soon as they are given the permission to work.

Article 16: Housing

19. UNHCR welcomes the mandatory provision of Article 16 on the housing of asylum-seekers and their accompanying family members. The provision prescribes four types of housing arrangements from which the Member States can choose. Whatever the form of housing chosen, it must, according to the general rule set out in Article 15(2), "ensure a standard of living adequate for the health and the well-being of applicants and their accompanying family members as well as the protection of their fundamental rights." In the light of this objective, Article 16 could usefully be strengthened in three areas.

20. Firstly, it would be desirable if the stay of an asylum-seeker in a collective accommodation centre is for the shortest possible duration. Housing asylum-seekers in collective centres during the initial months following their arrival has the advantage that it facilitates efficient dissemination of information and the provision of advice and guidance. At later stages, when the need for information and advice has alleviated, private accommodation is often more suitable. The longer people stay in collective centres, the greater the dangers of marginalisation.

21. Secondly, asylum-seekers who have the opportunity to stay with relatives or friends should not be compelled to live in collective accommodation centres. They should, instead, be provided with a financial allowance that enables them to contribute to the shared rental and/or maintenance costs.

22. Thirdly, the minimum common standards that the housing which the Member States make available to asylum-seekers, whether in collective or private accommodation, may usefully include the following additional requirements:

(i) Where practicable, the delivery of basic services to asylum-seekers should not be self-contained, but integrated into existing community services. This should be supplemented, as required, by targeted support structures that address the special needs of asylum-seekers (e.g. language training, orientation and cultural awareness programmes, social and legal counselling, community development, etc.)

(ii) As soon as unsuccessful asylum-seekers are served with deportation orders, they should be transferred to a different housing facility. There are at least two good reasons for this. Firstly, deportation practices are at times accompanied by serious disturbances and traumatic experiences which could affect the other residents of the accommodation centres. Secondly, deportation proceedings may involve visits to the accommodation centres by government officials from the countries of origin of the unsuccessful asylum-seekers for the purposes of identification and travel documentation.

Article 17: Total amount of allowances and vouchers

23. Article 17 sets out the means for achieving the aim of the proposed Directive embodied in Article 15(2): that asylum-seekers must be ensured a standard of living adequate for their health and well-being, as well as for the protection of their fundamental rights. While welcoming this important objective, UNHCR must, however, express reservations as regards the voucher system that the proposed Directive seeks to legislate as one of the forms by which Member States would ensure the material reception conditions of asylum-seekers. The evidence suggests that in some Member States there are particular societal sensitivities to the reality of shopping with vouchers that may lead to prejudices and discrimination against asylum-seekers.

24. UNHCR is also of the view that Article 17 could be improved by setting a more objective parameter as to what level of material support would ensure asylum-seekers "a dignified standard of living and comparable living conditions in all Member States." Rather than calling on Member States not to let asylum-seekers "fall into poverty," Article 17 could usefully make express reference to the level of national welfare systems as the common yardstick for determining the value of reception support. This would also ensure that whenever national welfare levels are increased as a function of increases in living costs, the same applies to asylum-seekers.

Articles 20 and 21: Health and psychological care

25. The proposed Directive makes the nature of health care provided to asylum-seekers dependent on the type of asylum procedures they are consigned to. Asylum-seekers in the regular procedure have access to primary health care provided by a general practitioner and to psychological care, whilst those in admissibility and accelerated procedures only benefit from emergency health and psychological care. UNHCR is of the view that all applicants for asylum should, in principle, receive equal treatment as regards access to health care. On a different, but related, issue, UNHCR would recommend that the financial contributions expected from resourceful asylum-seekers to cover the cost of their health and psychological care under Articles 20(4) and 21(6) should be set at the same level as nationals.

Article 22: Reduction and withdrawal of reception conditions

26. Article 22 of the proposed Directive provides for a reduction or withdrawal of reception support in the case of applicants for asylum who manifest "negative behaviour." The situations warranting a finding of "negative behaviour" under Article 22 include the following: disappearance of the asylum-seeker; non-compliance with reporting duties; failure to provide information relating to his or her asylum claim; failure to appear for personal interviews relating to the asylum claim; withdrawal of the asylum application; concealment of own financial resources; threat to national security; possible exclusion from refugee status by virtue of Article 1F of the 1951 Convention; manifestation of violent or threatening behaviour towards the management or residents of accommodation centres; non-compliance with residence requirements; and preventing children under one's care from attending school.

27. UNHCR fully appreciates that Governments and communities have, as a matter of course, legitimate interests to ensure that their hospitality and generosity are not exploited. Where there are problems of real abuse of States' asylum systems by way of, for example, deliberate non-cooperation on the part of the asylum-seeker in facilitating an expeditious determination of his or her asylum claim, these can and should find their effective redress within established asylum procedures. Likewise, if an applicant for asylum has withdrawn his or her asylum application or has disappeared and thus not presented himself or herself to the refugee status determination authorities within an established time-frame, it is up to those authorities to discontinue the asylum application. Once such persons are removed from the asylum procedure because they have shown no interest to pursue their applications, they are no longer considered as asylum-seekers and have no legitimate claims to the benefits of the State's reception system for asylum-seekers.

28. As regards the exclusion clauses of Article 1(F) of the 1951 Convention, the competence to decide whether any of these clauses are applicable falls on the refugee status determination authorities. If these authorities have established that there are serious reasons for considering that an applicant has committed one of the acts described in Article 1(F) of the Convention, the person is not considered to be deserving of international protection and is excluded from refugee status. Only then can the person be denied reception support.

29. When it comes to the other types of "negative behaviour" that are not related to the processing of asylum claims, such as inappropriate conduct at accommodation centres

or the withholding of children from school, asylum-seekers should be subject to the same measures as similarly situated nationals and legally resident immigrants.

Conclusion

30. The adoption of a Community instrument on minimum standards on the reception of asylum-seekers will be a major step towards the development of a Common European Asylum System. With equitable and adequate living conditions of asylum-seekers throughout the European Union, the operation of Community standards in other areas of asylum may become more effective. Only when asylum-seekers do not have to worry about their basic necessities of life, can asylum procedures be conducted in a meaningful way.

31. The draft Council Directive proposed by the Commission addresses the reception of asylum-seekers in a comprehensive manner. UNHCR welcomes almost all of the provisions contained therein and hopes that they will be retained in the final text. In a few areas, UNHCR has called for clarification or amendment in order to ensure their full conformity with established standards of refugee protection and human rights, as well as the realisation of the fundamental aims of the proposed Directive. It is in the spirit of its ongoing, close co-operation with the Commission and Member States that UNHCR has offered the foregoing observations and suggestions.

UNHCR Geneva
July 2001

Extracts from the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, February 1999

I. General principles

(i) Alternatives to the detention of an asylum-seeker until his or her refugee status is determined should be considered first in each individual case.

(ii) Asylum-seeking children under the age of 18 years should not be detained; if their detention cannot be avoided as a measure of last resort it should be for the shortest period of time.

(iii) As a general rule, the detention of pregnant women in their final months and of nursing mothers should be avoided.

(iv) Asylum-seekers who have suffered torture or trauma, those with a mental or physical disability and elderly asylum-seekers should not be detained without the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being.

II. Minimum procedural guarantees for asylum-seekers in detention

(i) To receive, in a language and in terms they understand, prompt and full communication of any order of detention, together with the reasons for the order and their rights in connection with the order.

(ii) To be informed of the right to legal counsel and, where possible, to receive free legal assistance.

(iii) To have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities, followed by regular periodic reviews of the necessity for the continuation of detention.

(iv) To challenge at the review hearing, either personally or through a representative, the necessity of the deprivation of liberty and to rebut any findings made.

(v) To be able to pursue their application for asylum without any obstacle caused by their detention.

III. Conditions of detention

(i) In all circumstances, conditions of detention of asylum-seekers should be humane with full respect shown for the inherent dignity of the person; conditions of detention have to be prescribed by national law.

(ii) There should be, at the outset of detention, initial screening to identify any victims of torture or traumatised persons.

(iii) Asylum-seekers should not be detained in prisons; if there is no alternative, they should be accommodated separately from convicted criminals.

(iv) Detained female asylum-seekers should be accommodated separately from male asylum-seekers, unless they are close family relatives.

(v) Detained asylum-seekers should have the opportunity to make regular contact with, and receive visits in private from, friends, relatives, UNHCR and refugee-assisting NGOs.

(vi) They should receive appropriate medical treatment and psychological counselling where needed.

(vii) They should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities.

(viii) They should have the opportunity to continue further education or vocational training.

(ix) They should be able to exercise their religion and to receive a diet in keeping with their religion.

(x) They should have access to basic necessities of life, such as beds, shower facilities, toiletries, etc.

(xi) They should have access to a complaints mechanism; the procedures that need to be followed in lodging complaints should be made available to detainees in a language they understand.

The findings of a recent UNHCR study on this subject were presented to the European Commission in a report entitled "Reception Standards for Asylum-seekers in the European Union," UNHCR, July 2000.

See Explanatory Memorandum to the proposed Directive, p. 5.

Article 2(d) defines "family members" only in terms of the family that already existed in the country of origin.

Article 2(e) defines "accompanying family members" to mean "the family members of the applicant who are present in the same Member State in relation to the application for asylum."

See UNHCR Policy regarding Refugees and Acquired Immune Deficiency Syndrome (AIDS), Geneva, December 1998; and Inter-Agency Field Manual on Reproductive Health in Refugee Situations, Geneva, 1999. The opposition to mandatory HIV screening of refugees and asylum-seekers takes as its point of departure that refugees and asylum-seekers are not an "at-risk" group for infection with the AIDS viruses and that they should therefore not be the object of specific measures unless these are applied to all citizens and foreign residents of the country concerned.

EU'S HARMONIZED TREATMENT OF ASYLUM SEEKERS WELCOMED

GENEVA – UNHCR on Friday welcomed the adoption of a European Union directive on reception conditions for asylum seekers, saying it ensures that most asylum seekers will receive a uniform package of benefits.

The European Council directive laying down minimum standards for the reception of asylum seekers in member states was announced in Luxembourg on Thursday afternoon by the Justice and Home Affairs Council of the European Union. The directive, which will eventually be reflected in national legislation throughout all EU member states, contains some provisions that will result in an overall improvement in general reception conditions in several EU countries.

In particular, UNHCR praised sections of the directive regulating access to health care and education and the provision of identity documents and vital information on asylum procedures, including legal assistance.

In addition, the refugee agency expressed general satisfaction with sections of the directive that require EU states to take special measures for vulnerable individuals, including victims of torture or violence, unaccompanied children, pregnant women and the disabled.

However, UNHCR feels that many provisions of the directive allow too much scope for exceptions and adaptations by the member states. It sees the decision by the EU states not to harmonize the very different national policies and practices regarding access to employment as a drawback, particularly at a time when many states are concerned about the costs of supporting asylum seekers through a sometimes lengthy asylum process.

The final text of the directive allows for the withholding of all benefits -- except for emergency medical care – from asylum seekers who show uncooperative behaviour or who have not complied with certain reporting requirements. While insisting on the importance of asylum seekers cooperating with national authorities, UNHCR said it believes that basic essentials, including food and accommodation, must always be assured. Reducing asylum seekers to a state of destitution serves no useful purpose and may indeed have undesirable humanitarian and social consequences.

UNHCR supports the EU harmonisation process, which has set two key objectives -- a common standard of protection and assistance for refugees and asylum seekers, and an improved asylum system that will benefit member states and their citizens. The adoption of the directive on reception conditions marks a significant move forward in this critical and far-reaching process, which is due to be completed by May 2004.

"We believe that a well-harmonized asylum system based on a common interest rather than on a state's individual domestic concerns would be of enormous benefit both for the European Union and for refugees," said Raymond Hall, Director of UNHCR's Europe Bureau. "A well-organized, streamlined system would alleviate the pressures caused by asylum seekers moving from state to state in search of better treatment."

UNHCR said Friday it hoped that the present momentum in the negotiations would be maintained.

"The ramifications of the EU harmonization process will be felt far beyond the current borders of the European Union," said Hall. "If the resulting common policy is of high quality, it will set a very positive example."

UNHCR annotated comments on COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(b) of the first subparagraph of Article 63 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the Opinion of the European Parliament[2],

Having regard to the opinion of the Economic and Social Committee[3],

Having regard to the opinion of the Committee of the Regions[4],

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) At its special meeting in Tampere on 15 and 16 October 1999, the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus maintaining the principle of non-refoulement.

(3) The Tampere Conclusions provide that a Common European Asylum System should include, in the short term, common minimum conditions of reception of asylum seekers.

(4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.

(5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.[5]

(6) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

(8) The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception.

(9) Reception of groups with special needs should be specifically designed to meet those needs.

(10) Reception of applicants who are in detention should be specifically designed to meet their needs in that situation.

(11) In order to ensure compliance with the minimum procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.

(12) The possibility of abuse of the reception system should be restricted by laying down cases for the reduction or withdrawal of reception conditions for asylum seekers.

(13) The efficiency of national reception systems and cooperation among Member States in the field of reception of asylum seekers should be secured.

(14) Appropriate coordination should be encouraged between the competent authorities as regards the reception of asylum seekers, and harmonious relationships between local communities and accommodation centres should therefore be promoted.

UNHCR comment: UNHCR welcomes the attention given in the Directive to the need to promote harmonious relationships between asylum-seekers and the local communities receiving them. The political and social perception of asylum-related issues by public opinion in general, and by local communities in particular, plays a major role in the quality of life of asylum applicants, and facilitates local integration. This has also been recognised by the Executive Committee of UNHCR (ExCom) in its Conclusion No. 93 (LIII) paragraph (d).

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(15) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.

(16) In this spirit, Member States are also invited to apply the provisions of this Directive in connection with procedures for deciding on applications for forms of protection other than that emanating from the Geneva Convention for third country nationals and stateless persons.

(17) The implementation of this Directive should be evaluated at regular intervals.

(18) Since the objectives of the proposed action, namely to establish minimum standards on the reception of asylum seekers in Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the proposed action, be better achieved by the Community, the Community may adopt measures in accordance with the principles 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.

(19) 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 18 August 2001, of its wish to take part in the adoption and application of this Directive.

(20) In accordance with 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.

(21) 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 neither bound by it nor subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
PURPOSE, DEFINITIONS AND SCOPE

Article 1
Purpose

The purpose of this Directive is to lay down minimum standards for the reception of asylum seekers in Member States.

Article 2
Definitions

For the purposes of this Directive:

(a) "Geneva Convention" shall mean the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(b) "application for asylum" shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum unless a third-country national or a stateless person explicitly requests another kind of protection that can be applied for separately;

UNHCR comment: In UNHCR's view, an application for asylum is not limited to a request for international protection under the Geneva Convention, but includes a request for international protection under subsidiary or complementary forms of protection. The question of which basic rights and benefits asylum-seekers deserve in order to live in dignity while the determination of their protection

claims is pending should be based on their needs rather than on the grounds on which their claims are based. Adequate reception conditions should consequently be provided to any person requesting international protection, including those requesting other forms of protection.

(c) "applicant" or "asylum seeker" shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

(d) "family members" shall mean, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:

(i) the spouse of the asylum seeker or his or 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;

(ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

UNHCR comment: UNHCR is concerned about the restrictive definition of family members other than spouses and minor children under the Reception Conditions Directive. In contrast to the Temporary Protection Directive, other dependent members of the asylum-seeker's family are not covered by the definition in this Directive. In addition to being unmarried, minor children must also be dependent on the asylum-seeker. UNHCR is also concerned that respect for family unity in the Directive is made conditional on whether the family was established before flight from the country of origin or in the course of the asylum procedure in a Member State. In this respect, ExCom Conclusions No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii) recommend "the consideration of liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family".

(e) "refugee" shall mean a person who fulfils the requirements of Article 1(A) of the Geneva Convention;

UNHCR comment: UNHCR notes that the Temporary Protection Directive defines a "refugee" as a person 'within the meaning of Article 1(A)', which it considers the more appropriate formulation.

(f) "refugee status" shall mean the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State;

UNHCR comment: UNHCR wishes to point out that Paragraph 28 of the UNHCR

Handbook on Procedures and Criteria for Determining refugee Status reads: "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined." In this sense, "refugee status" means the condition of being a refugee. In contrast, this provision uses the term "refugee status" to mean the protection, the set of rights, the benefits and the obligations that flow from the recognition of a person as a refugee, which would best be referred to as "asylum".

(g) "procedures" and "appeals", shall mean the procedures and appeals established by Member States in their national law;

(g) "unaccompanied minors" shall mean persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States;

UNHCR comment: The terminology commonly used is 'separated children'.

(i) "reception conditions" shall mean the full set of measures that Member States grant to asylum seekers in accordance with this Directive;

(j) "material reception conditions" shall mean the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance;

(k) "detention" shall mean confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;

UNHCR comment: In UNHCR's understanding, detention also includes confinement in airport or seaport transit zones where freedom of movement is substantially curtailed and where the only opportunity to leave this limited area is to leave the territory.

(l) "accommodation centre" shall mean any place used for collective housing of asylum seekers.

Article 3
Scope

1. This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the national law.

UNHCR comment: Adequate reception conditions should not be limited to the first instance procedure, but should also be provided to the asylum-seeker until the final outcome of the asylum application. UNHCR wishes to reiterate that appeals should, in principle, have suspensive effect and the right to stay therefore be extended until a final decision is reached on the application.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.

3. This Directive shall not apply when the provisions of 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[6] are applied.

4. Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees.

UNHCR comment: UNHCR welcomes this provision, although it would have preferred if it were a mandatory requirement that all asylum-seekers, irrespective of the grounds on which their claims are based, benefit from adequate reception conditions.

Article 4
More favourable provisions

Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive.

UNHCR comment: UNHCR welcomes the possibility given to Member States to maintain or introduce more favourable reception conditions for asylum-seekers. The standards as laid down in the Directive are considered minimum standards which could usefully be complemented and built upon by more detailed and extensive provisions in national law and practice.

CHAPTER II
GENERAL PROVISIONS ON RECEPTION CONDITIONS

Article 5
Information

1. Member States shall inform asylum seekers, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.

   Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally.

UNHCR comment: UNHCR generally welcomes this provision, however, considers it necessary to provide information to an asylum-seekers in a language he or she understands.

Article 6
Documentation

1. Member States shall ensure that, within 3 days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined.

   If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify this fact.

UNHCR comment: UNHCR welcomes this provision and refers to ExCom Conclusions No. 91(LII) and No. 93 (LIII) paragraph (b)(v) for further guidance.

Member States may exclude application of this Article when the asylum seeker is in detention and during the examination of an application for asylum made at the border or within the context of a procedure to decide on the right of the applicant legally to enter the territory of a Member State. In specific cases, during the examination of an application for asylum, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

UNHCR comment: The length of the procedure is a decisive factor which should be taken into account in the application of Article 6(1) of this Directive. As a rule, asylum-seekers should not be left destitute or without any legal status pending the final outcome of their claims. Effective access to reception conditions may be difficult, if not impossible, if the asylum-seeker is not provided with the necessary documentation.
It is furthermore not clear to which procedure(s) the phrase "within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State "is referring. As considerable numbers of applicants may fall within the scope of such procedure(s), the concerns with regard to documentation should be addressed in national legislation.

3. The document referred to in paragraph 1 need not certify the identity of the asylum seeker.

4. Member States shall adopt the necessary measures to provide asylum seekers with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain in the territory of the Member State concerned or at the border thereof.

UNHCR comment: UNHCR generally recommends that documentation certifying the status of asylum-seekers include also information on the holder's entitlements and benefits. If such information is lacking, neither the asylum-seekers nor the service providers may be fully aware of these rights and benefits.

5. Member States may provide asylum seekers with a travel document when serious humanitarian reasons arise that require their presence in another State.

Article 7
Residence and freedom of movement

1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

UNHCR comment: UNHCR is concerned that these provisions allow for exceptions and a wide measure of interpretation by Member States. UNHCR

notes that Article 7(2) permits Member States to limit the freedom of movement of asylum-seekers to a specific area of their national territory, if this is necessary to enable applications for asylum to be processed swiftly. UNHCR recommends that the relevant national legislation also takes into account the following factors for determining the area or location where applicants may be requested to reside during the asylum procedure:

- **the presence of NGOs, legal aid providers, language training facilities and, where possible, an established community of the asylum-seekers' national or ethnic group;**
- **the possibilities for harmonious relations between the asylum-seekers and the surrounding communities;**
- **the need for supplementary financial support to cover the cost which the asylum-seekers will incur when they have to travel to the assigned area.**

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3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

UNHCR comment: In UNHCR's understanding, detention may include confinement within a narrowly bounded or restricted location, where freedom of movement is substantially curtailed. In UNHCR's view, detention should be resorted to as an exceptional measure and should be applied in accordance with international standards (see, in particular, ExCom Conclusion No. 44 (XXXVII)). National legislation would also benefit from the inclusion of provisions on the conditions of detention in order to ensure humane treatment with respect for the inherent dignity of the person (see, for example, the 1988 United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment). UNHCR also recommends that national legislation incorporates the standards described in the 1999 UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-seekers, including the minimum procedural guarantees for asylum-seekers in detention. Standards on the conditions of detention should specifically address the following issues:

Asylum-seekers should generally not be detained in places designated for criminal justice purposes. Men and women should not be detained together, except in family situations. Special efforts should be made to avoid the detention of nursing mothers and women in the later stages of pregnancy. When single women are detained or otherwise accommodated at border points or airports, their physical safety and security should be ensured.

Children should not be detained; this principle applies to unaccompanied minors. Where possible, children should be released into the care of family members who already have residency within the asylum country. Where this is not possible, the competent authorities should make alternative care arrangements, such as residential homes or foster care placements. If no alternative can be applied and States do detain children, this should be as a measure of last resort, and for the shortest period of time.

Given the negative effects of detention on the psychological well-being of those detained,

active consideration of possible alternatives should precede any decision to detain unaccompanied elderly persons, survivors of torture or trauma, or persons with a mental or physical disability.

4. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national legislation.

5. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.

   The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.

6. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

Article 8
Families [7]

Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the asylum seeker's agreement.

UNHCR comment: Family unity and privacy should be respected also in situations of detention or reception at borders, including airports. Please also see comments to Article 2(d).

Article 9
Medical screening

Member States may require medical screening for applicants on public health grounds.

UNHCR comment: In UNHCR's view such medical screening should not include mandatory HIV screening of applicants.

Article 10
Schooling and education of minors

1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not

actually enforced. Such education may be provided in accommodation centres.

UNHCR comment: Separate facilities for the education of children within reception centres may contribute to marginalisation. Where education is provided in separate facilities, it should be for a limited period.

The Member State concerned may stipulate that such access must be confined to the State education system.

Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

UNHCR comment: UNHCR welcomes this provision in as far as it explicitly refers to secondary education.

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2. Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.

UNHCR comment: When joining local schools, children will require induction into the new education system, and additional support to meet their particular linguistic and psycho-social needs. All asylum-seekers should be entitled to basic training in the language of the Member State, since knowledge of the language may facilitate good relations with the local population. [8]

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3 Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State may offer other education arrangements.

Article 11
Employment

1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.
2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until

such time as a negative decision on the appeal is notified.

4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals.

UNHCR comment: It is UNHCR's view that it is in the interest of Member States and to the benefit of asylum-seekers that they be granted access to the labour market when the length of the asylum procedure exceeds a period of perhaps six months, depending on the nature of the application and the procedure (manifestly unfounded cases in accelerated procedures vs. regular procedures). It is widely accepted that dependence on the State is reduced when asylum-seekers are working. UNHCR's Executive Committee has recognised that reception arrangements can be mutually beneficial where they are premised on the understanding that many asylum-seekers can attain a certain degree of self-reliance, if provided with the requisite opportunities to do so.[9] Access to the labour market furthermore removes incentives for informal employment. UNHCR therefore is concerned that this provision permits considerable scope for exceptions and restrictive application by Member States.

Article 12
Vocational training

Member States may allow asylum seekers access to vocational training irrespective of whether they have access to the labour market.

UNHCR comment: UNHCR is concerned that this provision allows substantial scope for exceptions and adjustment by Member States. Access to vocational training may be a necessary step in maximizing the prospects of future employment. UNHCR therefore recommends that asylum-seekers be granted access to vocational training as soon as reasonably possible.

Access to vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market in accordance with Article 11.

Article 13
General rules on material reception conditions and health care

1. Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum.

2. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.

Member States shall ensure that that standard of living is met in the specific situation of

persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.

UNHCR comment: While UNHCR welcomes the provisions in paragraphs 1 and 2, it would have preferred the language of the original draft proposal which referred to the obligation of Member States to ensure "a standard of living adequate for the health and the well-being of applicants and their accompanying family members as well as the protection of their fundamental rights", which reflects Article 11(1) of the ICESCR on the right of all individuals to an adequate standard of living.

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3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

5. Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions.

Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article.

UNHCR comment: UNHCR has reservations with regard to the proposed voucher system due to the observed prejudices and discrimination against asylum-seekers who are obliged to use vouchers for shopping.

Article 14
Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

(a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;

(b) accommodation centres which guarantee an adequate standard of living;

UNHCR comment: UNHCR generally welcomes this provision. However, insofar as accommodation is provided in collective centres, it should be for the shortest possible duration. Housing asylum-seekers in collective centres during the initial months following their arrival has the advantage of facilitating efficient dissemination of information and the provision of advice and guidance. At later stages, private accommodation is often more suitable, as prolonged periods of stay in collective centres could lead to marginalisation.
Families should be housed together even for short periods, while single men and women should be housed separately. Accommodation in centres should respect privacy and provide for the basic necessities of life (including sanitary and health facilities).
Access to an independent/impartial arbitrator for resolving complaints and disputes should be made available.
As a rule, centres should be as small as economically feasible. Residents should be allowed to participate in the management of material resources and aspects of life in the centre. In order to allow for the respect of cultural and religious customs, asylum-seekers should be given the necessary means to prepare their own food.
Furthermore, where practicable, the delivery of basic services to asylum-seekers should not be self-contained, but integrated into existing community services. This should be supplemented, as required, by targeted support structures that address the special needs of asylum-seekers (e.g., language training, orientation and cultural awareness programmes, social and legal counselling, community development etc.)
As soon as unsuccessful asylum-seekers are served with deportation orders, they should be transferred to a different housing facility in order to avoid possible difficulties for community life in the centre.
Asylum-seekers who have the opportunity to stay with relatives or friends should not be required to live in collective accommodation centres but enabled to stay with their relatives or friends.

(c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured:

(a) protection of their family life;

(b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) recognised by Member States.[11]

Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres referred to in paragraph 1(a) and (b).

3. Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.

4 Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers of the transfer and of their new address.

5. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality principle as defined in the national law in relation to any information they obtain in the course of their work.

6. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.

7. Legal advisors or counsellors of asylum seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the Member State concerned shall be granted access to accommodation centres and other housing facilities in order to assist the said asylum seekers. Limits on such access may be imposed only on grounds relating to the security of the centres and facilities and of the asylum seekers.

8. Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when :

– an initial assessment of the specific needs of the applicant is required,

– material reception conditions, as provided for in this Article, are not available in a certain geographical area,

– housing capacities normally available are temporarily exhausted,

– the asylum seeker is in detention or confined to border posts.

These different conditions shall cover in any case basic needs.

UNHCR comment: Reception facilities at borders, including airports, should include all necessary assistance and the provision of basic necessities of life, including food, shelter and basic sanitary and health facilities. Even for a short stay, family unity and privacy should be respected.

Article 15
Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness.

UNHCR comment: UNHCR generally welcomes this provision but considers that minimum standards incorporated into national legislation should also contain the following:
– Counselling on reproductive health matters;

– Confidentiality requirements for medical examination and psychological counselling, in particular concerning voluntary HIV testing and results;
– Availability of psychological care and counselling free of charge;
– Training and sensitisation for relevant authorities and medical personnel dealing with patients of different cultural backgrounds.

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2. Member States shall provide necessary medical or other assistance to applicants who have special needs.

UNHCR comment: Particular attention should be paid to survivors of trauma or torture, in particular to cases involving traumatised children. Medical or other assistance would need to be taken care of by specialists.

CHAPTER III
REDUCTION OR WITHDRAWAL OF RECEPTION CONDITIONS

Article 16
Reduction or withdrawal of reception conditions

UNHCR comment: UNHCR regrets this provision and has expressed its concern that the Directive allows for the withholding of all benefits (except emergency health care) from asylum-seekers who have not complied with reporting or other requirements. Where there are problems of real abuse of States' asylum systems, these can and should find their effective redress within established asylum procedures. Moreover, UNHCR reiterates that the core content of human rights applies to everyone in all situations , including asylum-seekers who may have infringed specific regulations in relation to the processing of their claims. Measures to reduce or withhold reception conditions may also affect the applicant's family members, including children, and may be inconsistent with the provisions of the Convention on the Rights of Child. In UNHCR's opinion, adequate reception conditions are also a necessary component of fair asylum procedures. Asylum-seekers who find themselves in situations of poverty or destitution tend not to be in the physical or psychological condition needed to pursue adequately their asylum applications. Overall, UNHCR considers that if a reduction in the level of reception conditions has to be made, this should take place only in situations of emergency or force majeure and for a short time period.

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1 Member States may reduce or withdraw reception conditions in the following cases:

(a) where an asylum seeker

– abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or

– does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or

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UNHCR comment: As noted above, the situation described in this paragraph should be addressed in the context of the asylum procedure and not through changes in reception conditions. In cases in which it can be concluded that an applicant for asylum is no longer pursuing his or her asylum application the asylum procedure can be discontinued by the competent authorities.

– has already lodged an application in the same Member State.

When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the reception conditions;

(b) where an applicant has concealed financial resources and has therefore unduly benefited from material reception conditions.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

2 Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

UNHCR comment: UNHCR is concerned that this provision may constitute an obstacle for asylum-seekers to have access to fair asylum procedures. Asylum-seekers may lack basic information on the asylum procedure and be unable to state their claims formally or intelligibly without adequate guidance (including legal advice and representation). These difficulties would be exacerbated where asylum-seekers arrive with insufficient means and are denied assistance through the rigid application of the "reasonably practicable" criteria.

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3. Member States may determine sanctions applicable to serious breaching of the rules of the accommodation centres as well as to seriously violent behaviour.

4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to emergency health care.

5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken.

CHAPTER IV
PROVISIONS FOR PERSONS WITH SPECIAL NEEDS

Article 17
General principle

1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.

2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation.

UNHCR comment: UNHCR welcomes this provision and wishes to highlight the need for early identification of asylum-seekers with special needs and vulnerabilities.

Article 18
Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.
2. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

Article 19
Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors 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. Regular assessments shall be made by the appropriate authorities.

UNHCR comment: UNHCR welcomes this provision. When dealing with separated children, authorities in Member States should endeavour to be guided by the 1997 UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum.

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2. Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed:

(a) with adult relatives;

(b) with a foster-family;

(c) in accommodation centres with special provisions for minors;

(d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers.

UNHCR comment: Special attention should be paid to the risk of trafficking of children, in particular of separated female children. Special accommodation arrangements, counselling and protection arrangements are necessary for them.

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

UNHCR comment: UNHCR welcomes this provision. Tracing of family members of separated children should always be undertaken at a very early stage.

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6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.

UNHCR comment: UNHCR welcomes this provision.

Article 20
Victims of torture and violence

Member States shall ensure that, if necessary, persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts.

UNHCR comment: Mechanisms to identify survivors of torture and violence are required at the earliest possible stage of an asylum procedure, including – where appropriate and feasible - at entry points. Treatment of such persons should be entrusted to specialised medical personnel and institutions.

CHAPTER V
APPEALS

Article 21
Appeals

1. Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or a review before a judicial body shall be granted.
2. Procedures for access to legal assistance in such cases shall be laid down in national law.

CHAPTER VI
ACTIONS TO IMPROVE THE EFFICIENCY OF THE RECEPTION SYSTEM

Article 22
Cooperation

Member States shall regularly inform the Commission on the data concerning the number of persons, broken down by sex and age, covered by reception conditions and provide full information on the type, name and format of the documents provided for by Article 6.

Article 23
Guidance, monitoring and control system

Member States shall, with due respect to their constitutional structure, ensure that appropriate guidance, monitoring and control of the level of reception conditions are established.

UNHCR comment: UNHCR welcomes this provision.

Article 24
Staff and resources

1. Member States shall take appropriate measures to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants.

2. Member States shall allocate the necessary resources in connection with the national provisions enacted to implement this Directive.

UNHCR comment: While UNHCR welcomes this provision, it regrets that previously proposed provisions aimed at improving the efficiency of the reception systems, such as the need for improving exchange and co-ordination between different relevant actors, have been deleted.

CHAPTER VII
FINAL PROVISIONS

Article 25
Reports

By …….[13], the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary.
Member States shall send the Commission all the information that is appropriate for drawing up the report, including the statistical data provided for by Article 22 by ……. [14].

After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 26
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by …….. [15]. They shall forthwith inform the Commission thereof.

When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

Council Regulation (EC) No 343/2003 of 18 February 2003 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 national (Dublin II)

Council Regulation (EC) No 343/2003 of 18 February 2003 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 national

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63, first paragraph, point (1)(a),

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

(3) The Tampere conclusions also stated that this system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(4) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.

(5) As regards the introduction in successive phases of a common European asylum system

that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted asylum, it is appropriate at this stage, while making the necessary improvements in the light of experience, to confirm the principles underlying the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities(4), signed in Dublin on 15 June 1990 (hereinafter referred to as the Dublin Convention), whose implementation has stimulated the process of harmonising asylum policies.

(6) Family unity should be preserved in so far as this is compatible with the other objectives pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.

(7) The processing together of the asylum applications of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly and the decisions taken in respect of them are consistent. Member States should be able to derogate from the responsibility criteria, so as to make it possible to bring family members together where this is necessary on humanitarian grounds.

(8) The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the Treaty establishing the European Community and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

(9) The application of this Regulation can be facilitated, and its effectiveness increased, by bilateral arrangements between Member States for improving communications between competent departments, reducing time limits for procedures or simplifying the processing of requests to take charge or take back, or establishing procedures for the performance of transfers.

(10) Continuity between the system for determining the Member State responsible established by the Dublin Convention and the system established by this Regulation should be ensured. Similarly, consistency should be ensured between this Regulation and Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention(5).

(11) The operation of the Eurodac system, as established by Regulation (EC) No 2725/2000 and in particular the implementation of Articles 4 and 8 contained therein should facilitate the implementation of this Regulation.

(12) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by obligations under instruments of international law to which they are party.

(13) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(6).

(14) The application of the Regulation should be evaluated at regular intervals.

(15) The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union(7). In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.(16)
Since the objective of the proposed measure, namely the establishment of 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 national, cannot be sufficiently achieved by the Member States and, given the scale and effects, can therefore 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 Regulation does not go beyond what is necessary in order to achieve that objective.

(17) 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 and Ireland gave notice, by letters of 30 October 2001, of their wish to take part in the adoption and application of this Regulation.

(18) 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 does not take part in the adoption of this Regulation and is not bound by it nor subject to its application.

(19) The Dublin Convention remains in force and continues to apply between Denmark and the Member States that are bound by this Regulation until such time an agreement allowing Denmark's participation in the Regulation has been concluded,

HAS ADOPTED THIS REGULATION:

CHAPTER I
SUBJECT-MATTER AND DEFINITIONS

Article 1

This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

Article 2
For the purposes of this Regulation:

(a) "third-country national" means anyone who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community;

(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) "application for asylum" means the application made by a third-country national which can be understood as a request for international protection from a Member State, under

the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless a third-country national explicitly requests another kind of protection that can be applied for separately;

(d) "applicant" or "asylum seeker" means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken;

(e) "examination of an asylum application" means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation;

(f) "withdrawal of the asylum application" means the actions by which the applicant for asylum terminates the procedures initiated by the submission of his application for asylum, in accordance with national law, either explicitly or tacitly;

(g) "refugee" means any third-country national qualifying for the status defined by the Geneva Convention and authorised to reside as such on the territory of a Member State;

(h) "unaccompanied minor" means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(i) "family members" means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:
(i) the spouse of the asylum seeker or his or 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;
(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
(iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;

(j) "residence document" means any authorisation issued by the authorities of a Member State authorising a third-country national to stay in its territory, including the documents substantiating the authorisation to remain in the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the responsible Member State as established in this Regulation or during examination of an application for asylum or an application for a residence permit;

(k) "visa" means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:
(i) "long-stay visa" means the authorisation or decision of a Member State required for entry for an intended stay in that Member State of more than three months;
(ii) "short-stay visa" means the authorisation or decision of a Member State required for entry for an intended stay in that State or in several Member States for a period whose

total duration does not exceed three months;

(iii) "transit visa" means the authorisation or decision of a Member State for entry for transit through the territory of that Member State or several Member States, except for transit at an airport;

(iv) "airport transit visa" means the authorisation or decision allowing a third-country national specifically subject to this requirement to pass through the transit zone of an airport, without gaining access to the national territory of the Member State concerned, during a stopover or a transfer between two sections of an international flight.

CHAPTER II
GENERAL PRINCIPLES

Article 3

1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.

4. The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.

Article 4

1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

2. An application for asylum shall be deemed to have been lodged once a form submitted by the applicant for asylum or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

3. For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i), shall be indissociable from that of his parent or guardian and shall be a matter for

the Member State responsible for examining the application for asylum of that parent or guardian, even if the minor is not individually an asylum seeker. The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

4. Where an application for asylum is lodged with the competent authorities of a Member State by an applicant who is in the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for asylum was lodged.
   The applicant shall be informed in writing of this transfer and of the date on which it took place.

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.
   This obligation shall cease, if the asylum seeker has in the meantime left the territories of the Member States for a period of at least three months or has obtained a residence document from a Member State.

CHAPTER III
HIERARCHY OF CRITERIA

Article 5

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.

Article 6

Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.
In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

Article 7

Where the asylum seeker has a family member, regardless of whether the family was

previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 8

If the asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 9

1. Where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for asylum.

2. Where the asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for asylum, unless the visa was issued when acting for or on the written authorisation of another Member State. In such a case, the latter Member State shall be responsible for examining the application for asylum. Where a Member State first consults the central authority of another Member State, in particular for security reasons, the latter's reply to the consultation shall not constitute written authorisation within the meaning of this provision.

3. Where the asylum seeker is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the application for asylum shall be assumed by the Member States in the following order:

(a) the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the Member State which issued the residence document having the latest expiry date;

(b) the Member State which issued the visa having the latest expiry date where the various visas are of the same type;

(c) where visas are of different kinds, the Member State which issued the visa having the longest period of validity, or, where the periods of validity are identical, the Member State which issued the visa having the latest expiry date.

4. Where the asylum seeker is in possession only of one or more residence documents which have expired less than two years previously or one or more visas which have expired less than six months previously and which enabled him actually to enter the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

   Where the asylum seeker is in possession of one or more residence documents which have expired more than two years previously or one or more visas which have expired more than six months previously and enabled him actually to enter the territory of a Member State and where he has not left the territories of the Member States, the

Member State in which the application is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.

Article 10

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1, and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), that the asylum seeker - who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established - at the time of lodging the application has been previously living for a continuous period of at least five months in a Member State, that Member State shall be responsible for examining the application for asylum.
   If the applicant has been living for periods of time of at least five months in several Member States, the Member State where this has been most recently the case shall be responsible for examining the application.

Article 11

1. If a third-country national enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for asylum.

2. The principle set out in paragraph 1 does not apply, if the third-country national lodges his or her application for asylum in another Member State, in which the need for him or her to have a visa for entry into the territory is also waived. In this case, the latter Member State shall be responsible for examining the application for asylum.

Article 12

Where the application for asylum is made in an international transit area of an airport of a Member State by a third-country national, that Member State shall be responsible for examining the application.

Article 13

Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.

Article 14

Where several members of a family submit applications for asylum in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to them being separated, the Member State responsible shall be determined on the basis of the following provisions:

(a) responsibility for examining the applications for asylum of all the members of the family shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of family members;

(b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

CHAPTER IV
HUMANITARIAN CLAUSE

Article 15

in Article 27(2).

CHAPTER V
TAKING CHARGE AND TAKING BACK

Article 16

1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;

(b) complete the examination of the application for asylum;

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

(d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn

the application under examination and made an application in another Member State;

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

2. Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State.

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

4. The obligations specified in paragraph 1(d) and (e) shall likewise cease once the Member State responsible for examining the application has adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third-country national can go to his country of origin or to another country to which he may lawfully travel.

Article 17

1. Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant.
Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for asylum shall lie with the Member State in which the application was lodged.

2. The requesting Member State may ask for an urgent reply in cases where the application for asylum was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in detention.
The request shall state the reasons warranting an urgent reply and the period within which a reply is expected. This period shall be at least one week.

3. In both cases, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 18(3) and/or relevant elements from the asylum seeker's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.
The rules on the preparation of and the procedures for transmitting requests shall be adopted in accordance with the procedure referred to in Article 27(2).

Article 18

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.

2. In the procedure for determining the Member State responsible for examining the application for asylum established in this Regulation, elements of proof and circumstantial evidence shall be used.

3. In accordance with the procedure referred to in Article 27(2) two lists shall be established and periodically reviewed, indicating the elements of proof and circumstantial evidence in accordance with the following criteria:

(a) Proof:

(i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary.
(ii) The Member States shall provide the Committee provided for in Article 27 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs.

(b) Circumstantial evidence:

(i) This refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them.
(ii) Their evidentiary value, in relation to the responsibility for examining the application for asylum shall be assessed on a case-by-case basis.

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

6. Where the requesting Member State has pleaded urgency, in accordance with the provisions of Article 17(2), the requested Member State shall make every effort to conform to the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give the reply after the time limit requested, but in any case within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the provisions for proper arrangements for arrival.

Article 19

1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect.
   If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).
   The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

5. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).

Article 20

1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;

(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.
If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).
The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.

2. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

3. The rules of proof and evidence and their interpretation, and on the preparation of and the procedures for transmitting requests, shall be adopted in accordance with the procedure referred to in Article 27(2).

4. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).

CHAPTER VI
ADMINISTRATIVE COOPERATION

Article 21

1. Each Member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive for:

(a) the determination of the Member State responsible for examining the application for asylum;

(b) examining the application for asylum;

(c) implementing any obligation arising under this Regulation.

2. The information referred to in paragraph 1 may only cover:

(a) personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);
(b) identity and travel papers (references, validity, date of issue, issuing authority, place of issue, etc.);

(c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with Regulation (EC) No 2725/2000;

(d) places of residence and routes travelled;

(e) residence documents or visas issued by a Member State;

(f) the place where the application was lodged;

(g) the date any previous application for asylum was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any.

3. Furthermore, provided it is necessary for the examination of the application for asylum, the Member State responsible may request another Member State to let it know on what grounds the asylum seeker bases his application and, where applicable, the grounds for any decisions taken concerning the applicant. The Member State may refuse to respond to the request submitted to it, if the communication of such information is likely to harm the essential interests of the Member State or the protection of the liberties and fundamental rights of the person concerned or of others. In any event, communication of the information requested shall be subject to the written approval of the applicant for asylum.

4. Any request for information shall set out the grounds on which it is based and, where its purpose is to check whether there is a criterion that is likely to entail the responsibility of the requested Member State, shall state on what evidence, including relevant information from reliable sources on the ways and means asylum seekers enter the territories of the Member States, or on what specific and verifiable part of the applicant's statements it is based. It is understood that such relevant information from reliable sources is not in itself sufficient to determine the responsibility and the competence of a Member State under this Regulation, but it may contribute to the evaluation of other indications relating to the individual asylum seeker.

5. The requested Member State shall be obliged to reply within six weeks.

6. The exchange of information shall be effected at the request of a Member State and may only take place between authorities whose designation by each Member State has

been communicated to the Commission, which shall inform the other Member States thereof.

7. The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may, depending on its type and the powers of the recipient authority, only be communicated to the authorities and courts and tribunals entrusted with:

(a) the determination of the Member State responsible for examining the application for asylum;

(b) examining the application for asylum;

(c) implementing any obligation arising under this Regulation.

8. The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that that Member State has forwarded information which is inaccurate or which should not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.

9. The asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him.
If he finds that this information has been processed in breach of this Regulation or 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(8), in particular because it is incomplete or inaccurate, he is entitled to have it corrected, erased or blocked.
The authority correcting, erasing or blocking the data shall inform, as appropriate, the Member State transmitting or receiving the information.

10. In each Member State concerned, a record shall be kept, in the individual file for the person concerned and/or in a register, of the transmission and receipt of information exchanged.

11. The data exchanged shall be kept for a period not exceeding that which is necessary for the purposes for which it is exchanged.

12. Where the data is not processed automatically or is not contained, or intended to be entered, in a file, each Member State should take appropriate measures to ensure compliance with this Article through effective checks.

Article 22

1. Member States shall notify the Commission of the authorities responsible for fulfilling the obligations arising under this Regulation and shall ensure that those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back asylum seekers.

2. Rules relating to the establishment of secure electronic transmission channels between

the authorities mentioned in paragraph 1 for transmitting requests and ensuring that senders automatically receive an electronic proof of delivery shall be established in accordance with the procedure referred to in Article 27(2).

Article 23

1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:

(a) exchanges of liaison officers;

(b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back asylum seekers;

2. The arrangements referred to in paragraph 1 shall be communicated to the Commission. The Commission shall verify that the arrangements referred to in paragraph 1(b) do not infringe this Regulation.

CHAPTER VII
TRANSITIONAL PROVISIONS AND FINAL PROVISIONS

Article 24

1. This Regulation shall replace the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (Dublin Convention).

2. However, to ensure continuity of the arrangements for determining the Member State responsible for an application for asylum, where an application has been lodged after the date mentioned in the second paragraph of Article 29, the events that are likely to entail the responsibility of a Member State under this Regulation shall be taken into consideration, even if they precede that date, with the exception of the events mentioned in Article 10(2).

3. Where, in Regulation (EC) No 2725/2000 reference is made to the Dublin Convention, such reference shall be taken to be a reference made to this Regulation.

Article 25

1. Any period of time prescribed in this Regulation shall be calculated as follows:
   (a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;
   (b) a period expressed in weeks or months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event or action from which the period

is to be calculated occurred or took place. If, in a period expressed in months, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;

(c) time limits shall include Saturdays, Sundays and official holidays in any of the Member States concerned.

2. Requests and replies shall be sent using any method that provides proof of receipt.

Article 26

As far as the French Republic is concerned, this Regulation shall apply only to its European territory.

Article 27

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall draw up its rules of procedure.

Article 28

At the latest three years after the date mentioned in the first paragraph of Article 29, the Commission shall report to the European Parliament and the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments. Member States shall forward to the Commission all information appropriate for the preparation of that report, at the latest six months before that time limit expires.
Having submitted that report, the Commission shall report to the European Parliament and the Council on the application of this Regulation at the same time as it submits reports on the implementation of the Eurodac system provided for by Article 24(5) of Regulation (EC) No 2725/2000.

Article 29

This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.
It shall apply to asylum applications lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back asylum seekers, irrespective of the date on which the application was made. The Member State responsible for the examination of an asylum application submitted before that date shall be determined in accordance with the criteria set out in the Dublin Convention.
This Regulation shall be binding in its entirety and directly applicable in the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels, 18 February 2003.

For the Council
The President
N. Christodoulakis

Footnotes:

(1) OJ C 304 E, 30.10.2001, p. 192.
(2) Opinion of 9 April 2002 (not yet published in the Official Journal).
(3) OJ C 125, 27.5.2002, p. 28.
(4) OJ C 254, 19.8.1997, p. 1.
(5) OJ L 316, 15.12.2000, p. 1.
(6) OJ L 184, 17.7.1999, p. 23.
(7) OJ C 364, 18.12.2000, p. 1.
(8) OJ L 281, 23.11.1995, p. 31.

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UNHCR'S POSITION

Overview of the Council Regulation determining the Member State responsible for examining an asylum application, 'Dublin II'

The original Dublin Convention was an agreement between the EU Member States which sought to determine which country within the EU should deal with an asylum seeker's application. It was considered that a mechanism to share the processing of asylum seekers' claims was necessary, since some countries receive more asylum applications than others despite the fact they were not the first country in which many asylum applicants arrived. Rather than allow asylum seekers to travel to where they want to within the EU in order to lodge their claim, a system was devised to take the pressure off the most popular destination states. This would also theoretically stop 'asylum shopping' by asylum seekers and also guarantee that at least one Member State assumes responsibility for each asylum application. The original agreement stipulated that the first country on EU territory that the asylum seeker entered should have responsibility for processing his or her application, save in cases where the applicant has a family member residing as a refugee, or the administration had issued a visa or residence permit. The idea was to create a better balance of responsibilities between countries processing asylum claims, rather than allowing some Member States to turn a blind eye to asylum seekers passing through their countries to other destinations in the EU. It was also an attempt to stop asylum seekers applying for asylum multiple times. However, in reality, determining an asylum seeker's point of entry into the EU was difficult, and moving large numbers of asylum seekers between EU Member States under the agreement proved almost unworkable. The EU Treaty provided for the rewriting of the Convention as a Community Regulation; hence the Community law proposal for determining the Member State responsible for examining an asylum application was adopted in February 2003 and is dubbed 'Dublin II'.

When writing on the failure of the initial Dublin Convention, the European Commission has suggested that perhaps the 'most credible alternative' would simply be that responsibility for asylum applications would lie with the Member State in which an asylum seeker had lodged his or her application. Although this could mean that asylum seekers would continue to be pulled towards certain Member States over others, the completed common asylum policy in 2004 would have harmonised measures to the extent that all countries would offer the same benefits and there would be less reasons for asylum seekers to be pulled towards particular Member States. However, the Commission has not based its proposal on this idea. Rather, Dublin II is shaped along similar lines as the first Dublin Convention.

Dublin II states that primary responsibility for asylum applications will lie with the Member State that has borne greatest responsibility for the asylum seeker entering EU territory. However, responsibility for the application can be transferred to another state if it can be shown that in that other state a family member resides as refugee or asylum-seeker, or if that state had issued a visa, residence permit or other travel document .

The Regulation includes new humanitarian provisions which in comparison with similar provisions in the "old" Dublin Convention represent a higher degree of protection and respect personal circumstances and the unity of the refugee family - not least with regard to situations where minors are, or risk to become, separated.

The Regulation also states that the responsibility for the State where the applicant entered

first should cease 12 months after the date on which the irregular border crossing took place. Beyond this period, or if it is not known where the person entered irregularly, the Member State responsible will be the one where the person has resided for the last five months, or - in case the person has been visiting various countries for at least such a period - the one where this has been most recently. The Regulation is accompanied by a Declaration in which Member States commit themselves to strengthening their co-operation in controlling the external borders in an effort to support those Member States most affected.

Summary of UNHCR comments Sources : UNHCR's Observations on the proposal COM(2001)441 final

UNHCR welcomes certain improvements in the new Regulation in comparison to the existing Dublin Convention, particularly as regards the humanitarian exceptions which to higher degree take into account the personal situation of the asylum-seeker and possible protection vulnerabilities, such as those of separated children. These may come into play, for instance, where, on the basis of a strict application of the criteria, families risk to be split or minors left unaccompanied. The new Regulation also includes welcome provisions on increased transparency of decision-taking as regards taking charge or taking back of an asylum application.

However, UNHCR reiterates its concern about possible significant imbalances in the distribution of asylum applications among Member States, particularly those on the periphery of the Union's common territory, as a result of a strict application of the agreed rules. The general principle underlying the Regulation that responsibility for examining an asylum application lies with the Member State which played the most significant role regarding the applicant's entry into or residence on the territories of the Member States may risk in States particularly affected to delay processing of applications and, moreover, to adopt policies aimed at further restricting access to their territory and even to their asylum procedure.

UNHCR therefore calls on the Member States to adopt complementary and compensatory measures to ensure that the Regulation will be implemented in a fair, balanced and effective manner. The entry into force of the EURODAC fingerprinting system is expected to contribute to speeding up decision-taking on allocation of responsibility, yet equitable burden-sharing arrangements , where financial, physical or a combination of both, would also be necessary in order to ensure that all those with a valid asylum claim receive effective protection in one of the Member States.

UNHCR's Observations on the European Commission's 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 national (COM (2001) 447 final)

Introduction

1. Following the entry into force of the Amsterdam Treaty and as part of the establishment of a common asylum system called for by the Tampere Council Conclusions, the European Commission started in March 2000 the preparation of a proposal for a Regulation aimed at replacing the mechanism established under the Dublin Convention for the allocation of responsibility for asylum-seekers. To this end, the Commission issued on 21 March 2000 a Working Document entitled "Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States". The Working Document offers a critical analysis of the objectives and of the functioning of the Dublin system, and presents possible alternatives for its replacement.

2. The Commission also conducted an evaluation of the practical implementation of the Dublin Convention, the conclusions of which were published in a document entitled "Evaluation of the Dublin Convention". Finally, further to extensive consultations with Member States, UNHCR and several non-governmental organisations, the Commission issued on 26 July 2001 a 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 national.

3. UNHCR considers that, in the light of the experience accumulated by States Parties to the Dublin Convention during the time that it has been in operation, a re-assessment of the objectives that the Convention sought to attain and of the criteria that it set out for distributing responsibilities among Member States is not only amply justified, but is also necessary and timely. UNHCR, therefore, welcomes that this re-assessment is now being undertaken and, in this connection, it wishes to offer some general observations concerning the protection principles involved, as well as some specific comments on the proposed Regulation.

General observations

4. UNHCR notes that, in the Working Document referred to above as well as in the Explanatory Memorandum attached to the current proposal for a Regulation, the

Commission acknowledges that the system for apportioning responsibilities established by the Dublin Convention presents many inadequacies and drawbacks. The Commission further notes that a system in which responsibility would depend solely on where the application is lodged, would be "the most credible alternative scenario", as it "would probably make it possible to set up a clear, viable system that meets a number of objectives: rapidity and certainty; no "refugees in orbit"; resolution of the problem of multiple asylum applications; and a guarantee of family unity". While UNHCR would have been very interested in a more thorough exploration of this alternative, the Commission's proposed Regulation is basically shaped along the same lines as those of the Dublin Convention.

5. It is generally accepted that the primary responsibility for considering an asylum application lies in principle with the State to which it has been submitted. Such State may be able to transfer that responsibility to another State if it ensures that that other State is safe and that it will receive and examine the application in accordance with generally agreed international standards of refugee protection.

6. Within this understanding, UNHCR considers that bilateral or multilateral agreements on the transfer of responsibility for examining asylum applications may play an important role in the proper management of population flows. At the same time, such agreements on transfer of responsibility should not be conceived solely as instruments of migration control, but should be seen as an integral part of the panoply of tools that States have at their disposal for addressing refugee situations in a fair and equitable manner.

7. It is, therefore, crucial that any arrangements for apportioning responsibility for the examination of asylum requests adequately ensure that the protection needs of the persons concerned are met and a suitable durable solution achieved. In this connection, the fact that the applicant has already meaningful links with the State to which the transfer is intended, is a relevant consideration. In UNHCR's view, family connections, cultural ties, knowledge of the language, the possession of a residence permit and the applicant's previous periods of residence in the other State would constitute meaningful links for this purpose.

Specific comments on the Commission's proposal

8. The general principle informing the Commission's proposed Regulation is that, with few exceptions, responsibility for examining an asylum application lies with the Member State which played the most significant role regarding the applicant's entry into or residence on the territories of the Member States. Thus, according to the proposal, the Member State that has issued a visa to a third country national will be responsible for examining an asylum application that such person may subsequently submit. The proposed Regulation further provides that if a third country national has managed to enter irregularly the territory of a Member State, that Member State will be responsible for examining an asylum application that such person may submit subsequently. This provision may -- unless it is complemented by additional, corrective measures -- create serious imbalances in the distribution of asylum applicants among Member States. Such imbalances would not only pose serious problems to those States that are situated on the periphery of the Union's territory, but it may also have negative consequences for the protection of asylum-seekers and refugees. One of those consequences may be the delay in the processing of claims which almost inevitably results when States are

confronted with transfers of significant numbers of applications. More worrisome, though, is the risk that States that are likely to be affected by a disproportionate number of applicants as a result of the control-oriented criteria on the apportioning of responsibility, may be tempted to adopt policies aimed at further restricting access to their territory and perhaps even to their asylum procedure.

9. This being said, UNHCR welcomes that the proposed Regulation introduces some valuable improvements to the regime laid down by the Dublin Convention. These include the following:

(a) The Dublin Convention provides that if the applicant for asylum has a member of his or her family who is residing in another Member State as a recognised refugee, that Member State shall be responsible for examining the application, provided that the persons concerned so desire. The proposed Regulation expands this entitlement to include also the applicant's family member who has an asylum application that is being considered under the normal procedure. UNHCR wishes to submit that it would also be appropriate to extend the same entitlement in cases where the applicant has a member of his or her family who is an ordinary resident in another Member State, as well as in cases where the member of the family is a national of another Member State;

(b) Under the Dublin Convention, the notion of "member of the family" is circumscribed to "the spouse of the applicant for asylum or his or her unmarried child who is a minor of under eighteen years, or his or her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor of under eighteen years". The proposed Regulation defines "family members" to include "an asylum seeker's spouse or unmarried partner in a stable relationship, if the legislation of the Member State responsible treats unmarried couples in the same way as married couples, provided that the couple was formed in the country of origin; his unmarried minor children under the age of eighteen, irrespective of the nature of their filiation or his ward; his father, his mother or his guardian, if the asylum seeker is himself an unmarried minor under the age of eighteen; where appropriate, other persons to whom the applicant is related and who used to live in the same home in the country of origin, if one of the persons concerned is dependent on the other". UNHCR strongly welcomes this proposal, which is in line with the approach advocated by its Executive Committee in Conclusion No. 88 (XLX) of 1999; and,

(c) The proposed Regulation provides that the responsibility for considering an application for asylum submitted to a Member State by an unaccompanied minor shall be transferred to another Member State if there is in that Member State a member of the family of the minor who is able to take charge of him or her, provided it has been determined that the transfer of responsibility is in the best interests of the child. This provision, which is not found in the Dublin Convention, is most welcome from UNHCR's perspective, not least because it implements one of the key provisions of the Convention on the Rights of the Child.

10. UNHCR further appreciates that the Commission's proposal for a Regulation stipulates that the applicant shall be informed immediately -- and in a language which he or she understands -- of the fact that a request has been sent to another Member State to take charge of the responsibility for dealing with his or her claim.

11. UNHCR also appreciates that the proposed Regulation reaffirms the asylum-seeker's entitlement – already recognised in the Dublin Convention– to have access to any data that is processed concerning him or her, and to have corrected, erased or blocked, any

part of those data which is incomplete or inaccurate.

12. A retrograde development in relation to the regime of the Dublin Convention is that under the proposed Regulation, appeals against decisions on transfer of responsibility do not have suspensive effect. UNHCR considers that the suspensive effect of the appeal is not only important to avoid unnecessary hardship in the case that the appeal is successful, but it is also important for reasons of procedural efficiency. UNHCR would insist, therefore, that the principle of suspensive effect of appeals against a decision on transfer be maintained in the proposed Regulation.

Conclusion

13. UNHCR considers that, while the Commission's proposal presents a number of positive aspects, the criteria used for apportioning responsibility are likely to produce significant inequalities in terms of burden-sharing within the European Union. Such a situation will not only affect the countries concerned, but may also have adverse effects on the protection of asylum-seekers and refugees.

14. UNHCR wishes, therefore, to strongly recommend that the mechanism foreseen by the proposed Regulation be complemented by additional measures and criteria, including equitable burden-sharing arrangement within the European Union. In the absence of such complementary measures, a system where the responsibility for examining an asylum application normally remains with the State to which it has been submitted may be the most appropriate one, as initially indicated by the Commission. Within such a system, transfers of responsibility could be undertaken when the imperatives of protection or durable solution so necessitate in the individual case.

UNHCR Geneva
February 2002

UNHCR on new EC rules on responsibility of examining asylum applications

(Dublin II Regulation)

UNHCR welcomes the political agreement reached on new EC rules on sharing responsibility for dealing with asylum applications throughout the European Union. Such a system has existed for some time under the present Dublin Convention, yet had to be revamped on the basis of a proper EC Regulation. Agreement on these new Dublin rules is a welcome signal of the Member States' political will to adopt the key building blocks of the common asylum system within the time limits set.

UNHCR welcomes certain improvements in the new Regulation in comparison to the existing Dublin Convention, particularly as regards the humanitarian exceptions which to higher degree take into account the personal situation of the asylum-seeker and possible protection vulnerabilities. These may come into play, for instance, where, on the basis of a strict application of the criteria, families risk to be split or minors left unaccompanied. The new Regulation also includes welcome provisions on increased transparency of decision-taking as regards taking charge or taking back of an asylum application.

However, UNHCR reiterates its concern about possible significant imbalances in the distribution of asylum applications among Member States, particularly those on the periphery of the Union's common territory, as a result of a strict application of the agreed rules. The general principle underlying the Regulation is that responsibility for examining an asylum application lies with the Member State which played the most significant role regarding the applicant's entry into or residence on the territories of the Member States. This may risk in States particularly affected to delay processing of applications and, moreover, to adopt policies aimed at further restricting access to their territory and even to their asylum procedure.

UNHCR therefore calls on the Member States to adopt complementary and compensatory measures to ensure that the Regulation will be implemented in a fair, balanced and effective manner. The entry into force of the EURODAC system is expected to contribute to speeding up decision-taking on allocation of responsibility, yet equitable burden-sharing arrangements, where financial, physical or a combination of both, would also be necessary in order to ensure that all those with a valid asylum claim receive effective protection in one of the Member States.

UNHCR
December 2002

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63 point (1)(a) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament(1),

Whereas:

(1) Member States have ratified the Geneva Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967, relating to the Status of Refugees.

(2) Member States have concluded the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (hereinafter referred to as "the Dublin Convention")(2).

(3) 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. It is also desirable, in order effectively to apply the Dublin Convention, and in particular points (c) and (e) of Article 10(1) thereof, to allow each Member State to check whether an alien found illegally present on its territory has applied for asylum in another Member State.

(4) Fingerprints constitute an important element in establishing the exact identity of such persons. It is necessary to set up a system for the comparison of their fingerprint data.

(5) To this end, it is necessary to set up a system known as "Eurodac", consisting of a Central Unit, to be established within the Commission and which will operate a computerised central database of fingerprint data, as well as of the electronic means of transmission between the Member States and the central database.

(6) It is also necessary to require the Member States promptly to take fingerprints of every applicant for asylum and of every alien who is apprehended in connection with the irregular crossing of an external border of a Member State, if they are at least 14 years of age.

(7) It is necessary to lay down precise rules on the transmission of such fingerprint data to the Central Unit, the recording of such fingerprint data and other relevant data in the central database, their storage, their comparison with other fingerprint data, the transmission of the results of such comparison and the blocking and erasure of the recorded data. Such rules may be different for, and should be specifically adapted to, the situation of different categories of aliens.

(8) Aliens who have requested asylum in one Member State may have the option of requesting asylum in another Member State for many years to come. Therefore, the maximum period during which fingerprint data should be kept by the Central Unit should be of considerable length. Given that most aliens who have stayed in the Community for several years will have obtained a settled status or even citizenship of a Member State after that period, a period of ten years should be considered a reasonable period for the conservation of fingerprint data.

(9) The conservation period should be shorter in certain special situations where there is no need to keep fingerprint data for that length of time. Fingerprint data should be erased immediately once aliens obtain citizenship of a Member State.

(10) It is necessary to lay down clearly the respective responsibilities of the Commission, in respect of the Central Unit, and of the Member States, as regards data use, data security, access to, and correction of, recorded data.

(11) While the non-contractual liability of the Community in connection with the operation of the Eurodac system will be governed by the relevant provisions of the Treaty, it is necessary to lay down specific rules for the non-contractual liability of the Member States in connection with the operation of the system.

(12) In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty, the objective of the proposed measures, namely the creation within the Commission of a system for the comparison of fingerprint data to assist the implementation of the Community's asylum policy, cannot, by its very nature, be sufficiently achieved by the Member States and can therefore be better achieved by the Community. In accordance with the principle of proportionality as set out in the said Article, this Regulation does not go beyond what is necessary to achieve that objective.

(13) Since the Member States alone are responsible for identifying and classifying the results of comparisons transmitted by the Central Unit as well as for the blocking of data relating to persons admitted and recognised as refugees and since this responsibility concerns the particularly sensitive area of the processing of personal data and could affect the exercise of individual freedoms, there are specific grounds for the Council reserving for itself the exercise of certain implementing powers, relating in particular to the adoption of measures ensuring the safety and reliability of such data.

(14) The measures necessary for the implementation of other measures of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(3).

(15) Directive 95/46/EC of the European Parliament and of 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(4) applies to the processing of personal data by the Member States within the framework of the Eurodac system.

(16) By virtue of Article 286 of the Treaty, Directive 95/46/EC also applies to Community institutions and bodies. Since the Central Unit will be established within the Commission, that Directive will apply to the processing of personal data by that Unit.

(17) The principles set out in Directive 95/46/EC regarding the protection of the rights and freedoms of individuals, notably their right to privacy, with regard to the processing of personal data should be supplemented or clarified, in particular as far as certain sectors are concerned.

(18) It is appropriate to monitor and evaluate the performance of Eurodac.

(19) Member States should provide for a system of penalties to sanction the use of data recorded in the central database contrary to the purpose of Eurodac.

(20) The United Kingdom and Ireland, 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 the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the said Treaties, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.

(22) It is appropriate to restrict the territorial scope of this Regulation so as to align it on the territorial scope of the Dublin Convention.

(23) This Regulation should serve as legal basis for the implementing rules which, with a view to its rapid application, are required for the establishment of the necessary technical arrangements by the Member States and the Commission. The Commission should be charged with verifying that those conditions are fulfilled,

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1: Purpose of "Eurodac"

1. A system known as "Eurodac" is hereby established, the purpose of which shall be to assist in determining which Member State is to be responsible pursuant to the Dublin Convention for examining an application for asylum lodged in a Member State, and

otherwise to facilitate the application of the Dublin Convention under the conditions set out in this Regulation.

2. Eurodac shall consist of:

(a) the Central Unit referred to in Article 3;

(b) a computerised central database in which the data referred to in Article 5(1), Article 8(2) and Article 11(2) are processed for the purpose of comparing the fingerprint data of applicants for asylum and of the categories of aliens referred to in Article 8(1) and Article 11(1);

(c) means of data transmission between the Member States and the central database.
The rules governing Eurodac shall also apply to operations effected by the Member States as from the transmission of data to the Central Unit until use is made of the results of the comparison.

3. Without prejudice to the use of data intended for Eurodac by the Member State of origin in databases set up under the latter's national law, fingerprint data and other personal data may be processed in Eurodac only for the purposes set out in Article 15(1) of the Dublin Convention.

Article 2: Definitions

1. For the purposes of this Regulation:

(a) "the Dublin Convention" means the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed at Dublin on 15 June 1990;

(b) an "applicant for asylum" means an alien who has made an application for asylum or on whose behalf such an application has been made;

(c) "Member State of origin" means:

(i) in relation to an applicant for asylum, the Member State which transmits the personal data to the Central Unit and receives the results of the comparison;

(ii) in relation to a person covered by Article 8, the Member State which transmits the personal data to the Central Unit;

(iii) in relation to a person covered by Article 11, the Member State which transmits such data to the Central Unit and receives the results of the comparison;

(d) "refugee" means a person who has been recognised as a refugee in accordance with the Geneva Convention on Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967;

(e) "hit" shall mean the existence of a match or matches established by the Central Unit by comparison between fingerprint data recorded in the databank and those transmitted by a Member State with regard to a person, without prejudice to the requirement that Member

States shall immediately check the results of the comparison pursuant to Article 4(6).

2. The terms defined in Article 2 of Directive 95/46/EC shall have the same meaning in this Regulation.

3. Unless stated otherwise, the terms defined in Article 1 of the Dublin Convention shall have the same meaning in this Regulation.

Article 3: Central Unit

1. A Central Unit shall be established within the Commission which shall be responsible for operating the central database referred to in Article 1(2)(b) on behalf of the Member States. The Central Unit shall be equipped with a computerised fingerprint recognition system.

2. Data on applicants for asylum, persons covered by Article 8 and persons covered by Article 11 which are processed at the Central Unit shall be processed on behalf of the Member State of origin under the conditions set out in this Regulation.

3. The Central Unit shall draw up statistics on its work every quarter, indicating:

(a) the number of data sets transmitted on applicants for asylum and the persons referred to in Articles 8(1) and 11(1);

(b) the number of hits for applicants for asylum who have lodged an application for asylum in another Member State;

(c) the number of hits for persons referred to in Article 8(1) who have subsequently lodged an application for asylum;

(d) the number of hits for persons referred to in Article 11(1) who had previously lodged an application for asylum in another Member State;

(e) the number of fingerprint data which the Central Unit had to request a second time from the Member States of origin because the fingerprint data originally transmitted did not lend themselves to comparison using the computerised fingerprint recognition system. At the end of each year, statistical data shall be established in the form of a compilation of the quarterly statistics drawn up since the beginning of Eurodac's activities, including an indication of the number of persons for whom hits have been recorded under (b), (c) and (d). The statistics shall contain a breakdown of data for each Member State.

4. Pursuant to the procedure laid down in Article 23(2), the Central Unit may be charged with carrying out certain other statistical tasks on the basis of the data processed at the Central Unit.

CHAPTER II
APPLICANTS FOR ASYLUM

Article 4
Collection, transmission and comparison of fingerprints

1. Each Member State shall promptly take the fingerprints of all fingers of every applicant for asylum of at least 14 years of age and shall promptly transmit the data referred to in points (a) to (f) of Article 5(1) to the Central Unit. The procedure for taking fingerprints shall be determined in accordance with the national practice of the Member State concerned and in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child.

2. The data referred to in Article 5(1) shall be immediately recorded in the central database by the Central Unit, or, provided that the technical conditions for such purposes are met, directly by the Member State of origin.
3. Fingerprint data within the meaning of point (b) of Article 5(1), transmitted by any Member State, shall be compared by the Central Unit with the fingerprint data transmitted by other Member States and already stored in the central database.

4. The Central Unit shall ensure, on the request of a Member State, that the comparison referred to in paragraph 3 covers the fingerprint data previously transmitted by that Member State, in addition to the data from other Member States.

5. The Central Unit shall forthwith transmit the hit or the negative result of the comparison to the Member State of origin. Where there is a hit, it shall transmit for all data sets corresponding to the hit, the data referred to in Article 5(1), although in the case of the data referred to in Article 5(1)(b), only insofar as they were the basis for the hit.
Direct transmission to the Member State of origin of the result of the comparison shall be permissible where the technical conditions for such purpose are met.

6. The results of the comparison shall be immediately checked in the Member State of origin. Final identification shall be made by the Member State of origin in cooperation with the Member States concerned, pursuant to Article 15 of the Dublin Convention.
Information received from the Central Unit relating to other data found to be unreliable shall be erased or destroyed as soon as the unreliability of the data is established.

7. The implementing rules setting out the procedures necessary for the application of paragraphs 1 to 6 shall be adopted in accordance with the procedure laid down in Article 22(1).

Article 5
Recording of data

1. Only the following data shall be recorded in the central database:

(a) Member State of origin, place and date of the application for asylum;

(b) fingerprint data;

(c) sex;

(d) reference number used by the Member State of origin;

(e) date on which the fingerprints were taken;

(f) date on which the data were transmitted to the Central Unit;

(g) date on which the data were entered in the central database;

(h) details in respect of the recipient(s) of the data transmitted and the date(s) of transmission(s).

2. After recording the data in the central database, the Central Unit shall destroy the media used for transmitting the data, unless the Member State of origin has requested their return.

Article 6
Data storage

Each set of data, as referred to in Article 5(1), shall be stored in the central database for ten years from the date on which the fingerprints were taken.
Upon expiry of this period, the Central Unit shall automatically erase the data from the central database.

Article 7
Advance data erasure

Data relating to a person who has acquired citizenship of any Member State before expiry of the period referred to in Article 6 shall be erased from the central database, in accordance with Article 15(3) as soon as the Member State of origin becomes aware that the person has acquired such citizenship.

CHAPTER III
ALIENS APPREHENDED IN CONNECTION WITH THE IRREGULAR CROSSING OF AN EXTERNAL BORDER

Article 8
Collection and transmission of fingerprint data

1. Each Member State shall, in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the

Child, promptly take the fingerprints of all fingers of every alien of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back.

2. The Member State concerned shall promptly transmit to the Central Unit the following data in relation to any alien, as referred to in paragraph 1, who is not turned back:

(a) Member State of origin, place and date of the apprehension;

(b) fingerprint data;

(c) sex;

(d) reference number used by the Member State of origin;

(e) date on which the fingerprints were taken;

(f) date on which the data were transmitted to the Central Unit.

Article 9
Recording of data

1. The data referred to in Article 5(1)(g) and in Article 8(2) shall be recorded in the central database.

Without prejudice to Article 3(3), data transmitted to the Central Unit pursuant to Article 8(2) shall be recorded for the sole purpose of comparison with data on applicants for asylum transmitted subsequently to the Central Unit.

The Central Unit shall not compare data transmitted to it pursuant to Article 8(2) with any data previously recorded in the central database, nor with data subsequently transmitted to the Central Unit pursuant to Article 8(2).

2. The procedures provided for in Article 4(1), second sentence, Article 4(2) and Article 5(2) as well as the provisions laid down pursuant to Article 4(7) shall apply. As regards the comparison of data on applicants for asylum subsequently transmitted to the Central Unit with the data referred to in paragraph 1, the procedures provided for in Article 4(3), (5) and (6) shall apply.

Article 10
Storage of data

1. Each set of data relating to an alien as referred to in Article 8(1) shall be stored in the central database for two years from the date on which the fingerprints of the alien were taken. Upon expiry of this period, the Central Unit shall automatically erase the data from the central database.

2. The data relating to an alien as referred to in Article 8(1) shall be erased from the central database in accordance with Article 15(3) immediately, if the Member State of origin

becomes aware of one of the following circumstances before the two-year period mentioned in paragraph 1 has expired:

(a) the alien has been issued with a residence permit;

(b) the alien has left the territory of the Member States;

(c) the alien has acquired the citizenship of any Member State.

CHAPTER IV
ALIENS FOUND ILLEGALLY PRESENT IN A MEMBER STATE

Article 11
Comparison of fingerprint data

1. With a view to checking whether an alien found illegally present within its territory has previously lodged an application for asylum in another Member State, each Member State may transmit to the Central Unit any fingerprint data relating to fingerprints which it may have taken of any such alien of at least 14 years of age together with the reference number used by that Member State.

As a general rule there are grounds for checking whether the alien has previously lodged an application for asylum in another Member State where:

(a) the alien declares that he/she has lodged an application for asylum but without indicating the Member State in which he/she made the application;

(b) the alien does not request asylum but objects to being returned to his/her country of origin by claiming that he/she would be in danger, or

(c) the alien otherwise seeks to prevent his/her removal by refusing to cooperate in establishing his/her identity, in particular by showing no, or false, identity papers.

2. Where Member States take part in the procedure referred to in paragraph 1, they shall transmit to the Central Unit the fingerprint data relating to all or at least the index fingers, and, if those are missing, the prints of all other fingers, of aliens referred to in paragraph 1.

3. The fingerprint data of an alien as referred to in paragraph 1 shall be transmitted to the Central Unit solely for the purpose of comparison with the fingerprint data of applicants for asylum transmitted by other Member States and already recorded in the central database.
   The fingerprint data of such an alien shall not be recorded in the central database, nor shall they be compared with the data transmitted to the Central Unit pursuant to Article 8(2).

4. As regards the comparison of fingerprint data transmitted under this Article with the

fingerprint data of applicants for asylum transmitted by other Member States which have already been stored in the Central Unit, the procedures provided for in Article 4(3), (5) and (6) as well as the provisions laid down pursuant to Article 4(7) shall apply.

5. Once the results of the comparison have been transmitted to the Member State of origin, the Central Unit shall forthwith:

(a) erase the fingerprint data and other data transmitted to it under paragraph 1; and

(b) destroy the media used by the Member State of origin for transmitting the data to the Central Unit, unless the Member State of origin has requested their return.

CHAPTER V
RECOGNISED REFUGEES

Article 12
Blocking of data

1. Data relating to an applicant for asylum which have been recorded pursuant to Article 4(2) shall be blocked in the central database if that person is recognised and admitted as a refugee in a Member State. Such blocking shall be carried out by the Central Unit on the instructions of the Member State of origin.

As long as a decision pursuant to paragraph 2 has not been adopted, hits concerning persons who have been recognised and admitted as refugees in a Member State shall not be transmitted. The Central Unit shall return a negative result to the requesting Member State.

2. Five years after Eurodac starts operations, and on the basis of reliable statistics compiled by the Central Unit on persons who have lodged an application for asylum in a Member State after having been recognised and admitted as refugees in another Member State, a decision shall be taken in accordance with the relevant provisions of the Treaty, as to whether the data relating to persons who have been recognised and admitted as refugees in a Member State should:

(a) be stored in accordance with Article 6 for the purpose of the comparison provided for in Article 4(3); or

(b) be erased in advance once a person has been recognised and admitted as a refugee.

3. In the case referred to in paragraph 2(a), the data blocked pursuant to paragraph 1 shall be unblocked and the procedure referred to in paragraph 1 shall no longer apply.

4. In the case referred to in paragraph 2(b):

(a) data which have been blocked in accordance with paragraph 1 shall be erased immediately by the Central Unit; and

(b) data relating to persons who are subsequently recognised and admitted as refugees shall be erased in accordance with Article 15(3), as soon as the Member State of origin becomes aware that the person has been recognised and admitted as a refugee in a Member State.

5. The implementing rules concerning the procedure for the blocking of data referred to in paragraph 1 and the compilation of statistics referred to in paragraph 2 shall be adopted in accordance with the procedure laid down in Article 22(1).

CHAPTER VI
DATA USE, DATA PROTECTION AND LIABILITY

Article 13
Responsibility for data use

1. The Member State of origin shall be responsible for ensuring that:

(a) fingerprints are taken lawfully;

(b) fingerprint data and the other data referred to in Article 5(1), Article 8(2) and Article 11(2) are lawfully transmitted to the Central Unit;

(c) data are accurate and up-to-date when they are transmitted to the Central Unit;

(d) without prejudice to the responsibilities of the Commission, data in the central database are lawfully recorded, stored, corrected and erased;

(e) the results of fingerprint data comparisons transmitted by the Central Unit are lawfully used.

2. In accordance with Article 14, the Member State of origin shall ensure the security of the data referred to in paragraph 1 before and during transmission to the Central Unit as well as the security of the data it receives from the Central Unit.

3. The Member State of origin shall be responsible for the final identification of the data pursuant to Article 4(6).

4. The Commission shall ensure that the Central Unit is operated in accordance with the provisions of this Regulation and its implementing rules. In particular, the Commission shall:

(a) adopt measures ensuring that persons working in the Central Unit use the data recorded in the central database only in accordance with the purpose of Eurodac as laid down in Article 1(1);

(b) ensure that persons working in the Central Unit comply with all requests from Member

States made pursuant to this Regulation in relation to recording, comparison, correction and erasure of data for which they are responsible;

(c) take the necessary measures to ensure the security of the Central Unit in accordance with Article 14;

(d) ensure that only persons authorised to work in the Central Unit have access to data recorded in the central database, without prejudice to Article 20 and the powers of the independent supervisory body which will be established under Article 286(2) of the Treaty.

The Commission shall inform the European Parliament and the Council of the measures it takes pursuant to the first subparagraph.

Article 14
Security

1. The Member State of origin shall take the necessary measures to:

(a) prevent any unauthorised person from having access to national installations in which the Member State carries out operations in accordance with the aim of Eurodac (checks at the entrance to the installation);

(b) prevent data and data media in Eurodac from being read, copied, modified or erased by unauthorised persons (control of data media);

(c) guarantee that it is possible to check and establish a posteriori what data have been recorded in Eurodac, when and by whom (control of data recording);

(d) prevent the unauthorised recording of data in Eurodac and any unauthorised modification or erasure of data recorded in Eurodac (control of data entry);

(e) guarantee that, in using Eurodac, authorised persons have access only to data which are within their competence (control of access);

(f) guarantee that it is possible to check and establish to which authorities data recorded in Eurodac may be transmitted by data transmission equipment (control of transmission);

(g) prevent the unauthorised reading, copying, modification or erasure of data during both the direct transmission of data to or from the central database and the transport of data media to or from the Central Unit (control of transport).

2. As regards the operation of the Central Unit, the Commission shall be responsible for applying the measures mentioned under paragraph 1.

Article 15
Access to, and correction or erasure of, data recorded in Eurodac

1. The Member State of origin shall have access to data which it has transmitted and which are recorded in the central database in accordance with the provisions of this Regulation.

No Member State may conduct searches in the data transmitted by another Member State, nor may it receive such data apart from data resulting from the comparison referred to in Article 4(5).

2. The authorities of Member States which, pursuant to paragraph 1, have access to data recorded in the central database shall be those designated by each Member State. Each Member State shall communicate to the Commission a list of those authorities.

3. Only the Member State of origin shall have the right to amend the data which it has transmitted to the Central Unit by correcting or supplementing such data, or to erase them, without prejudice to erasure carried out in pursuance of Article 6, Article 10(1) or Article 12(4)(a).

   Where the Member State of origin records data directly in the central database, it may amend or erase the data directly.
   Where the Member State of origin does not record data directly in the central database, the Central Unit shall amend or erase the data at the request of that Member State.

4. If a Member State or the Central Unit has evidence to suggest that data recorded in the central database are factually inaccurate, it shall advise the Member State of origin as soon as possible.

   If a Member State has evidence to suggest that data were recorded in the central database contrary to this Regulation, it shall similarly advise the Member State of origin as soon as possible. The latter shall check the data concerned and, if necessary, amend or erase them without delay.

5. The Central Unit shall not transfer or make available to the authorities of any third country data recorded in the central database, unless it is specifically authorised to do so in the framework of a Community agreement on the criteria and mechanisms for determining the State responsible for examining an application for asylum.

Article 16
Keeping of records by the Central Unit

1. The Central Unit shall keep records of all data processing operations within the Central Unit. These records shall show the purpose of access, the date and time, the data transmitted, the data used for interrogation and the name of both the unit putting in or retrieving the data and the persons responsible.

2. Such records may be used only for the data-protection monitoring of the admissibility of data processing as well as to ensure data security pursuant to Article 14. The records must be protected by appropriate measures against unauthorised access and erased after a period of one year, if they are not required for monitoring procedures which have already begun.

Article 17
Liability

1. Any person who, or Member State which, has suffered damage as a result of an unlawful

processing operation or any act incompatible with the provisions laid down in this Regulation shall be entitled to receive compensation from the Member State responsible for the damage suffered. That State shall be exempted from its liability, in whole or in part, if it proves that it is not responsible for the event giving rise to the damage.

2. If failure of a Member State to comply with its obligations under this Regulation causes damage to the central database, that Member State shall be held liable for such damage, unless and insofar as the Commission failed to take reasonable steps to prevent the damage from occurring or to minimise its impact.

3. Claims for compensation against a Member State for the damage referred to in paragraphs 1 and 2 shall be governed by the provisions of national law of the defendant Member State.

Article 18
Rights of the data subject

1. A person covered by this Regulation shall be informed by the Member State of origin of the following:

(a) the identity of the controller and of his representative, if any;

(b) the purpose for which the data will be processed within Eurodac;

(c) the recipients of the data;

(d) in relation to a person covered by Article 4 or Article 8, the obligation to have his/her fingerprints taken;

(e) the existence of the right of access to, and the right to rectify, the data concerning him/her.

In relation to a person covered by Article 4 or Article 8, the information referred to in the first subparagraph shall be provided when his/her fingerprints are taken.

In relation to a person covered by Article 11, the information referred to in the first subparagraph shall be provided no later than the time when the data relating to the person are transmitted to the Central Unit. This obligation shall not apply where the provision of such information proves impossible or would involve a disproportionate effort.

2. In each Member State any data subject may, in accordance with the laws, regulations and procedures of that State, exercise the rights provided for in Article 12 of Directive 95/46/EC.

Without prejudice to the obligation to provide other information in accordance with point (a) of Article 12 of Directive 95/46/EC, the data subject shall have the right to obtain communication of the data relating to him/her recorded in the central database and of the Member State which transmitted them to the Central Unit. Such access to data may be granted only by a Member State.

3. In each Member State, any person may request that data which are factually inaccurate be corrected or that data recorded unlawfully be erased. The correction and erasure shall

be carried out without excessive delay by the Member State which transmitted the data, in accordance with its laws, regulations and procedures.

4. If the rights of correction and erasure are exercised in a Member State, other than that, or those, which transmitted the data, the authorities of that Member State shall contact the authorities of the Member State, or States, in question so that the latter may check the accuracy of the data and the lawfulness of their transmission and recording in the central database.

5. If it emerges that data recorded in the central database are factually inaccurate or have been recorded unlawfully, the Member State which transmitted them shall correct or erase the data in accordance with Article 15(3). That Member State shall confirm in writing to the data subject without excessive delay that it has taken action to correct or erase data relating to him/her.
6. If the Member State which transmitted the data does not agree that data recorded in the central database are factually inaccurate or have been recorded unlawfully, it shall explain in writing to the data subject without excessive delay why it is not prepared to correct or erase the data.

   That Member State shall also provide the data subject with information explaining the steps which he/she can take if he/she does not accept the explanation provided. This shall include information on how to bring an action or, if appropriate, a complaint before the competent authorities or courts of that Member State and any financial or other assistance that is available in accordance with the laws, regulations and procedures of that Member State.

7. Any request under paragraphs 2 and 3 shall contain all the necessary particulars to identify the data subject, including fingerprints. Such data shall be used exclusively to permit the exercise of the rights referred to in paragraphs 2 and 3 and shall be destroyed immediately afterwards.

8. The competent authorities of the Member States shall cooperate actively to enforce promptly the rights laid down in paragraphs 3, 4 and 5.

9. In each Member State, the national supervisory authority shall assist the data subject in accordance with Article 28(4) of Directive 95/46/EC in exercising his/her rights.

10. The national supervisory authority of the Member State which transmitted the data and the national supervisory authority of the Member State in which the data subject is present shall assist and, where requested, advise him/her in exercising his/her right to correct or erase data. Both national supervisory authorities shall cooperate to this end. Requests for such assistance may be made to the national supervisory authority of the Member State in which the data subject is present, which shall transmit the requests to the authority of the Member State which transmitted the data. The data subject may also apply for assistance and advice to the joint supervisory authority set up by Article 20.

11. In each Member State any person may, in accordance with the laws, regulations and procedures of that State, bring an action or, if appropriate, a complaint before the competent authorities or courts of the State if he/she is refused the right of access provided for in paragraph 2.

12. Any person may, in accordance with the laws, regulations and procedures of the

Member State which transmitted the data, bring an action or, if appropriate, a complaint before the competent authorities or courts of that State concerning the data relating to him/her recorded in the central database, in order to exercise his/her rights under paragraph 3. The obligation of the national supervisory authorities to assist and, where requested, advise the data subject, in accordance with paragraph 10, shall subsist throughout the proceedings.

Article 19
National supervisory authority

1. Each Member State shall provide that the national supervisory authority or authorities designated pursuant to Article 28(1) of Directive 95/46/EC shall monitor independently, in accordance with its respective national law, the lawfulness of the processing, in accordance with this Regulation, of personal data by the Member State in question, including their transmission to the Central Unit.

2. Each Member State shall ensure that its national supervisory authority has access to advice from persons with sufficient knowledge of fingerprint data.

Article 20
Joint supervisory authority

1. An independent joint supervisory authority shall be set up, consisting of a maximum of two representatives from the supervisory authorities of each Member State. Each delegation shall have one vote.

2. The joint supervisory authority shall have the task of monitoring the activities of the Central Unit to ensure that the rights of data subjects are not violated by the processing or use of the data held by the Central Unit. In addition, it shall monitor the lawfulness of the transmission of personal data to the Member States by the Central Unit.

3. The joint supervisory authority shall be responsible for the examination of implementation problems in connection with the operation of Eurodac, for the examination of possible difficulties during checks by the national supervisory authorities and for drawing up recommendations for common solutions to existing problems.

4. In the performance of its duties, the joint supervisory authority shall, if necessary, be actively supported by the national supervisory authorities.

5. The joint supervisory authority shall have access to advice from persons with sufficient knowledge of fingerprint data.

6. The Commission shall assist the joint supervisory authority in the performance of its tasks. In particular, it shall supply information requested by the joint supervisory body, give it access to all documents and paper files as well as access to the data stored in the system and allow it access to all its premises, at all times.

7. The joint supervisory authority shall unanimously adopt its rules of procedure. It shall be assisted by a secretariat, the tasks of which shall be defined in the rules of procedure.

8. Reports drawn up by the joint supervisory authority shall be made public and shall be forwarded to the bodies to which the national supervisory authorities submit their reports, as well as to the European Parliament, the Council and the Commission for information. In addition, the joint supervisory authority may submit comments or proposals for improvement regarding its remit to the European Parliament, the Council and the Commission at any time.

9. In the performance of their duties, the members of the joint supervisory authority shall not receive instructions from any government or body.

10. The joint supervisory authority shall be consulted on that part of the draft operating budget of the Eurodac Central Unit which concerns it. Its opinion shall be annexed to the draft budget in question.

11. The joint supervisory authority shall be disbanded upon the establishment of the independent supervisory body referred to in Article 286(2) of the Treaty. The independent supervisory body shall replace the joint supervisory authority and shall exercise all the powers conferred on it by virtue of the act under which that body is established.

CHAPTER VII
FINAL PROVISIONS

Article 21
Costs

1. The costs incurred in connection with the establishment and operation of the Central Unit shall be borne by the general budget of the European Union.

2. The costs incurred by national units and the costs for their connection to the central database shall be borne by each Member State.

3. The costs of transmission of data from the Member State of origin and of the findings of the comparison to that State shall be borne by the State in question.

Article 22
Implementing rules

1. The Council shall adopt, acting by the majority laid down in Article 205(2) of the Treaty, the implementing provisions necessary for

   - laying down the procedure referred to in Article 4(7),
   - laying down the procedure for the blocking of the data referred to in Article 12(1),
   - drawing up the statistics referred to in Article 12(2).

In cases where these implementing provisions have implications for the operational expenses to be borne by the Member States, the Council shall act unanimously.

2. The measures referred to in Article 3(4) shall be adopted in accordance with the procedure referred to in Article 23(2).

Article 23
Committee

1. The Commission shall be assisted by a committee.

2. In the cases where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The committee shall adopt its rules of procedure.

Article 24
Annual report: Monitoring and evaluation

1. The Commission shall submit to the European Parliament and the Council an annual report on the activities of the Central Unit. The annual report shall include information on the management and performance of Eurodac against pre-defined quantitative indicators for the objectives referred to in paragraph 2.

2. The Commission shall ensure that systems are in place to monitor the functioning of the Central Unit against objectives, in terms of outputs, cost-effectiveness and quality of service.

3. The Commission shall regularly evaluate the operation of the Central Unit in order to establish whether its objectives have been attained cost-effectively and with a view to providing guidelines for improving the efficiency of future operations.

4. One year after Eurodac starts operations, the Commission shall produce an evaluation report on the Central Unit, focusing on the level of demand compared with expectation and on operational and management issues in the light of experience, with a view to identifying possible short-term improvements to operational practice.

5. Three years after Eurodac starts operations and every six years thereafter, the Commission shall produce an overall evaluation of Eurodac, examining results achieved against objectives and assessing the continuing validity of the underlying rationale and any implications for future operations.

Article 25
Penalties

Member States shall ensure that use of data recorded in the central database contrary to the purpose of Eurodac as laid down in Article 1(1) shall be subject to appropriate penalties.

Article 26
Territorial scope

The provisions of this Regulation shall not be applicable to any territory to which the Dublin Convention does not apply.

Article 27
Entry into force and applicability

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

2. This Regulation shall apply, and Eurodac shall start operations, from the date which the Commission shall publish in the Official Journal of the European Communities, when the following conditions are met:

(a) each Member State has notified the Commission that it has made the necessary technical arrangements to transmit data to the Central Unit in accordance with the implementing rules adopted under Article 4(7) and to comply with the implementing rules adopted under Article 12(5); and

(b) the Commission has made the necessary technical arrangements for the Central Unit to begin operations in accordance with the implementing rules adopted under Article 4(7) and Article 12(5).

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 11 December 2000.
For the Council
The President
H. Védrine

(1) OJ C 189, 7.7.2000, p. 105 and p. 227 and opinion delivered on 21 September 2000 (not yet published in the Official Journal).
(2) OJ C 254, 19.8.1997, p. 1.
(3) OJ L 184, 17.7.1999, p. 23.
(4) OJ L 281, 23.11.1995, p. 31.

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UNHCR'S POSITION

UNHCR comments on the entry into force of the EURODAC system

(15 January 2003)

UNHCR welcomes the launch of the EURODAC system, the very first European Automated Fingerprint Identification System for asylum-seekers and certain groups of irregular immigrants on 15 January 2003. UNHCR trusts that the system will contribute to improved implementation of the Dublin mechanism which is aimed at determining which Member States has responsibility for the treatment of an asylum application lodged in any of the EU Member States (and Norway and Iceland). Improved implementation of the Dublin mechanism is in the interest of increasing fairness, efficiency and credibility of States' asylum procedures - one of UNHCR's main concerns and interests in the European asylum space.

UNHCR welcomes the specific safeguards included in the EURODAC system which should prevent that any personal data of the asylum -seeker may come to the attention of authorities in the country of origin. UNHCR's main concern with the EURODAC system would thus be alleviated. UNHCR moreover notes that the data stored in the EURODAC system do not include any personal details such as name, country of origin, or reasons for flight. Scrutiny of the implementation of the EURODAC system by national authorities on data protection as well as an independent joint supervisory authority is expected to further contribute to the lawful processing of the data .

In addition, UNHCR takes note of the provisions of the EURODAC Regulation on blocking, and eventual erasure, of data of asylum-seekers who have been recognised and admitted as refugees, as well as the provisions on data protection and right of access by the data subject.

UNHCR
15 January 2003

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

UNHCR'S POSITION

UNHCR's Observations on the European Commission's 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 (12 September 2001, COM(2001) 510 final, 2001/0207(CNS))

Introduction

1. On 12 September 2001, the European Commission issued a 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. In putting forward this proposal, the Commission has completed the entire set of legislative measures in the field of asylum set out in Article 63 of the Amsterdam Treaty and envisaged by the Tampere European Council as the first legislative step of developing a common European asylum system.

2. The Commission's proposal lays down a common interpretation of the criteria for determination of refugee status under the 1951 Convention and 1967 Protocol, introduces criteria for qualification for subsidiary protection status, and establishes minimum standards of treatment applicable to persons falling under the above categories.

3. UNHCR has often stressed that, since one of the main features of refugee status is its international character, and since recognition of refugee status under the 1951 Convention and 1967 Protocol has certain extraterritorial effects, it is essential that States parties to these international instruments apply the substantive criteria of the refugee definition in a harmonised and mutually consistent manner.

4. It has generally been acknowledged that, however properly the refugee definition contained in the 1951 Convention and 1967 Protocol may be applied, there are some categories of persons in need of protection who do not fall under the strict scope of these instruments. Such refugees of concern to UNHCR include, for example, those fleeing the indiscriminate effects of violence arising in situations of armed conflict, with no specific element of persecution. UNHCR has, accordingly, promoted the adoption of complementary or subsidiary regimes of protection to address their needs.

5. UNHCR generally welcomes the Commission's proposal, and hopes that the Community instrument eventually adopted will effectively ensure the realisation of the objectives affirmed by the Tampere European Council, as regards the full and inclusive application of the 1951 Convention and the granting of protection to all those who need it. Inherent in the notion of "full and inclusive application of the Convention" is also ensuring access for all persons seeking protection to fair and efficient procedures for the determination of refugee status or subsidiary forms of protection, irrespective of

nationality or country of origin. UNHCR therefore hopes that Member States will continue to examine any asylum application that may be submitted to them by any person who is not a national of the Member State concerned.

Overall assessment of the proposal

6. Generally speaking, UNHCR is pleased with the orientation of many of the key provisions of the text. In particular, UNHCR welcomes that the proposal:

(i) Reaffirms that the 1951 Convention and its 1967 Protocol are the cornerstone of the international legal regime for the protection of refugees, and emphasises that the subsidiary protection regime that the draft Directive provides for is complementary and additional to the refugee protection regime enshrined in those instruments.

(ii) Acknowledges that the recognition of refugee status is a declaratory act.

(iii) Recognises that the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides valuable guidance for Member States when determining refugee status.

(iv) Recognises that, for a person to qualify as a refugee under the 1951 Convention, it is immaterial whether the persecution feared stems from the State, or from parties or organisations controlling the State, or from non-state actors – provided, in the latter case, that the State is unable or unwilling to offer effective protection. This approach is in conformity with the practice of the vast majority of States, and also reflects UNHCR's long-standing position as set out not least in the Handbook.

(v) Further recognises that, for a person to qualify as a refugee under the 1951 Convention, it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the agent of persecution;

(vi) Recognises that the risk of punishment for draft evasion or desertion may, by itself, provide grounds for a refugee claim if the reason for the evasion or desertion is the person's unwillingness to participate in military actions incompatible with his or her deeply held moral, religious or political convictions.

(vii) Recognises that cessation of refugee status must be declared on a case-by-case basis and that the burden of proof lies with the Member State which has granted such status.

(viii) Contains special provisions for the protection of unaccompanied minors, and provides that the "best interests of the child" should be a primary consideration of Member States when implementing the Directive.

(ix) Recognises that persecution may be gender-related, and that a social group may be defined, inter alia, by gender or sexual orientation.

(x) Provides that the notion of "members of the family" of the refugee encompasses not only the spouse and minor children, but also other close relatives who lived together as part of the family unit at the time of leaving the country of origin, and who were wholly or mainly dependent on the applicant at the time.

(xi) Emphasises that Member States have the power to introduce or maintain more favourable standards of treatment both in respect of the qualifying criteria and of the rights and benefits attached to the possession of the relevant status.

(xii) Generally provides for an adequate level of treatment of refugees and beneficiaries of subsidiary protection, taking into account not only the provisions of the 1951 Convention, but also the development of international human rights law.

7. UNHCR is, however, concerned about the fact that some of the definitions provided in the proposed Directive differ from those embodied in relevant international instruments. It is also of concern that some of the proposed Directive's provisions and commentaries thereon do not, in UNHCR's view, correctly reflect the legal position. Moreover, some of the provisions as currently drafted are not in line with principles of international refugee law or with UNHCR's policy positions.

Specific comments

8. The following observations focus on those aspects of the proposed Directive that UNHCR believes require clarification or amendment in order to ensure full conformity with international standards. The observations follow the actual structure of the proposed Directive.

Article 2(a)

9. The expression "international protection" is used here to refer to the protection accorded by a Member State, either in the form of refugee status or of subsidiary protection status. While acknowledging that this use of the term is common, UNHCR would like to point out that from an international law perspective, international protection is the protection that the international community accords to individuals or groups through special organs and mechanisms.

10. The regime of international refugee protection exists independently of any State having accepted responsibility to protect the refugee in question. In conformity with paragraphs 1 and 8 of the Statute of UNHCR, adopted by General Assembly resolution 428(V) of 1950, the responsibility for providing international protection to refugees lies with the High Commissioner for Refugees. The protection that States extend to refugees is not, properly speaking, "international protection," but national protection extended in the performance of an international obligation. This form of national protection is better described, in UNHCR's view, as "asylum."

Article 2(c)

11. The term "refugee" is defined in this provision as a "third country national or a stateless person who fulfils the requirements laid down by Article 1(A) of the Geneva Convention…" This definition does therefore not replicate the precise wording of the refugee definition contained in the 1951 Convention and its 1967 Protocol in that it excludes from its ambit nationals of EU Member States. While indeed it is extremely unlikely that nationals of EU Member States would have any valid claim to asylum, this

consideration should have no effect on the manner in which the globally accepted refugee definition of the 1951 Convention and 1967 Protocol is being defined in the domestic legal system of 15 States parties. The scope of the refugee definition embodied in these binding international treaties cannot be reserved from, by virtue of the provisions of Article 42 of the Convention; nor can the provisions of the Convention be restricted on grounds of nationality, by virtue of the non-discrimination principle enshrined in Article 3. To ensure full compatibility with the 1951 Convention, UNHCR therefore recommends that the proposal refers not merely to "third country nationals" but to aliens.

Article 2(d)

12. The expression "refugee status" is defined as "the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of the Member State and/or permitted to remain and reside there."

13. UNHCR wishes to point out that the term "refugee status" may, depending on the context, cover two different notions. Paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status reads: "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined." In this sense, "refugee status" means the condition of being a refugee. In contrast, the proposed Directive appears to here use the term "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum."

Articles 2(g) and 2(h)

14. For the reasons set out above with respect to the wording of Articles 2(a) and 2(d), UNHCR would recommend that the term "asylum" be used in preference to "international protection". If this were adopted, these two articles could be combined into one subparagraph, and the term "asylum" in the fifth line of the present 2(g) could be replaced with the term "Convention refugee status". There would then, in UNHCR's view, be no need for the present 2(h).

Article 2(j)(ii)

15. According to this provision, the family unit of the applicant includes the children of the applicant as well as the children of the couple (i.e. those of the applicant and his or her spouse or unmarried partner in a stable relationship), but does not include the children of the applicant's spouse or stable partner. UNHCR considers that this distinction unjustified and should be corrected.

Article 2(k)

16. UNHCR understands the final phrase of this provision, "in relation to the application for asylum" to mean, in effect, that "accompanying family members" are only those family

members who are present in the country, but are not themselves applicants for asylum. UNHCR recommends that this terminology be used in preference to the current wording, to avoid confusion, particularly with respect to Article 6(1).

Article 3

17. UNHCR wishes to draw attention again to its comments formulated under Article 2(c), regarding the unwarranted restriction of access to asylum to third country nationals and stateless persons. For UNHCR, it is necessary to ensure that all persons who seek protection, no matter their country of origin, are entitled to have their claims considered.

Article 5

18. UNHCR welcomes the proposed Directive's holistic approach to international protection as embodied in Article 5, save for the unwarranted nationality-based limitations commented upon above.

19. UNHCR wishes to point out that the last part of Article 5(2) referring to "is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" may be misplaced in the context of subsidiary protection. Under the refugee definition of Article 1(A) of the 1951 Convention, "availment of protection" of the country of nationality has a special meaning that is intrinsically linked to the notion of "well-founded fear of persecution." UNHCR would therefore recommend that the definition with respect to beneficiaries of subsidiary protection should refer rather to unwillingness or inability to return to the country of nationality or former habitual residence. UNHCR would also like to caution that the use of the "well-founded fear" test in respect of subsidiary protection may potentially lead to unnecessary confusion with the refugee definition contained in the 1951 Convention and 1967 Protocol.

20. UNHCR further wishes to pount out that, in order to duly reflect the text of Article 1(A)(2) of the 1951 Convention, the last sentence of the commentary on Article 5(1), should read: "The fear must be such that it makes the applicant unwilling or unable to avail him or herself of the protection of the country of nationality or, if the appplicant has no nationality, unable or unwilling to return to the country of his or her former habitual residence."

Article 6(1)

21. This article provides that "Member States shall ensure that accompanying family members are entitled to the same status as the applicant for international protection." UNHCR would like to draw attention to its comments under Article 2(k), where a recommendation was made to clarify that the term "accompanying family members" refers only to persons who are not applicants for asylum in their own right.

22. In addition, UNHCR wishes to point out that not all the dependent members of the family of a refugee, or of a beneficiary of subsidiary protection, are automatically eligible for derivative refugee or subsidiary protection status. Recognition of derivative status would not be appropriate if the member of the family is a national of a State other than that of the applicant. In such a case, the member of the family should be granted a

residence permit, and should be entitled to continue to maintain normal relations with his or her country of nationality. Granting of a residence permit would, of course, not be necessary if the member of the family is a national of the country of asylum. Automatic recognition of derivative status is indeed called for only where the member of the family is either a national of the same country as the applicant, or is a stateless person. UNHCR therefore recommends that "unless such status is incompatible with their existing status" or words to that effect be added to Article 6(1).

Article 7(b)

23. UNHCR notes the reference to a "reasonable possibility" and assumes that this is in line with the UNHCR standard. However, to ensure that the standard of proof is not unrealistic given the special nature of the refugee, UNHCR recommends to replace "will" with "might" (which would also more generally be in line with Article 7(c) of the proposed Directive).

Article 7(e)

24. UNHCR is concerned that the provision in Article 7(e) may be read into as a general evidentiary requirement. A person claiming to be in need of protection must not be required to produce "credible evidence that laws or regulations are in force and applied in practice in the country of origin which authorise or condone the persecution or the infliction of other serious harm to the applicant." Information as to whether or not such laws or regulations exist is part of the fact-finding process provided for in Article 7(a), which requires the decision-makers to examine "all relevant facts as they relate to the country of origin…" In some instances, it may well be the case that existing laws (as such in line with international law) could have the effect of condoning persecution, if applied, for instance, in a discriminatory or arbitrary manner. To avoid any potential misinterpretation, this provision could therefore be deleted.

Article 8(2)

25. Article 8(2) provides that "a well-founded fear of being persecuted or otherwise suffering serious unjustified harm may be based on activities which have been engaged in by the applicant since he left his country of origin, save where it is established that such activities were engaged in for the sole purpose of creating the necessary conditions for making an application for international protection."

26. UNHCR acknowledges that there may be instances where an individual outside his or her country of origin acts in a certain way for the sole purpose of "manufacturing" an asylum claim, when that person would otherwise not have a well-founded fear of persecution. UNHCR appreciates that States face a certain difficulty in assessing the validity of such claims, and agrees with States that the practice should be discouraged. At the same time, UNHCR needs to insist that the principle at stake is whether the person consequently would face a risk to his or her life or liberty upon return, and is not primarily a question of how the risk comes about. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious unjustified harm, and the fact that the person may have acted in a manner designed to create a refugee claim.

27. If the aim of Article 8(2) is to assist States in addressing so-called self-serving claims, which sometimes raise difficult evidentiary and credibility issues, it would be preferable, in UNHCR's view, to address the issue from the perspective of making appropriate credibility assessments and looking into burden of proof issues in the individual case. For UNHCR, therefore, a proper analysis of such cases demands not an assessment of whether the asylum-seeker acted in "bad faith" (as noted in the explanatory memorandum) but rather, as for every case, whether the requirements of the definition are in fact fulfilled taking into account all the relevant facts surrounding the claim.

28. As regards beneficiaries of subsidiary protection, UNHCR finds it difficult to see how a person may have a well-founded fear of suffering serious unjustified harm as a result of activities undertaken after leaving his or her country of origin. For example, it is difficult to imagine that activities engaged in by the applicant while in the country of asylum could be cause for a well-founded fear of being subjected to serious and unjustified harm resulting from "indiscriminate violence arising in situations of armed conflict".

Article 9

29. The provision in Article 9 dealing with sources of persecution is most welcome in so far as it acknowledges and codifies what UNHCR views as the state of international law in this regard - i.e. that it is immaterial whether the feared harm emanates from a State or a non-State agent. There are, however, two aspects of Article 9 that are cause for some concern.

30. Firstly, UNHCR would sound a note of caution with respect to the statement in Article 9(2) that where effective State protection is available, the fear of being persecuted or otherwise suffering serious unjustified harm "shall not be considered well-founded". In UNHCR's view, this assertion is too categorical and fails adequately to express the complexities of the assessment.

31. Secondly, as regards Article 9(3), the question of availability of State protection (or lack thereof) comes in as a factor for consideration where the threat of persecution emanates from non-State actors. This provision equates national protection provided by States with control over territory by international organisations or quasi-State authorities. In UNHCR's view, such an equation is inappropriate. An international organisation may indeed (as has been the case in Kosovo or East Timor) have a certain administrative authority and control over territory on a transitional or temporary basis but such functions cannot be interpreted to substitute for the full range of measures normally attributed to the exercise of State sovereignty. Similarly, quasi-State authorities may indeed control parts of territory. This control (which is often disputed and rather fluid) cannot, however, be meant to replace the exercise of national protection provided by States, not least because international obligations stemming from international human rights law would not necessarily tally with those of States parties to international human rights instruments. UNHCR recommends therefore that this provision be deleted from the proposed Directive.

Article 10

32. UNHCR welcomes this attempt to put a more uniform structure and meaning to a notion which has been applied in widely differing ways by various States for some years. In general UNHCR agrees with the proposed analysis, including in particular its recognition that it will not normally be a consideration where the feared harm emanates from agents of the State, and that the reasonableness of finding such an alternative will depend both on circumstances in that part of the country put forward as furnishing the alternative and the individual personal circumstances of the asylum-seeker.

33. In UNHCR's view, though, the expression "internal protection" as introduced in this context is not defined and may be confused with other notions of protection referred to in the proposed Directive. The expression most commonly used to refer to this situation is "internal flight alternative" or "internal relocation alternative". Consideration of this would only require a change in the second paragraph of Article 10(l) by replacing "against finding internal protection to be a viable alternative to international protection" with "in favour of international protection".

34. As regards the Commission's commentary on Article 11(1)(d), the second sentence lists a reason for refusing to perform military obligations ("conscientious objection") alongside different manners in which those obligations may be avoided ("absence without leave, evasion, or desertion"). Moreover, the assertion made in that sentence that prosecution or punishment for refusal to perform military service for reasons of conscience "will not usually amount to persecution" is in direct contradiction with the text of Article 11(1)(d).

35. In addition, in relation to Article 11(2)(c), the Commission's commentary gives the impression that persons in flight from civil war or armed conflict could hardly be recognised as Convention refugees. However, experience shows that most civil wars or internal armed conflicts are rooted in ethnic, religious or political differences which specifically victimise those fleeing. War and violence are themselves often used as instruments of persecution.

Article 12

36. UNHCR also welcomes this elucidation of the meaning of the reasons for being persecuted set out in Article 1 of the 1951 Convention, and is in general agreement with the draft's clarifications of the meaning of these terms. UNHCR would recommend, however, that Article 12(c) relating to the meaning of "nationality" should also contain, after the word "citizenship" in the first line, the words "or lack thereof" in order to fully reflect its meaning. In addition, UNHCR recommends that Article 12(d) dealing with the "membership of a particular social group" ground also expressly provide for external factors as one of the identifying and defining characteristics of the particular social group.

Article 13

37. UNHCR is pleased that this provision takes in the Article 1C cessation clauses of the 1951 Convention and that it places the burden of proving the cessation of refugee status on the State asserting it.

38. UNHCR would however recommend that the commentary on this Article be amended to reflect the generally accepted position that, in certain circumstances, the refugee may be able to obtain or renew his or her national passport without forfeiting his or her refugee status.

Article 14

39. UNHCR welcomes that this provision takes in the language of Article 1F of the 1951 Convention and that certain fundamental principles of accepted doctrine and State practice with respect to exclusion are codified here, including the need for personal and knowing conduct to trigger exclusion and that procedural rights should be preserved.

40. With respect to the commentary on Article 14(1)(a), however, UNHCR wishes to note that the assertion that "…the protection or assistance available from the United Nations agency must have the effect of eliminating or durably suppressing the individual's well-founded fear of being persecuted" does not have any legal or empirical basis. Nor is there any legal basis for making the applicability of this exclusion clause contingent upon a requirement of continuity in the protection or assistance received from the United Nations.

41. UNHCR further wishes to note that the commentary on Article 14(1)(c)(i), is at variance with the text of the 1951 Convention, insofar as the Convention does not require that the instruments defining the international crimes to which the provision refers should have been acceded to or accepted by each State concerned.

Article 15

42. UNHCR notes the approach taken by the proposed Directive to set out the grounds for subsidiary protection, which would only come into play when an examination of the asylum claim has indeed led to the conclusion that the applicant would not qualify for refugee status under the 1951 Convention and the 1967 Protocol. UNHCR would like to point out that in most cases the type of threats that are enumerated in Article 15 may indeed indicate a strong presumption for Convention refugee status, except perhaps for those fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no element of persecution or link to a specific Convention ground. And it is for the latter category of persons that subsidiary protection indeed fulfils an important function. Against this background, the elements listed under Article 15 would need to be revisited to ensure that the applicability of the 1951 Convention and the 1967 Protocol is not in effect undermined by resorting to subsidiary forms of protection.

Article 17(1)(b)

43. The provision under Article 17(1(b) relating to serious non-political crime (which refers to beneficiaries of subsidiary protection) should be amended to remove the words "as a refugee" at the end of the subparagraph.

Article 20

44. While UNHCR welcomes the provision of information to persons recognised as needing international protection, the Office queries the use of the terminology "in a language likely to be understood by them." UNHCR would recommend that the provisions in this regard should mirror those of the Commission proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status, where the wording used is "in a language which they understand."

Article 21

45. UNHCR appreciates that, as noted in the commentary on this provision, many Member States consider subsidiary protection to be temporary in nature. Nevertheless, as is also pointed out elsewhere in the explanatory memorandum, the reality is that the need for subsidiary protection is often just as long-lasting as that for protection under the 1951 Convention. In recognition of that fact, UNHCR would recommend that the residence permit provided to beneficiaries of subsidiary protection should be for the same duration as that for Convention refugees. If it appears that subsidiary protection is no longer necessary in advance of the expiry of the residence permit, the cessation provisions of Article 16 would in any case apply.

Article 24

46. Access to employment and employment-related educational opportunities is another area where the proposed Directive treats Convention refugees and beneficiaries of subsidiary protection differently. UNHCR takes the view that, just as the proposal provides for equal treatment to all beneficiaries of international protection as regards access to housing, social welfare and health care, there is no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees as regards access to employment. UNHCR therefore submits that beneficiaries of subsidiary protection should be entitled to work, and to benefit from available vocational training, workplace experience and other employment-related educational opportunities, once they are granted that status.

Article 28(3)

47. With a view to aligning this provision with similar provisions contained in the Proposal from the Commission for a Council Directive laying down minimum standards of reception of applicants for asylum in Member States, UNHCR would propose that the words "in order of priority" be added at the end of the phrase "Member States shall ensure that unaccompanied minors are placed" in the first line of Article 28(3).

Article 31

48. According to this provision, Convention refugees are eligible for programmes of integration once they are granted asylum, whereas access to those programmes by beneficiaries of subsidiary protection status may be postponed for up to one year after that status has been granted. Again, for the reasons set out above in the comments to Article 21, UNHCR considers that this difference of treatment is not warranted.

Article 33

49. The mechanism envisaged under Article 33 to facilitate "direct co-operation and an exchange of information between the competent authorities" could also usefully build in opportunities for co-operation and information exchange with UNHCR. Such a role for UNHCR would be in line with the mandate of UNHCR to supervise the application of international conventions for the protection of refugees and with Article 35 of the 1951 Convention.

Conclusion

50. As is evident from the foregoing comments, UNHCR generally welcomes the present proposal from the European Commission. The proposal provides adequate basis for the discussion of the relevant issues, and constitutes an important step in the process of building a common European asylum system.

51. UNHCR considers, however, that there are some aspects of the Commission's proposal which need to be revised in order to ensure the desired full conformity with international protection principles, as well as the realisation of the fundamental aims of the proposed Community instrument.

52. It is in the spirit of its on-going, close co-operation with the Commission and Member States that UNHCR has offered the foregoing observations and suggestions. UNHCR trusts that they will be duly taken into consideration and will be appropriately reflected in the final text of the proposed Council Directive.

UNHCR Geneva
November 2001

Footnotes

Preamble, paras. 3 and 17.

Preamble, para. 10.

Preamble, para. 11.

Articles 9 (1) and 11 (2)(a).

UNHCR Handbook, paragraph 65.

Article 11(2)(b).

Article 11(1)(d)(ii).

Article13(2).

Article 28 and Preamble para. 23.

Article 12(d) and Preamble para. 15.

Article 2(j).

Article 4.

Chapter V.

UNHCR acknowledges that the definitions contained in the draft Directive are given for the sole purpose of that instrument and, as such, they do not – and indeed cannot – affect the interpretation of other instruments. It, nevertheless, submits that, in the drafting of legal instruments, it is strongly advisable to adhere to accepted language and terminology in order to avoid confusion of concepts.

The General Assembly has also reaffirmed UNHCR's international protection function and responsibilities in a series of resolutions since 1957.

The expression "international protection" was proposed by the French delegate during the discussions at ECOSOC and the General Assembly of the Statute of UNHCR (instead of the expression "legal protection" which was used in the text under discussion). The French delegate explained that the purpose of the proposal was to mark the difference between international protection extended by UNHCR and national protection extended by States (Official Records of ECOSOC, Ninth session, 1949, Summary Record of the Three Hundred and Twenty-Sixth Meeting, pp.628-629; and GAOR, Fourth session, Third Committee, Summary Record of the 256th Meeting). The relationship existing between international protection extended by UNHCR and national protection extended by States –in the form of asylum– is illustrated in the "Note on Asylum" submitted by the High Commissioner to the Twenty-eighth session of UNHCR's EXCOM (Document EC/SCP/4 of 24 August 1977). In that Note, the High Commissioner pointed out: "A person who leaves his country of origin because of persecution or a well-founded fear of it has a primary and essential need to receive asylum in another country. (...) In the exercise of his function to provide international protection, the High Commissioner seeks to ensure that refugees receive asylum and to promote liberal asylum practices by States…"

UNHCR's Handbook, para.28. It is noted that, in this respect, the draft Directive appears to use the phrase in two different ways, in so far as para.10 of the Preamble acknowledges the declaratory character of the decision that determines refugee status.

This meaning is reflected in a wealth of works on international law, in numerous international instruments, and in numerous national Constitutions and legislations, including those of Member States of the EU (See for instance Article 16 of the German Constitution and Section 51 of the German Aliens Law; Preamble of the French Constitution, and Laws of 11.05.98 and of 25.07.52 of France; Article 3 of the Asylum Law of Spain; Article 10 of the Italian Constitution and article 1 of Law 39/90 of Italy; and Article 1 of Law 15/1998 of Portugal).

Cf. UNHCR Handbook, para.184.

UNHCR Handbook, paras.37-50

It is noted that this is recognised in the Commission's commentary on this article.

For instance, the reference to continuity of convictions is, in UNHCR's view, an assessment which goes to credibility and not a principle or requirement in and of itself.

In this sense the explanatory memorandum paragraph on this provision is somewhat difficult to interpret, as it asserts that Member States are entitled to start from the premise that the impugned activities do not in principle furnish grounds for recognition, but goes on (correctly, in UNHCR's view) to point out that if a risk or persecution or serious harm nevertheless is produced, the protection need must be recognised.

This is one of the grounds of subsidiary protection listed in Article 15 of the proposed Directive.

Where persecution emanates from the State, the question of availability of State protection (or lack thereof) does not arise. Lack of State protection is not a general requirement of the refugee definition.

The reference in Article 12(d) to "…groups of individuals who are treated as 'inferior' in the eyes of the law" could be more accurately portrayed to encompass all externally-defined social groups.

Cf. UNHCR Handbook, para. 120.

See Articles 7(a),(e) and (f) of the proposal, COM(2000)578 final (2000/0238(CNS)).

See the Explanatory Memorandum, at p. 4, where it is noted that while the regime of subsidiary protection starts from the premise that the need for such protection is temporary in nature, "…in reality the need for subsidiary protection often turns out to be more lasting."

See Article 25(2) of the proposal, COM(2001) 181 final (2001/0091(CNS)).

UNHCR annotations for Articles 1 to 19 of the draft Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. December 2002[1]

CHAPTER I
General provisions

Article 1

Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Article 2

Definitions

For the purposes of this Directive:

(a) "International protection" consists of refugee and subsidiary protection status as defined in sub-paragraphs (d) and (f);

UNHCR Comment: UNHCR indicated in earlier comments that the protection extended by States to refugees is not, properly speaking, "international protection," but national protection extended in the performance of an international obligation. This form of national protection is better described, in UNHCR's view, as "asylum."

(b) "Geneva Convention" means the Convention relating to the status of refugees done at Geneva on 28th July 1951, as amended by the New York Protocol of 31 January 1967;

(c) "Refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, and a

stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 14 does not apply;

UNHCR Comment: This definition does not replicate the precise wording of the refugee definition contained in the 1951 Convention and its 1967 Protocol. To ensure full compatibility with the 1951 Convention, UNHCR recommends that the proposal refers not merely to third country nationals but to foreigners.

(d) "Refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee;

UNHCR Comment: UNHCR wishes to point out that the term "refugee status" may, depending on the context, cover two different notions. Paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status reads: "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined." In this sense, "refugee status" means the condition of being a refugee. In contrast, the draft Qualification Directive appears to here use the term "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum."

(e) "Person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in article 15, and to whom Article 17 paragraph 1 and 2 does not apply, and is unable, or owing to such risk, is unwilling to avail himself or herself of the protection of that country;

(f) "Subsidiary protection status" means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;

(g) "Application for international protection" means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

UNHCR Comment: UNHCR considers it important to clarify, in the definition, that "any application for international protection should first be considered under the criteria of the refugee definition of the 1951 Convention and only if that fails under the criteria for subsidiary protection". This is important to ensure that the 1951 Geneva Convention is not undermined by resorting to subsidiary

protection in cases which would fall under the refugee definition of the 1951 Convention.

(h) (deleted)

(i) (deleted)

(j) "Family members" shall mean, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

(i) the spouse of the beneficiary of refugee or subsidiary protection status or his or 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;

(ii) the minor children of the couple referred to in point (i) or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(iii) (deleted)

UNHCR Comment: UNHCR supports the originally proposed definition of family members which included close relatives and unmarried children who lived together as a family unit and who are wholly or mainly dependent on the applicant. This is in line with the right to family unity, as outlined in the UNHCR Handbook, which stipulates that other dependants living in the same household are normally considered as benefiting from family unity.

(k) (deleted)

(l) "Unaccompanied minors" means third-country nationals and 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; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(m) "Residence permit" means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;

(n) "Country of origin" means the country or countries of nationality or, for stateless persons, former habitual residence.

Article 3

(deleted)

Article 4
More favourable provisions

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and in determining the content of international protection, in so far as those standards are compatible with this Directive.

CHAPTER II
Assessment of applications for international protection

Article 5
(deleted - its content has been transferred to Article 2)

Article 6
(see new Article 21A)

UNHCR Comment: UNHCR generally supports the initiative to re-insert a provision on derivative refugee status for family members. The problematic aspects of the originally proposed formulation relate to (a) the lack of clarity that the possibility for family-members eligible to derivative status have their applications examined on their own merits and (b) the possible incompatibility with the personal status of the family member (i.e. of a different nationality). UNHCR therefore proposes a provision on derivative status, which stipulates that "family members are entitled to/should be granted refugee status, unless they are applicants in their own right or this is incompatible with their personal status".

Article 7
Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the claim for international protection. In co-operation with the applicant it is the duty of the Member State to investigate the relevant elements of the claim.

2. The elements referred to in the first sentence of paragraph 1 consist of statements and all documentation at the applicants disposal regarding his/her age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.
3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

UNHCR Comment: UNHCR suggests to delete the term "all" since this may prove to be overly ambitious and complicate the decision-making process unnecessarily.

(b) the relevant statement and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicants' personal circumstances, the acts to which he or she has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since he left his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for making an application for international protection, so as to assess whether these activities will expose the concerned person to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert nationality.

UNHCR Comment: UNHCR would like to point out that the factor contained in Paragraph 7(3)(e) should not form part of the refugee status determination assessment. There is no obligation on the part of an applicant under international law to avail him- or herself of the protection of another country where he or she could "assert" nationality. The situation closest to the one envisaged by this newly introduced provision of the draft Qualification Directive is contemplated by Article 1 E of the Convention. However, for Article 1 E to apply, a person otherwise included in the refugee definition would need to fulfil:
***the requirement of having taken residence in the country; and**
***recognition of the individual by the competent authorities in that country as having the rights and obligations attached to the possession of the nationality of that country. It is therefore suggested to delete this paragraph to ensure full compatibility with Article 1 of the Convention.**

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4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle referred to in the first sentence of paragraph 1 according to which it is the duty of the applicant to substantiate his or her claim and

where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his claim;

(b) all relevant elements, at his/her disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to his/her case,

(d) the applicant has filed his or her application for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so, and

(e) the general credibility of the applicant has been established.

UNHCR Comment: One standard which UNHCR believes should be reflected in the draft Qualification Directive is the benefit of the doubt principle which should be given to a generally credible asylum-seeker. The requirements of evidence should be applied in a balanced manner with the necessary flexibility to take account of the special character of asylum applicants who are often forced to flee instantaneously without the necessary documentation. As known from practice, cases where an applicant can provide full evidence of statements will be the exception rather than the rule.

Article 8
International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left his country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left his country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. (deleted)

Article 9
Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned under sub-paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection as defined in article 9 A against persecution or serious harm.

Article 9 A
Actors of protection

1. Protection can be provided by:

   (a) the State; or

   (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

2. Protection is generally provided when the actors mentioned in sub-paragraphs (a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm inter alia by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

4. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

UNHCR Comments on Articles 9 and 9A: UNHCR welcomes that the draft Qualification Directive makes it clear that acts committed by non-State agents against whom the State is unwilling or unable to offer effective protection qualify as persecution. This being said, refugee status in such cases should not be denied on the assumption that the threatened individual could be protected by international organisations, unless the assumption is unchallengeable, or is unassailable, which it basically cannot be. It would be, in UNHCR's view, inappropriate to equate national protection provided by States, with the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis. Under international law, international organisations do not have the attributes of a State. In practice, this has also meant that their ability to enforce the rule of law is highly problematic. Determining the availability of protection requires an assessment of its effectiveness, accessibility and adequacy of to prevent persecution in the individual case rather than a general reference to either the possible guarantors of such protection or the existence of a legal system in a given country.

Article 10
Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm; and the applicant can reasonably be expected to stay in that part of the country.

UNHCR Comment: The current draft remains of concern to UNHCR because it does not contain any limitation to the effect that an assessment of an internal flight alternative is normally not relevant in cases where persecution emanates from state agents. In UNHCR's view, in analysing the applicability of an internal relocation alternative, it has to be determined first whether the issue has any relevance to an individual case. The relevance of considering relocation will depend on the particular factual circumstances of an individual case, with some limiting parameters. If an alternative location is considered not to be relevant to the particular claim, then there is no need to examine as to whether or not the proposed area would be a reasonable alternative. It should therefore not normally be a consideration where the feared persecution emanates from State agents.

In order to address these problems, UNHCR proposes the following reformulation of Article 10 (including the title to reflect the commonly known terminology of "Internal flight alternative"): As part of the assessment of whether the fear of persecution is well-founded or a risk of otherwise suffering serious harm exists, there may be circumstances in which it is relevant to examine whether this risk is clearly confined to a specific part of the territory of the country of origin and, if relevant, whether the applicant could reasonably, including without undue hardship, be expected to relocate to another part of that country."

2. In examining whether a part of the country is in accordance with paragraph 1, Member States shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant at the time of taking the decision on the application.

3. Paragraph 1 may apply notwithstanding technical obstacles to return.

UNHCR Comment: In UNHCR's view, Paragraph (3) which foresees the applicability of internal flight alternative in cases where return to the proposed part of the country is not possible for "technical obstacles to return" is problematic and should be deleted. The effect of this provision is to deny international protection to a person who has no accessible "protection alternative". In UNHCR's view, this is not consistent with Article 1 of the 1951 Convention. An assessment of whether or not internal relocation alternatives exist comprises an assessment of whether the proposed area is physically, safely and legally accessible. If the proposed area is not accessible in a practical sense, an internal flight or relocation alternative does not exist.

CHAPTER III
Qualification for being a refugee

Article 11
Acts of persecution

1. Acts considered as persecution within the meaning of article 1 A of the Geneva Convention must :

   (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

   (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in sub-paragraph (a).

UNHCR Comment: In UNHCR's view, the interpretation of persecution needs to be flexible, adaptable and sufficiently open to accommodate ever changing forms of persecution and human rights abuses. Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves amounting to persecution, either alone or in combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin. The current draft provision, in particular Article 11(1)(b) of the draft Qualification Directive does not seem to take these considerations into account and the provision is not formulated in a way conducive to the necessary flexibility and adaptability.

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2. Acts of persecution, which can be qualified as such in accordance with paragraph 1, can inter alia take the form of:

   (a) acts of physical or mental violence, including acts of sexual violence;

   (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

   (c) prosecution or punishment, which is disproportionate or discriminatory;

   (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

   (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 14, paragraph 2;

UNHCR Comment: UNHCR supports the original Commission proposal which recognised that the risk of punishment for the refusal to perform compulsory military service in the form of draft evasion or desertion may, in itself, provide grounds for a refugee claim, if the reasons for the refusal to perform the required military service are based on specific individual circumstances relating to deeply held moral, religious or political convictions (conscientious objection). This interpretation is consistent with the UNHCR Handbook and evolving human rights law. Thus, for example, the Human Rights Committee states, in General Comment No. 22 (48) on Article 18 ICCPR (right to freedom of thought, conscience and religion), that a right to conscientious objection can be derived from Article 18.

(f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2 (c), there must be a connection between the reasons mentioned in Article 12 and the acts of persecution as qualified in paragraph 1.

Article 12
The reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

– members of that group share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

– that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

– Depending on the circumstances in the country of origin, a particular social group might include a group based on common characteristic of sexual orientation. Sexual orientation can not be understood to include acts considered to be criminal in accordance with national law of the Member states;

UNHCR Comment: UNHCR welcomes the definition of membership of a particular social group but believes that the draft Qualification Directive would represent an added value if further examples of characteristics were to be mentioned explicitly, such as gender, age, disability and health, as originally proposed.

(e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential persecutors mentioned in Article 9 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic, which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the actor of persecution.

Article 13
Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality […];

(f) being a person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence [….];

2. In considering sub-paragraphs (e) and (f), Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

UNHCR comment: UNHCR suggests that the "compelling reasons" exception to general cessation set out under both Articles 1C (5) and (6) of the 1951 Convention be incorporated into the draft Qualification Directive. This humanitarian exception is interpreted to extend beyond the actual wording of the provision and is recognised to apply to refugees under Article 1 A (2) of the 1951 Convention. As explained in the UNHCR Handbook, it reflects a general humanitarian principle that is now well grounded in State practice and should therefore be expressly reflected in the draft Qualification Directive

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Article 14
Exclusion

1. A third country national or a stateless person is excluded from being a refugee, if:

   (a) he or she is receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

   (b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

   (a) 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;

   (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

UNHCR Comment: The marked clause which was added to the wording of Article 1F(b) is unclear and potentially confusing. Article 1F(b) specifies explicitly in the text that serious non-political crimes must have been committed (I) outside the country of refuge and (ii) prior to admission there. The provision contains both a territorial and temporal limitation.

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons, who instigate or otherwise participate in the commission of the crimes or acts mentioned in that paragraph.

4. (deleted)

(former paragraph 3 is deleted)

CHAPTER IV
Refugee Status

Article 14 A
Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Article 14 B
Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection lodged after the entry into force of the Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 13:

2. Without prejudice to the duty of the refugee in accordance with Article 7(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal the Member State, which has granted refugee status, shall on an individual basis demonstrate that the concerned person has ceased to be or has never been a refugee in accordance with paragraph 1.

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if it, after he or she has been granted refugee status, is established by the concerned Member State that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 14

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the EU Member State in which he or she is; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, States may decide not to grant status to a refugee, where such a decision on recognition has not yet been taken.

6. Persons to whom paragraph 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4,16, 22, 31, 32 and 33 of the Geneva Convention insofar as they are present in the Member State.

7. (deleted)

UNHCR Comments were provided separately.

CHAPTER V
Qualification for subsidiary protection

Article 15
Serious harm

Serious harm consists of:

(c) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in his or her country of origin, or in the case of a stateless person, his or her country of former habitual residence; or,

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

UNHCR Comments: UNHCR proposed linking the word "indiscriminate" to "serious threats" rather than "violence" to make clearer the difference with discriminate threats qualifying as persecution on grounds enumerated in the 1951 Convention. The proposed incorporation of "individual" might run counter to this important distinction between discriminate and indiscriminate threats. Also, in UNHCR,s view, the notion of an 'individual' threat should not lead to an additional threshold and a commensurate higher burden of proof in situations of generalised violence characterised precisely by the indiscriminate and unpredictable nature of the risks they entail for civilians. At the same time, UNHCR agrees that such risks should be more serious and not merely be a remote possibility as, for example, when the conflict and the situation of generalised violence are localised in a different part of the country concerned. Moreover, it is important that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This implies that the refugee definition under the 1951 Convention be interpreted in such a manner that individuals who fulfil the definitional criteria are granted Convention refugee status, rather than being treated under subsidiary protection. UNHCR has proposed safeguards to be incorporated in the draft Qualification Directive. Such safeguards are all the more important given that the Directive's provisions on subsidiary protection comprise grounds which would indicate a strong presumption for Convention refugee status in certain cases. UNHCR therefore proposes to include a clarification, at the end of Article 15, that subsidiary protection should apply only if there is no link between the risk or threat of harm and any of the five Convention grounds. The proposed formulation is:"…for reasons outside the scope of the refugee definition."

Article 16
Cessation

1. A third country national or stateless person shall cease to be a person eligible for subsidiary protection when the circumstances, which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In considering paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

Article 17
Exclusion

1. A third country national or a stateless person is excluded from being a person eligible for subsidiary protection where there are serious reasons for considering that:

(a) 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;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the country in which he or she is.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned in that paragraph.

3. Member States may exclude a third country national or a stateless person from being a person eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

UNHCR Comment: Given the close linkages between refugee status and subsidiary forms of protection, similar concerns as those expressed separately with regard to Articles 14 and 14B of the draft Qualification Directive would seem to apply here as well.

CHAPTER VI
Subsidiary Protection Status

Article 17 A
Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person who qualifies as a person eligible for subsidiary protection in accordance with Chapters II and V.

Article 17 B
Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection lodged after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a person eligible for subsidiary protection in accordance with Article 16.

1A. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being a person eligible for subsidiary protection in accordance with Article 17, paragraph 3.

2. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

   (a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being a person eligible for subsidiary protection in accordance with Article 17, paragraphs 1 and 2.

   (b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.

3. Without prejudice to the duty of the third country national or stateless person in accordance with Article 7(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that a person has ceased to be or is not a person eligible for subsidiary protection in accordance with paragraphs 1 and 2.

4. (deleted)

CHAPTER VII

Article 18
Content of international protection

1. The rules laid down in this Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. The rules laid down in this Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

3. [The level of rights granted to a refugee or a person eligible for subsidiary protection status shall not be lower than that enjoyed by applicants during the determination process.]

4. When implementing the provisions of this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

5. Paragraph 4 shall apply only to persons found to have special needs after an individual evaluation of their situation.

6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of Chapter VII, granted to a refugee, whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.

7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of Chapter VII, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

Article 19
Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognized or not, when:

(b) there are reasonable grounds for considering him or her as a danger to the security of the EU Member State in which he or she is; or

(c) he or she, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

UNHCR Geneva,

Additional UNHCR observations on Article 33(2) of the 1951 Convention in the context of the Draft Qualification Directive

1. UNHCR welcomes that the discussions have moved away from including Article 33(2) of the 1951 Convention in the provisions on the exclusion clauses of the Draft Qualification Directive. The most recent version of the draft Directive proposes two ways of incorporating Article 33(2) into the draft Directive.

2. Article 19 (2) of the draft Directive reflects the exceptions to the principle of non-refoulement, as contained in Article 33(2), proposing them to be applicable to asylum-seekers, refugees and persons eligible for subsidiary forms of protection. Paragraph 3 stipulates that Member States may revoke, end or refuse to renew or grant the residence permit of (or to) a refugee or a person eligible for subsidiary protection.

3. Paragraph 4 of Article 14B of the draft Directive allows for the revocation or ending of refugee status if

   (a) the person "…has committed a serious non-political crime for reasons which would have led to exclusion of the person, if the crime had been committed outside the country of refuge prior to admission to that country as refugee;" or

   (b) "there are reasonable grounds for regarding that he or she constitutes a danger to the security of the country in which he or she is".

4. If these proposals are alternatives, from UNHCR's perspective, adding Article 33(2) of the 1951 Convention to Article 19 is clearly the preferred option since it is closest to the logic and tenor of the Convention. Article 19(3) of the draft Directive, which is consistent with Article 33(2) of the 1951 Convention, gives States the possibility to revoke residence permits of refugees in cases where refoulement is permitted under the 1951 Convention but prohibited under human rights instruments.

5. Yet the way Article 19(2) and (3) is currently conceived is not fully satisfactory since it does not give the full picture of the Convention obligations applicable in such a case. As correctly foreseen in Article 19 of the draft Directive, an expulsion order in accordance with Articles 32 and 33(2) of the 1951 Convention does not entail loss of refugee status. However, a refugee - lawfully staying at the time an expulsion procedure is initiated - who has been served with an expulsion order after due process of law, in accordance with Articles 32 and 33(2), can no longer be regarded as lawfully present in the territory of the State concerned, as a result of such a procedure. Accordingly, such a refugee would not be entitled to the benefits that are attached to the lawfulness of his or her presence.[2] It should also be pointed out that Article 32(3) stipulates that a refugee subject to expulsion pursuant to Article 32(1) shall be allowed "a reasonable period within which to seek legal admission into another country". This is a specific procedural safeguard attached to refugee status, which is explicitly stated in Article 32 and impacts on the operation of Article 33(2) in case expulsion to the country of origin is envisaged. It also underlines that refoulement is considered a measure of last resort if other means, such as prosecution or imprisonment in the country of refuge or removal to a third country, are unavailable. It is conceivable that someone may be admitted as a refugee to a third country that does not have the same security concerns as the country of expulsion. UNHCR would therefore suggest that reference to the procedural

safeguards, contained in Article 32, be made explicitly in Article 19(3) of the draft Directive. UNHCR notes that the current formulation of Article 19(2) also refers to asylum-seekers. This is, however, not necessary since the applicability of the exception of Article 33(2) depends in the first place on whether or not the person fulfills the criteria of the refugee definition. Establishing the refugee character is an important element for the applicability of Article 33(2), not least to enable the assessment of proportionality considerations.

6. As regards the proposal to revoke or cancel refugee status on the basis of Article 14B(4) of the draft Directive, UNHCR appreciates that exclusion considerations come into play when considering grounds for revocation of refugee status. Clearly, these considerations will need to take into account a number of new dimensions of serious threats to national security. UNHCR is therefore supportive of revoking refugee status on the basis of crimes listed in Article 1F(a) and (c) of the 1951 Convention, irrespective of when and where these crimes were committed. The draft Directive seems to have picked this up in Article 14B(3). The types of atrocious crimes committed in the context of new threats of an international terrorist nature would normally be covered by these exclusion clauses. This enhanced understanding of the exclusion clauses will also be reflected in UNHCR's revised guidelines on the applicability of the exclusion guidelines. Whereas the aforementioned exclusion clauses do not contain a temporal reference, Article 1F(b) specifies explicitly that serious, non-political crimes must have been committed outside the country of refuge prior to admission. The logic of the Convention is such that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement, as well as the application of Article 32 and Article 33(2) where necessary. The proposal of the draft Directive (as contained in Article 14B(4)) does, however, not follow this logic. The Office appreciates the perceived incompatibility between persons enjoying the benefits of the 1951 Convention who committed a serious non-political crime and the fundamental humanitarian tenor of the Convention. However, the Office's concerns stem from the lack of a harmonised interpretation of such crimes and the reality in some countries where offences are included for which the stripping of refugee status and its effects would be disproportionate. This is not least reflected in the phraseology of Article 33(2), which refers to conviction by a final judgement of a particularly serious crime, coupled with an assessment of danger to the host community. The Office prefers to maintain the revocation of residence permits of refugees in such cases, as envisaged by draft Article 19(3).

7. Against this background, UNHCR recommends that refugees who are considered a danger to the security of the country of refuge or the community should be examined in the light of Article 19 of the draft Directive (and thus Article 33(2) of the 1951 Convention). The proposal to include Article 33(2) or elements thereof in Article 14B(4) is not necessary for the reasons outlined above. In addition, it may have serious negative effects outside the European Union, were it to be replicated and used as a basis for cancellation or revocation of refugee status in regions with less stringent human rights and rule of law safeguards in place.

UNHCR Geneva
December 2002

Footnotes:

1 Articles 20 to 39 of the draft Qualification Directive will not be further considered under the current EU Presidency. "UNHCR's Observations on the European Commission's 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" of November 2001 include initial observations on these provisions.

2 The rights and benefits provided under the various provisions of the 1951 Convention have different levels of application, depending on the nature of the refugee's sojourn or residence in the country. The most fundamental rights (Articles 3, 31 and 33) and some others (see for example Articles 2,4,20,22,27) apply to all refugees, irrespective of the lawfulness of their presence. Other provisions apply to refugees "lawfully in" the country (Articles 18, 26, and 32(1)) while certain of the more generous benefits are to be accorded "to refugees lawfully staying in the territory" of the country concerned (Articles 15, 17, 19, 21, 23, 24 and 28; see also Articles 14, 16(2) and 25). The drafting history shows that the English term "lawfully staying" is based on the French, and that a distinction was intended between basic rights accorded to all refugees and other rights and benefits accorded to those accepted as legal residents.

Council Directive on minimum standards on procedures for granting and withdrawing refugee status

UNHCR'S POSITION

UNHCR's Summary Observations
on the Amended Proposal by the European Commission for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (COM(2000) 326 final/2, 18 June 2002)

I. GENERAL COMMENTS

The Office of the United Nations High Commissioner for Refugees (UNHCR) is pleased to submit the following comments to the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Document COM(2002) 326 final/2) issued on 18 June 2002. UNHCR's comments of July 2001 on the original proposal, issued on 20 September 2000, have not lost their validity in many regards. The present document highlights UNHCR's main observations on the amended proposal. They will be followed separately by more detailed comments in the form of an annotated version of the proposal.

UNHCR welcomes the fact that some of its initial observations on the original proposal have been taken into account. These include: the lifting of certain restrictions on the application of basic principles and guarantees to accelerated procedures (but not border procedures); access to legal counsel at all stages of the procedures; and the provision for necessary (instead of basic) training for all persons involved in identifying asylum-seekers and determining refugee status. The revision is not entirely positive, however. The draft seems to have lost considerably in logic (we refer here to our comments later in this document on the structure of the proposal, on accelerated procedures and on the safe third country concept) and in terms of progress towards genuine harmonisation.

UNHCR hopes that Member States will be prepared to overcome an apparent reluctance to engage in more substantial procedural harmonisation. The now proposed minimum standards are often not binding; the exceptions allowed are many; and certain clauses permit Member States to maintain laws and regulations on important points which may deviate from the draft Directive. Such provisions can only serve to defeat the purpose of harmonisation. Certainly in the long run, the costs associated with legislative adaptation at the national level would be outweighed by the benefits resulting from an efficient, truly common asylum system.

UNHCR has noted a generally more restrictive approach reflected in the amended draft Directive. It is concerned at the broad formulation of powers to detain, the increasingly heavy reliance on accelerated procedures, the non-applicability of a considerable number of principles and guarantees in border procedures, and the overly extensive exceptions to the principle of suspensive effect of appeals. The presentation in the draft proposal (in Chapter III) is an indication that "regular procedures" are seen as a rather exceptional process, while accelerated procedures apply to, and appear to serve mainly to reject or deflect, the majority of claims lodged in the Member States. Such restrictions seem to reflect more generally a shift in emphasis away from the efficient and fair identification of persons in need of protection towards the deterrence of real or perceived abuse, if not sheer deterrence of arrivals of asylum-seekers.

UNHCR fully shares the concern to establish more efficient asylum procedures, while fully maintaining principles of fairness. This is in the interest of all concerned and not least to ensure the credibility and cost-effectiveness of asylum systems. A much higher degree of efficiency than is currently the case could be achieved, inter alia, by instituting a single procedure to determine all claims for international protection with a strong focus on quality decision-making in first instance, by prioritising the processing of certain categories of claims within such a procedure and, above all, by introducing a three-month time limit for all first instance procedures. If States made the resources available to observe this time limit, there would be no need for separate legal procedures and devices which moreover raise protection concerns.

II. SPECIFIC COMMENTS

Given that a more extensive annotated version of the proposed Directive will follow, UNHCR's comments here are organised around main principles and do not necessarily follow the structure of the chapters. Where not indicated otherwise, references to articles are those of the draft Directive.

CHAPTER I
SCOPE AND DEFINITIONS

Single Procedure for All Requests for International Protection

Article 1 limits the scope of the draft Directive to procedures for granting and withdrawing refugee status. While Article 3(3) opens the possibility of applying the provisions of the Directive to applications for subsidiary protection, it is clear that they are not necessarily to come under the purview of this draft Directive.

UNHCR would like to reiterate that a single procedure to examine international protection needs would serve to increase considerably the efficiency of systems in place to identify persons in need of such protection, in the interests of both the individuals in question and of cost-reduction. In light of the expert discussions and the broad consensus on this topic during the Global Consultations on International Protection, it would be disappointing if the opportunity to introduce a single procedure would be missed. The examination of a claim under the 1951 Refugee Convention allows for information to be obtained which could usefully be considered as relevant not only to the 1951 Convention refugee definition, but also to subsidiary protection categories. The circumstances that force people to flee their country are complex and, often, of a composite nature. The identification of protection needs cannot, therefore, be made in a compartmentalised fashion. Cases must be examined in a comprehensive manner, which can best be achieved in a single procedure that provides for a single set of procedural standards and guarantees. They should also be determined in a hierarchical manner whereby the first determination is always made in relation to the 1951 Convention. If the procedures were left separate, however, the same standards and safeguards would need to apply to identify persons in need for subsidiary protection.

UNHCR further notes that Article 2(b) defines an "application for asylum" as a request for international protection under the 1951 Refugee Convention only. Under international law, however, the term asylum is broader than the protection granted under the 1951 Refugee Convention and should incorporate protection under complementary or subsidiary protection categories. The definition of the term here and its use elsewhere in the document are therefore unfortunate.

CHAPTER II
BASIC PRINCIPLES AND GUARANTEES

In general, UNHCR is pleased with the basic principles and guarantees which should apply to any asylum procedure. Certain concerns remain, which are outlined below.

Access to the Procedure

Article 5(1) indicates that the failure to apply for asylum as soon as possible may be used as a ground, albeit not a sole ground when rejecting an asylum claim. UNHCR would like to emphasise that a great number of valid reasons may delay the filing of a claim, including for instance the perceived need first to consult with a legal counsellor, trauma or cultural sensitivities. While a delay in application may therefore be a factor in consideration of the credibility of a claim, it should not be a ground for rejection in and of itself, whether as a sole ground or one ground among others.

Furthermore, while UNHCR does not object to the requirement that an application be made in person (Article 5(2)), such a requirement should not be used to hinder access to the procedure itself, such as may for example occur when the person is in detention.

To ensure that border officials do not filter applications submitted at the border, UNHCR believes that it deserves to be made clear that they register and forward the asylum claim to the determining authority, rather than "deal with applications", as Article 5(6) currently stipulates.

Gender Sensitivity and Special Cases

UNHCR would encourage a more gender-sensitive approach throughout the Directive. While special measures are included for separated children (Article 15), the Directive seems to lack similar special provisions with respect to claims by women, victims of torture or sexual violence or traumatised persons. Trauma and sensitivities related to sexual violence or culture may play an important factor in a late application, for example. They may also lead such persons to acquiesce to being part of a single claim by the head of a household initially, with an application only being filed on their own behalf subsequently. Such delays should therefore not lead to non-consideration of the claim, as provided for, among others, in Article 5(4).

While some special measures with respect to personal interviews could be inferred from Article 11(2)(a), more explicit references to measures required to meet the special needs of female asylum-seekers, victims of torture or sexual violence and traumatised persons, similar

to Article 15, would be useful. These would include an entitlement for female asylum-seekers to be heard by a female interviewer and interpreter, and the assurance of in camera interviews in all cases (Article 11(1)) to ensure full confidentiality and privacy, unless the applicant requests otherwise. Special measures and exceptions are, in UNHCR's view, also necessary with respect to detention (Article 17), including at the border (Article 35). With respect to children, Article 15 would usefully be complemented with an explicit reference to the "best interest of the child" principle.

UNHCR would furthermore encourage the use of gender-neutral wording throughout the Directive.

Right to Stay Pending Examination of Application

UNHCR appreciates that asylum-seekers shall be allowed to stay on the territory of Member States (Article 6(1)). However, UNHCR is concerned that this right to stay is limited to the first instance procedure, as per Article 2(e). Given the seriousness of treatment that refugees may be exposed to, the asylum-seeker should be allowed to remain until a final decision on his or her asylum application is issued, unless specific exceptions are applicable (see UNHCR's observations on appeals). Access to UNHCR

Article 9(1)(c) provides that asylum-seekers "must not be denied the opportunity to communicate with the UNHCR". In practice, many asylum-seekers will not be able to do so for various reasons. Asylum-seekers should therefore rather be provided with an effective opportunity to contact UNHCR.

Effective Communication with Asylum-Seekers

Where so much depends on the testimony of the individual, effective information of and communication with an asylum-seeker is essential. No meaningful asylum procedure is possible if there is not proper communication on often complex matters. UNHCR is therefore concerned that Article 9(1)(a) provides for information to be given to asylum-seekers in a language they "may reasonably be supposed to understand", rather than a language that is understood by the applicant. The same applies to interpretation services (Article 11(2)(b)). Experience shows that very often, an assumption to the effect that an asylum-seeker speaks and understands the official language of his or her country of origin may prove incorrect. Where, however, the difficulty of providing information and the services of an interpreter in a language that is understood by the applicant lies in his or her lack of co-operation and bad faith, specific exceptions could be foreseen. The services of an interpreter should furthermore be made available whenever necessary, rather than when "reasonable" only, as now stipulated in Article 9(1)(b).

UNHCR is also concerned that personal interviews may be omitted if the competent authority cannot provide an interpreter (Article 10(2)(c). Comments to be made on behalf of an applicant in lieu of a personal interview because an interpreter is not available, as provided under Article 10(3), Para. 2, cannot eliminate the fundamental need for meaningful communication with an applicant.

Access to Information, Legal Counselling and Assistance

UNHCR welcomes the provision that asylum seekers shall be afforded the opportunity to consult a legal adviser or other counsellor on matters relating to their asylum procedure in an effective manner, as provided for in Article 13(1). UNHCR also welcomes the provision that legal assistance must be provided free of charge in case of appeals, as stipulated in Article 13(2). UNHCR would appreciate it if limitations to access by legal advisors and other counsellors (see Article 14(1)) did not impede the right of asylum applicants to consult a legal counsellor in an effective manner.

Article 14 (1) foresees limitations to access to information in an applicant's file for the asylum-seeker and his or her legal advisor or counsellor. While Article 7(1)(b) rightly stipulates that Member States shall ensure that precise country of origin information is made available to decision-makers, it does not rule out that sources on which such information is based, may be withheld from the scrutiny of the asylum-seeker or his/her counsel. Such an approach would leave the asylum-seeker and decision-maker in unequal positions. UNHCR recommends that information and its sources may be withheld only in clearly defined cases in which disclosure of such sources would jeopardise national security or the security of organisations or persons providing the information in question.

Detention of Asylum-Seekers

The reaffirmation of the general principle that asylum seekers should not be detained is, in itself, welcome. However, UNHCR is seriously concerned at the broad formulations of powers to detain where such detention is "objectively necessary for an efficient examination of the application" (Article 17(1), Para. 1) or "necessary for a quick decision" (Article 17(2)). In UNHCR's view, the above wording is too vague and general to justify such a severe measure as deprivation of liberty. It might, for instance, be understood as authorising the detention of an asylum-seeker for reasons of administrative expedience or convenience.

UNHCR believes that the guidance provided in Executive Committee Conclusion No. 44 (XXXVII) of 1986 on permissible exceptions to the general rule of not detaining asylum-seekers continues to meet States' concerns. The exceptions (together with explanatory guidance quoted from UNHCR's Guidelines on Detention) which may be resorted to, if necessary, are:

(i) to verify identity
This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based
This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum
What must be established is the absence of good faith on the part of the applicant to

comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) To protect national security and public order
This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security.

UNHCR appreciates the concerns of Member States, as reflected in the draft Directive, to address problems associated with the abuse of asylum-systems and, in this regard, use detention as a deterrent. The Office therefore stands ready to further discuss ways in which these concerns can be met without compromising basic human rights standards.

It would be useful to provide a listing of general principles applicable to detention, such as specific provisions for children and other particularly vulnerable persons, who should only be detained as a measure of last resort and for the shortest possible time. Furthermore, UNHCR considers it important for the Directive to provide for alternatives to detention, such as forms of assignment of residence in reception centres with enforceable limitations on movement, or reporting obligations. Guidance in this regard can also be found in the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (1999).

Because of the gravity of detention, UNHCR welcomes mandatory periodic judicial review of the detention order. It understands Article 17(3) to provide for this without requiring application by the detainee.

Effect of Explicit or Implicit Withdrawal of Asylum Application

UNHCR notes that explicit or implicit withdrawal of an asylum application may lead either to discontinuation or to rejection of the application. In UNHCR's view, any withdrawal of an application should lead to a discontinuation of the examination of the claim, and a closing of the file, rather than a rejection of the claim.

CHAPTER III
PROCEDURES AT FIRST INSTANCE

Distinction between Admissibility and Examination of the Merits of a Claim

UNHCR notes that admissibility considerations (Article 25) have been integrated into accelerated procedures. This lack of a clear distinction between questions of admissibility, which are of a formal nature, and an examination of the merits of the claim, risks causing confusion between very different stages of the assessment of an asylum claim. UNHCR strongly recommends therefore that admissibility issues be treated in a separate chapter, clearly distinct from issues concerning the substance of a claim, as was initially the case. To

enhance the distinction between questions of admissibility and matters of substance of a claim, UNHCR further recommends a change in terminology: Where questions of admissibility determine a decision in an asylum procedure, Member States may declare inadmissible rather than "reject" an application. This distinct terminology would adequately reflect the fact that a denial of admissibility is not based on a substantive examination of the claim.

Similarly, on a general note, Member States may find that assessing a claim that is manifestly well-founded or unfounded may be more efficient than first examining admissibility issues. UNHCR appreciates that this possibility is provided for by the draft Directive and encourages States to consider it on a more general basis.

With regard to the grounds for inadmissibility proposed in the draft Directive, UNHCR has the following observations:

According to Article 25(d) an asylum application may be considered inadmissible if an extradition request has been made by an EU Member State or another 'safe' third country. It is UNHCR's view that the proposed approach is problematic, in as far as it mixes a decision on an asylum claim with the distinct extradition procedure. UNHCR has, in the context of the European Commission proposal for a Council Framework Decision on the European arrest warrant and surrender procedures between Member States, proposed that in such cases the asylum procedure should be suspended and, after the resolution of prosecution, whether by sentence or by acquittal, consideration of the asylum case should be resumed and brought to its final conclusion. This can be done either in the State in which the asylum-procedure was initially pending or through transfer of responsibility for examining the asylum-application to the EU Member State or other 'safe' third country to which extradition takes place.

With regard to Article 25(e) UNHCR notes that an indictment by an international criminal tribunal is a matter of exclusion and therefore concerns the merits of the case, which potentially involve complex legal issues. It must therefore be considered in the substantive stage of the procedure and cannot be left to the admissibility stage.

UNHCR further notes the inclusion of the "safe" third country notion under Article 25(c), 27 and 28, and the elaboration of this notion in Annex I. In UNHCR's view, the applicability and therefore the usefulness of this notion is questionable, as countries currently at the periphery of the Union will soon join the EU.

As the preamble to the 1951 Refugee Convention and a number of Executive Committee Conclusions make clear, refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international co-operation. It is for this reason, that UNHCR generally welcomes multilateral agreements such as have been agreed by the EU to lay out the criteria and mechanisms for determining the State responsible for examining the claim which aim to ensure effective protection for the persons concerned.

UNHCR's main concerns with regard to the proposed "safe" third country concept remain the following:

Pursuant to Article 28 (1)(a) Member States may seek to transfer to a third country the responsibility for considering an asylum request in cases where the applicant "has had an opportunity to avail himself/herself of the protection of the authorities of that country". UNHCR considers it inappropriate to derive the third country's responsibility from the mere presence of the applicant there. Mere presence is often the result of fortuitous circumstances. UNHCR therefore recommends deletion of the last phrase of Article 28 (1)(a).

UNHCR equally expresses a reservation to the provision that Member States may deny an applicant access to the procedure – and remove him to a third country – solely because, pursuant to Article 28 (1) (b) "there are grounds for considering that this particular applicant will be admitted (...)". UNHCR takes the view that removal of an asylum-seeker to a third country should not take place unless the following conditions are met:

- that the third country has expressly agreed to re-admit the person to its territory and to consider the asylum application; hence, the assurance that the third country agrees to admit the applicant to its territory and to consider the asylum claim substantively should be substituted for the draft text;

- that the third country will protect the asylum-seeker against refoulement and will treat him or her in accordance with recognised basic human rights standards until a durable solution is found, namely that the country is "safe" for the particular applicant; in this context, accession to the 1951 Convention and its 1967 Protocol, and actual State practice and compliance remain a critical factor;

- that the applicant has already a connection or close links with the third country so that it appears reasonable and fair that s/he be called upon to first request asylum there; in this respect, the well-founded intentions of the asylum-seeker should as far as possible be taken into account.

Without these safeguards, asylum-seekers may easily find themselves "in orbit". Whether a country is "safe" or not, is not a generic question which can be answered for any asylum-seeker who has set foot in that particular country. The analysis whether the asylum-seeker can be transferred to a third country for determination of the claim must be made on an individualised basis. It is for this reason, that UNHCR cautions against the use of lists of countries. It follows that UNHCR has strong reservations about Article 27 of the proposal. The burden of proof does not lie with the asylum-seeker to establish that the third country is unsafe, but with the country that wishes to remove the asylum seeker from its territory.

The "Norm" of Accelerated Procedures

It is telling that the entire chapter on first instance decisions of the proposed Directive refers to accelerated procedures only. In this sense, the chapter heading foreseen in the draft Directive does not appear appropriate.

Member States have an interest in ensuring efficient procedures more generally, rather than introducing a variety of parallel procedures. An important means to ensure efficiency is to set time limits in general for all procedures, particularly in first instance procedures. UNHCR therefore proposes a general time limit of three months to reach a decision on an asylum application at the first instance. This time limit may be extended for specified reasons such as the complexity of a case. However, experience shows that the large majority of asylum claims tend to originate from nationals of a limited number of States, with regard to which expertise in country of origin information can be established. Such a general time limit is, in UNHCR's view, more effective than the specific one of Article 24.

Efforts to combine speed and quality decision-making would also reduce the number of appeals, which tend to be particularly lengthy. In some States this would probably require additional resources and training. A focus on an inquisitorial process rather than an adversarial one would also be useful to elicit the relevant information in a more co-operative manner, based on mutual trust.

As outlined in our earlier comments, an asylum procedure can be accelerated in a number of ways, including: prioritising specific categories of applications; establishing shorter, but reasonable, delays for appeals; reducing the time required for the completion of the appeals process; and simplifying and/or prioritising appeals and reviews. Instead of establishing separate accelerated procedures, priority within the regular procedure could be given to the examination of defined categories of applications, such as manifestly unfounded and well-founded claims, and those from unaccompanied minors/separated children seeking asylum and other vulnerable persons.

Manifestly well-founded claims deserve early attention as these concern persons whose cases not only can be dealt with quickly and efficiently, but who have been so clearly exposed to serious harm that they merit being assured of safety and stability as early as possible.

With respect to manifestly unfounded claims, UNHCR notes that Article 29(a) does not take into account considerations relevant for subsidiary protection. UNHCR wishes to recall the Executive Committee Conclusion No. 30, which refers to applications obviously without foundations as those "not related to the criteria for the granting of refugee status … nor to any other criteria justifying the grant of asylum". As noted above, asylum in this sense is broader than refugee status under the 1951 Refugee Convention only.

UNHCR disagrees with Article 29(c), which provides for an accelerated procedure for an applicant who "is prima facie excluded from refugee status (...)". In UNHCR's experience, decisions on exclusion from refugee status are complex and demand a careful examination of the asylum claim, not only because of the grave consequences for the applicant but in order that all relevant evidence can be elicited and considered as part of the determination process. UNHCR would thus advise against adoption of this paragraph.

Under Articles 30 and 31, and Annex II an application may also be deemed manifestly unfounded if the applicant is from a "safe country of origin". UNHCR acknowledges that applications for asylum may be made by persons coming from countries in which there is in general terms no serious risk of persecution. UNHCR has not objected in principle to the use of this notion as a procedural tool to assign these applications to accelerated procedures. It would, however, be important to spell out more clearly in Article 31, that the use of this procedural tool does not increase the burden of proof on the asylum-seeker and that it remains essential to fully assess each individual case on its merits.

Article 32 of the draft Directive describes other grounds for processing applications for asylum under an accelerated procedure. According to UNHCR's Executive Committee Conclusion No. 30 (XXXIV) of 1983, systems must be able to adjust to deal expeditiously with cases of clear fraud, abuse and misrepresentation. Article 32 seems to describe claims falling broadly into these categories, but concerns with regard to some of the provisions, as outlined in earlier comments, remain. In particular, Article 32(h) seems outside the scope of cases envisaged in Executive Committee Conclusion No. 30.

Notwithstanding the above, UNHCR considers it important to bear in mind that a key consideration for accelerating the processing of an asylum claim is a practical one: the claim must lend itself to a prompt examination and decision.

Separate Border Procedure

UNHCR notes that provisions on the border procedure, which are separate and parallel to regular and accelerated procedures, are included at the behest of Member States. There is no reason for due process of law requirements in asylum cases submitted at the border to be considerably different from those submitted within the territory. Given the importance of personal testimony in determining asylum claims, the lack of a requirement for a personal interview is of special concern. UNHCR recommends inclusion in Article 35(1) of the basic safeguards contained in the Articles 7, 8(1), 9, 10(1), 11, 12 and 16(3) of the draft Directive.

Moreover, given that a stay at the border entry point or transit zone is generally equivalent to detention and cannot be considered a conducive environment for refugee status determination, the stay of an asylum-seeker at the border should be for the shortest possible time, and subject to judicial review. It would be particularly important to prioritise manifestly unfounded and well-founded claims in procedures initiated at the border and to provide for exceptions and special measures for vulnerable persons and minors, while fully respecting the principle of family unity.

CHAPTER IV
APPEALS PROCEDURES

Non-Suspensive Effect of Appeals Procedures

UNHCR notes with satisfaction that applicants have the right to an effective remedy of a decision on their asylum claim, in as far an appeal by a "court of law" (an independent and impartial tribunal or body) is provided for, with the authority to review both points of fact and law.

UNHCR is concerned about the extensive exceptions to the principle of suspensive effect of appeals against a negative decision in cases enumerated in Articles 39(2), 39(3), 39(4) and 40(1) and (3). If an applicant is not permitted to await the outcome of an appeal against a negative first instance decision on the territory of the Member State, the remedy against that decision is ineffective. Even in manifestly unfounded cases as defined in Executive Committee Conclusion No. 30, there must be some form of review. UNHCR would go along with the proposal to limit the automatic suspensive effect of an appeal in clearly defined manifestly unfounded cases, provided a court of law or another independent authority has reviewed and confirmed the denial of suspensive effect, taking into account the chances of an appeal.

In UNHCR's view, the safeguards set out in the preceding paragraph form a fundamental guarantee, given the potentially serious consequences of an erroneous determination in the first instance. This requirement should be seen in the light of the need to respect the principle of non-refoulement, exceptions to which are narrowly circumscribed. That principle should be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of "safe" third country policies or in a substantive procedure.

In light of the above, UNHCR is concerned at the exceptions provided in Article 39(2), 39(4) and proposes to amend Article 39(3) to apply only to cases determined to be manifestly unfounded. The exceptions to even a review of a decision not to grant suspensive effect, provided for under Article 40(3)(a), (3)(b) and (3)(d) should, in UNHCR's view, be deleted.

III. CONCLUSION

UNHCR appreciates the resolve of Member States of the European Union and the initiative of the Commission to harmonise their asylum procedures within the framework of the Amsterdam Treaty. The adoption of a Community instrument on minimum standards on procedures for granting and withdrawing refugee status will, hopefully, result in fairer and more efficient asylum procedures throughout the Union.

UNHCR has concerns, however, about an approach to harmonisation which accommodates lower standards found in the domestic legislation and practice of individual Member States. The risk of downward harmonisation will, inevitably, be higher if the Directive contains significant scope for derogation or wide margins of discretion. It is UNHCR's fervent hope that best practice, in full conformity with international standards, will be allowed to prevail.

It is with this concern in mind that UNHCR has offered the foregoing observations. On some aspects of the proposal, such as the notions of "safe third country" and "safe country of origin" or accelerated procedures, UNHCR has noted that the emphasis on procedural devices risks overshadowing the basic concepts and principles which refugee status determination is supposed to uphold.

UNHCR is, nonetheless, very conscious of the need to establish efficient procedures, not least to enhance credibility in the asylum system. Various proposals outlined above would, in UNHCR's view, have the important advantage of greater efficiency without sacrificing fairness or principle. They include amongst others:

- the institution of a single procedure to determine all claims for international protection to avoid separate procedures having to be initiated for subsidiary protection upon final rejection under the 1951 Refugee Convention;

- specific short timelines to be set for all first instance procedure decisions;

- prioritization of claims within the regular procedure for certain types of cases, such as manifestly unfounded and manifestly well-founded cases, as well as special cases, such as children;

- a strong focus on quality decision-making in the first instance to reduce the number of appeals, with appropriate resources and training;

- limitation of appeals to one level on both facts and points of law;

- acceleration of appeals processes for manifestly unfounded cases, including reduced deadlines for filing appeals;

- allowance of a limited number of well-defined exceptions to the principle of (automatic) suspensive effect of appeals, with the decision not to grant suspensive effect being checked and authorised by a court of law.

To further harmonisation within the EU in asylum decision making, UNHCR would also encourage the establishment of an EU-wide advisory board, to monitor decision-making of the administrative authorities responsible for first instance decisions and gradually reduce divergence(s) in jurisprudence. UNHCR would be willing to provide its expert services in the establishment and functioning of such a body. Together with an efficient system of up-to-date information on countries of origin to be put at the disposal of national decision-makers, such an advisory board could support the harmonisation of diverging interpretations of the 1951 Refugee Convention or the Qualification Directive.

UNHCR looks forward to a continuing dialogue with the Commission and Member States on these as well as other topical issues that are being addressed by other, closely related EU instruments.

UNHCR, Geneva
January 2003

UNHCR's annotated comments on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2002) 326 final of 18 June 2002)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point (1)(d) of the first paragraph of Article 63 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, 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 Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as complemented by the New York Protocol of 31 January 1967, thus maintaining the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Tampere Conclusions provide that a Common European Asylum System should include in the short term common standards for fair and efficient asylum procedures in the Member States and in the longer term Community rules leading to a common asylum procedure in the European Community.

(4) Minimum standards on procedures in Member States for granting or withdrawing refugee status are therefore a first measure on asylum procedures without prejudice to any other measures to be taken for the purpose of implementing Article 63(1)(d) of the Treaty or the objective of a common asylum procedure agreed on in the Tampere Conclusions.

(5) The main aim of this Directive is to introduce a minimum framework in the European Community on procedures for the determination of refugee status, ensuring that no Member State expels or returns an applicant for asylum in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(6) To secure this aim, the Council Conclusions on procedures in Member States for granting and withdrawing refugee status of 7 December 2001 (as revised 18 December 2001) underline the need for provisions ensuring that applicants for asylum receive substantial guarantees with regard to the decision-making process and that decisions are of optimum quality, without jeopardising the objective of efficiency of procedures. Such provisions should also define the minimum standards for a regular procedure, make it possible to adopt or retain accelerated procedures, and allow for sufficient differentiation between these types of procedures.

(7) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular this Directive seeks to ensure full respect for human dignity, the right to asylum of applicants for asylum and their dependants, and the protection in the event of removal, expulsion or extradition, promoting the application of Articles 1, 18 and 19 of the Charter.

(8) This Directive should be implemented without prejudice to Member States' existing international obligations under human rights instruments.

(9) This Directive should be without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty establishing the European Community.

(10) Asylum procedures should not be so long and drawn out that persons in need of international protection have to go through a long period of uncertainty before their cases are decided, whilst persons who have no need of protection but wish to remain on the territory of the Member States see an application for asylum as a means of prolonging their stay by several years. At the same time, asylum procedures should contain the necessary safeguards to ensure that those in need of protection are correctly identified.

(11) The minimum standards laid down in this Directive should therefore enable Member States to operate a quick and simple system that swiftly and correctly processes applications for asylum in accordance with the international obligations and constitutions of the Member States.

(12) A quick and simple system for procedures in Member States could, provided that the necessary safeguards are in place, consist of a single appeal against the decision to a court.

(13) The necessary safeguards should require that, in the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1(A) of the Geneva Convention, every applicant is to have an effective access to procedures, the opportunity to co-operate and properly communicate with the competent authorities so as to present the relevant facts of his case and sufficient procedural guarantees to pursue his case at and throughout all stages of the procedure.

(14) On the other hand, in the interests of a system of swift recognition of those applicants in need of protection as refugees within the meaning of Article 1(A) of the Geneva Convention, provision should be made for Member States to operate accelerated procedures for processing in accordance with clear, pre-established criteria a number of different categories of applications, including applications for which it is not necessary to

consider the substance, those that appear to be manifestly unfounded, subsequent applications containing no fresh evidence or arguments, and applications of persons whose right to entry to the territory of the Member States is subject to an examination.

(15) It is essential that accelerated procedures contain the necessary safeguards to ensure that earlier doubts on the part of the status determining authority can be set aside so that those who are in need of protection can still be correctly identified. They should therefore contain, in principle, the same minimum procedural guarantees and requirements regarding the decision making process as regular procedures, provided that this is necessary for the purposes of the particular procedure. Thus, the standards regarding procedures to consider subsequent applications containing no fresh evidence or arguments, and procedures through which a decision is taken on the right of entry of an applicant for asylum are proportionate to the specific purpose of such procedures.

(16) As minimum procedural guarantees for all applicants for asylum in all procedures should be considered, inter alia, access to the procedure, right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting their case if interviewed by the authorities, the opportunity to communicate with the United Nations High Commissioner for Refugees (UNHCR) or, with any organisation working on its behalf, the right to appropriate notification of a decision, motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor, and the right to be informed of their legal position at decisive moments in the course of the procedure, in a language they can reasonably be supposed to understand. .

(17) In addition, specific procedural guarantees for persons with special needs, such as unaccompanied minors, should be laid down.

(18) Minimum requirements regarding the decision-making process in all procedures should be that decisions are taken on the basis of the facts by authorities competent in the field of asylum and refugee matters.

(19) Decisions taken on an application for asylum should be subject to an appeal consisting of an examination on both facts and points of law by a court of law. . The applicant should be entitled not to be expelled until a court has ruled on the right to remain pending the outcome of this appeal, except in a limited number of cases laid down in this Directive, including for reasons of national security or public order.

(20) 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 shall apply to personal data treated in application of this directive. Directive 95/46/EC shall also apply to the transmission of data from Member States to the UNHCR in the exercise of its mandate under the Geneva Convention. This transmission is subject to the level of personal data protection in the UNHCR being considered as adequate.

UNHCR's comment: UNHCR's mandate is not defined by the Geneva Convention but by its Statute [General Assembly Resolution 428(V) of 14 December 1950] and subsequent General Assembly resolutions. To reflect correctly the legal basis for the exercise of UNHCR's mandate, the text should read as follows: "…shall also apply to the transmission of data from Member States to the UNHCR in the exercise of its mandate under its Statute in conjunction with the Geneva Convention."

(21) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention.

(22) In this spirit, Member States should be encouraged to apply the provisions of this Directive to procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for persons who are found not to be refugees, taking into account in particular Council Directive …/… [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].

(23) Member States should provide for penalties in the event of infringement of the national provisions adopted pursuant to this Directive.

(24) The implementation of this Directive should be evaluated at regular intervals not exceeding two years.

(25) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely to establish minimum standards on procedures in Member States for granting and withdrawing refugee status cannot be sufficiently attained by the Member States. They can therefore, by reason of the scale and effects of the action, be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
General provisions

Article 1
Purpose

The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

UNHCR's comment: UNHCR notes that the draft Directive relates only to procedures for determination and withdrawal of refugee status under the 1951 Convention and 1967 Protocol. Article 3(3) of the draft Directive foresees that Member States may apply the provisions of this Directive to procedures for deciding on applications for protection not falling under the scope of the above refugee instrument, but does not go further. This leaves a comprehensive treatment of all applications for international protection at the level of a mere possibility. In UNHCR's view, an important opportunity would, therefore, be missed. It is in the interest of Member States that the same minimum guarantees are applied in all procedures leading to the grant of whatever form of international protection is available in national legal systems. UNHCR strongly favours such an approach, because the circumstances that force

people to flee their country are complex and often of a composite nature. The identification of international protection needs cannot, therefore, be made in a compartmentalised fashion by de facto allowing different procedural rules to apply. Each case must be examined in its entirety, ideally by the same authority, and this can be best achieved if the claim is considered in a single procedure. Furthermore, UNHCR believes that a single asylum procedure will help to increase efficiency and reduce the costs of decision-making in asylum matters. The concept of a single procedure would also be fully consistent with the rationale behind the draft Qualification Directive which deals comprehensively with all international protection needs from a substantive point of view.

Article 2
Definitions

For the purposes of this Directive:

(a) "Geneva Convention" means the Convention relating to the status of refugees done at Geneva on 28th July 1951, as complemented by the New York Protocol of 31 January 1967;

(b) "Application for asylum" means an application made by a person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

UNHCR's comment: In the light of the aforementioned observations, UNHCR finds the definition of an "application for asylum" provided in Article 2 (b) too limiting and hopes that it could be expanded to cover any application for international protection, which would also include subsidiary forms of protection. In addition, this definition would benefit from clear language in that a request for international protection is understood to be one of not being returned to danger.

(c) "Applicant" or "applicant for asylum" means a person who has made an application for asylum in respect of which a final decision has not yet been taken.

(d) A final decision is a decision in respect of which all possible remedies under this Directive have been exhausted;

(e) "Determining authority" means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases

(f) "Refugee" means a person who fulfils the requirements of Article 1(A) of the Geneva Convention as set out in Council Directive …/ … [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];

(g) "Refugee Status" means the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State;

UNHCR's comment: UNHCR wishes to point out that this provision may, depending on the context, cover two different notions. Paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status reads: "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined". In this sense, "refugee status" means the condition of being a refugee. In contrast, the proposal uses the term "refugee status" to mean the protection, the set of rights, the benefits and the obligations that flow from the recognition of a person as a refugee, which would best be referred to as "asylum".

(h) "Unaccompanied minor" means a person below the age of eighteen who arrives on the territory of the Member States unaccompanied by an adult responsible for him whether by law or by custom, and for as long as he is not effectively taken into the care of such a person, or a minor who is left unaccompanied after he has entered the territory of the Member States;

(i) «Representative » means a person or organisation representing an unaccompanied minor as legal guardian, a national organisation which is responsible for his/her care and well-being, or any other appropriate representation appointed to ensure his/her best interests;

(j) "Detention" means the confinement of an applicant for asylum by a Member State within a restricted area, where his freedom of movement is substantially curtailed;

(k) "Withdrawal of refugee status" means the decision by a competent authority to withdraw the refugee status of a person on the basis of Article 1(C) of the Geneva Convention or Article 33(2) of the Geneva Convention;

UNHCR's comment: The exception laid down in the second paragraph of Article 33 of the 1951 Convention falls outside the scope of this Directive, which relates to procedures for granting and withdrawing refugee status. Article 33(2) of the Convention denies, under very exceptional circumstances, the benefit of the non-refoulement protection to a person who is a refugees within the meaning of Article 1(A) of the Convention. Withdrawal of refugee status is not an issue in the operation of this exceptional provision, but the withdrawal of the benefit of non-refoulement. UNHCR therefore recommends the deletion of the reference to Article 33 (2) of the 1951 Convention.

(l) "Annulment of refugee status" means the decision by a competent authority to cancel the refugee status of a person 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.

(m) "Remain on the territory of the Member State" means to remain at the border, the airport or port transit zones or on the territory of the Member State in which the application for asylum has been made or is being examined.

Article 3
Scope

1) This Directive shall apply to all applications for asylum made at the border, at port and airport transit zones or on the territory of Member States.

UNHCR's comment: For refugees to be able to benefit from the standards of treatment provided for by the 1951 Convention, or by other relevant international instruments and/or by national law, it is essential that asylum-seekers can have physical access to the territory of the State where they are seeking admission as refugees and that they can further have access to a procedure where the validity of their refugee claim can be assessed. These essential pre-conditions of refugee protection have been repeatedly underlined by the General Assembly of the United Nations and by the Executive Committee of UNHCR. UNHCR therefore appreciates that the Directive is meant to be applied to all persons who make a request for asylum either at the border or on the territory of a Member State, without discrimination. This being said, Article 35 of this draft Directive seems to carry with it the risk that crucial procedural safeguards provided for in this draft Directive may not apply to asylum applications made at the border. This is further analysed under Article 35.

2) This Directive shall not apply to requests for diplomatic or territorial asylum submitted to diplomatic or consular representations of Member States.

3) Member States may decide to apply the provisions of this Directive to procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for persons who are found not to be refugees.

UNHCR's comment: As outlined above, it would be disappointing if the opportunity to introduce a single procedure were missed. In UNHCR's view, a single procedure would serve to increase considerably the efficiency of asylum systems to identify persons in need of international protection, in the interest of both the individuals in question and States. The examination of a claim under the 1951 Convention allows for information to be obtained which could usefully be considered as relevant also for the examination of subsidiary protection categories. A comprehensive examination of all applications for international protection, be it under the 1951 Convention or other instruments, should therefore be the rule, not a mere possibility.

Article 4
More favourable provisions

Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, in so far as those standards are compatible with this Directive.

CHAPTER II
Basic principles and guarantees

Article 5
Access to the procedure

1) Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

UNHCR's comment: UNHCR notes that the failure to apply for asylum promptly may be an element in the consideration of the credibility of a claim. It should, however, not be a reason,

let alone the sole reason, for rejecting an application. In the Office's experience, there are indeed a number of valid reasons, which may delay the filing of a claim, including for instance because of the perceived need first to consult with a legal counsellor, or cultural sensitivities. UNHCR furthermore notes that some Member States operate a time limit within which an asylum-seeker needs to submit an asylum request, counting from the moment of the person's arrival. UNHCR would like to reiterate its position that formal requirements should not be an obstacle to the exercise of the right to seek asylum and, in particular, that the asylum-seeker's failure to submit the asylum request within a prescribed time limit should not lead to the request being excluded from consideration. It understands Article 5(1) to encompass cases where an asylum request is not made within the prescribed time limit and therefore welcomes this provision as an important clarification.

2) Member States may require that applications for asylum be made in person.

UNHCR's comment: UNHCR does not object to the requirement, in principle, that an application for asylum be made in person as long as such a requirement is not used to hinder access to the procedure, for example, in a situation where the application is made through a legal representative for a person in detention.

3) Member States shall ensure that each adult person has the right to make a separate application for asylum on his own behalf.

However, Member States may determine, by law

(a) the cases in which a minor cannot make an application on his own behalf and in which his application is to be made by another person on his behalf;
(b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 15(1).

4) Member States may provide by law that an application may be made by an applicant on behalf of his dependants, including minors. In these cases Member States shall ensure that dependant adults and dependant minors not covered by point (a) of paragraph 3 consent to the making of the application on their behalf, failing which the dependants shall have an opportunity to make an application on their own behalf.

Where a dependant files an application on his own behalf after he/she has consented to the making of an application on his/her behalf, the subsequent application may be rejected on the basis of the application made on his/her behalf.

UNHCR's comment: UNHCR considers this limitation on subsequent own applications of asylum-seekers for whom an application is otherwise made as dependants unduly restrictive, particularly in light of possible trauma and sensitivities related to sexual violence or culture. These may, for example, lead a female asylum-seeker initially to consent to an asylum-application on her behalf, while she might develop only after some time the understanding and confidence to apply for asylum on her own behalf. UNHCR therefore suggests either to delete this limitation or to provide for appropriate exceptions, particularly from a gender-sensitive perspective.

5) Member States shall ensure that the procedures as provided for in this Directive shall start as soon as possible.

6) Member States shall ensure that:

(a) all relevant authorities likely to be addressed by the applicant at the border or on the territory of the Member State have instructions for dealing with applications for asylum, including the instruction to forward the applications and all relevant information to the competent authority for examination;
(b) the personnel of those authorities have received the necessary training to recognise an application for asylum and to proceed further in accordance with those instructions.

UNHCR's comment: From UNHCR's perspective, there is benefit in qualifying more specifically the extent to which other officials would be included in handling asylum applications made at the border or on the territory of the Member State. UNHCR suggests that the authorities should have instructions merely "for registering an asylum application and for forwarding it and all relevant information to the competent authorities for examination", rather than instructions "for dealing with" such applications. The term "dealing with" has the potential of being misinterpreted and giving broader authority to officials not competent to deal with asylum matters. UNHCR welcomes that Article 5(6)(b) foresees the necessary training for the authorities.

Article 6
Right to stay pending the examination of the application

1) Applicants for asylum shall be allowed to remain on the territory of the Member State until such time as the determining authority has made a decision.

UNHCR's comment: Article 6, as proposed, limits the right to stay to the first instance procedure, as per Article 2(e). Given the seriousness of treatment that refugees may be exposed to, and in line with the principle of non-refoulement, appeals should, in principle, have suspensive effect and the right to stay therefore be extended until a final decision is reached on the application. Certain exceptions to automatic suspensive effect may apply and are dealt with in the Chapter on appeals.

2) Member States can only make an exception where, in accordance with Articles 33 and 34, a subsequent application will not be further examined.

Article 7
Requirements for the examination of applications

1) Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that

(a) applications are examined and decisions are taken individually, objectively and impartially;
(b) precise and up to date information is obtained from various sources, including information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

(c) the personnel examining applications and taking the decisions have the appropriate knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

UNHCR's comment: UNHCR welcomes the importance attached by the draft Directive to the availability of information on the situation in countries of origin and asylum. Such information should, however, similarly be available to the asylum-seeker and his or her legal adviser/counsellor as well as be subject to the scrutiny of reviewing bodies.

3) Members States shall ensure that the authorities referred to in Chapter IV are given access to the general information referred to in § 1(b), necessary for the fulfilment of their task.

Article 8
Requirements for a decision by the determining authority

1) Member States shall ensure that decisions on applications for asylum are given in writing.

2) They shall also ensure that if an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Article 9
Guarantees for applicants for asylum

1) With respect to the procedures provided for in Chapter III of this Directive, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) They must be informed of the procedure to be followed and of their rights and obligations during the procedure, in a language which they may reasonably be supposed to understand. The information must be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Articles 16 and 20 (1);

UNHCR's comment: In the context of an asylum procedure, where so much depends on the testimony of an individual, effective communication with an asylum-seeker is essential. UNHCR considers it therefore necessary to provide information to an asylum-seeker in a language, which he or she understands. As a matter of principle, every effort to do so should be made by the countries of asylum. Assumptions, for example, that an asylum-seeker speaks or understands the official language of his or her country of origin, may prove incorrect. Where, however, the difficulty of providing information in a language that is understood by the applicant lies in a lack of co-operation on the part of the asylum-seeker, this could specifically be addressed by way of an additional provision in the draft Directive.

(b) They must receive the services of an interpreter for submitting their case to the competent authorities whenever reasonable. Member States shall consider it reasonable to give these services if the determining authority calls upon the applicant to be interviewed before a decision is taken on the application. In this case and in other cases where the competent authorities call upon the interpreter, the services shall be paid for out of public funds;

UNHCR's comment: As noted above, asylum-seekers, in UNHCR's view, should be able to benefit from the services of an interpreter whenever this proves necessary, and not whenever reasonable, to enable them effectively to submit their applications.

(c) They must not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR on the territory of the Member State pursuant to an agreement with such Member State;

UNHCR's comment: Asylum-seekers should be provided with an effective opportunity to communicate with UNHCR or with any other organisation working on behalf of UNHCR. A more positive formulation would be appreciated. Given that the form of agreement regarding organisations working on behalf of UNHCR may vary, it is suggested to replace the words "pursuant to an agreement" with "subject to the agreement".

(d) They must be notified in reasonable time and in an appropriate manner of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to notify the decision to him instead of to the applicant for asylum;

(e) They must be informed of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor. The information provided shall include information on how to challenge a negative decision.

UNHCR's comment: As mentioned before, asylum-seekers must be informed in a language which they understand, not in a language with they may reasonably be supposed to understand.

2) Each adult among the dependants referred to in Article 5(4) shall be informed in private of the possibility to provide information to the competent authorities on the application for asylum before a decision is taken by the determining authority.

With respect to the procedures provided for in Chapter IV, Member States shall ensure that all applicants for asylum shall also enjoy the guarantees listed in paragraph 1(b), (c) and (d).

Article 10
Persons invited to a personal interview

1) Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent to conduct such an interview under national law.

Member States may, however, provide that minors below a certain age need not be interviewed.

2) The personal interview may be omitted where, on the basis of an individual assessment:

(a) the determining authority is able to take a positive decision on the basis of evidence available;
(b) the competent authority is of the opinion that the applicant is unfit or unable to be interviewed due to lasting circumstances beyond his control. When in doubt, Member States may require a medical or psychological certificate;
(c) the competent authority cannot provide an interpreter in accordance with point (b) of Article 11(2) within a reasonable time;
(d) the competent authority is not able to conduct the interview, because the applicant has, without good reasons, not complied with invitations to appear.

3) In the cases referred to in second subparagraph of paragraph 1 and in points (b), (c) and (d), of paragraph 2, the applicant must be offered the opportunity, before a decision is taken by the determining authority, to make comments in lieu of a personal interview, where appropriate with the assistance of a legal adviser or other counsellor and/or, in the case of a minor, a representative.

If the applicant can not have an interview because the competent authority is not able to provide an interpreter in accordance with point (b) of Article 11(2) within a reasonable time, Member States shall provide, free of charge, assistance by a legal adviser or other counsellor and/or, in the case of an unaccompanied minor, a representative, and shall provide them with an opportunity, before a decision is taken by the determining authority, to make comments on behalf of the applicant in lieu of a personal interview.

UNHCR's comment: UNHCR is concerned about the possibility of a personal interview with an asylum applicant being omitted for lack of an interpreter. Comments made on behalf of an applicant in lieu of an interview cannot, in UNHCR's view, eliminate the fundamental need for meaningful communication with a co-operative applicant.

(4) The fact that no personal interview has taken place on a ground referred to in paragraph 2 and that no comments were received pursuant to paragraph 3, shall not prevent the determining authority from taking a decision on an application for asylum.

The absence of a personal interview on the grounds referred to in paragraph 2 or 3 shall not in itself adversely affect the decision of the determining authority.

Article 11
Requirements for a personal interview

1) A personal interview shall normally take place without the presence of family members.

2) Member States shall take appropriate steps to ensure that personal interviews are conducted in conditions, which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall

(a) when appointing the person who conducts the interview and the interpreter, use their best endeavours to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so in advance and the competent authority is aware of such circumstances;

UNHCR's comment: UNHCR appreciates that cultural origin and vulnerability of an applicant will be taken into account in the conduct of the personal interview with an asylum-seeker. The draft Directive would gain if explicit measures were included to address the special needs of female asylum-seekers, survivors of violence and torture, and traumatised persons. This particular provision would, for example, benefit if an entitlement for female asylum-seekers to be heard by a female interviewer and interpreter were to be included. UNHCR would also appreciate a clarification to the effect that interviews are best conducted in camera.

(b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he may reasonably be supposed to understand.

UNHCR's comment: As mentioned above, a proper way of communicating with an asylum-seeker is a pre-condition for a fair and effective asylum procedure. While such communication does not necessarily need to be in the language preferred by the applicant, supposing he or she understands and is able to communicate in several languages, it needs to be in a language which is understood by the applicant and in which he or she is able to communicate.

Article 12
Status of the transcript of a personal interview in the procedure

1) Member States shall ensure that a transcript is made of every personal interview.

2) Member States shall ensure that applicants have timely access to the transcript of the personal interview on which the decision is or will be based.

3) Member States may request the applicant's approval on the contents of the transcript of the personal interview.

In such cases, Member States shall ensure that the applicant has the opportunity to request or propose corrections of mistranslations or misconceptions appearing in the transcript.

The refusal of an applicant to approve the contents of the transcript of the personal interview shall not prevent the determining authority from taking a decision on his/her application.

Article 13
Right to legal assistance and representation

1) Member States shall allow applicants for asylum the opportunity to consult in an effective manner a legal adviser or other counsellor on matters relating to their asylum applications at all stages of the procedure, including following a negative decision.

2) In the event of a negative decision by a determining authority, Member States shall ensure that legal assistance, on request, be granted free of charge, subject to the provisions of this paragraph.

Member States may

(a) choose to only make available legal assistance free of charge to those who lack sufficient resources and insofar as such assistance is necessary to ensure their effective access to justice.

(b) restrict legal assistance given free of charge to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum.

UNHCR's comment: UNHCR welcomes the guarantees regarding legal assistance and representation contained in this draft Directive. The limitation, however, to provide legal assistance free of charge "insofar as is necessary" might be too restrictive. Unlike citizens, asylum-seekers are largely unfamiliar with procedures in countries of asylum, and are therefore generally unable to have effective access to justice without legal assistance.

Article 14
Rights of legal adviser or counsellor

1) Member States shall ensure that a legal adviser or other counsellor who assists or represents an applicant for asylum under the terms of national law shall enjoy access to such information in the applicant's file as is liable to be examined by the authorities referred to in Chapter IV.

UNHCR's comment: This provision allows for some limitations to access to information in an applicant's file for the asylum-seeker and his or her legal advisor. UNHCR is concerned that this would leave asylum-seekers and decision-makers in unequal positions. UNHCR therefore recommends that information and its sources may be withheld only under clearly defined conditions where disclosure of sources would seriously jeopardise national security or the security of the organisations or persons providing information.

Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas for the purpose of visiting that applicant. Member States may only limit the possibility to visit applicants in closed areas where such limitation is, by virtue of national law or regulation, objectively necessary for the security of the area or to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible.

2) Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum is informed in due time of the time and place of the applicant's personal interview as provided for in Articles 10, 11 and 12 and is allowed to attend it.

Member States shall provide rules on the presence of legal advisers or other counsellors at all other interviews in the procedure, without prejudice to this Article or to Article 15(1)(b).

Article 15
Guarantees for unaccompanied minors

1) With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 10 and 12, Member States shall ensure that all unaccompanied minors enjoy the following guarantees:

(a) To be granted, as soon as possible, a representative who shall represent and/or assist them with respect to the examination of the application;
(b) The representative must be given the opportunity to help prepare them for the personal interview. Member States shall allow the representative to be present at this interview and to ask questions or make comments.

2) Member States shall ensure that:

(a) If an unaccompanied minor has a personal interview on his application for asylum as referred to in Articles 10, 11 and 12, this interview is conducted by an person who has the necessary knowledge of the special needs of minors;
(b) An official trained with regard to the special needs of minors takes the decision on the application of an unaccompanied minor.

3) Member States that use medical examinations to determine the age of unaccompanied minors shall ensure that:

(a) Unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, about the possibility of age determination by a medical examination.
(b) The decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on this refusal.

UNHCR's comment: UNHCR appreciates that special care is taken in the draft Directive to address the particular situation of separated children (which is the terminology meanwhile commonly used) and to provide for special procedural safeguards. UNHCR recommends that the principle of the "best interest of the child" be included explicitly in this provision. Missing in the draft Directive are specific provisions to address the special needs of survivors of violence, in particular sexual violence and torture, as well as of traumatised asylum-seekers. Such guarantees could, as indicated, be usefully included in Articles 5 (access), 11 (personal interview), 17 (detention), Chapter III (admissibility and accelerated procedures) and 35 (border procedure) of the draft Directive.

Article 16
Establishing the facts in the procedure

1) Member States shall take appropriate measures to enable the applicant for asylum to fulfil his/her obligation of co-operation to assist the competent authorities in establishing the facts of his case.

An applicant shall be considered to have fulfilled this obligation if he/she has presented all the facts of his/her case relevant for the examination as completely as possible and supported these with all available evidence in time for the determining authority to take a decision.

2) An applicant for asylum shall be considered to have presented all the relevant facts of his/her case if he/she has provided statements on his age, background, identity, nationality, travel routes, identity and travel documents and the reasons for his fear for persecution.

After the applicant has made an effort to support his/her statements concerning the relevant facts by any available evidence and has given a satisfactory explanation for any lack of evidence, the determining authority must, evaluating the evidence, assess the well-foundedness of the fear for persecution.

3) Member States shall ensure that the determining authority, despite a possible lack of evidence for some of the applicant's statements, gives the applicant the benefit of the doubt if the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his claim;

(b) all available evidence has been obtained and, where possible, checked;

(c) the examiner is satisfied that the applicant's statements are coherent and plausible and do not run counter to generally known facts relevant to his/her case.

UNHCR's comment: UNHCR welcomes the express provision that applicants for asylum are to benefit from the benefit of the doubt principle, as outlined in Article 16, and generally considers the provisions on the standard and burden of proof to be consistent with international standards in refugee law.

Article 17
Detention pending a decision by the determining authority

1) Without prejudice to Article 18, Member States shall not hold an applicant for asylum in detention for the sole reason that his application for asylum needs to be examined before a decision is taken by the determining authority.

However, Member States may only hold an applicant for asylum in detention during the examination of the application where such detention is, in accordance with a procedure laid down by national law or regulation, objectively necessary for an efficient examination of the application or where, on the basis of the personal conduct of the applicant, there is a strong likelihood of his absconding.

2) Member States may also hold an applicant for asylum in detention during the examination of his application if there are grounds for believing that the restriction on his freedom of movement is necessary for a quick decision to be made. Detention for this reason shall not exceed two weeks.

UNHCR's comment: The re-affirmation of the general principle that asylum-seekers should not be detained is, in itself, welcome. However, UNHCR is concerned that a single article in the proposal cannot do justice to the complex and delicate issues involved in the application of, and exceptions to, this principle. UNHCR believes that the guidance provided by the Executive Committee on the permissible exceptions to the general rule that detention of asylum-seekers should normally be avoided, continues to meet State concerns. Those permissible exceptions for clearly defined purposes are:

- to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security or public order.

In contrast, the wording of the proposed provision seems vague and unspecific to justify such a severe measure as deprivation of liberty. It risks to be understood as authorising the detention of an asylum-seeker for reasons of administrative expediency, or convenience. UNHCR would, as a minimum, suggest an exhaustive enumeration of permissible grounds for detention based on Executive Committee Conclusion No. 44. Valuable guidance can also be found in the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (1999).
The UNHCR Guidelines make extensive references to alternatives to detention, such as reporting obligations, including (though not exclusively) for the benefit of minors and other vulnerable persons seeking asylum. The Directive could therefore explicitly foresee exceptions to detention measures in relation to children, survivors of torture or sexual violence and traumatised persons.

3) Member States shall provide for the possibility of an initial judicial review and subsequent regular judicial reviews of the order for detention of applicants for asylum detained pursuant to paragraph 1.

UNHCR's comment: Because of the gravity of detention, UNHCR welcomes mandatory periodic judicial review of the detention order. It understands Article 17 (3) to provide for this without the detainee having to specifically apply for it.

Member States shall ensure that the court called upon to review the order of detention is competent to review whether detention is in accordance with the provisions of this Article.

Article 18
Detention after agreement to take charge under Council Regulation…/…

1) Member States may hold the applicant in detention to prevent him from absconding or effecting an unauthorised stay, from the moment at which another Member State has agreed to take charge of him or to take him back in accordance with 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 national] until the moment the applicant is transferred to the other Member State. Detention for this reason shall not exceed one month.

2) Member States shall ensure that the authority called upon to review the order is competent to examine the legality of the detention in accordance with the provisions of this Article.

Article 19
Procedure in case of withdrawal of the application

1) When an applicant for asylum explicitly withdraws his application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided the information to do so is available, to reject the application on some other ground in accordance with this Directive.

2) Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority shall enter a notice in the file.

Article 20
Procedure in case of implicit withdrawal or abandonment of the application

1) When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided the information to do so is available, to reject the application on some other ground in accordance with this Directive.

Member States may assume that the applicant has implicitly withdrawn or abandoned his application for asylum when it is ascertained that:

(a) He/she has not within a reasonable time complied with reporting duties or other obligations to communicate, has failed to respond to requests for information essential to his/her application under the terms of Article 16 or has not appeared for an personal interview as provided for in Articles 10, 11 and 12;

(b) He/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time.

2) Member States shall ensure that the applicant who reports once again to the competent authority after a decision to discontinue as referred to in paragraph 1 is taken, is entitled to request that his/her case be re-opened.

Member States shall ensure that this person will not be removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage in which the application was discontinued.

UNHCR's comment: UNHCR notes that explicit (Article 19) or implicit (Article 20) withdrawal of an asylum application may lead either to discontinuation or rejection of the application. In UNHCR's view, the rejection of a claim (as would recognition) in such circumstances is inconsistent: withdrawal should lead to discontinuation of the procedure and the closing of the file.

Article 21
The role of UNHCR

1) Member States shall allow the UNHCR :

(a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;

(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto;

UNHCR's comment: UNHCR fully endorses the principle of confidentiality of person-specific information concerning asylum-seekers and refugees. However, not all information concerning an asylum applicant would necessarily require the consent of the individual. It is therefore recommended that a distinction be made between information on individual applications on the one hand and person-specific information on the other, with only the latter being dependent on the consent of the applicant.

(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

UNHCR's comment: UNHCR would welcome if explicit reference could be made to the possibility for the Office to present its views also to courts of law, as the competent body during the appeals procedure (see Article 38). It is often, during the appeals procedure, that relevant questions of international refugee law are being treated. Such submissions are also in line with standard international practice. To reflect more accurately the legal source of UNHCR's mandate, Article 21(1)(d) should read:"…in the exercise of its supervisory responsibilities under the UNHCR Statute in conjunction with Article 35…."

2) Paragraph 1 shall also apply to an organisation, which is working on the territory of the Member State on behalf of the UNHCR pursuant to an agreement with that Member State.

UNHCR's comment: UNHCR appreciates the flexibility provided in the draft Directive with regard to the way in which UNHCR may exercise its mandate function in Member States of the European Union. Taking this into account, it is suggested to re-word Article 21(2) to read "an organisation which is working (…) on behalf of the UNHCR, subject to the agreement with that Member State", as such agreements may take different forms.

Article 22
Data protection

1) Member States shall not disclose the information regarding individual applications for asylum to the authorities of the country of origin of the applicant for asylum.

2) Member States shall take appropriate measures to ensure that no information required for the purpose of examining the case of an individual applicant shall be obtained from the authorities of his country of origin in a manner that would result in the disclosure to those authorities of the fact of his having applied for asylum.

CHAPTER III
Procedures at first instance
Section I

Article 23
Purpose of accelerated procedures

1) Member States may adopt or retain an accelerated procedure for the purpose of

(a) processing applications for asylum considered to be inadmissible under Section II;

(b) processing applications for asylum considered to be manifestly unfounded under Section III;

(c) processing unfounded applications under Section IV;

(d) processing subsequent applications for asylum within the framework of the provisions set out in Section V;

(e) taking a decision on the entry of applicants for asylum into the territory of a Member State in accordance with Section VI.

2) Member States shall consider as regular procedures all other procedures under which applications for asylum are processed.

UNHCR's comments: UNHCR notes with concern that "regular procedures" are seen as a rather exceptional process and defined as "all other" procedures in which neither of the accelerated procedures, defined in Chapter III apply. It appears that the majority of claims lodged in Member States are expected to be treated at the first instance level, in accelerated procedures for the purpose of being considered inadmissible, manifestly unfounded, unfounded or in the context of the denial of entry. This is regrettable insofar as a much higher degree of efficiency and cost-effectiveness could, in UNHCR's view, be achieved (i) by focussing on the quality of decision-making in a regular first instance procedure; (ii) by prioritising the processing of certain claims within such a procedure, namely manifestly well-founded, manifestly unfounded claims and special cases; and (iii) by introducing a three-month time limit for all first instance procedures. Such measures would obviate the need for separate legal proceedings and devices, which raise a number of protection concerns.

UNHCR furthermore notes that admissibility considerations have been integrated into accelerated procedures. The lack of a clear distinction between questions of admissibility, which are of a formal nature, and an examination of the merits of the claim, risks causing confusion between very different stages of the assessment of an asylum claim. UNHCR strongly recommends therefore that admissibility issues be treated in a separate chapter, clearly distinct from issues concerning the substance of a claim, as was the case in the earlier Commission proposal of this Directive.

Last but not least, UNHCR regrets that the described accelerated procedures fail to address the special needs of particularly vulnerable asylum-seekers, including survivors of violence and trauma.

Article 24

Time limits for an accelerated procedure

1) Member States shall ensure that the determining authority takes a decision in the accelerated procedure within three months after the application of the person concerned has been made.

2) The time limit referred to in paragraph 1 may be extended for three months for legitimate reasons.

3) An extension of the time limit in a particular case shall not be valid unless notice is served on the applicant or on the legal adviser or other counsellor who assists or represents him.
Non-compliance with the time limits in paragraphs 1 and 2- shall result in the application for asylum being processed under the regular procedure, unless Member States determine that an applicant who is at the origin of non-compliance referred to in paragraphs 1 and 2, cannot invoke this consequence of non-compliance, in particular in case of a failure on his part to submit the information he is reasonably expected to provide under the terms of Article 16 or to appear for an personal interview as provided for in Articles 10, 11 and 12.

4) Member States may determine that a decision is deemed to have been taken under the accelerated procedure in cases where it can be established after the expiry of the time limits referred to in paragraphs 1 and 2 that the applicant has, without reasonable cause and in bad faith, withheld information which, had it been known at that stage of the procedure, would have resulted in a decision in the accelerated procedure.

5) This Article shall not apply once one Member State calls upon another Member State to take charge of an applicant in accordance with 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 national].

Section II

Article 25
Cases of inadmissible applications

Member States may reject a particular application for asylum as inadmissible if:

UNHCR's comments: To enhance the much required distinction between questions of admissibility and matters of substance of a claim, UNHCR recommends a change in terminology: Where questions of admissibility determine a decision in an asylum procedure, Member States may declare inadmissible rather than "reject" an application. This differentiation would adequately reflect the fact that a denial of admissibility is not based on a substantive examination of the claim.

(a) another Member State, or Norway or Iceland, has acknowledged responsibility for examining the application, according to the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted

by a national of a third country or stateless person in one of the Member States;

(b) country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Articles 27 and 28;

(d) a country other than the country of origin of the applicant has made an extradition request and that country is either another Member State or a third country which can be considered a safe third country in accordance with the principles set out in Annex I, provided that extradition to this country is legal;

UNHCR's comment: In UNHCR's view, the proposed approach to declare inadmissible an asylum application because of an extradition request is problematic, insofar as it confuses a decision on an asylum claim with the extradition procedure. UNHCR has, in the context of the European Commission proposal for a Council Framework Decision on the European arrest warrant and surrender procedures between Member States, proposed that in such cases the asylum procedure should be suspended and, after the resolution of prosecution, whether by sentence or by acquittal, consideration of the asylum case should be resumed and brought to its final conclusion. This can be done either in the State where the asylum procedure was pending initially or through transfer of responsibility for examining the asylum application to the EU Member State or to another 'safe' third country to which extradition has taken place.

(e) an indictment by an International Criminal Court has been made.

UNHCR's comment: UNHCR notes that an indictment by an international criminal tribunal is a matter of exclusion and therefore concerns the merits (not the admissibility) of the case. The aforementioned considerations in relation to extradition would seem to apply in this constellation as well.

Article 26
Application of the concept of first country of asylum

A country can be considered to be a first country of asylum for an applicant for asylum if he/she has been admitted to that country as a refugee or for other reasons justifying the granting of protection, and can still avail himself of protection in that country that is in accordance with the relevant standards laid down in international law.

Article 27
Designation of countries as safe third countries

1) Member States may consider that a third country is a safe third country for the purpose of examining applications for asylum only in accordance with the principles set out in Annex I.

2) Member States may retain or introduce legislation that allows for the designation by law or regulation of safe third countries. Such laws or regulations shall be compatible with Article 28.
3) Member States which, at the date of entry into force of this Directive, have in force laws

or regulations designating countries as safe third countries and which wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive and shall notify as soon as possible any subsequent relevant amendments.

Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating countries as safe third countries after the adoption of this Directive, as well as any subsequent relevant amendments.

Member States shall give specific grounds for the designation of countries as safe third countries and for any subsequent exclusion or addition of such a country.

UNHCR's comments: UNHCR notes the inclusion of the "safe third country" concept under Articles 25(c), 27 and 28. In UNHCR's view, the focus on the "safe third country" notion should be reviewed. Member States should recognise that this notion will be far less relevant when States of transit that are currently at the periphery of the Union join the EU, i.e. as early as next year. As the preamble to the 1951 Refugee Convention and a number of Executive Committee Conclusions make clear, refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international co-operation. The primary responsibility to provide protection remains with the State where the claim is lodged. It is for this reason, that UNHCR welcomes multilateral agreements such as those that have been agreed by the EU to lay out the criteria and mechanisms for determining the State responsible for examining the claim. The "safe third country" notion rests on a unilateral decision by a State to invoke the responsibility of a third State in examining an asylum claim and should be abandoned in favour of such multilateral agreements which aim to ensure effective protection to the persons concerned. In UNHCR's view, the mere circumstance that the applicant has been in a third country where s/he could have sought asylum does not provide sufficient grounds for refusing to consider the application in substance. However, provided that certain conditions are met, the responsibility for considering an asylum request may be transferred to a third country. These conditions are:

(i) That it is a country where s/he will be protected against refoulement and will be treated in accordance with accepted international standards – i.e., that the third country is "safe" for the applicant;

(ii) That the applicant already has a connection or close links with the third country, so that it appears fair and reasonable that he be called upon first to request asylum there; in this respect, the intentions of the asylum-seeker as regards the country in which s/he wishes to request asylum should, as far as possible, be taken into account;

(iii) That the third country expressly agrees to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure, and provides access to a durable solution for those recognised.

As regards the notion of "safety", it is UNHCR's view that this cannot be assessed solely on the basis that such country is or is not a party to international instruments for the protection of human rights and/or for the protection of refugees. UNHCR has stressed that what is relevant is the country's practice, not just the formal obligations that it may have assumed.

UNHCR has also pointed out that the question of whether a particular third country is "safe" for the purpose of returning an asylum-seeker is not a generic question which can be answered for any asylum-seeker in all circumstances. This is the reason for UNHCR's position

that the analysis of whether the asylum-seeker can be sent to a third country for determination of the claim must be done on an individualised basis. The Office, therefore, advises against the use of "safe third country" lists.

A "safe third country" is defined in the proposal as one which generally observes the standards laid down in international law for the protection of refugees, and generally observes basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation. Sections I A, 1 and B, 1 and 2, of Annex I elaborate on these standards, which UNHCR would generally endorse as useful indicators for deciding whether a country is "safe" in relation to the particular circumstances of an individual case.

On the other hand, UNHCR has, for the reasons stated above, reservations about a procedure (as per section II of Annex I) for the purpose of designating a country as "safe" in general. Furthermore, UNHCR is concerned about the designation of a country as a "safe third country", even with regard to a particular individual, if that country has not acceded to the 1951 Convention and if the applicant whose admissibility is under examination is seeking the protection of that Convention.

Article 28
Application of the safe third country concept

1) A country that is a safe third country in accordance with the principles set out in Annex I can only be considered as a safe third country for a particular applicant for asylum if, notwithstanding any list:

(a) the applicant has either a connection or close links with the country or has had an opportunity to avail himself/herself of the protection of the authorities of that country;

UNHCR's comment: UNHCR is concerned that Member States may seek to transfer to a third country the responsibility for considering an asylum application, not only in cases where the applicant has a connection or close links with that third country but, in addition, in cases where the applicant "has had the opportunity during a previous stay in that country to avail himself of the protection of its authorities". UNHCR considers it inappropriate to derive any responsibility for considering an asylum application from the mere fact that the applicant has been present in the territory of another State. "Mere presence" in a territory is often the result of fortuitous circumstances, and does not necessarily imply the existence of any meaningful link or connection. Although the Commission's comments on this provision seem to suggest that the expression "previous stay" does not include stays of a short duration, this interpretation does not necessarily flow from the actual wording of the provision, which may well be read as allowing the removal of asylum-seekers to countries of mere transit.

(b) there are grounds for considering that this particular applicant will be admitted or re-admitted to this country and

UNHCR's comment: UNHCR is very concerned about this provision, which allows Member States to deny an applicant access to the procedure and remove him or her to a third country where there are "grounds for considering that this particular applicant will be re-admitted to [the third country's] territory". Removal following a decision of inadmissibility may thus take place without the third country having consented to admit or re-admit the person to its territory and to consider the asylum application. Since the agreement of another State cannot

be presumed, the State's express consent to accept responsibility for examining the application must be a key factor in any decision on admissibility. The relevance of consent also derives from the principle of international co-operation to address refugee matters. Most importantly, however, the need for consent is based on the basic protection preoccupation that, if no State assumes responsibility for an asylum-seeker, he or she risks to face, at best, "orbit" situations between national jurisdictions, and at worst refoulement.

(c) there are no grounds for considering that the country is not a safe third country in his/her particular circumstances.

UNHCR's comment: UNHCR appreciates the explicit provision foreseeing an individual assessment in the context of the "safe" third country concept. It wishes to note, however, that it is not on the asylum-seeker to establish that the third country is unsafe, but on the country that wishes to remove the asylum-seeker from its territory. The burden of proof should not unduly be shifted to the applicant.

2) When implementing a decision based on this Article, Member States shall provide the applicant with a document in the language of the third country informing the authorities of that country that the application has not been examined in substance.

Section III

Article 29
Cases of manifestly unfounded applications

Member States may reject an application for asylum as manifestly unfounded if the determining authority has established that:

(a) the applicant in submitting his application and presenting the facts, has only raised issues that are obviously not relevant to the Geneva Convention;

UNHCR's comment: UNHCR notes that Article 29(a) does not take into account considerations relevant for subsidiary protection. UNHCR wishes to recall the Executive Committee Conclusion No. 30, which refers to applications obviously without foundations as those "not related to the criteria for the granting of refugee status … nor to any other criteria justifying the grant of asylum". In UNHCR's view, it is important that a claim is not rejected as manifestly unfounded, if issues were raised which give rise to the granting of subsidiary forms of protection.

(b) the applicant is from a safe country of origin within the meaning of Articles 30 and 31 of this Directive;

(c) the applicant is prima facie excluded from refugee status by virtue of Council Directive …/ …. [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]

UNHCR's comment: In UNHCR's experience, decisions on exclusion from refugee status are

complex and demand a careful examination of the asylum claim, not only because of the grave consequences for the applicant but also to ensure that all relevant facts and pieces of evidence are duly considered as part of the determination process. UNHCR would thus advise against adoption of this paragraph.

Article 30
Designation of countries as safe countries of origin

1) Member States may consider a country to be a safe country of origin for the purpose of examining applications for asylum only in accordance with the principles set out in Annex II.

2) Member States may retain or introduce legislation that allows for the designation by law or regulations of safe countries of origin. Such laws or regulations shall be compatible with Article 31.

3) Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating countries as safe countries of origin and which wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive and shall notify as soon as possible any subsequent relevant amendments.

Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating countries as safe countries of origin after the adoption of this Directive, as well as any subsequent relevant amendments.

Member States shall give specific grounds for the designation of countries as safe countries of origin and for any subsequent exclusion or addition of a country as a safe country of origin.

UNHCR's comment: UNHCR shares the intention of the drafters of the Directive to design procedural devices for the treatment of asylum applicants who originate from countries that do not normally produce refugees in an effort to preserve the integrity of the regular asylum process. UNHCR does not oppose the notion of "safe country of origin" where it is used as a procedural tool for accelerated and simplified treatment and in carefully circumscribed situations, and generally agrees with the criteria laid out in Annex II. The Office has, however, concerns that any designation of such countries by law or regulation be flexible enough to take account of changes, including gradual changes, in a given country.

Article 31
Application of the safe country of origin concept

A country that is a safe country of origin in accordance with the principles set out in Annex II can only be considered as a safe country of origin for a particular applicant for asylum if he has the nationality of that country or, if he is a stateless person, it is his country of former habitual residence, and if there are no grounds for considering the country not to be a safe country of origin in his particular circumstances.

UNHCR's comment: While UNHCR does not object in principle to the use of the notion of "safe" country of origin as a procedural tool to assign these applications to accelerated procedures, it is however, important to spell out more clearly in Article 31, that the use of this

procedural tool does not increase the burden of proof for the asylum-seeker and that it remains essential to assess each individual case fully on its merits.

Section IV

Article 32
Other cases under the accelerated procedure

Member States may process an application for asylum under the accelerated procedure where:

(a) the applicant has without good reason, misled the authorities with respect to his identity and/or nationality, by presenting false information or by withholding relevant information that could have had a negative impact on the decision;
(b) the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, and there are serious reasons for considering that he/she has, in bad faith, destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality;

UNHCR's comment: The lack of documentation or use of forged documents to flee does not, of itself, render a claim fraudulent, or warrant negative conclusions about the genuineness of the claim. Asylum-seekers are frequently compelled to flee by irregular means, as is recognised also by Article 31 of the 1951 Refugee Convention. Asylum-seekers may, moreover, have destroyed or disposed of an identity or travel document because they are compelled to do so by smugglers who wish to reduce their own chances of detection. Such circumstances need to be taken into account when applying this provision. It should also be borne in mind that such behaviour of an applicant does not in and of itself outweigh a possible well-founded fear of persecution.

(c) the applicant has made deliberately false or misleading representations of a substantial nature in relation to the evidence produced in support of his/her application for asylum;

(d) the applicant has submitted a subsequent application raising no relevant new facts with respect to his/her particular circumstances or to the situation in his country of origin;

(e) the applicant has failed without reasonable cause to make his application earlier, having had ample opportunity to do so, and is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal;

UNHCR's comment: UNHCR notes that there may be circumstances where a foreigner already in a country of asylum, having had ample opportunity to apply for asylum, does not do so for understandable reasons, for example, during a stay on a visa for other purposes or in sur place circumstances where the reasons for a fear of persecution or a risk upon return become apparent only during the stay. When applying this provision, such circumstances should be kept in mind.

(f) the applicant failed to comply with obligations referred to in Articles 16 and 20(1) of this

Directive;

(g) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has not presented himself/herself to the authorities as soon as possible given the circumstances of his/her entry;

(h) the applicant is a danger to the security of the Member State or constitutes a danger to the community of that Member State, having been convicted by a final judgement of a particularly serious crime.

UNHCR's comment: According to UNHCR's Executive Committee Conclusion No. 30 (XXXIV) of 1983, systems must be able to adjust to deal expeditiously with cases of clear fraud, abuse and misrepresentation. While Article 32 seems to describe claims falling broadly into these categories, Article 32(h) seems outside the scope of cases envisaged by Executive Committee Conclusion No. 30.

The application can only be rejected if the determining authority has established that the applicant has no well-founded fear of being persecuted by virtue of Council Directive …/… …. [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].

Section V

Article 33
Cases of subsequent applications

1) Member States may adopt or retain a specific procedure entailing a preliminary examination as referred to in paragraph 2, where a person makes a subsequent application for asylum:

(a) after his/her previous application has been withdrawn by virtue of Articles19 or 20;

(b) after a final decision has been reached on his/her previous application.

2) A subsequent application for asylum shall first be subject to a preliminary examination as to whether, after the withdrawal of the previous application or after the final decision on this application has been reached,

(a) the personal circumstances of the applicant or his/her legal situation has changed or

(b) there is new information indicating that a decision more favourable to the applicant could be taken or could have been taken or

(c) the decision on a former application for asylum was taken on an incorrect or false basis or

(d) there are other reasons under national law to further examine that subsequent application.

If one of the reasons described under subparagraphs (a), (b), (c) and (d) applies and the

applicant concerned was, through no fault of his/her own, incapable of asserting those reasons set forth in this paragraph in the previous procedure, in particular by filing an appeal before a court, the application will be further examined in conformity with Chapter II.

UNHCR's comment: As noted earlier, UNHCR does not consider it appropriate to equate explicit or implicit withdrawal of an asylum application with the rejection of a claim. There should, therefore, not be the same requirements for a resumption or re-opening of an asylum procedure as there are for cases which are rejected in a final decision.

Article 34
Procedural rules

1) Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 33 enjoy the guarantees listed in Article 9.

2) Member States may lay down in national law rules on the preliminary examination pursuant to Article 33. Those rules may inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
(b) require submission of the new information by the applicant concerned within a time limit after which it has been obtained by him or her;
(c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render the access applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.

3) Member States shall ensure that

(a) the determining authority which has taken the decision on the previous application is responsible for the preliminary examination;

(b) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons and of the possibilities of challenging it;

(c) if one of the situations referred to in Article 33(2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

Section VI

Article 35
Cases of border procedures

1) Subject to the provisions of this Article, Member States may maintain, in accordance with laws or regulations in force at the time of adoption of this Directive, specific procedures in order to decide at the border on the entry to their territory of applicants for asylum who have arrived and made an application for asylum, in so far as those laws or regulations are compatible with Articles 5, 6, 8(2), 13(1), 14(1), 14(2), 15, 17, 21 and 22.

2) This procedure may also be applicable to applicants for asylum arriving in airport and port transit zones.

3) Member States shall ensure that the laws or regulations lay down rules for those specific procedures as regards the examination of applications and the decision on the application, the access to legal assistance and representation, the procedure, duration and conditions of detention as well as any time limits that apply.

4) Member States shall ensure that a decision to refuse entry to the territory of a Member State for a reason arising from the application for asylum is taken within two weeks, subject to an extension of the time limit for no more than two weeks agreed upon by a competent judicial body in a procedure prescribed by law.

5) Non-compliance with the time limits provided for in this paragraph shall result in the applicant for asylum being granted entry to the territory of the Member State in order for his application to be processed in accordance with the other provisions of this Directive. Member States shall ensure that applicants for asylum, who are refused entry in accordance with this procedure, enjoy the guarantees referred to in Chapter IV.

6) The refusal of entry into the territory can not override the decision on the application for asylum, unless it is based upon a rejection of the application for asylum after an examination on the basis of the facts of the case by authorities competent in the field of asylum and refugee law.

UNHCR's comment: UNHCR notes that provisions on the border procedure, which are separate and parallel to regular and accelerated procedures, are included at the behest of Member States. There is no reason for due process of law requirements in asylum cases submitted at the border to be considerably different from those submitted within the territory. Given the importance of personal testimony in determining asylum claims, the lack of a requirement for a personal interview is of special concern. UNHCR recommends inclusion in Article 35(1) of the basic safeguards contained in the Articles 7, 8(1), 9, 10(1), 11, 12 and 16(3) of the draft Directive.

Moreover, given that a stay at the border generally is equivalent to detention and cannot be considered a conducive environment for refugee status determination, the stay of an asylum-seeker at the border should be for the shortest possible time, and subject to judicial review. Provision should be made that persons may, after the elapse of a certain time period, be permitted to enter for the duration of the examination of the claim. It would be particularly important to prioritise manifestly unfounded and well-founded claims in procedures initiated

at the border. Further, special exceptions and measures should apply to vulnerable persons, individuals with special needs, in particular minors, while fully respecting the right to family unity.

Section VII

Article 36
Withdrawal or annulment of refugee status

Member States shall ensure that an examination may be started to withdraw or annul the refugee status of a particular person when information comes to light indicating that there are reasons to reconsider the validity of his refugee status.

Article 37
Procedural rules

1) Where in a Member State a determining authority reconsiders a refugee's qualification, the annulment or withdrawal of a refugee status shall be examined under the regular procedure in accordance with the provisions of this Directive.

Where in a Member State a court or another body reconsiders a refugee's qualification, the annulment or withdrawal of a refugee status shall be examined under the same conditions as the review of decisions taken under the regular procedure.

2) Member States may derogate from Articles 9 to 12 when it is technically impossible for the competent authority to comply with the provisions of those Articles.

UNHCR's comment: It would, in UNHCR's view, be important to spell out exceptional circumstances under which cancellation or cessation of refugee status or subsidiary protection could take place without the guarantees foreseen in Article 9 and without a personal interview of the individual concerned.

CHAPTER IV
Appeals procedures

Article 38
The right to an effective remedy before a court of law

1) Member States shall ensure that applicants for asylum have the right to an effective remedy of a decision taken on their application for asylum before a court of law.

2) Member States shall ensure that the effective remedy referred to in paragraph 1 includes the possibility of an examination on both facts and points of law.

3) Member States shall ensure that:

(a) refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20, and

(b) an extension of the time limit pursuant to Article 24 can also be subjected to examination through appeal proceedings before a court of law.

UNHCR's comment: UNHCR notes with satisfaction that applicants have the right to an effective remedy, insofar as an appeal by a "court of law" (an independent and impartial tribunal or body) is provided for, with the authority to review both points of fact and law. In order to enhance the efficiency of the review or appeals procedure, the prioritisation of cases in the review procedure could similarly contribute to speedy decision-making. Cases given priority during the review stage of the procedure could include those rejected at first instance as inadmissible, as manifestly unfounded as well as those of particularly vulnerable individuals or families.

Article 39
Review and appeal proceedings against decisions taken under the regular procedure

1) Member States shall allow applicants for asylum lodging an appeal before a court of law against a decision taken in the regular procedure to remain on the territory of the Member State concerned pending its outcome. Member States shall also allow applicants for asylum requesting a review of a decision taken under the regular procedure by an administrative body prior to appeal before a court of law to remain on the territory of the Member State concerned pending its outcome.

2) Member States may derogate from paragraph 1 by virtue of laws or regulations in force on the date of adoption of this Directive.

3) Where national law provides that an applicant for asylum is not allowed to remain on the territory of the Member State concerned awaiting the outcome of his appeal or review, Member States shall ensure that the court of law has the competence to rule whether or not such an applicant may, given the particular circumstances of his/her case, remain on the territory of the Member State concerned, either upon request of the applicant or acting of its own motion.

4) No expulsion may take place until the court of law has ruled in the case referred to in paragraph 3. Member States may provide for an exception where it has been decided that grounds of national security or public policy preclude the applicant for asylum from remaining on the territory of the Member State concerned.

UNHCR's comment: Given the potentially serious consequences of an erroneous determination at first instance, suspensive effect of an appeal is a fundamental principle. This requirement should be seen in the light of respect for the principle of non-refoulement. If an applicant is not permitted to await the outcome of an appeal against a negative decision at first instance in the territory of the Member State, the remedy against a decision is ineffective. No exceptions to this fundamental principle should therefore be permitted, although in certain clearly defined cases the automatic application of a suspensive effect may be lifted. UNHCR is therefore seriously concerned at the exceptions provided in the draft Directive

even for claims examined in a regular procedures (Article 39(2), 39(4)). These should be deleted. Furthermore, suspensive effect should be automatic in all cases other than those which are clearly manifestly unfounded. The provision under Article 39(3) should be amended accordingly.

Article 40
Review and appeal proceedings against decisions taken in the accelerated procedure

1) Member States shall lay down in national law those cases in which applicants for asylum lodging an appeal against or requesting a review of a decision taken under the accelerated procedure are not to be allowed to remain on the territory of the Member State concerned pending its outcome.

2) In such cases, Member States shall ensure that a court of law has the competence to rule whether or not this applicant for asylum may, given the particular circumstances of his case, remain on the territory of the Member State concerned, either upon request of the concerned applicant or acting on its own motion.

3) No expulsion shall take place until the court of law has ruled in the case referred to in paragraph 2. Member States may provide for an exception in the following cases:

(a) where it has been decided that an application for asylum is inadmissible as referred to in Article 25;

(b) where a court of law has already rejected a request from the concerned applicant for asylum to remain on the territory of the Member State concerned and it has been decided that, since that rejection, no new relevant facts have been submitted with respect to the particular circumstances of the applicant or his country of origin after this rejection;

(c) Where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33;

(d) Where it has been decided that grounds of national security or public policy preclude the applicant for asylum from remaining at the border, the airport or port transit zones or on the territory of the Member State concerned.

UNHCR's comments: As already outlined above, UNHCR is concerned about the extensive exceptions to the principle of suspensive effect of appeals against a negative decision. Even in manifestly unfounded cases, as defined in Executive Committee Conclusion No. 30, there should be some form of review. UNHCR would go along with the proposal to limit the automatic suspensive effect of an appeal in clearly defined manifestly unfounded cases, provided a court of law or another independent authority has reviewed and confirmed the denial of suspensive effect, taking into account the chances of an appeal. The principle should otherwise be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of "safe" third country policies or in a substantive procedure. The exceptions as provided under Article 40(3)(a), (3)(b) and (3)(d) should therefore be deleted.

Article 41
Time limits and scope of the examination in review or appeal

1) Member States shall lay down:

(a) reasonable time limits for giving notice of appeal and, where applicable, for requesting a review; these time limits may be shorter for giving notice of appeal and requests for review in respect of decisions taken under the accelerated procedure;

(b) all other necessary rules for lodging an appeal and, where applicable, for requesting a review;

(c) powers whereby the court of law is enabled to uphold or overturn the decision of the determining authority or has both;

(d) rules whereby, if the court of law overturns a decision, it must either remit the case to the determining authority for a new decision or must itself take a decision on the merits of the application.

2) Member States shall lay down the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his review or appeal together with the rules on the procedure to be followed in these cases.

CHAPTER V
General and final provisions

Article 42
Non-discrimination

Member States shall implement this Directive without discrimination on the basis of sex, race, nationality, membership of a particular social group, health, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation or country of origin.

UNHCR's comment: UNHCR welcomes this non-discrimination provision.

Article 43
Penalties

Member States shall lay down the penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all the measures necessary to ensure that they are enforced. The penalties laid down must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by no later than the date specified in Article 45 and shall notify it without delay of any subsequent amendments affecting them.

UNHCR's comment: UNHCR considers this provision on penalties vague and unclear, in particular with regard to its coverage. Should such penalties target asylum-seekers, it is – in

UNHCR's view – necessary to respect for Article 31 of the 1951 Convention and to ensure that such penalties undermine a full and fair determination of international refugee protection needs.

Article 44
Report

No later than two years after the date specified in Article 45, 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. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 45
Transposal

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Member States shall communicate to the Commission the text of the provisions of national law, which they adopt in the field covered by this Directive.

Article 46
Entry into force

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

Article 47
Addressees

This Directive is addressed to the Member States.

Done at Brussels,
For the Council
The President

ANNEX I

Principles with Respect to the Designation of Safe Third Countries

I. Requirements for designation

A country is considered as a safe third country if it fulfils, with respect to those foreign nationals or stateless persons to which the designation would apply, the following two requirements:

A. it consistently observes the standards laid down in international law for the protection of refugees;

B. it consistently observes basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation.

A. The standards laid down in international law for the protection of refugees

1) A safe third country is any country that has ratified the Geneva Convention, observes the provisions of that Convention with respect to the rights of persons who are recognised and admitted as refugees and has in place with respect to persons who wish to be recognised and admitted as refugees an asylum procedure in accordance with the following principles:

® The asylum procedure is prescribed by law.
® Decisions on applications for asylum are taken objectively and impartially.
® Applicants for asylum are allowed to remain at the border or on the territory of the country as long as the decision on their application for asylum has not been decided on.
® Applicants for asylum have the right to a personal interview, where necessary with the assistance of an interpreter.
® Applicants for asylum are not denied the opportunity to communicate with the UNHCR or other organisations that are working on behalf of the UNHCR pursuant to an agreement with this country.
® There is provision for appeal to a higher administrative authority or to a court of law against the decision on each application for asylum or there is an effective possibility to have the decision reviewed.
® The UNHCR or other organisations working on behalf of the UNHCR pursuant to an agreement with this country have, in general, access to asylum applicants and to the authorities to request information regarding individual applications, the course of the procedure and the decisions taken and, in the exercise of their supervisory responsibilities under Article 35 of the Geneva Convention, can make representations to these authorities regarding individual applications for asylum.

2) Notwithstanding the above, a country that has not ratified the Geneva Convention may still be considered a safe third country if:

- ® it consistently observes the principle of non-refoulement as laid down in the OAU Convention governing the specific aspects of refugee problems in Africa of 10 September 1969 and has in place with respect to the persons who request asylum for this purpose a procedure that is in accordance with the above-mentioned principles; or
- ® it has followed the conclusions of the 19–22 November 1984 Cartagena Declaration of Refugees to ensure that national laws and regulations reflect the principles and criteria of the Geneva Convention and that a minimum standard of treatment for refugees is established; or
- ® it nonetheless consistently observes in practice the standards laid down in the Geneva Convention with respect to the rights of persons in need of international protection within the meaning of this Convention and has in place with respect to the persons who wish to be so protected a procedure which is in accordance with the above-mentioned principles; or
- ® as evinced by the UNHCR it complies in another manner with the need for international protection of these persons, either through cooperation with UNHCR or other organisations which may be working on behalf of the UNHCR or by other means deemed to be adequate for that purpose by the UNHCR.

For the purpose of part A a safe third country is also a country that has ratified the Geneva Convention and, while not having (yet) put in place a procedure in accordance with the principles under 1), nonetheless consistently observes in practice the standards laid down in the Geneva Convention with respect to the rights of persons in need of international protection within the meaning of this Convention as evinced by the UNHCR.

B. The basic standards laid down in international human rights law

1) Any country that has ratified either the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as 'European Convention') or both the 1966 International Covenant on Civil and Political Rights (hereafter referred to as 'International Covenant') and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as 'Convention against Torture'), and consistently observes the standards laid down therein with respect to the right to life, freedom from torture and cruel, inhuman or degrading treatment, freedom from slavery and servitude, the prohibition of retro-active criminal laws, the right to recognition as a person before the law, freedom from being imprisoned merely on the ground of inability to fulfil a contractual obligation and the right to freedom of thought, conscience and religion.

2) Observance of the standards for the purpose of designating a country as a safe third country also includes provision by that country of effective remedies that guarantee these foreign nationals or stateless persons from being removed in breach of Article 3 of the European Convention or Article 7 of the International Covenant and Article 3 of the Convention against Torture.

II. Procedure for designation

Every general assessment of the observance of these standards for the purpose of designating a country as a safe third country in general or with respect to certain foreign nationals or stateless persons in particular must be based on a range of sources of information, which may include reports from diplomatic missions, international and non-

governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

The report of the general assessment shall be in the public domain.

Where Member States solely assess in an individual decision the safety of a third country with respect to a particular applicant, such a decision need not be motivated on the basis of a general assessment as provided above.

ANNEX II

Principles with Respect to the Designation of Safe Countries of Origin

I. Requirements for designation

A country is considered as a safe country of origin if it consistently observes the basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation, and it:

A. has democratic structures and the following rights are consistently observed there: the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of peaceful assembly, the right to freedom of associations with others, including the right to form and join trade unions and the right to take part in government directly or through freely chosen representatives;

B. allows monitoring by international organisations and NGOs of its observance of human rights;

C. is governed by the rule of law and the following rights are consistently observed there: the right to liberty and security of person, the right to recognition as a person before the law and equality before the law;

D. provides for generally effective remedies against violations of these civil and political rights and, where necessary, for extraordinary remedies;

E. is a stable country.

II. Procedure for designation

Every general assessment of the observance of these standards for the purpose of a designating a country as a safe country of origin must be based on a range of sources of information, which may include reports from diplomatic missions, international and non-governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

The report of the general assessment shall be in the public domain.

Where Member States solely assess in an individual decision the safety of a country of origin with respect to a particular applicant, such a decision need not be motivated on the basis of a general assessment as provided above.

Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)

Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

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 gradually creating an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union.

(2) Implementation of such a policy should be based on solidarity between Member States and requires the existence of mechanisms intended to promote a balance in the efforts made by Member States in receiving and bearing the consequences of receiving refugees and displaced persons. To that end, a European Refugee Fund should be established.

(3) It is necessary to support the efforts made by the Member States to grant appropriate reception conditions to refugees and displaced persons, including fair and effective asylum procedures, so as to protect the rights of persons requiring international protection.

(4) The integration of refugees into the society of the country in which they are established is one of the objectives of the Geneva Convention and, to this end, there should be support for action by the Member States intended to promote their social and economic integration, in so far as it contributes to economic and social cohesion, the maintenance and strengthening of which is one of the Community's fundamental objectives referred to in Articles 2 and 3(1)(k) of the Treaty.

(5) It is in the interests of both the Member States and the persons concerned that refugees and displaced persons who are allowed to stay in the territory of the Member States are given the opportunity to provide for themselves by working.

(6) Since measures supported by the Structural Funds and other Community measures in the field of education and vocational training are not in themselves sufficient to promote such integration, support should be given for special measures to enable refugees and

displaced persons to benefit fully from the programmes which are organised.

(7) Practical support is needed to create or improve conditions enabling refugees and displaced persons to take an informed decision to leave the territory of the Member States and return home, should they so wish.

(8) Practical ways are to be found of testing innovatory action in this field and exchanges between Member States should be encouraged with a view to identifying and promoting the most effective practices.

(9) Account should be taken of the experience acquired during implementation of the Council's joint action 1999/290/JHA(5) on the reception and voluntary repatriation of refugees, displaced persons and asylum-seekers.

(10) As called for by the European Council at its meeting in Tampere on 15 and 16 October 1999, a financial reserve should be established for the implementation of emergency measures to provide temporary protection in the event of a mass influx of refugees.

(11) It is fair to allocate resources proportionately to the burden on each Member State by reason of its efforts in receiving refugees and displaced persons.

(12) The support provided by the European Refugee Fund will be more efficient and better targeted if the co-financing of eligible action is based on a request from each Member State taking into account its situation and needs.

(13) In order to speed up and simplify co-financing procedures, the responsibilities of the Commission should be distinguished from those of the Member States. Provision should, therefore, be made for the Commission, after examining the Member States' requests for co-financing, to adopt co-financing decisions, while the Member States are to assure the management of the action.

(14) Such decentralised implementation of action by the Member States should provide sufficient guarantees as to the details and quality of implementation, the results of their action and the evaluation thereof and sound financial management and its supervision.

(15) One way of ensuring that the action of the European Refugee Fund is effective is efficient monitoring. The conditions of such monitoring should be set out.

(16) Without prejudice to the Commission's responsibilities for financial control, cooperation between the Member States and the Commission in this regard should be established.

(17) The responsibility of the Member States for the pursuit and correction of irregularities and infringements, and that of the Commission where the Member States do not comply with their obligations, should be specified.

(18) The effectiveness and impact of the action supported by the European Refugee Fund also depend on the evaluation thereof and the responsibilities of the Member States and the Commission in this regard, and arrangements to ensure the reliability of evaluation, should be laid down.

(19) Action should be evaluated with a view to a mid-term review and assessment of its impact, and the evaluation process should be incorporated into the monitoring of the action.

(20) The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commissions(6).

(21) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely to demonstrate solidarity between Member States by achieving a balance in the efforts made by those Member States in receiving refugees and displaced persons and bearing the consequences of so doing, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or impact of the action, be better achieved by the Community. This Decision does not go beyond what is necessary to achieve those objectives.

(22) This Decision applies to the United Kingdom and to Ireland by virtue of the notifications which they have communicated, 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.

(23) Denmark in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community is not participating in the adoption of this Decision and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS DECISION:

CHAPTER I
OBJECTIVES AND TASKS

Article 1
Establishment and objective of the European Refugee Fund

1. A European Refugee Fund (hereinafter referred to as the Fund) shall be established to support and encourage the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

2. The Fund shall operate from 1 January 2000 to 31 December 2004.

Article 2
Financial provisions

1. The financial reference amount for implementing this Decision shall be EUR 216 million.

2. The annual appropriations shall be authorised by the budgetary authority within the limits of the financial perspective. The budget authority shall allocate the annual appropriations between the measures referred to respectively in Articles 4 and 6 of this Decision.

Article 3
Groups targeted by the action

For the purposes of this Decision the target groups shall comprise the following categories:

1. any third-country nationals or stateless persons having the status defined by the Geneva Convention of 28 July 1951 relating to the Status of Refugees and permitted to reside as refugees in one of the Member States;

2. any third-country nationals or stateless persons enjoying a form of international protection granted by a Member State in accordance with its national legislation or practice;

3. any third-country nationals or stateless persons who have applied for one of the forms of protection described in points 1 and 2;

4. third-country nationals or stateless persons benefiting from temporary protection arrangements in a Member State;

5. persons whose right to temporary protection is being examined in a Member State.

Article 4
Measures

1. To achieve the objective described in Article 1 and with regard to the relevant categories of persons as listed in Article 3, the Fund shall support Member States' action relating to:

(a) conditions for reception;

(b) integration of persons whose stay in the Member State is of a lasting and/or stable nature;

(c) repatriation, provided that the persons concerned have not acquired a new nationality and have not left the territory of the Member State.

2. With regard to the conditions for reception and access to asylum procedures, the action may concern in particular infrastructure or services for accommodation, supply of material aid, health care, social assistance or help with administrative and judicial formalities, including legal assistance. Here, account may also be taken of the special needs of the most vulnerable persons.

3. As regards integration into the society of the Member State of residence of persons referred to in paragraph 1(b) and members of their family, the action may in particular be to provide social assistance in areas such as housing, means of subsistence and health care or to enable beneficiaries to adjust to the society of the Member State or to provide for themselves.

4. As regards repatriation, the action may concern in particular information and advice about voluntary return programmes and the situation in the country of origin and/or general or vocational training and help in resettlement.

Article 5
Community action

1. At the Commission's initiative, up to 5 % of the Fund's available resources may be used to finance innovatory action or action of interest to the Community as a whole, separate from the action implemented by the Member States, including studies, exchanges of experience and steps to promote cooperation at Community level, as well as assessment of the implementation of measures and technical assistance.

2. The Commission shall examine the applications submitted by two or more Member States with a view to the joint implementation of transnational action.

3. The Fund may provide up to 100 % of the funding for such action.

Article 6
Emergency measures

1. By decision of the Council, acting unanimously on a proposal from the Commission, the Fund may also be used to finance emergency measures, separate from and in addition to the action referred to in Article 4, to help one or more or all Member States in the event of a sudden mass influx of refugees or displaced persons, or if it was necessary to evacuate them from a third country, in particular in response to an appeal by international organisations.
   After the entry into force of the Directive on temporary protection, the decision of the Council provided for in the first subparagraph will be taken under the conditions set out in the said Directive.

2. In the situation referred to in paragraph 1, eligible emergency measures cover the following types of action:

(a) reception and accommodation;

(b) provision of means of subsistence, including food and clothing;

(c) medical, psychological or other assistance;

(d) staff and administration costs incurred as a result of the reception of persons and implementation of the measures;

(e) costs of logistics and transport.

CHAPTER II
DETAILED PROVISIONS

Article 7
Implementation

The Member States shall be responsible for implementation of action supported by the Fund.

To this end, each Member State shall appoint a responsible authority, which shall handle all communication with the Commission. That authority shall be a public administration but may delegate its responsibility for implementation to another public administration or a non-governmental organisation.

Article 8
Requests for co-financing

1. Member States shall send the Commission each year, in accordance with the time table set out in Article 11, a request for co-financing for their implementation programme for the year in question, which describes, for each of the domains referred to in Article 4:

(a) the situation in the Member State and the requirements justifying the implementation of measures eligible for support from the Fund;

(b) the actions the Member State intends to implement, including:

(i) their nature and their purpose;

(ii) the expected quantified results;

(iii) their cost as well as the funding from the Member State and, where applicable, from the organisation(s) involved.

2. In addition, the first request for co-financing shall include a description of the system put in place by the Member State to:

(a) ensure coordination and consistency of actions;

(b) select projects and ensure the procedure is transparent;

(c) manage, monitor, check and evaluate projects.

3. The request shall contain, for each of the aspects referred to in paragraphs 1 and 2, sufficiently detailed information to enable the Commission to verify that it complies with the provisions of this Decision and the financial rules in force.

Article 9
Selection criteria

1. Member States shall have sole responsibility for the selection of individual projects and for the financial management and administration of projects supported by the Fund, with due respect for Community policies and the criteria for eligibility.

2. Following a public call for proposals, projects, which must be of a non-profit making nature, shall be presented by public authorities (national, regional or local, central or devolved), education or research institutions, training establishments, the social partners, government agencies, international organisations or non-governmental organisations, operating individually or in partnerships, with a view to obtaining funding from the Fund.

3. The responsible authority shall select projects on the basis of the following criteria:

(a) the situation and requirements in the Member State;

(b) the cost-effectiveness of the expenditure, in view of the number of persons concerned by the project;

(c) the experience, expertise, reliability and financial contribution of the organisation applying for funding and any partner organisation;

(d) the extent to which the projects complement other action funded by the budget of the European Communities or as part of national programmes.

Article 10
Distribution of resources

1. For the years 2000 to 2004 each Member State shall receive the following fixed amount of the European Refugee Fund's annual allocation:
   For the year 2000: EUR 500000
   For the year 2001: EUR 400000
   For the year 2002: EUR 300000
   For the year 2003: EUR 200000
   For the year 2004: EUR 100000

2. The remainder of the available resources shall be distributed proportionally between the Member States as follows:

(a) 65 % in proportion to the number of persons referred to in Article 3, points 3, 4 and 5 that have entered over the previous three years;

(b) 35 % in proportion to the number of persons admitted in one of the categories in Article 3, points 1 and 2 over the previous three years.

3. The reference figures shall be the most recent figures established by the Statistical Office of the European Communities.

Article 11
Timetable

1. The Commission shall provide the Member States by 1 June each year at the latest with an estimate of the amounts to be allocated to them for the following year from the total amounts allocated within the framework of the annual budgetary procedure.

2. The Member States shall submit the request for co-financing referred to in Article 7 to the Commission by 1 October each year at the latest.

3. The Commission shall approve the request for co-financing within three months of submission of the request, having carried out the checks provided for in Article 8(2).

Article 12
Technical and administrative assistance

A sum not exceeding 5 % of a Member State's total allocation may be set aside for technical and administrative assistance in the preparation, monitoring and evaluation of the actions under its responsibility within the meaning of Article 7.

CHAPTER III
FINANCIAL PROVISIONS

Article 13
Financing structure

For any given measure, the contribution from the Fund shall not exceed 50 % of the total cost of the measure.

That proportion may be increased to 75 % in Member States covered by the Cohesion Fund.

Article 14
Eligibility

1. Expenditure may not be considered eligible for support from the Fund if it has actually been paid before the date on which the Member State's request for co-financing is approved by the Commission. That date shall constitute the starting point for the eligibility of expenditure.

2. The Commission shall adopt the rules governing eligibility of expenditure in accordance with the procedure referred to in Article 21(2).

Article 15
Decision on co-financing from the Fund

After examining the request for co-financing, the Commission shall, in accordance with the procedure referred to in Article 21(2), adopt the decision on co-financing by the Fund. The decision shall state the amount allocated to the Member State.

Article 16
Budget commitments

Community budget commitments shall be made on the basis of the Commission decision on co-financing.

Article 17
Payments

1. Payment by the Commission of the contribution from the Fund shall be made to the responsible authority in accordance with the corresponding budget commitments.

2. As soon as the Commission decision on the contribution from the Fund is adopted, an initial payment, representing 50 % of the amount, shall be made to the Member State for the year in question. An interim payment of up to 30 % shall be made when the Member State states that it has actually spent half of the initial payment.

   The balance shall be paid within three months of approval of the accounts submitted by the Member State and the annual report on implementation of the programme.

CHAPTER IV
CHECKS AND EVALUATION

Article 18
Checks

1. Without prejudice to the Commission's responsibility for implementing the general budget of the European Communities, Member States shall take responsibility in the first instance for the financial control of the action. To that end, the measures they take shall include:

(a) verifying that management and control arrangements have been set up and are being implemented in such a way as to ensure that Community funds are being used efficiently and correctly;

(b) providing the Commission with a description of these arrangements;

(c) ensuring that the action is managed in accordance with the applicable Community rules and that the funds placed at its disposal is used in accordance with the principles of sound financial management;

(d) certifying that the declarations of expenditure presented to the Commission are accurate and ensuring that they result from accounting systems based on verifiable supporting documents;

(e) preventing, detecting and correcting irregularities, notifying these to the Commission, in accordance with the rules and keeping the Commission informed of the progress of administrative and legal proceedings;

(f) cooperating with the Commission to ensure that Community funds are used in accordance with the principle of sound financial management;

(g) recovering any amounts lost as a result of an irregularity detected and, where appropriate, charging interest on late payments.

2. The Commission, in its responsibility for the implementation of the general budget of the European Communities, shall ensure that Member States have smoothly functioning management and control systems so that Community funds are efficiently and correctly used.

To that end, without prejudice to the powers of the Court of Auditors or the checks carried out by the Member States in accordance with national laws, regulations and administrative provisions, Commission officials or servants may, in accordance with arrangements agreed with the Member States in the framework of the cooperation described in paragraph (1)(f), carry out on-the-spot checks, including sample checks, on the operations financed by the Fund and on management and control systems with a minimum of one working day's notice. The Commission shall give notice to the Member State concerned with a view to obtaining all the assistance necessary. Officials or servants of the Member State concerned may take part in such checks.
The Commission may require the Member State concerned to carry out an on-the-spot check to verify the correctness of one or more transactions. Commission officials or servants may take part in such checks.

3. After completing the necessary verifications, the Commission shall suspend the interim payments in the following situations:

(a) a Member State is not implementing the action as agreed in the co-financing decision; or

(b) all or part of an action justifies neither part nor the whole of the co-financing from the Fund.

In those cases, the Commission shall, stating its reasons, request that the Member State submit its comments and, where appropriate, carry out any corrections within a specified period of time.

4. At the end of the period set by the Commission, the Commission may, if no agreement has been reached and the Member State has not made the corrections and taking account of any comments made by the Member State, decide within three months to:

(a) reduce the interim payment referred to in Article 17(2); or
(b) make the financial corrections required by cancelling all or part of the contribution of the Fund to the action in question.

In the absence of a decision to do either (a) or (b) the interim payments shall immediately cease to be suspended.

Article 19
Financial corrections

1. The Member States shall, in the first instance, bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or conditions for the implementation or supervision of an action and making the financial corrections required.

The Member State shall make the financial corrections required in connection with the individual or systemic irregularity. The corrections made by the Member State shall consist in cancelling all or part of the Community contribution. The Community funds released in this way may be re-used by the Member State for action in the same field as referred to in Article 4, in compliance with the arrangements to be defined in accordance with the procedure referred to in Article 21(2).

2. If, after completing the necessary verifications, the Commission concludes that a Member State has not complied with its obligations under paragraph 1 of this Article, Article 18(3) and (4) shall apply.

3. Any sum received unduly and to be recovered shall be repaid to the Commission, together with interest on account of late payment.

Article 20
Monitoring and evaluation

1. In each Member State the responsible authority shall take whatever measures are necessary to monitor and evaluate action. To that end, the agreements and contracts it enters into with organisations charged with implementing the action shall contain clauses requiring them to present at least one report a year detailing progress made with regard to implementation of the action and achievement of the objectives attributed to it. In addition, the responsible authority shall have an independent assessment made of the execution and of the effect of the actions implemented.

2. Each year the responsible authority shall draw up a summary report on implementation of the action in progress, which shall be attached to the request for co-financing referred to in Article 8.

3. Within six months of the deadline fixed in the co-financing decision for the execution of expenditure, the responsible authority shall send the Commission a final report consisting of:
(a) financial accounts and a report on implementation of the action in accordance with the rules adopted by the Commission by the procedure referred to in Article 21(2);
(b) the report on assessment referred to in paragraph 1.

4. The Commission shall submit a mid-term report to the European Parliament and the Council by 31 December 2002 at the latest and a final report by 1 September 2005 at the latest.

CHAPTER V
THE COMMITTEE

Article 21
The Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

4. The Committee may consider any question relating to this Decision, raised by the chairman or by a representative of a Member State.

CHAPTER VI
SPECIAL PROVISIONS CONCERNING EMERGENCY MEASURES

Article 22
Special provisions concerning emergency measures

1. The provisions of paragraphs 2 to 5 of this Article shall apply to the implementation of the emergency measures provided for in Article 6.

2. inancial assistance from the Fund shall be limited to a period of six months and shall not exceed 80 % of the cost of each measure.

3. The Member State or Member States affected by a mass influx as referred to in Article 6(1) shall provide the Commission with a statement of requirements and a plan for the implementation of the emergency measures, including a description of the planned measures and the bodies responsible for their implementation.

4. Available resources shall be distributed among the Member States on the basis of the number of persons having entered each Member State as part of the mass influx referred to in Article 6(1).

5. Article 9 and Articles 18 to 21 shall apply.

CHAPTER VII
TRANSITIONAL PROVISIONS

Article 23
Transitional provisions

By way of derogation from Article 11, the following timetable shall apply for the implementation of the financial years 2000 and 2001:

- the Commission shall inform the Member States of the estimated amounts allocated to them the day after this Decision enters into force. If the Statistical Office of the European Community does not yet have all the statistics required by Article 10 the figures used shall be those supplied by the Member States; in that case the Commission shall adopt, in accordance with the procedure referred to in Article 21(2), the rules for interpreting the statistics supplied by the Member States,

- the Member States shall submit the requests for co-financing referred to in Article 8 to the Commission no later than 20 November 2000,

- the Commission shall approve requests for co-financing within three months of this submission, following verification of the particulars provided for in Article 8(2) and, with respect to the financial year 2000, subject to the carrying forward of appropriations to the financial year 2001,

- by way of derogation from Article 14, expenditure actually paid between 1 January 2000 and the deadline fixed in the decision granting the co-financing may be eligible for support from the Fund.

CHAPTER VIII
FINAL PROVISIONS

Article 24
Implementation

1. The Commission shall be responsible for the implementation of this Decision.

2. Where necessary, the Commission shall adopt any other provisions required for the implementation of this Decision in accordance with the procedure referred to in Article 21(2).

Article 25
Review clause

The Council shall review this Decision on the basis of a proposal from the Commission by 31 December 2004 at the latest.

Article 26
Addressees

This Decision is addressed to the Member States.

Done at Brussels, 28 September 2000.

For the Council
The President
D. Vaillant

(1) OJ C 116 E, 26.4.2000, p. 72.
(2) Opinion delivered on 11 April 2000 (not yet published in the Official Journal).
(3) OJ C 168, 16.6.2000, p. 20.
(4) Opinion delivered on 15 June 2000 (not yet published in the Official Journal).
(5) OJ L 114, 1.5.1999, p. 2.
(6) OJ L 184, 17.7.1999, p. 23.

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UNHCR'S POSITION

UNHCR Observations on the Council Decision creating a European Refugee Fund

General

1. The Commission proposal for a legal base to establish a European Refugee Fund was adopted at the Justice and Home Affairs Council in Brussels on 28 September 2000. It regroups existing budget lines related to the reception of asylum-seekers, integration of refugees and voluntary return of temporary protected persons into one financial instrument. The Fund makes available a total amount of 216 Million Euro over five years. Of this, 36 Million Euro will be spent from budgetary year 2000. Each consecutive year, 45 Million Euro will be available.

   UNHCR is pleased to see that most of its key concerns, which follow hereafter, have been addressed in the text of the legal base as finally adopted.

2. The creation of the Fund allows for greater coherence in implementing Community policy in the areas eligible for funding, as well as increased predictability and flexibility in allocating resources. The instrument covers the entire five year period in which the key elements of a common asylum system will be codified in Community legislative instruments in accordance with the provisions of Article 63 of the Treaty on European Union. The Fund should enable Member States to redress imbalances between their efforts in receiving and integrating persons in need of protection, provided the allocation of funds duly takes into account the various factors which have resulted in the uneven distribution of populations of asylum-seekers, refugees and temporary protected persons in the Union.

3. UNHCR expects the Fund to ensure continuity in Community funding of refugee projects and prevent disruption of a large number of national and European projects for which the Community budget has been the unique source of funding so far. It is hoped that a number of UNHCR's implementing partners will benefit by financial support from the Fund which provides a potentially valuable source of co-funding for UNHCR sponsored programmes.

Emergency situations

4. UNHCR welcomes the establishment of emergency procedures and specific budgetary arrangements addressing situations of sudden mass influx in EU Member States (Article 6). Such situations call, indeed, for specific measures and separate budgetary arrangements in order to ensure that regular, long-term actions do not suffer as a result of diversion of resources to confront emergency situations.

Allocation criteria

5. As for the distribution of resources (Article 10), UNHCR is pleased to see that the Fund provides for granting each Member State a fixed amount of the annual allocation of the Fund. This allows additional support for those Member States which experience difficulty in developing their asylum systems, with the remainder of the available funds allocated

according to numbers of applicants and accepted cases. Thus, the level of development of the asylum system is included as an additional criterion for allocating funds to Member States. The allocation criteria that were initially proposed – the average numbers of asylum applicants and recognised refugees during a fixed period, as well as the quality of the proposed project – would, in the view of UNHCR, not have been sufficient to address problems of very uneven capacity which militate against effective burden-sharing. .

Tasks and activities

6. As regards eligible tasks and activities (Article 4), UNHCR is pleased to see that the provision of legal assistance, as well as measures to taken into account special needs of vulnerable persons, have been included among activities aimed at improving reception conditions for asylum-seekers and temporary admitted persons. In UNHCR's experience, past Community funding in this particular area has given added impetus to Member States' efforts to develop their asylum systems.

Management structure

7. UNHCR appreciates the preferred option for decentralising the management of the Fund (Article 7), on the assumption that the proper identification of high-quality projects and the selection, administering, monitoring and control of implementation of projects and actions can best be done at the national level. UNHCR has proposed that its local Branch Offices, in addition to other relevant actors such as regional or local public authorities, government agencies, social partners, and non-governmental organisations, are closely associated with the work of any authority or committee set up to manage funds at national level. Such involvement, as a minimum, should include consultations regarding the selection, monitoring and evaluation of projects. In order to guarantee objectivity and impartiality of decision-taking, agencies or organisations represented in any structure or body responsible for the management of the funds should not have any voting rights in regard to project proposals submitted by themselves, or their member agencies, in response to a call for proposals.

Public awareness and networking

8. UNHCR calls on the Commission and Member States also to utilise the Fund for implementing public information and awareness measures related to States' policies and practices concerning refugees, asylum-seekers and temporary protected persons. UNHCR has benefited from Community funding to promote public awareness for the integration of refugees in the past, and the positive results of such activity would argue for continuation of such a facility, to be made available to any competent actor. While no longer included in the provisions of the final version of the legal base, as adopted in Council, UNHCR hopes that such activities can be included among the eligible Community-wide actions administered by the European Commission (Article 5). As for the latter, sufficient funding should also be released to maintain and strengthen existing networks established for the exchange of policies and practices, training and co-operation, and which so far have benefited from Community funding.

UNHCR Brussels
October 2000

COMMISSION WORKING DOCUMENT - The relationship between safeguarding internal security and complying with international protection obligations and instruments

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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".

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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 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.

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 "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 en 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 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 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.

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 national [16] 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.

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.

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-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.

Footnotes:

[1] Brussels, 19.9.2001 COM (2001) 521 final
[2] Brussels, 19.9.2001 COM (2001) 522 final
[3] Brussels, 20.09.2000 COM(2000) 578 final
[4] Id at 3
[5] Id at 3
[6] Id at 3
[7] Id at 3
[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
[12] Directive (2001/55/EC) 20.07.2001
[13] Regulation (2725/2000/EC) 11.12.2000
[14] Id at 3
[15] Brussels, 3.4.2001 COM (2001) 181 final
[16] Brussels, 26 .7.2001 COM(2001) 447 final
[17] Brussels, 12.9.2001 COM (2001) 510 final
[18] Brussels, 11.7.2001 COM (2001) 386 final
[19] Brussels, 10.10.2000 COM (2000) 624 final
[20] Brussels, 13.3.2001 COM (2001) 127 final

UNHCR'S POSITION

Addressing Security Concerns without Undermining Refugee Protection

UNHCR's perspective

A. Introduction

1. In the aftermath of the attacks of 11 September 2001, security considerations are permeating policy responses on a wide range of issues. UNHCR endorses all efforts, multilateral or national, directed at eliminating and effectively combating international terrorism. UNHCR shares the legitimate concern of States to ensure that there should be no avenue for those supporting or committing terrorists acts to secure access to territory, whether to find a safe haven, avoid prosecution, or to carry out further attacks. The Office recognizes that appropriate mechanisms need to be put in place in the field of asylum as in other areas. At the same time care should be taken to ensure a proper balance with the refugee protection principles at stake. The observations and suggestions that follow are offered against this background and in response to the request, contained in SCR 1377 of 12 November 2001, for the newly established Counter-Terrorism Committee to explore with international organizations the promotion of best practice in the areas covered by this resolution.

B. General

2. UNHCR's main concern is twofold: that bona fide asylum-seekers may be victimized as a result of public prejudice and unduly restrictive legislative or administrative measures, and that carefully built refugee protection standards may be eroded. Current anxieties about international terrorism risk fueling a growing trend towards the criminalisation of asylum-seekers and refugees. Asylum-seekers increasingly have a difficult time in a number of States, either accessing procedures or overcoming presumptions about the validity of their claims, which stem from their ethnicity, or their mode of arrival. The fact that asylum-seekers have arrived illegally does not vitiate the basis of their claim. Because they have a certain ethnic or religious background, which may be shared by those who have committed grave crimes, does not mean they, themselves, are also to be excluded.

3. Any discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorist acts, and are not the perpetrators of such acts. Another starting point is that the international refugee instruments do not provide a safe haven to terrorists and do not protect them from criminal prosecution. On the contrary, they render the identification of persons engaged in terrorist activities possible and necessary, foresee their exclusion from refugee status and do not shield them against either criminal prosecution or expulsion.

4. UNHCR's overall conclusion is that dealing with the terrorist threat in the context of asylum does not require amendment of the principles on which refugee protection is based, but should benefit from a review and tightening of procedural security measures where necessary.

C. Admission/Access to refugee status determination

5. UNHCR appreciates that States may wish to strengthen border controls as one way of identifying security threats at the point of entry. Enhanced cooperation between border guards, intelligence services and immigration and asylum authorities of the State concerned, as well as with such organizations as Interpol, Europol and Eurodac could assist in the early identification of terrorist suspects. Increased security checks, including through the use of fingerprints, are understandable measures but there may be a risk of over-burdening procedures. Profiling and screening solely on the basis of religious or racial characteristics would, in UNHCR's view, be discriminatory and inappropriate.

6. The summary rejection of asylum-seekers at borders or points of entry may amount to refoulement. All persons have the right to seek asylum and to undergo individual refugee status determination. Each claim, even where there is a suspicion of involvement in grave criminal acts, must be determined on its own merits, and not against negative and discriminatory presumptions deriving from the nationality, ethnic origin or religious faith of the claimant. The refugee definition, properly applied, should lead to the exclusion of those responsible for serious criminal, including terrorist, acts. Since issues of exclusion can be complicated, UNHCR continues to advocate that they should continue to be dealt with in the regular asylum procedure, which allows for a full factual and legal assessment in the individual case by qualified personnel. Non-admission at borders and barring access to the asylum procedure not only endangers bona fide asylum-seekers but could serve, ironically, as an incentive to terrorism by encouraging those involved to seek entry through illegal means, thereby removing the possibility of identification through the interview process accompanying asylum adjudications.

7. Where there is a reasonable possibility that exclusion issues may arise in the case of an individual pursuing an asylum claim, States have an evident interest in expedient decision making processes. In such cases UNHCR continues to support a proper factual and legal assessment, but believes this could be accomplished through prioritized and expedited consideration of the claim by a specialized "exclusion unit" within the refugee status determination process. Such unit would have expertise in relevant areas of refugee law and criminal law, specialist knowledge of terrorist organizations, and clear communication links with intelligence services and criminal enforcement agencies. Specialist expertise and clearly focused resources would enable prompt and quality decision making. UNHCR promotes the redesign of the regular asylum procedure in States to accommodate the setting up and operating of such a unit.

8. If the asylum-seeker is wanted by national courts or for extradition purposes, the examination of the claim could be deferred pending the completion of criminal law enforcement procedures.

9. In the case of individuals with regard to whom there are serious reasons to believe that they are seeking entry to prepare or commit terrorist offences, evidently there would be no obligation on the State in question to admit the person. This being said, there is an obligation of States to bring terrorists to justice as asserted most recently in SCR 1373 of 28 September 2001, which should presumably also be a factor in deciding whether to admit the person and how to respond to an asylum claim. As regards any asylum request lodged, its expedited examination would still be warranted.

D. Restrictions on the movement of asylum-seekers

10. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as human rights law do not preclude restrictions on the movement of asylum-seekers, including detention as the exception, not the rule, if necessary in circumstances prescribed by law and subject to due process safeguards. Detention would justifiably be deemed necessary, where there are solid reasons for suspecting links with terrorism in the individual case. Proposals to introduce automatic detention of all asylum-seekers entering illegally or coming from particular countries, as are being considered in a number of States in response to the resurgence of fears about terrorism, are not supported by UNHCR. They would, in UNHCR's view, contradict long established guidelines on detention agreed by States, and could be seen as an arbitrary, even discriminatory response which could then come into conflict with international legal norms.

E. Sharing of data on asylum-seekers

11. UNHCR recognizes that the sharing of data between States is crucial to combating terrorism. States should, though, also take into account the well-established principle that information on asylum-seekers should not be shared with the country of origin. This could endanger the safety of the bona fide asylum-seeker and/or family members remaining in the country of origin. Best State practice indeed incorporates a strict confidentiality policy. Should it exceptionally be deemed necessary to contact the authorities in the country of origin, in case there is suspicion of terrorist involvement and the required information may only be obtained from these authorities, there should be no disclosure of the fact that the individual has applied for asylum.

F. Exclusion from refugee status

12. Those responsible for serious crimes are legally excluded from refugee status by virtue of the terms of the international refugee instruments. UNHCR encourages States to use the exclusion clauses rigorously, albeit appropriately. It also encourages States, which have not already done so, to incorporate the exclusion clauses of the 1951 Refugee Convention into national legislation. This is consistent not only with the dictates of refugee law, but also with Security Council resolutions which call on States not to provide refuge to terrorists, in particular SCR 1373 (2001) which calls for appropriate measures with regard to asylum-seekers. This being said, according to the latter resolution, such measures need to conform to international law, including international standards of human rights.

13. The crimes to which article 1F(a) of the 1951 Refugee Convention refer – crimes against peace, war crimes or crimes against humanity – are those so defined in international instruments and are to be interpreted in the light of a number of rapidly evolving sources of international criminal law. UNHCR concurs with the view that the 11 September attacks constituted a crime against humanity.

14. Article 1F(c) concerns acts contrary to the purposes and principles of the United Nations. This provision has always been understood as applying to persons acting on behalf of States or quasi-States because the United Nations' purposes and principles are intended to be a guide for States in their relations with each other. It remains to be seen how the

assertion in SCR 1377 (2001) that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, may promote the application of article 1F(c) to a broader circle of persons, in the specific context of acts of international terrorism which may be qualified as serious threats to international peace and security.

15. A central exclusion clause, from the perspective of international terrorism and fugitives from justice, is article 1F(b). It refers to "serious non-political crimes" (committed outside the country of refuge), but this would generally encompass acts of terrorism as defined in relevant international conventions, notwithstanding any political motives behind such acts. This follows logically from the fact that the extradition clauses of these conventions have abolished the political offence exemption. Moreover, especially violent acts of terrorism are likely to fail the predominance and proportionality tests used in many jurisdictions to define political offences.

16. In view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and justice. As mentioned earlier, this assessment should be located within the refugee status determination process, albeit taking place in specially tailored procedures for exclusion.

17. The assessment should also, in UNHCR's view, be sensitive to certain additional considerations. Firstly, crimes may not be of the same level of gravity as terrorist violence sufficient to warrant exclusion, in which case one has to take into account the consequences upon return of the person to his or her country of origin. Secondly, even though exclusion proceedings do not equate with a full criminal trial, the standard of proof ("serious reasons") has to be a higher threshold than a mere "reasonable suspicion". In the case of an indictment by an international criminal tribunal, this standard would automatically be met and moreover no further individual assessment would be necessary. Thirdly, exclusion requires individual liability, that is, the personal and knowing involvement of the individual in acts of terrorism.

18. Where, however, there is sufficient proof that an asylum-seeker belongs to an extremist international terrorist group, such as those involved in the 11 September attacks, voluntary membership could be presumed to amount to personal and knowing participation, or at least acquiescence amounting to complicity in the crimes in question. In asylum procedures, a rebuttable presumption of individual liability could be introduced to handle such cases. Drawing up lists of international terrorist organizations at the international level would facilitate the application of this procedural device since such certification at the international level would carry considerable weight in contrast to lists established by one country alone. The position of the individual in the organization concerned, including the voluntariness of his or her membership, as well as the fragmentation of certain groups would, however, need to be taken into account.

19. UNHCR fully appreciates the wish of States to tackle the financing and other forms of support of terrorist groups. This would best be done through domestic legislation. As such legislation may influence the interpretation of the exclusion clauses, it would have to be carefully drafted to be explicit as to the ramifications of such activities. In UNHCR's view it would go too far if, for instance, individuals demonstrating or collecting private contributions for groups that are engaged in armed conflicts, as defined in international humanitarian law, were to be automatically excluded from refugee protection, solely for this reason.

G. Cancellation of refugee status

20. Generalized suspicions based solely on religious, ethnic or national origin or political affiliation do not justify a general review process. Cancellation of refugee status normally only follows evidence of fraud or misrepresentation as regarding facts central to the refugee decision. This does mean that refugee status may be cancelled, if it emerges that one of the exclusion clauses would have applied to the individual, had all the relevant facts been known. Terrorist activity after arrival would normally lead to prosecution locally and/or expulsion, rather than cancellation of status.

H. Expulsion, including to the country of origin

21. UNHCR is concerned that States may be inclined to expel groups or individuals based on religious, ethnic or national origin or political affiliation, on the mere assumption that they may be involved in terrorism. International law, in particular article 33(2) of the 1951 Refugee Convention, does not prohibit the expulsion of recognized refugees, provided however that it is established in the individual case that the person constitutes a danger to the security or the community of the country of refuge. As this danger should outweigh the danger of return to persecution, UNHCR wishes to emphasize that such expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.

22. Expulsion and exclusion are two different processes. Exclusion from refugee status is motivated by the severity of crimes committed in the past. It prevents fugitives from escaping justice for such crimes, just as, simultaneously, it protects the institution of asylum from abuse. Persons excluded do not deserve international refugee protection. Expulsion aims to protect the country of refuge and hinges on the appreciation of a present or future threat. The threshold for returning refugees to their country of origin – as an exception to the non-refoulement principle – has to be particularly stringent.

I. Extradition

23. International refugee law does not preclude the extradition for prosecution purposes of recognized refugees, much less of asylum-seekers. Extradition should, however, be granted only after the corresponding legal proceedings have been completed, and where it has been shown that the extradition is not being requested solely or principally as a means to return a person to a country for purposes which in fact amount to persecution. Although extradition clauses in recent international conventions no longer contain the political offence exemption for terrorist offences, they retain the non-persecution safeguard. UNHCR would recommend that the retention of this safeguard be mandatory rather than optional.

24. In case of a pending asylum procedure, it is conceivable that further consideration of the asylum claim be deferred until the proceedings in the extradition process enable informed decision making on whether or not exclusion from refugee status is justified. If the asylum-seeker is found excludable following consideration of his or her fear of persecution, the extradition could be decided upon without re-assessing the persecution element. If the asylum-seeker is not excluded and it is assessed that extradition would indeed amount to return to persecution, prosecution in the country of asylum is, in UNHCR's view, the appropriate response, based on the principle aut dedere aut iudicare.

J. Increasing criminal law enforcement

25. UNHCR would welcome the development and the swift adoption of a comprehensive Convention on International Terrorism and of other international or regional instruments, to serve also as an agreed framework for national legislation. UNHCR has already provided comments on the draft Convention and several pieces of national legislation. The closure of jurisdictional loopholes and clarity about the definition of terrorist offences would seem to be essential for combating terrorism effectively.

26. UNHCR appeals to governments, however, to ensure that the terms of international instruments and of domestic legislation do not imply any unwarranted linkages between asylum-seekers/refugees and terrorists. In addition, definitions need to be quite precise. If definitions are too broad and vague, there is a risk that the "terrorist" label could be abused by some for political ends, for example to criminalize activities of political opponents. This is a matter of concern to UNHCR. It could well lead to recriminations amounting to persecution. The definition of terrorist offences is moreover likely to influence the interpretation and application of the exclusion clauses of the 1951 Refugee Convention in the future.

K. The continuing importance of refugee resettlement

27. There are signs that several refugee resettlement countries are disinclined to maintain their programmes at the promised levels, particularly for certain ethnic groups. Resettlement remains imperative, and continued support for resettlement is of vital importance. UNHCR is maintaining its efforts to diversify the number of resettlement countries and to strengthen its programmes, from emergency processing through to more systematic and elaborate use of resettlement to address durable solutions needs of refugees. UNHCR has no difficulty with an intensification of security screening, including finger-printing, of candidates for resettlement.

L. Combating racism and xenophobia

28. Equating asylum with a safe haven for terrorists is not only legally wrong and thus far unsupported by facts, but it serves to vilify refugees in the public mind and promotes the singling out of persons of particular races or religions for discrimination and hate-based harassment.

29. Since 11 September, a number of immigrant and refugee communities have suffered attacks and harassment based on perceived ethnicity or religion, heightening social tensions. While there are some asylum-seekers and refugees who have been, or will be, associated with serious crime, this does not mean that the majority should be damned by association with the few. Rather, the full application of the 1951 Refugee Convention and indeed of immigration policies generally is a key aspect of measures to combat xenophobia and reduce prejudice, which could otherwise provide the very conditions in which anger and extremism can flourish. As the UN Secretary-General stated on 24 September 2001: "no people, no region and no religion should be condemned because of the unspeakable acts of a few individuals."

30. Resolute leadership is called for at this particularly difficult time to de-dramatise and de-politicise the essentially humanitarian challenge of protecting refugees and to provide better understanding of refugees and of their right to seek asylum.

UNHCR
Geneva, November 2001

Rev.1
Annex I
INTERNATIONAL LAW STANDARDS ON INTERNATIONAL TERRORISM

A. The lack of an accepted definition of international terrorism

States have for years sought to agree upon a definition of what constitutes terrorism, but it has proved very difficult until now to find a definition which is objective, clear and universally acceptable.

The 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism provides no definition of terrorism, but holds that the methods and practices of terrorism are contrary to the purposes and principles of the United Nations. Two more recent UN documents have attempted to define terrorism. The General Assembly's 1999 Resolution on Measures to Eliminate International Terrorism declares that
criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.
Thus, terrorism can be seen as crimes intended to inculcate terror in the population for political purposes.

The International Convention for the Suppression of the Financing of Terrorism defines terrorism in part by reference to other UN anti-terrorist conventions and additionally as:
Article 2(1)(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or international organization to do or abstain from doing any act.
This is a more specific definition than that of the 1999 resolution, but in practice both will cover the same sort of crimes. Thus, although there has been some movement towards defining terrorism more specifically, there is as yet no internationally agreed definition.

The August 2000 Draft Comprehensive Convention on International Terrorism defines those covered by the Convention in Article 2 as:

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility with the intent to cause extensive destruction of such a place, facility or system, or where such destruction results or is likely to result in major economic loss; when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person attempts to commit an offence or participates as an accomplice in an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person:

(a) Organizes, directs or instigates others to commit an offence as set forth in paragraph 1 or 2; or

(b) Aids, abets, facilitates or counsels the commission of such an offence; or

(c) In any other way contributes to the commission of one or more offences referred to in paragraphs 1, 2 or 3 (a) by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

In the European context, the Council of Europe Parliamentary Assembly has defined an act of terrorism as:

any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public.

The Proposal for a Council Framework Decision on combating terrorism published on 19 September 2001 defines terrorist offences in Article 3 as follows:

1. Each Member State shall take the necessary measures to ensure that the following offences, defined according to its national law, which are intentionally committed by an individual or a group against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country, will be punishable as terrorist offences:

(a) Murder;

(b) Bodily injuries;

(c) Kidnapping or hostage taking;

(d) Extortion;

(e) Theft or robbery;

(f) Unlawful seizure of or damage to State or government facilities, means of public transport, infrastructure facilities, places of public use, and property;

(g) Fabrication, possession, acquisition, transport or supply of weapons or explosives;

(h) Releasing contaminating substances, or causing fires, explosions or floods, endangering people, property, animals or the environment;

(i) Interfering with or disrupting the supply of water, power, or other fundamental resource;

(j) Attacks through interference with an information system;
(k) Threatening to commit any of the offences listed above;

(l) Directing a terrorist group;

(m) Promoting of, supporting of or participating in a terrorist group.

2. For the purpose of this Framework Decision, terrorist group shall mean a structured organization established over a period of time, of more than two persons, acting in concert to commit terrorist offences referred to in paragraph (1)(a) to (1)(k).

B. Security Council resolution 1373 and asylum

In the aftermath of the events of 11 September, the UN Security Council adopted resolution 1373 (28 September 2001). This foresees a wide range of measures to combat terrorism. It should be noted as well that this resolution established a "Counter-Terrorism Committee" to monitor the implementation of the resolution.

A couple of paragraphs refer to asylum-seekers and refugees specifically. Of direct relevance to UNHCR's work are paragraphs 2(c), 3(f) and 3(g) of the resolution. These are analysed in more detail below:

- Paragraph 2 (c) stipulates that States shall "deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens". It is unclear whether the use of the term "safe haven" would also include the granting of asylum. It seems to be directed more against States harbouring terrorists intentionally and in response to the 11 September events. If "safe haven" also includes the granting of asylum, it would mean that those engaging in international terrorist activities are to be excluded from refugee status in accordance with Article 1F of the 1951 Convention.

- Paragraph 3 (f) of the resolution is of particular relevance. It "calls upon States to … take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts". This paragraph in essence repeats wording that has already been adopted in previous General Assembly resolutions. It is welcome that this paragraph refers to the need to respect international law and in particular international human rights standards. Implicit in this wording is that asylum procedures need to include an evaluation of whether the exclusion clauses are applicable or not.

- Paragraph 3(g) "calls upon States to … ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists". The international refugee instruments do not provide protection to terrorists. They extend no immunity from prosecution to those engaged in terrorist activities. Refugees are bound to conform to the laws and regulations of the host country as any other person under the jurisdiction of a State, and may be prosecuted to the full extent of the law. Nothing in the 1951 Convention and/or

1967 Protocol prevents bringing refugees to justice. In this sense, this provision seems to reinforce that those committing terrorist acts should be prosecuted in their respective host countries.

The second clause of this paragraph refers to extradition law, confirming what has already been the trend in recently codified international instruments relating to terrorist acts, namely that political motivations would not as such prevent the extradition of suspected terrorists. These international instruments, however, also contain safeguards according to which extradition may be refused if the requested State believes that extradition could lead to return to persecution.

In conclusion, the Security Council resolution, if properly interpreted and applied, is in line with principles of international refugee law. Care must be taken in its implementation to ensure that bona fide asylum seekers and refugees are not denied their basic rights under cover of the need to take anti-terrorism measures.

C. Security Council resolution 1377 and asylum

On 12 November 2001 the Security Council adopted resolution 1377 at the Ministerial level. In this resolution the Security Council, inter alia, endorsed its earlier resolution and called upon all States to intensify their efforts to eliminate international terrorism. The resolution also stresses that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations. It remains to be seen how this paragraph may influence the interpretation of the exclusion clause, contained in Article 1F(c) of the 1951 Convention.

Annex II
LEGAL DOCUMENTATION ON THE FIGHT AGAINST INTERNATIONAL TERRORISM

A. International instruments

Key international instruments (with ratifications as of 17 September 2001) concerning terrorism are:

1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 171 States parties; authorizes the airplane commander to impose reasonable measures on any person who has committed or is about to commit such acts, and requires States parties to take custody of offenders.

1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 174 States parties; requires parties to punish hijackings by "severe penalties", and either extradite or prosecute the offenders.

1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 175 States parties; requires parties to punish offences by "severe penalties", and either extradite or prosecute the offenders; supplemented by the

1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Montreal; 107 States parties; extends the provisions of the Convention to encompass terrorist acts at airports.

1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; 107 States parties; requires parties to criminalize and punish attacks against State officials and representatives.

1979 Convention against the Taking of Hostages; 96 States parties; parties agree to make the taking of hostages punishable by appropriate penalties; to prohibit certain activities within their territories; to exchange information; and to carry out criminal or extradition proceedings.

1980 Convention on the Physical Protection of Nuclear Material; 68 States parties; obliges parties to ensure the protection of nuclear material during transportation within their territory or on board their ships or aircraft.

1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 52 States parties; obliges parties to either extradite or prosecute alleged offenders who have committed unlawful acts against ships, such as seizing ships by force and placing bombs on board ships; developed by IMO; supplemented by the

1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 48 States parties; extends the requirements of the Convention to fixed platforms such as those engaged in the exploitation of offshore oil and gas.

1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; 67 States parties; seeks to curb the use of unmarked and undetectable plastic explosives.

1997 International Convention for the Suppression of Terrorist Bombings; 26 States parties; seeks to deny "safe havens" to persons wanted for terrorist bombings by obligating each State party to prosecute such persons if it does not extradite them to another State that has issued an extradition request.

1999 International Convention for the Suppression of the Financing of Terrorism; four States parties; obligates States parties either to prosecute or to extradite persons accused of funding terrorist activities, and requires banks to enact measures to identify suspicious transactions; will enter into force when ratified by 22 States.

Draft Comprehensive Convention on International Terrorism (UN doc. A/C.6/55/1), 28 August 2000.

Draft Convention on Suppression of Acts of Nuclear Terrorism.

B. Regional instruments

1971 Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are Internationally Significant

1977 European Convention for the Suppression of Terrorism, ETS 90

1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism

1998 Arab Convention on Combating Terrorism

1999 Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism

Draft European Union Council Framework Decision on combating terrorism, Brussels, 19 September 2001, COM(2001) 521 final

Draft European Union Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, Brussels, 19 September 2001, COM(2001) 522 final

C. International and regional instruments concerning extradition

1990 UN Model Treaty on Extradition, adopted by General Assembly resolution 45/116, 14 December 1990

1957 European Convention on Extradition, ETS No. 24
1975 Addition Protocol, ETS No. 86
1978 Second Additional Protocol, ETS No. 98

1966 Commonwealth Scheme for the Rendition of Fugitive Offenders, as amended in 1990, Commonwealth Law Bulletin, 1990, 1036

1981 Inter-American Convention on Extradition (entered into force 28 March 1992)

1990 Schengen Convention applying the Schengen Agreement of 14 June 1985, including Title III, Chapter IV on Extradition, Articles 59–66

1995 Convention on Simplified Extradition Procedure between Member States of the European Union, OJ No. C/078, 30 March 1995, p. 1

1996 Convention relating to Extradition between Member States of the European Union, OJ No. C/313, 23 October 1996, p. 11

Annex III
SELECTED RESOLUTIONS BY INTERNATIONAL AND REGIONAL ORGANIZATIONS RELATING TO INTERNATIONAL TERRORISM

A. Security Council

Documents include: Resolution 1269 (1999) on international cooperation in the fight against terrorism, UN doc. S/RES/1269 (1999), 19 October 1999

Resolution 1368 (2001) condemning the terrorist attacks of 11 September 2001 in New York, Washington, DC, and Pennsylvania, United States of America, UN doc. S/RES/1368 (2001), 12 September 2001

Resolution 1373 (2001) on international cooperation to combat threats to international peace and security caused by terrorist acts, UN doc. S/RES/1373 (2001), 28 September 2001

Resolution 1377 (2001) on intensification of efforts to eliminate international terrorism, UN doc. S/RES/1377 (2001), 12 November 2001

These and other UN Security Council documents concerning international terrorism are available on http://www.un.org/terrorism/sc.htm

Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 7 October 2001, UN doc. S/2001/946, available on http://www.un.int/usa/s-2001-946.htm

B. General Assembly

Documents include:
Declaration on Measures to Eliminate International Terrorism, annexed to Resolution 49/60, Measures to eliminate international terrorism, UN doc. A/RES/49/60, 9 December 1994

Resolution on Measures to eliminate international terrorism, UN doc. A/RES/50/53, 11 December 1995

Declaration to supplement the 1994 Declaration, annexed to Resolution 51/210, Measures to eliminate international terrorism, UN doc. A/RES/51/210, 17 December 1996

Resolution on Measures to eliminate international terrorism, UN doc. A/52/165, 15 December 1997

Resolution on Measures to eliminate international terrorism, UN doc. A/RES/53/108, 26 January 1999

Resolution on Measures to eliminate international terrorism, UN doc. A/RES/54/110, 2 February 2000

Resolution on Measures to eliminate international terrorism, UN doc, A/RES/55/158, 30 January 2001
Resolution on Condemnation of terrorist attacks in the United States of America, UN doc. A/RES/56/1, 18 September 2001

These and other UN General Assembly documents concerning international terrorism available on http://www.un.org/terrorism/ga.htm

C. United Nations High Commissioner for Human Rights

Report of the United Nations High Commissioner for Human Rights, GAOR, UN doc. A/56/36, 31 October 2001, para. 2.
A human rights approach to the events of 11 September and their aftermath must begin with the victims and their right to justice. They have lost the foremost right, the right to life. Over 6,000 citizens of the United States and civilians of other nationalities have been killed. Those who carried out this carnage by hijacking civilian aircraft, taking over their controls and crashing them into highly populated buildings intended to cause the maximum loss of life. I consider that these crimes constitute crimes against humanity. The victims and their relatives have the right to see that those responsible for these international crimes are rendered accountable under due process of law and punished. World security and stability is now more than ever dependent on the serious efforts to advance equality, tolerance, respect for human dignity and the rule of law to every corner of the globe.

D. Council of Europe

Parliamentary Assembly, "European democracies facing up to terrorism", Recommendation 1426 (1999), 23 September 1999

Commissioner for Human Rights, Recommendation concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH/Rec(2001)1, 19 September 2001

Parliamentary Assembly, "Democracies Facing Terrorism", resolution 1258 (2001), 26 September 2001

8. There can be no justification for terrorism. The Assembly considers these terrorist actions to be crimes rather than acts of war. Any actions either by the United States acting alone or as a part of a broader international coalition, must be in line with existing UN anti-terrorist conventions and Security Council resolutions and must focus on bringing the perpetrators, organizers and sponsors of these crimes to justice, instead of inflicting a hasty revenge.

10. The Assembly supports the idea to elaborate and to sign at the highest level an international convention on combating terrorism which should contain a comprehensive definition of international terrorism, specific obligations of participating States to prevent acts of terrorism on national and global scale and to punish their organizers and executors.

13. The Assembly expresses its conviction that introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism, and calls upon all member States to refrain from introducing such restrictive measures.

Parliamentary Assembly, "Democracies facing terrorism", Recommendation 1534 (2001), 26 September 2001

E. Dakar Declaration by African States

Declaration of Dakar again Terrorism, made by the heads of State or representatives of 27 African States, 17 October 2001

F. European Union

European Parliament, Recommendation on the role of the European Union in combating terrorism (2001/2016(INI)), 5 September 2001
"Democratic dialogue based on mutual respect and non-violence, aimed at upholding democracy, is the best means of resolving political, social and environmental conflicts and preventing conflicts from being used as a pretext for committing terrorist acts". Also "measures taken to combat terrorism must not, under any circumstance, be based on exceptional laws or procedures".

Statement by European Commission President Romano Prodi on the attacks against the United States, Brussels, 12 September 2001, IP/01/1265, available on
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1265|0|RAPID&lg=EN .

Council (Justice and Home Affairs) Ministers, Brussels, Conclusions, 20 September 2001, doc. SN 3926/6/01, REV 6, available on
http://www.eurunion.org/partner/EUUSTerror/03926-r6.pdf .

Joint EU–US Ministerial Statement on combating Terrorism, 20 September 2001, available on
http://ue.eu.int/newsroom/LoadDoc.cfm?MAX=1&DOC=!!!&BID=109&DID=67801&GRP=3772&LANG=1 .

We will also co-operate in global efforts to bring to justice perpetrators of past attacks and to eliminate the ability of terrorists to plan and carry out future atrocities. We have agreed today that the United States and the EU will vigorously pursue co-operation in the following areas in order to reduce vulnerabilities in our societies: … border controls, including visa and document security issues; law enforcement access to information and exchange of electronic data.

European Council, Conclusions and plan of action of the extraordinary European Council meeting, 21 September 2001, available on
http://ue.eu.int/Newsroom/LoadDoc.cfm?MAX=1&DOC=!!!&BID=76&DID=67808&GRP=3778&LANG=1 .

G. Organization for Security and Cooperation in Europe

Gérard Stoudmann, Director, Office for Democratic Institutions and Human Rights (ODIHR)
There is a worrying trend of backtracking on human rights in some OSCE countries, often justified as reaction to security threats, but last week's terror attacks should motivate us to redouble our efforts to build democratic societies in which human rights are fully respected. We are convinced that the OSCE countries and all other civilized nations share the same basic values, notwithstanding cultural and religious differences – that's the bottom line.

Draft Decision on Combating Terrorism by the Ninth Meeting of the OSCE Ministerial Council, "The Bucharest Plan of Action for Combating Terrorism" (to be adopted by the OSCE Ministerial Council in Bucharest on 3 and 4 December 2001)

27. Preventing movement of terrorists: Participating States: Will prevent the movement of terrorist individuals or groups through effective border controls and controls on issuance of identity papers and travel documents, as well as through measures for ensuring the security of identity papers and travel documents and preventing their counterfeiting, forgery and fraudulent use. Will apply such control measures fully respecting their obligations under international refugee and human rights law. Will, through the proper application of the exclusion clauses contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, ensure that asylum is not granted to persons who have participated in terrorist acts. Will provide for the timely detention and prosecution or extradition of persons charged with terrorist acts, in accordance with their obligations under international and national law.

H. Organization of American States

Meeting of Consultation of Ministers of Foreign Affairs, Strengthening hemispheric cooperation to prevent, combat, and eliminate terrorism, doc., /Ser.F/II.23, RC.23/RES.1/01, 21 September 2001, available on http://www.oas.org/OASpage/crisis/RC.23e.htm .

4. To call upon all member states to strengthen cooperation, at the regional and international levels, to pursue, capture, prosecute, and punish and, as appropriate, to expedite the extradition of the perpetrators, organizers, and sponsors of these terrorist acts, strengthen mutual legal assistance, and exchange information in a timely manner.

5. To reaffirm that actions to combat terrorism must be undertaken with full respect for the law, human rights, and democratic institutions in order to preserve the rule of law, liberties, and democratic values in the Hemisphere;

6. To call upon all member states to promote widespread tolerance and social harmony within their societies in recognition of the racial, cultural, ethnic and religious diversity of the communities that make up our Hemisphere and whose fundamental rights and freedoms were reaffirmed most recently in the Inter-American Democratic Charter.

Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, doc. OEA/Ser.F/II.24, RC.24/RES.1/01, 21 September 2001, available on
http://www.oas.org/OASpage/crisis/RC.24e.htm .
Inter-American Committee Against Terrorism (CICTE), Declaration of the first plenary session, doc. OEA/Ser.L/X.3.1 CICTE/DEC.1 (I-E/01), 15 October 2001, available on
http://www.oas.org/OASpage/crisis/declar_e.htm.

UNHCR's Comments on the European Commission's Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments

1. General observations

UNHCR considers that the Commission's Working Document contains a number of positive elements. In particular, UNHCR welcomes that the Working Document:

(i) while recognising Member States' legitimate interest in reinforcing security safeguards to prevent terrorists from gaining admission to their territory, emphasizes the need that any current or future security safeguards strike a proper balance with the refugee protection principles at stake (Introduction);

(ii) affirms that, rather than through major changes to the international regime for the protection of refugees, the appropriate approach is to apply scrupulously the exceptions already provided for in that regime (Introduction);

(iii) stresses the need to admit all asylum seekers to an asylum procedure, and rightly points out that automatic bars to accessing an asylum procedure, for instance by rejection at the border, could result in refoulement (Paragraph 1.4.1);

(iv) affirms that exclusion from refugee status should be explored only where there are specific reasons to believe that the person may fall under the scope of one of the relevant clauses (Paragraph 1.4.3.1);

(v) emphasizes that, a person should not be excluded from refugee status unless it is clearly established that there are serious reasons for considering that he/she has committed the acts on which the exclusion is based (Paragraph 1.4.4);

(vi) also emphasizes that the determination of whether a person should be excluded from refugee status, requires a careful assessment of the measure of personal involvement of the refugee claimant in the acts on which the exclusion is based (Paragraph 1.4.4);

(vii) recommends that Member States establish formal and confidential cooperation agreements with the International Criminal Court in relation to cases that may fall under the scope of the exclusion clauses of the 1951 Refugee Convention (Paragraph 2.2.2).

2. Matters of concern

Use of accelerated procedures (Paragraph 1.4.3.2)

Given that the application of the exclusion clauses normally involves the examination of very complex issues, UNHCR considers that such examination should not take place in the context of admissibility procedures or accelerated procedures.

The inappropriateness of the use of accelerated procedures to handle exclusion issues is further compounded by the fact that under the Draft Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, appeals against decisions taken in accelerated procedures need not have suspensive effective.

3. Drafting suggestions and clarifications

Expulsion for crimes committed on the territory of the country of refuge (Paragraph 1.3)

This paragraph refers to the possibility of expulsion to the country in which the person fears persecution, in conformity with the exception to the principle of non-refoulement envisaged in Article 33(2) of the 1951 Convention. In this connection it would be useful to recall that the procedural guarantees provided for in Article 32(2) of the Convention are also applicable to such expulsions.

Suspension of examination of an asylum claim in extradition cases (Paragraph 1.4.2.1) and inadmissible asylum claims (Paragraph 1.4.2.2)

It would be useful to clarify whether the arrangement envisaged in these paragraphs would concern only extradition to another EU Member State or to any State, other than the country of origin.

UNHCR wishes to further suggest that the references to the country of origin of the asylum seeker be replaced by a reference to the country(ies) where the asylum seeker fears persecution.

Administrative treatment of potential Article 1F cases (Paragraph 1.5)

There is a potential inconsistency in the paper between section 1.4.3.1 which says exclusion should not be explored in all cases as a matter of routine and section 1.5.1 which says that "front-security checks" of all claims for potential security risks are compatible with international legal obligations. The paper needs to make clear that security checks should not amount to routine consideration of exclusion issues in all asylum applications.

2 May 2002

Communication from the Commission to the Council and the European Parliament "Towards more accessible, equitable and managed asylum systems", COM (2003) 315 final, 3 June 2003

Communication from the Commission to the Council and the European Parliament towards more accessible, equitable and managed asylum systems COM(2003) 315 final

Brussels, 3.6.2003

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INTRODUCTION

The letter of 10 March 2003 from the Prime Minister of the United Kingdom to the EU Presidency, requesting that the Presidency put the issue of the need for a "better management of the asylum process " on the agenda of the Spring 2003 European Council, constituted the catalyst for an intense debate which is currently being held both within and outside the EU, and to which all stakeholders in the asylum field contribute. Attached to the letter was a paper outlining some ideas on how best to address the need for a new approach to asylum. Shortly after the launch by the United Kingdom of their paper, UNHCR also presented concrete proposals for a substantially new approach to processing asylum claims.

The Spring European Council adopted Conclusion 61, in which it is stated that: "The European Council noted the letter from the UK on new approaches to international protection and invited the Commission to explore these ideas further, in particular with UNHCR, and to report through the Council to the European Council meeting in June 2003."

With this Communication the European Commission responds to the invitation by the European Council to explore the issues raised in the UK paper. Under this specific mandate, and bearing in mind the short time span between the two European Council meetings, the Commission has considered the ideas and relevant initiatives already in the EU pipeline. It has not sought at this stage to provide a fully-fledged and definitive analysis of the ideas set out in the UK paper, and proposed by UNHCR. However, this Communication does set out the Commission's views on the basic premises of and objectives for a possible new approach towards more accessible, equitable and managed asylum systems.

Such a new approach will need to build upon the ongoing harmonisation of existing asylum systems in the European Union. While Community legislation lays down a minimum level playing field for in-country asylum processes in the EU, the new approach intends to move beyond the realm of such processes and address the phenomenon of mixed flows and the external dimension of these flows. Embracing the new approach will not render the ongoing harmonisation obsolete, spontaneous arrivals will continue to occur in the future and should remain subject to common standards. But the new approach would reinforce the credibility, integrity and efficiency of the standards underpinning the systems for spontaneous arrivals, by offering a number of well-defined alternatives.

On 26 March 2003, the European Commission presented its Communication on the common asylum policy and the Agenda for protection. As that Communication also covers, to a certain extent, the issues addressed in the present Communication, both Communications need to be read in conjunction with each other.

I. THE RELEVANT GLOBAL AND EU LEGAL- AND POLICY FRAMEWORK

At a global level the 1951 Geneva Refugee Convention and the 1967 New York Protocol constitute the fundamental legal framework. As far as the global policy framework is concerned references need to be made to the so-called "Agenda for Protection" and the "Convention Plus" initiatives of UNHCR. Both mechanisms aim at adapting and reinforcing the international protection regime. The international community has established the Agenda for Protection after two years of worldwide consultations. It aims to offer a response to today's challenges in the governance of the refugee problem around the world faced with difficulties of applying international protection rules in a situation where there are mixed migratory flows

and ongoing persecutions, risks and dangers forcing millions of people to go into exile where they need protection. Building on the Agenda, the objective of the Convention Plus is to improve the operation of the Geneva Convention, boost solidarity and extend the management of asylum-related migratory flows by means of supplementary instruments or policies. It acknowledges that the asylum and international protection system can come under serious threat if it is used for other purposes or repeatedly misused, notably by networks of smugglers in human beings.

As far as the relevant EU legal framework is concerned, article 63 of the TEC provides for the legal basis for the EU to take legislative measures in the field of asylum (and immigration). The Tampere European Council Conclusions of October 1999 established a clear policy framework as far as policies on immigration and asylum are concerned, by calling for the development of a common EU policy to include the following elements: Partnership with countries of origin; A Common European Asylum System; Fair treatment of third country nationals; Management of migration flows.

More specifically, as far as the Common European Asylum System is concerned, the Tampere European Council reaffirmed the importance that the Union and Member States attach to the absolute respect of the right to seek asylum, and agreed to work towards establishing such a System through a two step approach. The first phase of the Common European Asylum System is to be constituted by four EU legislative "building blocks", relating to the determination of the State responsible for the examination of an asylum application, and setting minimum standards on asylum procedures, conditions for the reception of asylum seekers, and the qualification and content of refugee- and subsidiary protection status. In the second phase of the EU asylum policy harmonisation process, it was decided at Tampere that Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum, valid throughout the Union.

In discussing possible new approaches towards asylum systems, it is important to recall that the European Council at Tampere rightly stated that asylum and immigration issues are distinct but at the same time closely related issues. In particular, measures combating illegal immigration should comply with principles and obligations derived from refugee- and other human rights law. Equally, any measure taken to improve management of the asylum regime should not be to the detriment of the management of migration flows. The validity of this balanced and interlinked approach towards asylum and immigration issues was endorsed at both the Laeken- and Seville European Councils.

Furthermore, the Commission's Communication on asylum policy of November 2000[1] identified the need to explore measures which could contribute to providing legal and safe access to protection in the EU to those in need of it, whilst simultaneously deterring human smugglers and traffickers. In this Communication the Commission announced the launching of two studies further researching methods to increase orderly arrival of persons in need of international protection in the EU, namely by setting up Protected Entry Procedures and Resettlement Schemes. In the present Communication the Commission will propose how to make the best possible use of the results of these two studies.

Tampere also underlined the need for a comprehensive approach to migration and asylum addressing political, human rights and development issues in countries and regions of origin and transit. It also called for a greater coherence between the Union's internal and external policies, and stressed the need for more efficient management of migration flows at all their stages, in which the partnership with countries of origin and transit would be a key element for the success of such a policy. A key EU instrument relevant in this regard is constituted by

the Commission's Communication on integrating migration issues in the European Union's relations with third countries[2]. In its Communication, the Commission recognises that migration and asylum issues should be further integrated in the overall framework of the EU co-operation with the third countries. This should be done along the following lines: a global and balanced approach aimed at addressing the root causes of migratory flows; partnership with the third countries, flowing from the analysis of mutual interests; and specific and concrete initiatives assisting these third countries, aimed at improving their capacity to manage migratory flows. Furthermore, the Communication stressed the burden of receiving refugees borne by host countries in the developing world, particularly in the event of protracted situations. Alleviating this burden is the main objective of the 'aid to uprooted people' budget line. This dimension should also be reinforced in the management of other external financial instruments.

II. ANALYSIS OF THE UK PAPER

The Paper presented by the United Kingdom to the Spring European Council, entitled: "New international approaches to asylum processing and protection", consists of two parts, an analytical part and a part in which it develops two concrete new approaches to better manage the international protection regime. In its first part, the analysis, the Paper identified four factors which all substantially undermine the credibility, integrity, efficiency of and public support for the asylum system, not only in the EU, but also globally.

1. (Financial) support for refugees is badly distributed

2. Current asylum system requires those fleeing persecution to enter the EU illegally, using smugglers whereas the majority of refugees, including probably the most vulnerable one, stay in poorly resourced refugee camps in third countries

3. Majority of asylum seekers in EU do not meet the criteria for refugee or subsidiary protection status

4. Those found not to be in need of international protection are not returned to their country of origin

In part two of the UK Paper, two new approaches are presented. The Paper firstly proposes to set up regional protection areas in regions of origin aiming to provide accessible protection, with greater support from the global community in finding durable solutions. Asylum seekers from certain countries could be returned to their home regions where "effective protection" could be offered to them, and where they would be processed with a view to managed resettlement in their home regions or, for some, access to resettlement schemes in Europe. Significantly greater processing of asylum applications in regions, attached to resettlement programmes, would need to be developed according to the Paper, in a way which avoided creating a 'pull factor' or attracting people to camps as an easy way to get to Europe, and which avoided agencies being inundated with applications. Better regional protection should allow more equitable management of flows of irregular migrants who want to come to Europe. It might also be possible, in this concept, to return to the so-called "regional protection areas" failed asylum seekers who have reached Europe but have been found not to have a well-founded claim to refugee status, but who cannot be immediately returned to their country of origin. The aim would be to provide temporary support until conditions allowed for voluntary returns.

In addition to better protection in regions of origin, the UK Paper suggests that it is worth considering medium term action to deter those who enter the EU illegally and make unfounded asylum applications. One possibility, the Paper states, might be to establish protected zones in third countries, to which those arriving in EU Member States, and claiming asylum could be transferred to have their claims processed. These 'transit processing centres' might be on transit routes into the EU. Those given refugee status could then be resettled in participating Member States. Others would be returned to their country of origin. This approach could act, in the views of the UK, as a deterrent to abuse of the asylum system, whilst preserving the right to protection for those who are genuinely entitled to it.

The above proposals have been discussed in depth over the last few months, in various fora involving Member States, Acceding States and representatives of relevant international and non-governmental organisations. These discussions highlighted a substantial number of pertinent legal, financial and practical questions. The most basic question flowing from these discussions is whether the proposed new procedures are complementary to or substituting the current asylum system. In regard to the idea of Transit Processing Centres the question was raised where such centres would be located, within or outside the EU. First and foremost, it was stressed that an examination is required into whether such centres, or to that effect Regional Protection Areas or Zones, are compatible with EU legislation, national legislation, the legislation of the envisaged countries hosting such centres or zones, and the European Convention on Human Rights. Furthermore, it needs to be clarified by which procedural rules (EU or national legislation) such centres or zones would be governed.

Two other key legal questions surfaced during these discussions. First, in how far would it be possible, according to the 1951 Refugee Convention, EU legislation or national legislation, to transfer persons to the envisaged Regional Protection Zones and/or to Transit Processing Centres, who have not transited through or otherwise stayed in such zones/countries. Could they be kept as such outside the scope of the jurisdiction of the destination countries? In relation to the suggested Regional Protection Zones the key legal question seems to be what the exact definition of "effective protection" is. However, there seems to be generally agreement amongst the Member States that protection can be said to be "effective" when, as a minimum, the following conditions are met: physical security, a guarantee against refoulement, access to UNHCR asylum procedures or national procedures with sufficient safeguards, where this is required to access effective protection or durable solutions, and social-economic well being, including, as a minimum, access to primary healthcare and primary education, as well as access to the labour market, or access to means of subsistence sufficient to maintain an adequate standard of living. In certain regional contexts, it was stressed that EU Member States may need to accept higher standards.

As has become clear from the discussions, whilst there is seemingly agreement on the analysis of the deficiencies of the current asylum systems, there are still many questions outstanding on how best to achieve a better management of these systems. The various legal, financial and practical questions surrounding the proposed reshaping of asylum procedures, proposed by the UK, in particular in relation to the notion of transit processing centres, need to be researched and answered before taking any further position.

III UNHCR'S VIEWS

UNHCR is mandated to achieve better protection and solutions for all persons of its concern and committed to co-operating with efforts designed to address migratory strains on asylum systems. The Agenda for Protection, deriving from the Global Consultations process, has

spurred new thinking to tackle these problems, including through the development of special agreements in the context of the High Commissioner's Convention Plus initiative. UNHCR is therefore in the process of exploring measures to improve protection and solutions arrangements in regions of origin, while proposing an EU-based approach to deal with certain caseloads of essentially manifestly unfounded applications lodged primarily by "economic migrants" resorting to the asylum channel. These proposals should be seen to complement existing national asylum systems. UNHCR is further prepared to examine with States how national asylum systems, and in particular their procedural aspects, could be rendered more efficient.

According to UNHCR, State responsibility is a key concept, which must be maintained at all stages, but can often be better fulfilled through international co-operation and the sharing of commitments. Together with improving the working of their national asylum systems, EU Member States also have the challenge of strengthening the capacity of asylum countries at points where refugees first seek international protection. Amelioration of asylum conditions in countries hosting major refugee populations and more accessible solutions are prerequisites if the pressures driving onward movement, the so-called "secondary flows", are to be reduced. These are shared responsibilities in keeping with the principle of international solidarity and burden sharing.

3.1 Protection and solutions in regions of origin as part of the Convention Plus initiative

A genuine and concerted effort is required, in partnership with all States and international and non-governmental organisations concerned, to improve the quality and effectiveness of protection available within the countries in regions close to the source of refugee movements, as well as to promote durable solutions. Convention Plus can serve as an important enabling mechanism to develop comprehensive approaches through multilateral special agreements. The following would be elements of such an initiative:

Strengthened protection capacity in host countries: Effective protection must be assured. Agreement on what constitutes effective protection, identification of protection inadequacies, a willingness of the host country to address them, as well as substantial financial and material investment to enable host countries, UNHCR and other relevant actors to implement agreed objectives, are therefore required. As foreseen in the Agenda for Protection, UNHCR is working with a number of States to boost their protection capacities, focusing especially on countries from which significant secondary movements are taking place. In UNHCR's experience, improved safety and availability and access to means for self-reliance is particularly relevant to avert secondary movements, and is an important precursor to a durable solution. The High Commissioner's proposal on "Development Assistance for Refugees" (DAR) advocates additional development assistance for: improved burden-sharing for countries hosting large numbers of refugees; promoting better quality of life and self-reliance for refugees pending different durable solutions; and a better quality of life for host communities. It is based on broad based partnerships between governments, humanitarian and multi- and bilateral development agencies.

Comprehensive durable solutions comprising the following elements:

– Active promotion of voluntary repatriation and sustainable reintegration. In post-conflict situations, the High Commissioner has proposed an integrated approach, the "4 Rs" (Repatriation, Reintegration, Rehabilitation and Reconstruction) which aims to bring

together humanitarian and development actors in order to facilitate sustainable reintegration and bridge the transition period between emergency relief and long-term development.
– "Development through Local Integration" (DLI) as a strategy in circumstances where the local integration of refugees in countries of asylum is a viable option.
– Multilateral commitments to expand resettlement as a protection tool, a durable solution as well as an instrument of burden-sharing with countries of first asylum.
– Processing in countries of first asylum if necessary to access effective protection or durable solutions, such as: i) in the context of a comprehensive framework of durable solutions, or ii) where access to effective protection or a durable solution requires formal individual recognition of status. The entire caseload present in the country of first asylum should have equal access to such arrangements.

Facilitated return to and readmission by countries of asylum in regions of origin where effective protection is agreed and continues to be available, possibly as part of an integrated approach, consisting of:

– An admissibility procedure: to determine whether responsibility for providing protection lies in the country of destination or the country of first asylum, based on factors such as previous stay in a country offering effective protection and continued enjoyment of such protection upon return, or as part of a comprehensive durable solutions strategy.
– Specially tailored readmission agreements should ensure prompt transfer under acceptable conditions, and would benefit from assistance schemes and other supportive incentives, which could reinforce the aforementioned efforts.

3.2 An EU-based mechanism as a step towards a common asylum system

To target caseloads of asylum seekers that are composed of primarily economic migrants and to reinforce the return of persons not in need of international protection, UNHCR proposes a special EU-based mechanism to be piloted in respect of designated countries of origin. The mechanism could be an important step towards a common asylum system and would rely on an EC Regulation or Directive. Pre-negotiated readmission agreements to effect the swift return of rejected cases would be, according to UNHCR, a prerequisite. They should be easier to negotiate as they could be limited to nationals, and would benefit from the joint political weight of the EU and its Member States, and UNHCR facilitation. The EU-based mechanism would, in UNHCR views, also include the following elements:

– Closed reception facilities in which asylum seekers would be required to reside for the duration of the procedure (not to exceed one month), provided that the special needs of vulnerable persons, including children, are met. Exceptions could be made in cases where there is no fear of absconding and irregular movement. The centres could be located within one or possibly more Member States close to the external borders of the EU, probably of the enlarged EU of 2004. They would provide facilities in line with international standards and the EU Directive on Minimum Standards for the Reception of Asylum Seekers in Member States, as well as interpretation services and legal counselling for all asylum-seekers.

– Immediate transfer from EU Member States to the joint facilities of asylum seekers of the designated nationality, with the exception of persons who are medically unfit to travel or stay in closed reception centres, and unaccompanied or separated children.

– Rapid determination of claims on an individual basis by a consortium of national asylum officers and second instance decision-makers, who would determine international protection needs, in line with the future EU 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, in a single –one stop shop- procedure . Appeals could, according to UNHCR, be limited to simplified reviews. The entire process should be completed within one month, unless a particular case reveals special complexities, in which case the claim should be transferred to a regular national asylum procedure. UNHCR would monitor the determination process, provide advice, and could play a role in the simplified review process.

– Rapid transfer to asylum state: Persons found to be in need of international protection would be distributed fairly amongst Member States, according to a pre-determined key that would take into account effective links, including family, educational, or cultural ties.

– Rapid return of persons found not to be in need of international protection.

– The process would be a partnership effort involving States and relevant international organisations. It would, according to UNHCR, require joint EU funding and operation of the centres and for the transfer to the asylum state or return to country of origin, as applicable, possibly from a special EU budget, and the sharing of resources and expertise.

Whilst it is important to further investigate the exact legal modalities and the practical and financial consequences of implementing the proposals made by UNHCR, the Commission is of the opinion that in particular the EU-based mechanism as suggested by UNHCR is worthwhile giving further consideration. The Commission feels that such a model could usefully contribute to restoring the credibility and integrity of asylum system, as it is expected to assist in discouraging economic migrants from using such systems to gain entry to the EU.

IV. VIEWS NON-GOVERNMENTAL ORGANISATIONS

Several non-governmental organisations, active in the area of refugee policy, have contributed to the debate on the shortcomings of the current protection regime. The general gist of these contributions is that whilst welcoming, in principle, initiatives in dealing efficiently with these shortcomings, they express the fear that any new approach may shift rather than share the burden with host, third, countries. Such a shift would, according to those organisations, in particular be inappropriate, as the EU should acknowledge that many countries, especially those close to regions of origin of refugee populations, are already now hosting far greater numbers of refugees and asylum seekers than are EU Member States. To transfer domestic refugee processing to those regions would, in their views, not be in accord with the concept of international responsibility sharing and principles of international refugee law.

Two organisations in particular have expressed their opinion and issued statements in this regard. Amnesty International stated in a commentary on the UK proposals[3] that such proposals may effectively result in denying access to the EU territory and shifting asylum seekers to processing zones where responsibility, enforceability and accountability for refugee protection would, in Amnesty's views, be diminished, weak and unclear. Furthermore Amnesty International is concerned that the UK proposal will threaten the principle of international solidarity on which international protection and solutions for refugees depend, by creating two classes of asylum states: the rich and powerful states that can select whom

they will accept as refugees and the rest who are compelled to host large numbers, including people returned from the rich countries.

The European Council on Refugees and Exiles, (ECRE) issued , in collaboration with the US Committee for Refugees, a report[4], relevant to the issues discussed in this framework. This report is based upon field research in a number of countries hosting large refugee populations, such as Jordan, Syria, Turkey and Kenya. It examines the feasibility of complementing the processing of asylum applications in European and North American countries of asylum with processing in regions of origin as a means to facilitating the orderly and legal admission of refugees to Europe and North America. The report notes that those countries currently do not have the legal and social-economic infrastructure to ensure the safety of large numbers of asylum seekers, and that the insecurity of their legal status places them in dangerous situations. The extremely limited role of NGOs in these countries is, in the authors' views, furthermore an important constraint in offering a secure asylum environment for refugees in those countries. None of the countries, the report notes, is currently in favour of local integration of refugees. The report concludes that the most effective way to address the asylum and access challenge is through a comprehensive engagement to resolve protracted refugee situations.

In light of the variety of views expressed and approaches reported above, the Commission believes that it is vital that the EU continues to engage itself in a constructive, transparent and open dialogue with the various stakeholders, involved in the debate on this critical issue of new approaches to the management of asylum systems, including representatives of civil society.

V. BASIC PREMISES OF ANY NEW APPROACH TO THE INTERNATIONAL PROTECTION REGIME

In the Communication on the common asylum policy and the Agenda for protection[5], the Commission recognises that there is a crisis in the asylum system, more and more striking in certain Member States, and a subsequent growing malaise in public opinion. It notes that abuse of asylum procedures is on the rise, as are mixed migratory flows, often maintained by smuggling practices involving both people with a legitimate need for international protection and migrants using asylum procedures to gain access to the Member States to improve their living conditions. This phenomenon, as the Communication states, is a real threat to the institution of asylum and more generally for Europe's humanitarian tradition, and demands a structural response. This response is in particular necessary at a time when the question could be legitimately put whether the Member States could not better deploy the major human and financial resources which, partly supported by the European Refugee Fund, they devote to receiving displaced persons in the context of often lengthy procedures that regularly culminate in negative decisions requiring repatriation after a long wait. The Communication therefore concludes that there is a manifest need to explore new avenues to complement the stage-by-stage approach adopted at Tampere.

Such new approaches should be underpinned by the following 10 basic premises:

1. The need to fully respect international legal obligations of Member States, in particular the full and inclusive application of the 1951 Refugee Convention, the non-refoulement principle, and the European Convention on Human Rights and Fundamental Freedoms.

2. The most effective way of addressing the refugee issue is by reducing the need for

refugee movements. This means to address the root causes of forced migration, in conformity with the Council Conclusions on Migration and Development of 19 May 2003[6].

3. Access to legal immigration channels, in particular the facilitation of legal entry of third country nationals into the EU for employment (skilled, unskilled and seasonal labour) and/or family reunification purposes, will assist in discouraging migrants to use the asylum channel for non-protection related reasons.

4. Whilst respecting international humanitarian obligations, illegal immigration should continue to be combated, as called for in Seville. This aspect will gain significance when the new asylum policies will become effective, since people remaining committed to enter the EU, in spite of these policies, to enter the EU, will more frequently resort to using illegal tracks.

5. Any new approach should be built upon a genuine burden-sharing system both within the EU and with host third countries, rather than shifting the burden to them. Any new system should therefore be based upon full partnership with and between countries of origin, transit, first asylum and destination. The necessary involvement of host third, countries implies a long lasting process of confidence building and planning.

6. Any new approach to improve the management of asylum in the context of an enlarged Europe should build upon the policy objectives identified in the March 2003 Asylum Communication: improvement of the quality of decisions ("frontloading") in the European Union, consolidation of protection capacities in the region of origin, and treatment of protection requests as close as possible to needs, which presupposes regulating access to the Union by establishing protected entry schemes and resettlement programmes.

7. Any new approach should be complementary rather than substituting the Common European Asylum System, called for at Tampere. Such a new dimension should build upon the first phase of that System, be integrated in its second phase and pave the way for a "Tampere-II" political agenda on asylum policies, based on the new Treaty.

8. The Seville European Council sets clear deadlines in agreeing on the different "building blocks" of the first phase of the Common European Asylum System. Seville required agreement to be reached on the Refugee Definition and Subsidiary Protection Directive by June and on the Asylum Procedures Directive by the end of this year. As the EU cannot afford these deadlines to be missed, the discussions on new approaches should not result in delaying the present negotiations on these Directives. This does not preclude, however, the possibility of additional legislative instruments, in particular in relation to asylum procedures, if the need for such instruments would derive from the present discussions.

9. Any new EU or Member States' initiative to refine the asylum system should be in line with and enforcing the global, UNHCR steered, Agenda for Protection and Convention Plus initiatives.

10. Whatever the outcome of the current discussions on a new approach to asylum systems may be, possible financial consequences for the Community budget, need to respect the current financial perspective, as long as this remains applicable. Development resources should continue to focus on the central objective of poverty reduction and the

achievement of the Millennium Development Goals, based on national poverty reduction strategies, and, where available, Poverty Reduction Strategy Papers.

VI. POLICY- OBJECTIVES AND APPROACHES FOR MORE ACCESSIBLE, EQUITABLE AND MANAGED ASYLUM SYSTEMS

In the light of the analysis of the deficiencies of current asylum systems, and in full respect of the above 10 basic premises, the Commission feels it is appropriate and necessary to develop a new approach complementary to those systems, to be pursued within a framework of genuine burden- and responsibility sharing. The overall aim of such a new approach to asylum systems is, to better manage asylum-related flows in their European territorial dimension and in regions of origin, resulting in more accessible, equitable and managed asylum systems. These asylum systems should enable persons in need of international protection to access such protection as soon as possible and as closely as possible to their needs, and therewith reducing felt needs and pressures to seek international protection elsewhere.

Such a new approach is based on three specific but complementary policy objectives, namely:

1) the orderly and managed arrival of persons in need of international protection in the EU from the region of origin; 2) burden- and responsibility sharing within the EU as well as with regions of origin enabling them to provide effective protection as soon as possible and as closely as possible to the needs of persons in need of international protection, and 3) the development of an integrated approach to efficient and enforceable asylum decisionmaking and return procedures. Each three are equally important, have cross-links and strategically reinforce each other, and in their totality aim to address the noted deficiencies, in current asylum systems, and to restore and enhance the public support for the asylum system.

In addition to these three objectives another important element in achieving the overall aim is that economic migrants should as much as possible be discouraged from abusing the asylum system for non-protection related reasons. This should lead to a decrease in the number of asylum seekers, hence to a reduction in the costs of the domestic system, and would thus liberate funds to be spent on assisting the regions of origin in providing effective protection as soon as possible to persons in need of international protection. An asylum system used by those with credible protection needs will furthermore increase public support for the institution of asylum as such. It is therefore vital that there are legal immigration channels, and that other attempts are being made to address the mixed flows issue, even if this could mean that some people, remaining committed to enter the EU, will be more frequently using illegal channels, when the asylum route is no longer available to them.

6.1 The orderly and managed arrival of persons in need of international protection in the EU from the region of origin

6.1.1 Policy Objective to be achieved

Offering channels to access protection in the EU, already in the region of origin, serves a four-fold purpose:

– it facilitates orderly arrivals in the EU, which is very much preferable from a financial, integration and national security perspective. Orderly arrival of refugees will also boost the public support for the asylum system, as the orderly arrival of Kosovar refugees in the EU Member States during the Kosovo conflict very clearly demonstrated;

– it provides persons in need of international protection with means to access such protection in a safe and legal manner, and it provides a method of offering (procedures for accessing) protection as closely as possible to the needs, and as soon as possible being the overall aim of the new approach to the international protection regime;

– provided that it builds on protection strategies in the regions, it alleviates some of the pressures on these regions, and therefore assists in meeting the second objective of burden-sharing with these regions;

– these channels could also be used to properly inform candidate migrants to the EU on the possibilities and impossibilities of migrating for economic purposes to the EU. These channels may therefore help in deterring economic migrants from using the asylum route as the way to get entry to the EU, knowing their chances of receiving legal status would be minimal or even non-existent

6.1.2 Policy approaches needed to pursue the orderly and managed arrival of persons in need of international protection in the EU from the region of origin:

6.1.2.1 Orderly arrival can be ensured by the EU Member States participating in the UNHCR steered Comprehensive Plan of Action, allowing for a number of refugees to be resettled in the EU as part of the solution proposed by the UNHCR for dealing with a specific caseload in a protracted refugee situation.

6.1.2.2. Orderly arrival can also be assured by an EU-wide resettlement scheme. A study on the feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure, has been commissioned and will be released later this year. The notion of resettlement is understood to consist of transferring refugees from a first host country to a second, generally a developed country, where they enjoy guarantees of protection, including legal residence, and prospects for integration and autonomy. The resettlement process is approached in an integral manner, from policy formulation through the process of selection to transfer, arrival, settling and longer-term perspectives. In such a framework, several levels of EU harmonisation can be identified, as well as levels of discretion left to Member States in that regard.

The ideal model for the EU from the perspective of the global refugee protection regime, the increased prominence of resettlement as both a tool of protection and a durable solution, and to promote solidarity between the EU Member States and countries of first asylum, as well as among EU Member States, and between them and the traditional resettlement countries beyond, would be one in which all or almost all of the chronological steps in the resettlement process are set at EU level. However, the necessary political will to convert immediately to those models may not yet exist across the fifteen Member States (or the enlarged Union).

The Commission therefore proposes to further explore the viability of providing for an EU legislative framework which could establish the goals, the selection criteria - including the definition of those to be included in consideration for resettlement- and the total annual target for resettlement. However, it would be left, in such an approach, to Member States to establish their own quota within that target. Furthermore, Member States would also establish their own selection procedures, and be free to organise their own policy and approach to issues related to the arrival of refugees, including the immigration procedures to be carried out. Finally, in that model, Member States would also develop their own policy on the reception of resettling refugees and develop their own approach to the progress of a resettled refugee from arrival towards longer-term integration.

As one of the stumbling blocks to any new policy initiative lies in budgetary support for its implementation, the financial underpinning of such a new policy is vital. It may be worthwhile considering in this respect the inclusion of a specific strand in the new financial instrument, in succession to the European Refugee Fund (which will end in 2004), reinforcing the collective and co-operative notion underlying an EU resettlement scheme. The goals of such a strand would be to provide an EU level budgetary mechanism to support the resettlement programme, to allow for burden-sharing, but not shifting, among EU Member States, and to ensure reasonable financial support to resettling refugees during their first year in an EU Member State without making additional cost claims on national welfare systems.

6.1.2.3. Orderly arrival in the EU can also be facilitated by setting up Protected Entry Procedures in regions of origin, preferably EU-wide. The notion of Protected Entry Procedures is understood to allow a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final. A Commission study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure identified five blueprints which Member States could consider when developing Protected Entry Procedures in the future, varying from the flexible use of the Visa Regime, to the development of a Schengen Asylum Visa.

The Commission proposes to further explore the viability of the Study's proposal to set up a EU Regional Task Force. Whilst the exact legal and institutional nature of such a Task Force would need further clarification, the core of this proposal would be the creation of a joint regional presence of the EU, providing expertise to local authorities where needed, and operating a referral system, matching different needs with appropriate solutions. It would offer a multilateral platform, which could support varying material and operational content. The EU regional presence would allow for the establishment of a differentiated referral system, catering for migration and protection alike. To that effect, it would be staffed with persons well acquainted with the immigration and asylum policies of the EU and its Member States, and could undertake the following functions:

– Information dissemination: The EU presence would deliver accurate and authoritative information to potential migrants and local authorities on the immigration and asylum options on offer in the EU, and the risks of human smuggling.

– Processing: The EU presence could, where needed and requested, assist local authorities, or UNHCR, in carrying out refugee determination. Hence, eligible persons could be identified and the search for durable solutions could begin, i.e. return of those rejected, local integration of those accepted or resettlement, in particular for the vulnerable cases.

– Resettlement and Protected Entry Procedures: In the framework of processing, the EU presence could, in close co-operation with UNHCR, identify the cases which should be lifted out from the region and protected within the EU. Such cases could have special protection needs which cannot be catered for regionally, or posess close ties to a Member State. Additional cases could be taken over by the EU within the framework of a burden sharing arrangement with countries in the region. Finally, attention would also have to be paid to the effective protection of the remaining persons.

– Procuring information for asylum determination: The EU presence could also engage in the procurement of information on countries of origin to serve domestic asylum procedures in Member States.

Another proposal suggested in the Study, namely gradual harmonisation through a Directive based on best practices, is, according to the Commission, also worth considering. It is based on the introduction of a rudimentary form of Protected Entry Procedures in all Member States participating in the cooperation under Title IV TEC. It is assumed that Member States wish to retain a certain degree of control at all stages of Protected Entry Procedures, whilst approximating their practices to each other. It is inspired by the logic of the first phase in building the Common European Asylum System, which aims for the dissemination of minimum standards to be respected by all Member States in their unilateral practices. The adequate form for bringing about this level of harmonisation would therefore be a Directive.

6.2. BURDEN- AND RESPONSIBILITY SHARING WITHIN THE EU AS WELL AS WITH REGIONS OF ORIGIN

6.2.1 Policy Objective to be achieved

The regions of origin are currently faced with great refugee flow pressure and problems resulting from this pressure. The EU should continue to substantially assist these regions in alleviating these problems, and contribute to enhancing the protection capacity in the region of origin, both in qualitative as well as in quantitative terms. Whilst acknowledging that the EU itself forms a source region for asylum seekers coming from Europe or the wider periphery of Europe, it is vital that other, less developed, source regions are assisted in offering protection to those in need of it as protection in the region is, in principle, the logical and preferred protection modality: it offers protection to persons in need of international protection, as closely as possible to their needs, and at an earlier stage, than protection enjoyed in the EU. Furthermore, if substantial parts of the current EU financial resources spent on the domestic asylum system could ultimately become available for enhancing the protection capacity in the region, more people could be offered effective protection than is currently the case.

The EU should therefore assist in developing the asylum systems of transit countries in order to turn these states into first countries of asylum. When effective protection can be offered in the region this may diminish the need for secondary movement of persons in need of international protection, amongst others to the EU. Also, only then can the EU actively implement, in close co-operation with UNHCR, the notion of safe third country and first country of asylum vis-a-vis the countries in the region. To effectively implement such policies, readmission agreements concluded with these countries constitute vital instruments. Furthermore, whilst not underestimating the difficulty of returns more generally, return of rejected asylum seekers from within the region of origin to the country of origin may be easier than return from the EU to country of origin. Finally, the envisaged assistance to host countries should also contribute to their "good governance", and provide tools to fight against corruption and smuggling, two key development prerequisites.

Whilst policy approaches defined below focus on burden-sharing with regions of origin, it needs to be underscored that a proper discussion on burden- and responsibility sharing should preferably be done within a horizontal and integral framework. This is even more important taking into consideration the changed political EU asylum landscape, resulting from the entry into force of the Regulation for determining the state responsible for examining asylum claims (Dublin-II), supported by a fully operational Eurodac fingerprinting mechanism, and in the light of the likely reference to the burden-sharing notion in the asylum-related article of the new Treaty. In this context the reference to a horizontal framework means that burden sharing mechanism should be constructed, not only between the EU and regions of origin, but also within the EU itself. One could rightly argue that, the European Union being a unique model of an emerging "common asylum space", if burden-sharing and responsibility-sharing cannot be successfully applied within that space, how could it possibly be expected to be to others ?

The notion of an integrated approach to burden-sharing in the field of migration and asylum within the EU means that in addition to the sharing of the financial costs deriving from the management of the EU external borders, one would also need to take a look at how physical burden-sharing in hosting persons in need of international protection could be achieved. Whilst a burden-sharing of the total asylum caseload in the EU amongst the Member States does not seem feasible at this particular political juncture, however, as mentioned at the end of Chapter 3, the EU-based mechanism suggested by UNHCR, where the need for reallocation amongst the EU Member States is expected to be very minimal, is worthwhile giving further consideration. Furthermore, such a model may have the advantage that it assists in deterring economic migrants from using the asylum system to gain entry to the EU. Under the third objective, it is further explored how such an EU-based approach relates to the Proposal for a Council Directive on asylum procedures, currently under negotiation.

6.2.2 Policy approaches needed to pursue burden-and responsibility sharing within the EU as well as with regions of origin:

6.2.2.1. In order to be able to access protection close to the needs, therefore in the region of origin, a step by step approach is needed. This implies long-term investments, including capacity and institution building, facilitating the development of the asylum system of the countries in the region, and effective protection capacity in regions of origin. This requires political and financial commitments, as well as the involvement of countries of origin, first asylum and destination, which will be difficult to achieve. Enhanced protection capacity in the region is necessary both in terms of quantity and quality, if "effective protection"

is to become a true alternative to protection in the EU. As the standard of protection is currently often far from meeting the "effective protection" standard, enhancing the protection capacity in the region would require substantial financial assistance, as well as infrastructure aid, and expertise offered by the EU. Enabling third host countries to offer effective protection to persons in need of international protection will be a long process, which might only provide solutions in the mid-to-long-term.

The need for the EU to support regions of origin in providing protection has recently been politically endorsed by the Council. In its Conclusions on integrating migration issues in the European Union's relations with third countries: migration and development, adopted on 19 May 2003, conclusion 11 states that: "Taking account of both the financial and institutional capacities of many developing countries and of the fact that refugees can put considerable strain on their social and political structures, the Commission is invited to consider ways to strengthen their reception capacity and to elaborate further on the use of development co-operation in the search of durable solutions for refugees, in voluntary return and reintegration as well as local integration, and to develop concrete proposals on how more aid could be directed towards assisting refugees in the region, while targeting poverty reduction in host communities. Added value could ensue from increasing support and devising long-term interventions that offer sustainable improvements to refugees as well as to local communities in countries hosting large populations of refugees".

However, before undertaking any next steps in this regard, there needs to be a proper analysis and "grouping" of the various source regions and countries of first asylum possibly concerned by the new policies. At this juncture, the above call for more financial assistance needs to be framed within the current legal, political and financial frameworks (such as the Cotonou agreement process) and development programmes applicable to the various countries likely to be considered. However, in order to assess needs for the enhancement of protection capacity, proper quantification and further research are necessary. These may well point to the need for additional financial resources, to be addressed in the context of the next financial perspective.

Indeed, a comprehensive set of measures is needed to realise effective protection in the region. Creating sufficient protection capacity in developing countries will involve a number of actions ranging from ensuring the national legal framework, developing institutional capacities, as well as infrastructure and policies for reception, integration and return. In this context the Commission refers to the elements identified in the March 2003 Asylum Communication, in relation to the instruments of the European external protection policy and the means of achieving more effective co-operation and assistance.

In addition to the political endorsement of this specific policy objective, a legal base is needed for the proper implementation of Budget line 'Co-operation with Third Countries in the area of migration' (B7-667). It is clear that as a result of its limited financial scope this budget line can not provide for all the needs of host countries in protracted refugee situations. Nevertheless, this financial instrument could prove very useful for supporting new approaches to the asylum regime, in full co-operation with UNHCR and the host countries or regions concerned, through projects serving the multilateral interest of all stakeholders

involved.. The Commission is committed to present its proposal for a Regulation shortly and invites the Council and Parliament to treat this as a matter of priority.

In order to test the ground for actions to be implemented under the future legal basis, specific preparatory actions could be launched under B7-667 in 2003. In the selection and implementation of these actions the Commission will, in close –co-operation with UNHCR, take due account of the specific situation of the third countries to be involved in regard to, in particular, human rights, the rule of law and good governance. The purpose of these actions would be:

a) an identification, in-depth analysis and 'grouping' of the various source regions and third countries of first asylum, including an assessment of the requirements for achieving 'effective protection' capacity ;

b) an analysis of the legal, financial and practical questions related to Regional Protection Zones and Transit Processing Centres in third countries (cf. part II of this Communication);

c) the further exploration of the concept of EU Regional Task Forces, including a supplementary feasibility study (cf. point 6.1.2.3. of this Communication);

d) concrete proposals for future programmes/projects to be implemented with a view to foster the above goals (cf. point 6.2.2.1 of this Communication).

More specifically, projects could be taken up in regions facing protracted refugee situations, with a view to increasing, effective protection, thereby reducing secondary movements to EU Member States. Projects could also contribute to the creation of processing, reception and protection capabilities, including as regards persons returned from the EU.

6.2.2.2. Within the context of global burden- and responsibility-sharing, and in order to maintain sufficient protection capacity in the region, EU Member States should act to ease the pressure on the host countries on a permanent basis by offering durable solutions. This could in particular be effected by participating in UNHCR-steered Comprehensive Plans of Action for specific caseload in protracted refugee situations.

6.2.2.3. Pressure on host countries could also be eased by setting up EU-wide resettlement schemes, as outlined above in regard to the first objective, the managed arrival of refugees from the region in the EU. Resettlement, strategically used, can therefore serve a multiple purpose. In seeking to use resettlement strategically, the current and future EU resettlement Member States will need to consider how broader linkages can be achieved through partnership with first asylum states. Countries of first asylum need to be supported so that they become more open to making commitments on behalf of refugees beyond the provision of first asylum protection. This may entail commitments with respect to the maintenance of effective protection, the provision of local integration or the acceptance of returns from secondary movements. The involvement of an agreement for some action by the first asylum country in conjunction with resettlement could potentially convert a non-strategic situation into a strategic one. Such agreements would ideally arise from the collective analysis of the country of first asylum, the UNHCR and resettlement Member States. The

Convention Plus' "Special agreements" could be used in this respect, so as to identify and concretely agree on what the different responsibilities are of the various actors involved, namely countries of origin, first asylum, destination countries, and UNHCR.

6.3. The development of an integrated approach to efficient and enforceable asylum decision-making and return procedures

6.3.1 Policy Objective to be achieved

In order to promote the credibility and integrity of the asylum system, and at the same time ensure protection to genuine refugees, EC legislation and other EU measures should provide for the legal framework enabling Member States:

(a) to quickly and correctly identify the persons genuinely in need of international protection and grant such protection;

(b) to effectively remove from the territory of the Member States, persons who have been found not to be in need of protection

Without prejudice to the outcome of the current negotiations on the first phase of harmonisation in the area of asylum procedures, the European Community must further invest into its response to two major challenges: the quality of the examination of applications, and the speed of such examinations . The Commission will intensify its work on "frontloading", in particular through further study of the question of the single ("one stop-shop") asylum procedure It will be mindful of the results of a study launched by the Commission, and to be shortly published as "Asylum- a single procedure in the context of the Common European Asylum System and the goal of a common asylum procedure".

Improving the quality of decisions by "frontloading" will also substantially facilitate both objectives identified above. Objective (a), as "frontloading" will assist in the quick and correct filtering of persons in need of protection, as well as objective (b), in the sense that only those persons should be removed who, after their claim for asylum has been correctly examined, were found to be not in need of international protection.

An effective EU Return Policy will increase public faith in the need to uphold the EU humanitarian tradition of offering asylum to those in need of international protection. A quick return, in safety and dignity, immediately following rejection of the application for asylum and the appeal, where such appeal has no suspensive effect, will furthermore greatly deter migrants from abusing the asylum channels for non-protection-related reasons. The main issue at stake in this regard seems to be that of undocumented rejected asylum seekers whose identity and nationality cannot be established for the purposes of return. Following their final rejection, such persons unequivocally pose particular return problems, as the necessary prior establishment of their identity and nationality requires their co-operation and/or the cooperation of the presumed country of origin. Refusal of such co-operation often leaves Member States authorities without any possibility to remove the person concerned from their territories. If this serious problem is not satisfactorily solved, in line with the conclusions of the June 2002 Seville European Council, the November 2002 Return Action Programme, and the November 2002 General Affairs Council Conclusions on intensified co-operation on the management of migration flows with third countries, any new model proposed will most probably prove to be ineffective in the long run, however efficient it may seem in the short term.

6.3.2 Policy approaches needed in order to develop an integrated approach to efficient and enforceable asylum decision- making and return procedures

6.3.2.1. Whilst respecting the Seville deadline for adoption of the Asylum Procedures Directive, that Directive could be adapted in such a way that it provides for specific measures aimed at setting up a complementary mechanism for examining certain categories of applications lodged in or at the border of the EU, as defined in that Directive. Such measures would consist of uniform rules for more expeditiously processing these categories of applications to decide on the entry to and admission to the EU at particular locations, such as closed processing centres within the EU, at its external borders. This would imply that agreement on the categories of applications deserving such treatment is found in the Council, following consultation with UNHCR. It would thus be a tool enhancing the flexibility of the Common European Asylum System, in its exceptional character similar to the Temporary Protection Directive.

6.3.2.2. To the extent that certain countries of first asylum were found able to offer effective protection, as outlined earlier in this Communication, and as further explained in this Chapter under the second objective, the asylum procedures in EU Member States could furthermore be remodelled to more quickly filter out the applications of persons proceeding from those countries. For this purpose an EC legislative instrument could, on the basis of the framework provided in the Asylum Procedures Directive, establish a) the existence of effective protection for designated categories of persons; and b), where appropriate, particular procedural consequences that follow from this conclusion.

6.3.2.3. Closer co-operation between the EU and the countries of origin and first asylum on return issues should be established. This should be done in line with the conclusions of the June 2002 Seville European Council, the November 2002 Return Action Programme, and the November 2002 General Affairs Council Conclusions on intensified co-operation on the management of migration flows with third countries, and form the basis for making return more efficient and effective.

6.3.2.4. The existing approach towards the (developing) EC readmission policy could be revisited in the light of possible new needs flowing from a new approach to asylum systems. Needs in particular to be in taken into account include the need for registration and capturing of biometric identifiers of asylum seekers at the earliest point of time.

6.3.2.5. In addition to the conclusion of readmission agreements, the development of further EU return programmes could be considered, taking full account of the experiences and lessons to be learnt from the Return plan for Afghanistan the results of which will be thoroughly assessed. Provided that the conditions for "effective protection" are met future programmes could be useful to help to create economic perspectives for returnees in their countries of origin, on condition that they be open to the local population in order to avoid "revolving door" effects. The momentum of the Convention Plus' initiative could be usefully used in this context as well, by incorporating the return of persons found not to be in need of international protection into comprehensive special agreements, and thereby underscoring the state responsibility to accept returns of nationals.

VII. CONCLUSION AND WAY FORWARD

We are at a turning point in the development of the Common European Asylum System, with its first phase being nearly completed, reaching its critical mass. The time has now come to decide how best to further shape the second phase of this Asylum System, in addition to what Tampere already decided. The UK paper is therefore a very timely one, also as it links well to the global momentum created by the Agenda for Protection and the "Convention Plus" initiatives. Furthermore, the UK paper provides the right analysis of the deficiencies in the current international protection regime and asks the appropriate questions, helping to address the challenges the EU asylum system faces.

However, care needs to be taken to devise responses in a process which will have a major impact on various policy areas. New approaches to asylum systems should therefore respect a number of basic premises, one of them being the complementarity with the Common European Asylum System, called for at Tampere. Policy developments should build upon the first phase of that System and be integrated in the second phase, thus paving the way for a Tampere-II agenda.

The Commission suggests that as part of that agenda, as far as asylum policies are concerned, the strategic use and the introduction of Protected Entry Procedures and Resettlement Schemes should be considered. Furthermore, consideration should be given to the further development of legislative measures, refining asylum procedures so that they contribute to a better management of asylum systems, and preserving asylum for those who are entitled to it. Any new approach to the international protection regime should first and foremost not result in shifting, but in genuinely sharing the asylum burden. The Commission therefore suggests that further reflection is given to substantially assisting the regions of origin through various means in order to enhance their protection capacity, and to enable them to better cope with the great burden placed on them currently. Finally, the Commission recommends that the experience gained and the lessons learnt from past projects and current initiatives such as the Afghan Return Plan are used in informing and devising follow-up strategies.

In conclusion, the Commission asks the Council and European Council to endorse this Communication as the basis for contributing to more accessible, equitable and managed asylum systems, in view of the preparation of the Tampere-II agenda, the enlarged EU and the future Constitutional Treaty.

More specifically, the Commission requests the European Parliament, Council and the European Council to endorse the following elements, needed in the short to mid long term for achieving the policy objectives of: 1) managed arrival in the EU, 2) burden-and responsibility sharing within the EU as well as with regions of origin and 3) efficient and enforceable asylum decision- making and return procedures, as identified in this Communication:

(1) a legislative instrument on an EU resettlement scheme, including on the financial underpinning of such a scheme;

(2) a legislative instrument on Protected Entry Procedures;

(3) a legal basis building upon the preparatory actions financed out of Budget line (B7-667) 'Co-operation with Third Countries in the area of migration', which would specifically, and complementary to other existing programmes, support new approaches to asylum systems in third countries.

The Commission will work towards achieving the objectives identified in the Communication, in close co-operation with Member States, Acceding States and the European Parliament, in full partnership with countries of origin, transit and first asylum, and in close co-operation with UNHCR, and, other relevant stakeholders.

Footnotes:

(1) Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum (COM/2000/755 final)

(2) Communication from the Commission to the Council and the European parliament integrating migration issues in the European Union's relations with third countries (Brussels, 3.12.2002COM(2002) 703 final)

(3) Fortress Europe in Times of War"-Amnesty International commentary on UK proposals for external processing and responsibility sharing arrangements with third countries- London, 27 March 2003

(4) "Responding to the asylum and access challenge, an agenda for comprehensive engagement in protracted refugee situations"- ECRE and US Committee for Refugees- April 2003

(5) Communication on the common asylum policy and the Agenda for protection (Second Commission report on the implementation of Communication COM(2000)755 final of 22 November 2000) Brussels, 26.03.2003 COM(2003)152 final

(6) "The long-term objective of the Community should be to continue to address the root causes of migration, in partnership with third countries, in due recognition of the effect of long-term development programmes on migratory flows, in particular in poverty eradication, pro-poor economic growth, job creation, promotion of good governance, support for human rights, supporting population policy measures, institution and capacity building and conflict prevention. Development resources should continue to focus on the central objective of poverty reduction and the achievement of the Millennium Development Goals, based on national poverty reduction strategies, and, where available, Poverty Reduction Strategy Papers" (Point 2 of Council Conclusions on migration and development of 19 May 2003). In the same meeting the Council also concluded under point 3 that 'the integration of migration aspects in the external action of the Community should respect the overall coherence of EU external policies and actions. The EU's dialogue and actions with third countries in the field of migration should be part of a comprehensive approach. This approach should be differentiated, taking account of the situation in various regions and in each individual partner country, and should be consistent with the general objectives and the six priorities laid down in the November 2000 Joint Council/Commission Statement on the Community Development Policy'.

UNHCR'S POSITION

UNHCR Summary Observations on the European Commission Communication "Towards more accessible, equitable and managed asylum systems" (COM (2003) 315 final)

The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the Communication of the European Commission "Towards more accessible, equitable and managed asylum systems". It considers this document an important contribution to the present debate on how asylum processes can be better managed with a view to improving access to protection for those in need, reducing the impetus to secondary movements of asylum-seekers and refugees and limiting abuse of asylum systems.

UNHCR supports the basic premises of the approach taken in the Communication, notably that any future initiatives for improved asylum management must fully respect States' international legal obligations and build on ongoing efforts to establish a common EU asylum system.

In the Commission's policy objectives and approaches UNHCR recognises a number of its own proposals emanating from the Agenda for Protection, and introduced by the High Commissioner in his discussions with the informal Justice and Home Affairs Councils in Copenhagen and Veria. These aim at developing more efficient systems within the EU to protect refugees within broader migration movements and at addressing the need to find durable solutions for refugees in regions of origin.

UNHCR commends the Commission for its efforts to give priority to the issue of burden- and responsibility-sharing both within the EU and with regions of origin. UNHCR shares the Commission's views that enhancement of capacities to offer effective protection and durable solutions in regions of origin - through asylum capacity-building, local integration of refugees, repatriation and resettlement - requires increased and targeted use of technical assistance and development aid. The proposed common EU-wide resettlement scheme would not only support a more managed intake of refugees in the EU but also help to ensure that countries of first asylum are committed to extending and improving their capacities to offer protection to refugees. Access to solutions can also be enhanced through special agreements establishing comprehensive arrangements for specific situations, with the support of countries of origin, first asylum and final destination.

UNHCR will further develop a number of the elements included in the Commission Communication as part of its initiative on "Convention Plus", within the framework of the implementation of the Agenda for Protection. It expresses the hope that the European Union will take an active role in this initiative and that the Thessaloniki Summit will make a commitment to this effect.

4 June 2003

MIGRATION

European Commission Communication on a Community Immigration Policy COM (2000) 757 final of 22 November 2000

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON A COMMUNITY IMMIGRATION POLICY

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EXECUTIVE SUMMARY

The Treaty of Amsterdam establishes for the first time Community competence for immigration and asylum. The European Council, at its meeting in Tampere in October 1999, agreed that ÇThe separate but closely related issues of asylum and migration call for the development of a common EU policyÈ and set out the elements which it should include namely partnership with countries of origin, a common European asylum system, fair treatment of third country nationals and management of migration flows. In this framework, the European Council also stressed the need for rapid decisions on Çthe approximation of national legislations on the conditions for admission and residence of third country nationals based on a shared assessment of the economic and demographic developments within the Union as well as the situation in the countries of originÈ (paragraph 20 of the Presidency conclusions). It did not! , however, give any detailed indications as to how this polic! y should be developed and implemented.

The Commission has already made proposals on the rights and status of third country nationals and to combat racism and xenophobia, and other legislative measures are being prepared according to the programme agreed in Tampere (see overview in Annex 2). However, in view of the complex nature of immigration policy and its impact over a wide range of areas, social, economic, legal and cultural, the Commission believes that we cannot rely simply on a piecemeal approach to the legislative programme foreseen in Article 63 of the EC Treaty. This view has been supported by the European Parliament which has called on the Commission to set these measures into an overall framework.

In addition it is clear from an analysis of the economic and demographic context of the Union and of the countries of origin, that there is a growing recognition that the zero immigration policies of the past 30 years are no longer appropriate. On the on! e hand large numbers of third country nationals have entered the Union in recent years and these migratory pressures are continuing with an accompanying increase in illegal immigration, smuggling and trafficking. On the other hand, as a result of growing shortages of labour at both skilled and unskilled levels, a number of Member States have already begun to actively recruit third country nationals from outside the Union. In this situation a choice must be made between maintaining the view that the Union can continue to resist migratory pressures and accepting that immigration will continue and should be properly regulated, and working together to try to maximise its positive effects on the Union, for the migrants themselves and for the countries of origin.

In this new situation, the Commission believes that channels for legal immigration to the Union should now be made available for labour migrants. However, in view of the strongly divergent views in the Member States! on the admission and integration of third country nationals,! the Commission feels that it is essential to discuss these issues openly and to try to reach a consensus on the objectives of the policy to be followed. The purpose of this Communication is to stimulate this debate, taking into account the essential structural reforms the EU economy is undergoing in the framework of the European Employment Strategy and which are now showing the expected benefits. The admission of labour migrants can make a contribution to this strategy, but, because of the very important human issues involved, one on which there should be a clear understanding between the Member States on its role and contribution.

Both Article 63 of the EC Treaty and the Tampere conclusions call for a common EU immigration policy. To reach this goal it is essential to co-ordinate and to ensure the

transparency, within a Community framework, of actions which at the moment are carried out at Member State level since they have an effect on other areas of EU policy, e.g.! abolition of controls at internal borders, Community commitments at international level under the GATS agreement and the European Employment strategy.

This will provide a background for the formulation of commonly agreed objectives for channels of legal immigration which could underpin the detailed legislative proposals concerning migrants which the Council called for in Tampere. These concern not only the conditions for the admission and residence of third country nationals for employment and other reasons, but also standards and procedures for the issue of long-term visas and residence permits, the definition of a set of uniform rights for third country nationals and the criteria and conditions under which third country nationals might be allowed to settle and work in any Member State (see Annex 2) together with the Charter of Fundamental Rights. At the same time, the procedure put in place for the monitoring of migration flows will provide a framework for consult! ation between the Member States on migration issues, for the ! co-ordination of policy, for setting common objectives and for developing accompanying measures with respect to the integration of migrants. This mechanism is designed to enable the Community to provide a co-ordinated reaction both to fluctuations in migratory pressures and to changes in the economic and demographic situation in the Union.

1. WHY A NEW APPROACH TO IMMIGRATION-

With the coming into force of the Treaty of Amsterdam, Community competence was firmly established in the areas of immigration and asylum. From being a matter for inter-governmental co-ordination under the "third pillar" arrangements, responsibility for developing policy was moved to the "1st pillar" with a programme of action to be adopted by the Council in order to establish progressively an area of freedom, security and justice (Articles 61-63). Accordingly, in October 1999, the elements of a common EU asylum and immigration policy were agreed by the European Counci! l in the Tampere Conclusions [1] which, together with the Action Plan which had been approved by the Council in Vienna in 1998 [2], now form the basis of a work programme for the Commission and the Member States that is being made operational in a ÇscoreboardÈ [3]. The present Communication is being issued as part of this programme but in a context which, in a number of respects, is very different from the situation of the Union in 1993-94. On the one hand there is now a more acute recognition than a few years ago of the importance of immigration and asylum matters at the EU level as well as of the necessity for a common approach to them. This is emphasised by the fact that these areas are now the subjects of specific Community policies and no longer simply complementary to those related to the free movement of persons within the Union. On the other hand - and this is a direct consequence - by adopting the conclusions of Tampere, the Heads of State and Government, have def! ined clearly the political framework in which they wish to se! e a common EU asylum and immigration policy developed.

Security and Justice" in the European Union)

This new Commission Communication fits firmly within this framework. It constitutes above all a first response to the specific request of the European Council for a clear definition of the conditions of admission and of residence of third country nationals. This, it was agreed,

should be based on a common assessment of the economic and demographic development of the Union and of the situation in the countries of origin, and take account of the capacity of reception of each Member State as well as of their historical and cultural links with the countries of origin [4]. In addition, it is not possible to develop an integrated appro! ach to immigration without considering the impact of migration policies on the host society and on migrants themselves. The social conditions which migrants face, the attitudes of the host population and the presentation by political leaders of the benefits of diversity and of pluralistic societies are all vital to the success of immigration policies. Therefore, and the two aspects are intrinsically linked, this Communication will also touch on integration policy in the context set out in Tampere, namely fair treatment of third country nationals residing legally in the Union and the promotion of diversity. In this context the impact of the Charter of Fundamental Rights will also be reviewed.

Finally, this Communication comes at a time wh! en the question of the role of the EU with respect to immigration is of particular pertinence for a number of reasons. The projected decline in population in the EU over the next few decades has caught the attention of public opinion. At the same time labour shortages in some sectors are creating difficulties in a number of countries. There is a growing recognition that, in this new economic and demographic context, the existing "zero" immigration policies which have dominated thinking over the past 30 years are no longer appropriate.

Programmes to regularise the position of illegal migrants, which often give rise to difficult internal political debates, are developing in a number of Member States. Tragic incidents, such as the one in Dover in July 2000 in which 58 Chinese nationals trying to enter illegally into the United Kingdom lost their lives, which are taking place in almost all Member States, point not only to the importance of the fight against the t! rafficking of human beings, but also to the existence of a de! mand for clandestine manpower and of the exploitation of such undocumented migrants. The Commission has also taken account of the debates initiated under the French Presidency, notably the discussions at the informal ministerial meeting in Marseilles in July 2000 and at three conferences - on Co-development and Migrants (6-7 July); on Illegal Migration Networks (20-21 July); and on the Integration of Immigrants (5-6 October 2000).

In the light of these changing circumstances and bearing in mind the emergence of different political points of view and of the divergent reactions and growing concerns of the public which have been expressed in all Member States in recent months, the Commission believes that it is timely to contribute to this debate and to take a fresh look at how immigration policy should be developed within the Tampere mandate. In particular the Commission proposes to examine how the complex issues related to the admission of economic migrant! s, which were only touched on briefly in the Tampere Council, should be developed within a Community immigration policy. This will provide a background for the formulation of commonly agreed objectives for channels of legal immigration which would underpin the detailed proposals for the admission and residence of third country nationals which the Council called for in Tampere. Furthermore, it will be of equal importance to develop adequate policies aiming at promoting the integration of migrants, including those already living in the EU, and supporting the fight against the phenomena of racism and xenophobia.

2. THE TAMPERE FRAMEWORK FOR A COMMON EU ASYLUM AND IMMIGRATION POLICY

The European Council in Tampere agreed on a number of milestones to realise an area of freedom, security and justice. One of these was the development of a common EU asylum and immigration policy and progress with its implementation is set out below.

2.1. Partnership with countries of origi! n

The Member States at the Tampere Council acknowledged th! e principle that an EU asylum and immigration policy must necessarily involve co-operation with the countries of origin and transit of migrants. The Council recognised that developing a comprehensive approach to immigration also involves addressing political, and human rights issues in partnership with these countries. With such programmes as TACIS and PHARE, the Commission has developed strategies which address not only the need to reduce push factors, primarily through economic development in countries of origin and transit, but also support such activities as legislative reform, law enforcement capabilities and modern border management systems. A new integrated approach has also begun through the work of the High Level Group on Asylum and Migration. Six action plans, each based on a coherent programme of co-operation and development involving dialogue with the countries concerned, have been drawn up for specific countries or regions and it is expected that financial re! sources will be made available in the near future for community action to contribute to the implementation of the plans.

In future, while developing measures to understand and try to influence the reasons which cause migration, the EU must, therefore, also examine and take a responsible attitude towards the effects of emigration on the countries of origin taking into account the very different economic, demographic, social, political and human rights situations in each one which cause the migratory flows. Not only does this reflect European values but is also in the interests both of the EU and of the countries themselves.

In most cases the situation is complex and there are both positive and negative impacts of migration. During the initial period of settlement in the host country remittances sent home by migrants can become an important part of the national budget. Transfers on a large scale can be a disincentive for the sending country to cooperate in controlling ! emigration. For the receiving families remittances can bring! significant improvements in standards of living and contribute to the development of the local economy although there is some evidence to suggest that it is the larger towns which benefit most perhaps to the detriment of other areas. On the negative side there can be less favourable impacts on the local economy when it is the most highly skilled and the most entrepreneurial sections of the population who emigrate. The brain drain is of particular concern for developing countries who can least afford to lose the investments which they have made in education and training particularly of those who benefited from tertiary education. The scale of this problem is increasing for a number of countries, notably in Africa and in India, and is likely to grow as shortages in Europe and other parts of the developed world in certain highly skilled sectors, together with important wage differentials, continue to attract qualified people from the developing world to emigrate.
With tod! ay's increasingly mixed flows of migrants caused by economic and other reasons and with populations straddling two cultures as part of survival strategies it is possible to develop policies which use migration to the mutual benefit of the country of origin and the receiving country. In this way the effects of the brain drain can be mitigated and the benefits

of remittances can be maximised. Since the issues of immigration and asylum have become matters of Community competence they will, where possible, be incorporated more specifically into Community programmes with third-countries, both in the area of trade and of development. This is particularly true for the TACIS, PHARE and MEDA programmes and migration issues must increasingly form part of the dialogue which takes place within the framework of the Partnership and Co-operation Agreements, the Common Strategies of the EU on Russia, the Ukraine and the Mediterranean region and the discussions with the African, Cari! bbean and Pacific (ACP) countries.

The partnership ap! proach should provide a framework for dealing flexibly with new trends in migration which are now developing in the world, with the concept of migration as a pattern of mobility which encourages migrants to maintain and develop their links with their countries of origin. This includes ensuring that the legal framework does not cut migrants off from their country of origin e.g. that they have possibilities to visit without losing their status in their host country, and of moving on or going back as the situation develops in the country of origin and elsewhere in the world.

Such a concept would encourage migrants to participate in the economic development of their country of origin not only through remittances to family members, but also through supporting development projects, business ventures etc. Such action can lead in some cases to their voluntary return within a supported reintegration framework. The fact that at present in many Member States, visa policies and ot! her legislation, restrict the possibility for migrants to move freely between their country of residence and their country of origin even when retired, creates a barrier to such developments. Co-operation between countries of origin and residence of migrants must be based on dialogue with governments and with the migrants themselves and their associations to ensure that migratory movements are taken into account in developmental, economic and social strategies of the countries concerned (e.g. by promoting more efficient public and financial institutions, training and manpower skilling programmes as well as the inflow of foreign capital to projects (including those carried out by emigrants in their countries of origin)). In this way it can help to mitigate the effects of the brain drain and the loss of the most entrepreneurial members of society and contribute to the sustainable development of the country of origin which in the long term could reduce the incentive ! to emigrate.
It should be recognised, however, that the pa! rtnership approach to managing migrant flows should be seen as part of a medium to long-term strategy and that the impact will vary depending on the situation in the countries of origin.

2.2. A common European asylum system

The Tampere Council reiterated that the right to seek asylum must continue to be guaranteed as the cornerstone of EU policy. The objective of a common European asylum system must be to ensure the full application of the Geneva Convention on refugees and that nobody is sent back to persecution. The Treaty of Amsterdam requires the enactment of common measures.

The Commission tabled in May 2000 a proposal on temporary protection in case of mass influx of displaced persons and in September 2000 put forward a proposal on procedures in Member States for granting and withdrawing refugee status. Early in 2001, proposals will be made on reception conditions for asylum seekers and on a system for the clear and workable determination of the State responsi! ble for the examination of an asylum application. The preparation for the setting up of the EURODAC system is on going. Further proposals will be

made on the approximation of rules on the recognition and content of refugee status and also on subsidiary forms of protection offering an appropriate status to any person in need of such protection. In addition, the Council adopted in September 2000 the Commission's proposal for the establishment of a European Refugee Fund to promote a balance of effort between Member States in receiving refugees and displaced persons.

At the request of the Tampere Council, further proposals for the development of Community rules leading to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union are being made in a separate Communication which is being presented jointly with this one and which aims at providing a clear picture of the method and content of the measures to be taken from 20! 04 under the humanitarian heading [6].

2.3. Fair treatment of third country nationals

A key element of the development of the European Union as an area of freedom, security and justice agreed in Tampere is ensuring fair treatment of third country nationals residing legally on the territories of the Member States through an integration policy aimed at granting them rights and obligations comparable to those of EU citizens.
With respect to the setting up a legislative framework for the integration of those already resident on the territory of the Member States, the Commission has already proposed the extension of Community co-ordination of social security schemes, as laid down in Regulation (EEC)No. 1408/71 to employed persons and self-employed persons who are insured in a Member State and who are third country nationals [7]. The Commission has also put forward a proposal! to modify regulation 1612/68 aimed at enhancing the legal status of third country national family members of EU workers. [8] These proposals are still, however, under consideration in the Council.

In line with the Tampere mandate, further proposals concerning the status of third country nationals who are long-term residents will be made. These will include the rights to be granted, the conditions under which the status may be lost, protection against expulsion and the right to reside in another Member State. The right of abode in another Member State for long-term residents could be an important factor of mobility within the labour market of the Union. In this connection the Commission has already presented two proposals concerning the rights of third country workers and independent operators already legally established in a Member State to provide services in other Member States.

The Commission submitted in November 1999 a package of proposals to! combat discrimination. On 29 June 2000 the Council adopted the first of the package's three elements, the proposal for a Directive combating discrimination on grounds of racial or ethnic origin, which will apply in the fields of employment, training, social protection (including health and social security), education and the supply of goods and services, including housing. [9]

Political agreement on the second element, the Commission's proposal for an anti-discrimination action programme, was reached in the Council on 17 October 2000. The programme is to run for six years from 1 January 2001, and will have a budget of almost MEUR 100 for activities combating discrimination on the grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation. The activities are to be focused on

(i) analysing discrimination in the Member States and evaluating methods of combating it,

(ii strengthening the capacity of organisations combating discrimination via transnational exchanges and the core-funding of NGOs, and
(iii) promoting awareness of discrimination and the measures to combat it in the EU.

The Council also reached agreement on the third part of the anti-discrimination package, the Commission's proposal for a framework directive on discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. [10]

The Amsterdam Treaty, in its provisions on police and judicial co-operation in criminal matters, expressly states that the Union will take steps to prevent and combat racism and xenophobia as one of the prime objectives of its efforts to create an area of freedom, security and justice. In 1996 the Council adopted a Joint Action to facilitate effective judicial co-operation between the Member States to prevent perpetrators of racism and xenophobia from taking adva! ntage of differences in legislation within the Union in order! to escape justice. In the light of an evaluation of the Joint Action to be submitted at the end of 2000, the Commission will present a framework decision under Article 29 of the Treaty to enhance judicial co-operation in the fight against racism. This initiative will cover, among other things, the spread of this type of crime on the Internet.

In the area of conditions of admission and residence, the first initiative of the Commission since the entry into force of the Treaty of Amsterdam has been a draft Directive on the right to family reunification. [11] This is justified for several reasons: firstly, family reunification is not simply regulated by national laws since many international and regional instruments lay down rules or principles on this issue; secondly, family reunification has been one of the main vectors of immigration over the last twenty years; thirdly, it is an essential element in the integration of persons already admitted and finally, this subject ! has been a priority for the Council since 1991. This reflects the Commission's view that successful integration of third country nationals to maintain economic and social cohesion is one of the major challenges which the EU faces with respect to immigration policy. The establishment of stable family communities ensures that migrants are able to contribute fully to their new societies.

The proposal establishes a conditional right to family reunification on the part of third country nationals. It would allow third country nationals meeting certain criteria to be reunited with the members of their nuclear family, or even, in strictly defined cases, with other members of their wider family. The proposal also defines a number of rights which should be granted to family members. After receiving the opinion of the European Parliament, the Commission has adopted an amended proposal which is curren! tly under consideration in the Council.
Finally, the propo! sed Charter of Fundamental Rights which should be adopted in December 2000, sets out a number of principles which, because of the universality of certain rights, will apply to third country nationals. This will be particularly important with respect to a number of social rights such as protection against unjustified dismissal and the application of national and Community laws concerning working conditions. The Charter also includes the possibility, on the conditions set out in the Amsterdam Treaty, of free movement and stay for third country nationals legally resident in a Member State.

2.4. Management of migration flows

The European Council at Tampere stressed the need to take a comprehensive approach to the management or regulation of migrant flows including political, human rights and development issues and to involve the countries of origin and of transit.

The Council stressed that regulating migration flows includes intensive dialogue between reception countr! ies, transit countries, countries of origin and migrants themselves. A key element should be information campaigns by which potential migrants can be informed about legal possibilities for migration and what they may expect in the destination country and of the dangers of illegal migration and trafficking. The Council requested that steps to develop a common visa policy for the EU be intensified, combined with measures against forgery and the fraudulent use of travel documents.

Efficient management of migration flows requires monitoring and must be accompanied by measures to regulate movements. This requires action at all phases of movement of persons, in order both to safeguard legal channels for admission of migrants and for those who seek protection on humanitarian grounds while at the same time combating illegal immigration. A coherent and co-ordinated approach to illegal immigration will be an essential part of a more open immigration policy at the European level! . The phenomenon of illegal immigration consists of a number! of interlinked phases and each has to be tackled systematically with specific measures. These include action in source and transit countries, police co-operation to pool knowledge of trafficking operations which by their nature are international, action at the point of entry including border controls and visa policies, legislation against traffickers, help for victims and their humane repatriation.

One element in the regulatory process to which greater priority must be given is the voluntary return of persons who are refused admission to a Member State or who have no longer the right to remain in the EU. In cases when calls for voluntary return have no effect, the integrity of the European immigration policy has to be guaranteed in the end by forced return. The most valuable instrument to facilitate returns is by means of readmission agreements. In addition the Commission will be bringing forward proposals for the development of common standards for expulsion decision! s, detention and deportation, which should be both efficient and humane.

3. TOWARDS A COMMUNITY IMMIGRATION POLICY

3.1. Impact of existing immigration policies

Immigration to the EU falls into three broad categories, namely that based on humanitarian considerations, family reunion and then immigration which can be generally described as driven by economic and market forces.

Under the humanitarian heading, all Member States are signatories to the 1951 Geneva Convention relating to the status of refugees and adhere to its principles. The Convention provides for access to work as a direct individual right stemming from the status of refugee and cannot be made dependent on an economic needs test. A programme for the co-ordination of the EU approach to humanitarian immigration was agreed at the Tampere Council and this will be pursued as outlined in the Scoreboard (see section 2.2.2 above).
With respect to family reunion, all Member States allow, though usin! g a variety of different criteria, family members to join mig! rants already legally resident on their territory. A Directive to co-ordinate national legislation in this area is now under discussion in the Council (see

section 2.2.3 above).

This Communication concerns primarily the third category; economic migration which has been said to be close to zero since the 1970's and which, given the economic opportunities now available in the EU, no longer seems appropriate. Many economic migrants have been driven either to seek entry through asylum procedures or to enter illegally. This allows for no adequate response to labour market needs and plays into the hands of well organised traffickers and unscrupulous employers. In addition, there is substantial illegal immigration into the EU which Europol estimates at 500.000 people per annum, many of these being employed as undeclared workers. Given such numbers and the practical difficulties of returning people to the countries from which they came, several Member States have r! esorted to regularisation or amnesty measures and the total number of those permitted to stay legally as a result is estimated at approximately 1,8 million since the 1970's [12].

While procedures are already in place at EU level to co-ordinate policies in a number of areas to facilitate the operation of the Single Market, notably the free movement of goods, capital, services and EU workers and other citizens, sufficient attention has not yet been given to the role of third country nationals in the EU labour market nor to the need for accompanying measures in support of the integration of existing and prospective migrants.

3.2. Developing a new approach to immigration

The analysis of the current si! tuation with respect to migration flows in the EU suggests th! at a different, more flexible approach common to all Member States on the issue of legal immigration now needs to be taken. Such a proactive immigration policy should be based on the recognition that migratory pressures will continue and that there are benefits that orderly immigration can bring to the EU, to the migrants themselves and to their countries of origin. The opening up of channels for immigration for economic purposes to meet urgent needs for both skilled and unskilled workers has already begun in a number of Member States. Given the present economic and labour market situation the Commission believes that it is now time to review longer term needs for the EU as a whole, to estimate how far these can be met from existing resources and to define a medium-term policy for the admission of third country nationals to fill those gaps which are identified in a gradual and controlled way.

Many of the elements of such a policy were already put forward in the 1994 Co! mmunication on Immigration and Asylum Policies but the approach now should also take into account the changing nature of migration itself which has become a much more flexible process of movement between countries rather than simply a one-way flow. Globally, migratory movements change direction, rise and fall depending on the evolution of the economic and demographic situations both in receiving and sending countries. In order to regulate migrant flows successfully, therefore, and to reduce illegal immigration, the EU needs to adopt a co-ordinated approach which takes into account all the various interlinked aspects of the migratory system and to work in close partnership with the countries of origin and transit.

The benefits of a more open and transparent policy on migration movements, together with the co-ordination of policies designed to reduce push factors in countries of origin and greater efforts to enforce labour legislation in the Member States, could also help! to reduce illegal immigration, in particular the worst forms! of smuggling and trafficking. Member States will be in a better position to address the problem of irregular migration if they are equipped with a broad range of migration management policies going beyond measures to curb the perceived or real misuse of their asylum systems. Opening up legal admission policies for labour

migration will not completely prevent this, however, and they should be accompanied by both appropriate anti-smuggling measures and effective asylum adjudication systems which are capable of identifying refugees expeditiously and accurately thereby balancing refugee protection with immigration control.

It should be stressed that such strategies do not constitute the adoption of a policy of replacement migration as proposed in the UN report on Replacement Migration as a possible scenario to counteract demographic decline. [13] Rather they make up a controlled approach which is based on a common assessment of the economic and demographic development of the Union, and of the situation in the countries of origin, and takes account of its capacity of reception.

Bringing the issue of labour migration into the discussion on the development of economic and social policy for the EU, would also provide an opportunity to reinforce policies to combat irregular work and the economic exploitation of migrants which are at present fuelling unfair competition in the Union. A corollary of an economic immigration policy must be a greater effort in ensuring compliance with existing labour legislation by employers for third country nationals. Equality with respect to wages and working conditions is not only in the interests of the migrants, but of society itself which then both benefits fully from the contribution mig! rants make to economic and social life.

Given the differen! ces between Member States with respect to links to countries of origin, the capacity of reception, the development of integration policies and labour market needs the Commission proposes that the best way to achieve a regulated immigration policy is to establish an overall framework at EU level, with common standards and procedures and a mechanism for setting objectives and indicative targets, within which Member States would develop and implement national policies.

3.3. Framework for an EU immigration policy

Any EU immigration policy needs to take into account migration of all types - humanitarian, family reunion and economic - and to deal with the impact on the sending and receiving countries as a whole. It will need to respond to the difficult political debates taking place in some countries and will require strong political leadership to help shape public opinion. In dealing with all types of migration, it should present an integrated approach, taking account of th! e benefits of diversity in society, the need for a balanced framework of rights and obligations for third country nationals resident in the Union, the importance of developing support for integration and the effects on the labour market. The policy should be developed under a new framework for co-operation at Community level, which would be based on co-operation, exchange of information, and reporting and would be co-ordinated by the Commission.

Admission to the EU for humanitarian reasons would continue in full recognition of Member States international obligations to provide protection for refugees, asylum seekers and those in need of temporary protection. The programme to develop a common European asylum system as set out in Section 2.2. above will be pursued. While many people admitted to the EU for humanitarian reasons do return to their countries of origin when the situation there changes, the discussion on the number of economic migrants needed in different secto! rs should take into account the numbers of persons under inte! rnational protection, since better use of their skills could also be made, and of family members admitted to the EU who will also be entering the labour market.

Admission for economic migrants should clearly address the needs of the market place particularly for the very highly skilled, or for lesser or unskilled workers or for seasonal labour. Admission policies for economic migrants must enable the EU to respond quickly and efficiently to labour market requirements at national, regional and local level, recognising the complex and rapidly changing nature of these requirements and consequently of the need for greater mobility between Member States for incoming migrants. Such policies must also respect relevant provisions of existing Community law and bilateral and multilateral agreements already in force between the Community, or the Community and its Member States, on the one hand, and third countries on the other hand. [14]

The underlying principle of an EU immigration policy must be for different purposes,.that persons admitted should enjoy broadly the same rights and responsibilities as EU nationals but that these may be incremental and related to the length of stay provided for in their entry conditions. [15] The Commission has already tabled proposals on rights to service provision within the EU for third country nationals legally established in a Member State. [16] The measures under article 13 of the Treaty of Amsterdam to counteract racism and xenophobia must be vigorously pursue! d and action to integrate migrants into our societies must th! erefore be seen as the essential corollary of the admission policy. At the same time the fight against illegal immigration should be intensified with priority to combating trafficking and smuggling.

Finally the policy must be developed and implemented in partnership with countries of origin and transit.

3.4. Admission of migrants

3.4.1. Assessing appropriate immigration levels

Given the difficulties of assessing economic needs it would not be the intention to set detailed European targets. The responsibility for deciding on the needs for different categories of migrant labour must remain with the Member States. ! However, a new process would be established based on co-operation, exchange of information, and reporting.

Under such a scenario, Member States could be asked to prepare periodic reports in two parts. The first would review the development and overall impact of their immigration policy over the previous period, including the numbers of third country nationals admitted under the various categories and their situation in the labour market. The second would set out the Member States' future intentions on immigration, including a projection of labour migrants they would wish to admit with an indication of skills levels. The need for a flexible approach to changing economic needs would suggest that quotas are impracticable and that an appropriate system of indicative targets would be preferable. This would be closely related to labour market needs but would also take into consideration agreements in place with countries of origin and a range of other factors (e.g. publ! ic acceptance of additional migrant workers in the country co! ncerned, resources available for reception and integration, the possibilities for social and cultural adaptation etc).

In compiling these reports Member States would need to consult widely and to work closely with the social partners and also with regional and local authorities and all the other actors concerned with the integration of migrants. The reports would follow a commonly agreed structure so as to enable the Commission to prepare a synthesis which would be presented

to the Council. Following discussion, the Council would then lay down the principles of the common approach to be implemented in the next period. In this process, the Commission and the Council should take account of the progress made in the implementation of the European Employment Strategy and its impact on labour-market conditions in the Union. The Commission would ensure the monitoring and evaluation of the policy, including its impact on countries of origin, on a regular basis.

3.4.2. Defining a common legal framework for admission

As already announced in the Scoreboard, the Commission will be adopting early next year proposals for Directives dealing with the conditions of entry and residence to the EU of third country nationals for the exercise of employment, self-employment or unpaid activities and for study or vocational training. The Commission has already funded comparative studies on the conditions of admission and residence of third country nationals which provide an overall view of the legislation and practice of the Member States.
In presenting its proposals, the Commission intends to establish a coherent legal framework which will take into account concepts which have already been successfully applied in the Member States. The framework would determine the basic conditions and procedures to be applied whilst leaving it up to each Member State to adopt national measures on the admission of third country nationals based on the criteria set o! ut in the Directives. Preliminary consultation with the Memb! er States, the social partners, and non-governmental organisations will precede the adoption of the proposals by the Commission. This framework approach would be based on the following principles:

Transparency and rationality: laying down clearly the conditions under which third country nationals may enter and stay in the EU as employed or self-employed workers, setting out their rights and obligations and ensuring that they have access to this information and that there are mechanisms in place to see that it is applied fairly. This could imply, amongst others, provisions to facilitate the swift adoption of decisions on individual applications for admission both in the interest of the applicant and of the enterprise seeking to recruit, on the basis of objective and verifiable criteria. A general provision on access to information would greatly enhance transparency.

Differentiating rights according to length of stay - The principle that the length of residence has an ! influence on the rights of the person concerned has a long tradition in the Member States and this is referred to in the Tampere conclusions. In addition, responding to labour market needs means that admission must be facilitated for a wide range of workers, both skilled and un-skilled, and ensure a rapid and flexible response. The case of students could be considered separately with special arrangements for third country nationals who have studied for several years in the EU, to provide for easier access to the EU labour market. However, it is clear that a hard-core of rights should be available to migrants on their arrival, in order to promote their successful integration into society. The Community should explore how this core of rights might be extended with the length of stay with a view to coming to broadly comparable arrangements across the Union.

EU legislation should therefore provide for a flexible overall scheme based on a limited number of statuses designed! so as to facilitate rather than create barriers to the admis! sion of economic migrants. The aim should be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet certain criteria. One option would be to start with a temporary work permit- with special

arrangements for certain types of workers e.g. seasonal workers, transfrontier workers, intra-corporate transferees. This permit could be renewable and would then be followed by a permanent work permit, after a number of years to be determined, with the possibility of long-term residence status after a certain period. Agreement would be needed on the rights and obligations to be provided for at each stage, based on the principle of equal treatment with nationals, and these should be cumulative leading to those of long term residents. Based on a "best practice" approach the details of the scheme would be w! orked out in close consultation with Member States who would be responsible for implementing national admissions policies within the general framework.

Application and assessment procedures - Application procedures should be clear and simple. Initiating them in the country of origin in co-operation with governments, international bodies, NGOs, regional and local authorities could improve the effectiveness of monitoring procedures, the transparency of the procedures and the information available for potential migrants while at the same time respecting the employer's right to choose. However it is recognised that many potential labour migrants will present themselves for employment having already been admitted to a Member State for another reason and the provision of a job-seeker visa could help to regulate and monitor this practice.
To facilitate the availability of information more extensive use of new communications technology could be used to provide informati! on on job opportunities, conditions of work etc. A European ! information point (e.g. a website) could be created and maintained which contains a complete set of information relating to the admission of third country nationals to each Member State and giving contact details of national authorities competent to receive applications for permits in accordance with the Directives. The establishment of a special visa for job seekers from third countries could also be considered.

In order to allow European industry, particularly small and medium sized industries, to recruit - in cases of real need - successfully and quickly from third countries, employers need a practical tool for demonstrating that there is a concrete shortage on the EU labour market. One way of tackling this problem would be to foresee that the "economic needs test" is deemed to be fulfilled if a specific job vacancy has been made public via the employment services of several Member States for a certain period (e.g. by means of the European Employment S! ervices (EURES) network) and no suitable candidate from EU applicants (or certain persons privileged under international agreements [17]) has been received.

3.5. Integration of third country nationals

The importance of the fair treatment of third country nationals was underlined by the European Council in Tampere and an EU immigration policy must, therefore, incorporate steps to ensure that migrants benefit from comparable living and working conditions to those of nationals. Failure to provide the resources necessary to ensure the successful integration of such migrants and their families will in the longer term exacerbate social problems which may lead to exclusion and related problems such as delinquency and criminality. While many legally resident migrants have integrated successfully and make an! important contribution to the economic and social developmen! t of their host countries, social exclusion affects migrants disproportionately and they are often the victims of racism and xenophobia. The legal framework and other actions being proposed by the Commission to fight discrimination and xenophobia will need to be complemented by specific integration programmes at national, regional and local level. In its proposals for 2001, the Commission in its new employment guideline 7 already invites Member States to meet the needs of disadvantaged groups, including migrant workers already resident in the Union, as regards their integration

into the labour market and to set national targets for this purpose in accordance with the national situation [18].

However, it is also essential to create a welcoming society and to recognise that integration is a two-way process involving adaptation on the part of both t! he immigrant and of the host society. The European Union is by its very nature a pluralistic society enriched by a variety of cultural and social traditions, which will in the future become even more diverse. There must, therefore be respect for cultural and social differences but also of our fundamental shared principles and values: respect for human rights and human dignity, appreciation of the value of pluralism and the recognition that membership of society is based on a series of rights but brings with it a number of responsibilities for all of its members be they nationals or migrants. The provision of equality with respect to conditions of work and access to services, together with the granting of civic and political rights to longer-term migrant residents brings with it such responsibilities and promotes integration. By co-ordinating their efforts to ensure that employers respect the provisions of labour law in the case of third country nationals, Member States w! ould greatly contribute to the integration process, which wil! l be particularly important in attracting migrants to highly skilled jobs for which there is world-wide competition. In this connection the Commission has already tabled proposals concerning the rights of third country national workers and independent operators legally established in one Member State to the free provision of services within the EU.

The Charter of Fundamental Rights could provide a reference for the development of the concept of civic citizenship in a particular Member State (comprising a common set of core rights and obligations) for third country nationals. Enabling migrants to acquire such a citizenship after a minimum period of years might be a sufficient guarantee for many migrants to settle successfully into society or be a first step in the process of acquiring the nationality of the Member State concerned.

Successful integration policies need to start as soon as possible after admission and rely heavily on partnership between the migrants! and the host society. Political leaders need to create the environment necessary for the acceptance of diversity within which integration policies must be anchored. In order to promote integration, settlement packages could be developed for all new migrants tailored to their individual needs (these could include language training, information on political and social structures, accessing services etc with special attention to the needs of migrant women and children). It must be recognised, however, that integration is a long-term process and special attention needs to be paid to second generation migrants, including those born in the EU, to ensure that problems do not lead to social exclusion and criminality. In this context, women and the family should be an important focus of integration policies.

While integration is primarily the role of Member States, governments should share this responsibility with civil society notably at the local level where integration! measures must be implemented. The key to success is the est! ablishment of micro-level actions based on partnerships between all the many actors who need to be involved: regional and local authorities and their political leaders, especially those of the larger towns where many migrants settle, providers of education, healthcare, social welfare, the police, the media, the social partners, non-governmental organisations and migrants themselves and their associations. Each has a part to play in the design and implementation of integration programmes, which will need to be properly resourced.

Such a horizontal approach requires co-ordination at national and local level and the EU could contribute by developing a pedagogical strategy, promoting the exchange of information and

good practice, especially at local level and the development of guidelines or common standards for integration measures. A Community Action Programme to promote the integration of third country nationals could be developed aimed at improving the understanding of ! the issues concerned through evaluation of practices, developing benchmarks and other indicators, promoting dialogue between the actors concerned and supporting European networks and the promotion of awareness raising activities.

3.6. Information, research and monitoring

More information is needed about migration flows and patterns of migration into and out of the EU, including illegal immigration, the role of migrants in the labour market and the overall impact of migration (including its social, cultural and political aspects) on the EU and on the countries of origin and transit. The EU immigration policy itself must be closely monitored and evaluated. Efforts to improve the comparability of migration statistics and to support comparative research on migration should be continued. As suggested already by the European Parliament consideration should be given to reinforcing the work of existing research and data networks and by providing a European focus. Such! a European network could co-ordinate current activities in d! ifferent Member States and promote new research both in the EU and in the countries of origin.

The Commission is aware of the need to improve the collection and analysis of statistics on migration and asylum and will participate actively in the on-going debate as to how this can best be done. In this context consideration will be given to the establishment of a legal basis for the collection and analysis of statistical data in these fields.

4. CONCLUSIONS AND FOLLOW UP

Implementing the Tampere mandate implies making an assessment of present and future migration flows to the EU within the context of developing a common policy on asylum and immigration taking into account demographic changes, the situation of the labour market and migration pressures from countries and regions of origin of migrants.

In the light of demographic decline which will become increasingly important in the EU over the next 25 years and of the current strong economic prospects and growing s! kills shortages in the labour market, it advocates the development of a common policy for the controlled admission of economic migrants to the EU as part of an overall immigration and asylum policy for the Union. Without prejudice to the pursuit of structural reforms through the European Employment Strategy, and within the context of a policy strategy aiming at higher growth, higher employment and a more cohesive society, the Commission believes that, while immigration will never be a solution in itself to the problems of the labour market, migrants can make a positive contribution to make to the labour market, to economic growth and to the sustainability of social protection systems. It must be borne in mind, however, that immigration is a multi-dimensional phenomena which has legal, social and cultural as well as economic impacts. Developing a common policy therefore implies defining an appropriate policy mix. The Communication sets out a framework within which such a ! common policy might be regulated and managed.

Within this ! framework the Commission proposes a procedure for co-ordination at Community level, based on an assessment by the Member States, in consultation with the social partners and those involved in the integration of migrants, with the provision of periodic reports from which an overall policy for the EU for the admission of new migrants would be agreed by the Council. This open approach is justified by the fact that effective migration management must be based on partnership since a horizontal approach to the various elements is essential.

Such a policy must be accompanied by long-term, comprehensive integration programmes developed through partnerships involving national, regional and local authorities and civil society in order to maximise the positive effects in terms of employment, economic performance and social cohesion within a clear framework of rights and obligations. In this context concerted use of available Community policy instruments should be made (e.g. the an! ti-discrimination and social inclusion measures introduced under Articles 13 and 137 of the Amsterdam Treaty, the employment strategy, the European Social Fund and other Community initiatives such as EQUAL and URBAN). In order to support this policy, the Commission should play a role in encouraging action at local and national level and the exchange of good practice.

A shift to a proactive immigration policy will require strong political leadership and a clear commitment to the promotion of pluralistic societies and a condemnation of racism and xenophobia. It will be necessary to emphasise the benefits of immigration and of cultural diversity and, in commenting on issues related to immigration and asylum, avoid language which could incite racism or aggravate tensions between communities. They will need to demonstrate support for measures to promote the integration of newly arrived migrants and their families, and promote the recognition and acceptance of cultural ! differences within a clear framework of rights and obligation! s. The media also has considerable responsibility in this respect in its role as an educator of public opinion.

The Commission proposes that a common legal framework for admission of third country nationals should be developed, in consultation with the Member States, which would be based on the principles of transparency, rationality and flexibility. The legal status granted to third country nationals would be based on the principle of providing sets of rights and responsibilities on a basis of equality with those of nationals but differentiated according to the length of stay while providing for progression to permanent status. In the longer term this could extend to offering a form of civic citizenship, based on the EC Treaty and inspired by the Charter of Fundamental Rights, consisting of a set of rights and duties offered to third country nationals.

Partnership with countries of origin and transit is considered crucial to ensure the regulation of migration flows.! The development of differentiated co-operation policies with the various types of countries of origin (e.g. applicant countries, countries parties to regional programmes funded by the Community, other countries) will be necessary. In the longer term, such partnerships should also help to mitigate the effects of emigration by co-ordinated efforts to promote development in the countries concerned, particularly by mobilising migrants themselves in this process. They would provide support for the new patterns of mobility which are developing and facilitate migrants' contacts with their countries of origin as well as their participation in the development of these countries.

This more open and transparent immigration policy would be accompanied by a strengthening of efforts to combat illegal immigration and especially smuggling and trafficking, not only through increased co-operation and strengthening of border controls but also by

ensuring the application of labo! ur legislation with respect to third country nationals.

Gi! ven the complex nature of the issues involved and the need to ensure the participation of a wide range of actors in the implementation of such a policy, the Commission proposes to forward this Communication to the European Parliament, the Committee of the Regions and the Economic and Social Committee for their opinion and to distribute it widely for debate to national and regional authorities, the social partners, the economic and industrial world, and international and non-governmental organisations concerned with migration and migrant associations.

It is proposed that the results of this debate be discussed at a conference to be held under the Belgian Presidency in the second half of 2001 and that the conclusions of this conference be presented for discussion to the Council at its meeting in Brussels at the end of 2001 which will also be considering a mid-term review of the implementation of the Tampere programme.

ANNEX 1
The Demographic and Economic Context

The demographic context

During the 1990's the world's population increased more rapidly than ever before to reach 6 billion in 1999 and the UN estimates that about 150 million people (or some 2.5% of the total world population) now live outside of their country of origin. The world population increase is expected to continue at least in the short term and it is also estimated that improvements in communication, combined with the persistence of economic disparities, conflict and ecological factors, will ensure that migratory movements continue to ebb and flow during the 21st century.

The demographic situation in the EU has also been changing significantly, but in contrast to the overall world situation, two trends are particularly striking: a slowdown in population growth and a marked rise in the average age of the population. Figures prepared by Eurostat show that between 1975 and 1995, the population of the EU grew from 349 to 372 million people, and th! e proportion of the elderly (aged 65 and over) rose from! 13% to 15.4%. Between 1995 and 2025 Eurostat estimates that the population of EU15 will grow more slowly (from 372 to 386 million) and will then begin to decline. However, the working age population (those aged 20-64) will begin to decline within the next 10 years (from 225m in 1995 to an estimated 223m in 2025), while the over-65 age group will continue to rise and is expected to reach 22.4% of the population in 2025.

The general trend among all the Central and Eastern European countries is one of even slower population growth than that of the EU15 for the first quarter of this century [19]. Overall, the accession states will experience a similar ageing of the population to that of EU15. The expected fall in their working-age population will raise, in most of these States, similar challenges to those faced by EU15. However, the implications of the demographic trends will also depend upon the speed of the economic recovery and the labour market condit! ions in these countries. Regional disparities between urban and rural areas will be particularly pronounced in certain of them. Such disparities are also a feature of EU15 where some (D, I, S) have already entered negative natural growth (births minus deaths), while others (FIN, F, IRL, NL) will continue to experience relatively high natural growth for some years [20]. However across the EU as a whole, it is net migration that has become the principal component of population growth [21].

Eurostat figures show that net migration to the EU declined rapidly over the last decade after peaking in the early 1990s at over 1 million per year before starting to climb again and reaching just over 700 000 in 1999. [22] On average for the years 1990-98 t! he net migration rate for the EU was 2.2 per 1 000 population! against 3 for the USA, 6 for Canada and close to 0 for Japan. The flows are now composed of a mix of people: asylum seekers, displaced persons and those seeking temporary protection, family members coming to join migrants already settled in the EU, labour migrants and growing numbers of business migrants. Family reunion and the existence of ethnic communities from the countries of origin in a particular host country have become important factors in their size and direction. The flows have become more flexible - in particular there has been an increase in short-term and cross-border movements - with a complex pattern of people entering but also leaving the Union.

A recent report by the UN, based purely on demographic considerations, [23] suggested! that

replacement migration could be an important factor in solving the problems caused by the declining and ageing populations in Europe. The Commission believes that, while increased legal immigration in itself cannot be considered in the long term as an effective way to offset demographic changes, since migrants once settled tend to adopt the fertility patterns of the host country, it could, in the short term, be an important element in population growth which could accompany other responses to demographic change, such as more friendly family policies. Equally, increased immigration will not, of itself, be an effective long-term way to deal with labour market imbalances, including skill shortages, which should be addressed by an overall strategy of structural policies in the field of employment and human resources development. However, controlled immigration may help to alleviate shortages provided it takes place within the context of an overall structural strategy.

The economic context and the situation of the EU labour market

The macro-economic prospects for the EU are currently the best for some years with low inflation and interest rates, reduced public sector deficits and a healthy balance of payments. The benefits to the economy of the introduction of the Euro and the completion of the internal market are leading to improved growth and job creation with a consequent drop in unemployment.

The process initiated by the European Council in Luxembourg in 1997 has established an ambitious framework for policy co-ordination in the EU in the area of employment. According to Article 126 of the Amsterdam Treaty, Member States implement their employment policies in a way which is consistent with the employment guidelines and the broad economic policy guidelines drawn up each year by the Council. In the light of these guidelines, Member States prepar! e National Action Plans whose implementation is monitored on a regular basis by the Commission and the Council.

A number of weaknesses in the EU economy were highlighted at the Lisbon European Council in March 2000, notably the high number of people still unemployed, which although the unemployment rate has fallen to an average of 9.2% in 1999, remains at over 15 million. [24] The labour market is characterised by the insufficient participation of women and older people in the work force and by long-term structural unemployment, with marked regional differences. The European Council emphasised the problems caused by the under-development of the services sector, especially in the areas of telecommunications and the Internet and the widening skills gap, especially in information technology where increasing numbers of jobs remain unfilled. It also drew attention to the need to modernise social protection systems and in particular to secure their sustainability in the face! of an ageing population. [25] Adaptation of pension schemes! both to encourage more gradual forms of retirement with flexible forms of work and leisure for older age groups would also encourage people, who today are generally in better health and have easier working conditions than their grandparents, to work longer. Making pension schemes less sensitive to demographic changes through sharing responsibility more broadly between government, the social partners and the individual would also reduce the dependency on the working age population. The European Employment Strategy is beginning to tackle these problems.

In Lisbon the Council set a new strategic goal for the EU for the next decade namely that it should become the most competitive and dynamic knowledge-based econom! y able to sustain economic growth and create more and better jobs with greater social cohesion. An overall strategy was adopted in order to achieve this with the objective of raising the employment rate overall from an average of 61% in 2000 to near 70% in 2010 and for

women from 51% to over 60% in this period. This would also reinforce the sustainability of existing social protection systems. The Commission believes that the strategies now in place will reduce the effects of the ageing population in the EU and the level of dependency between those in work and those who have retired.

The Joint Employment Report 2000 [26] charts the progress which has been made in raising the employment rate which reached 62.2% in 1999. It also highlights the areas where further efforts are needed and reports on a worrying growth in skills shortages and miss-matches in supply and demand for labour. While this is becoming acute in relation to some sectors employing the highly skilled w! ho are essential to the development of a knowledge-based econ! omy, shortages in the traditional low-skilled areas, such as agriculture and tourism, are continuing even where there are high levels of unemployment in spite of the efforts being made to combat this phenomena. These shortages could threaten the EU's competitivity in the global economy.

In fact, the ability of different countries and regions in the EU to compensate for demographic effects and to mobilise unused labour resources varies considerably and immigration, therefore, will have a contribution to make in offsetting these problems in some countries as an element in the overall strategy to promote growth and reduce unemployment. While procedures are already in place at EU level to co-ordinate policies in a number of areas to facilitate the operation of the Single Market, notably the free movement of goods, capital, services and EU workers and other citizens, sufficient attention has not yet been given to the role of third! country nationals in the EU labour market which, given its increasing importance, is an issue which now needs to be addressed.

The situation of migrants in the EU labour market

Reviewing the situation of migrants in the EU labour market there has been, since the mid 1980's, an increasing polarisation between the situations of skilled and unskilled migrants. The number of migrants in the labour force with low or no qualifications has been increasing since 1992 where they are meeting a demand e.g. in agriculture, construction, domestic and personal services and seasonal work in tourism (hotel and catering industry) as well as in some manufacturing sectors. With respect to skilled workers, there is now a new willingness to recruit migrants with special skills into the labour market to meet demands which cannot be met by the existing work force, even in areas of high unemployment. At the same time global competition for such skilled personnel is becoming fiercer! (e.g. in the IT sector).

Although data on newly arri! ved migrants is not comprehensive, partly due to the large numbers of irregular and clandestine workers thought to be working in a number of Member States, official data (European labour force survey) suggests that employment rate patterns are generally worse for first generation migrants - especially for women - than for the population as a whole. Recent studies by the ILO on ethnic discrimination in the labour market have revealed statistically significant levels of discrimination in a number of Member States. Moreover, migrant populations often show a higher rate of school drop-out than indigenous populations. This may often reflect language difficulties, especially among newcomers, but also problems associated with assimilation into the school system.

Over the past few years a number of studies have tried to assess the economic impact of legal immigration in different Member States notably Germany, Denmark and Austria. These indicate that, while there are bot! h positive and negative effects, especially at local level, these tend to balance out and that overall, migrants generally have a positive effect on

economic growth, and do not place a burden on the welfare state. The perception that immigration contributes to unemployment is not borne out in these studies which show, on the contrary, that migrants generally take jobs which have remained unfilled even where there is high unemployment in the local population. This reflects earlier work in the USA, Canada and Australia where it has provided a justification for continuing immigration policies, which seek to attract annual quotas of migrants to specific sectors. It is, of course difficult to evaluate the impact of irregular migrants working in the EU since their number and whereabouts cannot be estimated with any precision. Although they, and in many areas also low-skilled legal migrants, undoubtedly make a contribution to the economy in the short-term, their presence may als! o hinder the implementation of structural changes which are n! ecessary for long-term growth.

Economic benefits may be more positive with respect to highly qualified migrants who are meeting skills needs, than for the low qualified who may, in some cases, be competing with national workers for jobs. It is in the lower skilled sectors (e.g. agriculture and related industries, catering, cleaning) where the largest numbers of undocumented migrants tend to find employment, often receiving wages which undercut the local workforce and sometimes in conditions which may lead to exploitation and to social unrest. On the other hand, the regional and sectoral concentration of migrants can mean that they represent an important force in the local economy.

While difficulties in some of the sectors which have traditionally attracted migrants (notably construction, mining and manufacturing) have contributed to higher levels of unemployment among migrants than nationals in some countries, there is also evidence that migrants have prove! d more flexible in dealing with such problems in recent years, in particular by moving into the service sector and by setting up their own small businesses. It is also the case that there are often overall productivity gains in sectors employing migrants and in related industries. In agriculture, some manufacturing industries and some business services it is estimated that a shortage of migrants would have negative consequences on the sector concerned [27].

With respect to social security systems the presence of legal labour migrants and their families may, in the short term at least, be a positive factor in face of an ageing and declining population although there may be initial settlement costs. The availability of effe! ctive integration measures for third country nationals ensuri! ng them decent living and working conditions reinforces their socio-economic contribution to their host society. The absence of such policies, leading to discrimination and social exclusion, may result in the end in greater long-term costs to society.

ANNEX 2

Overview of recent or planned Commission proposals relating to immigration policy
Proposal for a Council Regulation amending Regulation (EEC) No 1408/71 as regards its extension to nationals of third countries (COM (97) 561 final (presented 1997)
Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (COM (98) 394 final (presented 1998)
Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Directive 2000/43, OJ 19/7/2000 L 180,adopted June 2000)
Directive on discrimination in employment on the grounds of re! ligion or belief, disability, age or sexual orientation (COM (99) 565 final) (presented October 1999)
Council Decision establishing a Community Action Programme to combat discrimination 2001-2006 (COM (2000) 649) (adopted October 2000)
Directive on the right to family reunification (presented December 1999) amended version October 2000
Directive concerning the status of third county nationals who are long term residents in a Member State (February 2001)
Directive on the conditions of entry and residence for the purpose of study or vocational training (first half of 2001)
Directive on the conditions of entry and residence for the purpose of unpaid activities (first half of 2001)
Directive on the conditions of entry and residence for paid employment and self employed economic activity (first half of 2001)
Mobilisation on collection of statistics relating to migration on the basis of the collection which started in 1998 (first half 2001)
Communication on return policy (first half of 2001)
Proposals for a co-ordination and monitoring procedure for the implementation of the Community immigration policy
Proposals for a Community Action Programme to promote the integration of third country nationals concerning horizontal measures to support the exchange of experience and the development of good practice

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Footnotes:

[1] SN 200/99 (Presidency Conclusions of the Tampere European Council 15 & 16 October 1999)

[2] JO NiC 19 of 23.1.1999

[3] COM (2000) 167 (Scoreboard to review progress on the creation of an area of "Freedom,

[4] The Tampere conclusions acknowledge "the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the sit! uation in the countries of origin" (paragraph 20).However, with a view to maintaining the coherent approach agreed in Tampere, the Commission also intends to clarify the way in which the other components of an overall immigration policy must be taken into consideration. These include the fight against illegal immigration, relations with countries of origin and of transit and, especially, the humanitarian dimension - asylum policy - the importance of which has been repeatedly emphasised in recent years and which will be the subject of a separate Communication which is being presented jointly with this one. [5] It also includes the reinforcement of integration policies so as to provide the necessary means for a rapid integration of the migrant population into European society and aiming at combating racism and xenophobia.

[5] COM (2000)..." Towards a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union"

[6] COM(2000)! ;..." Towards a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union"

[7] COM(97)561 final, 12.11.1997

[8] COM(98)394 of 22.7.1998

[9] Directive 2000/43, OJ 19/7/2000 L180

[10] COM(1999)565 final

[11] JOCE C 116 E of 24/4/2000 and amended version COM(2000)624

[12] "Regularisations of illegal immigrants in the European Union", Academic network for legal studies on immigration and asylum law in Europe, under the supervision of Philippe de Bruycker, Collection of the Law Faculty, Free University of Brussels, 2000

[13] "Replacement Migration: is it a solution to declining and ageing populations-" Population Division, Department of Economic and Social Affairs, United Nations Secretariat, 21 March 2000 (ESA/P/WP.160)

[14] In particular, under the General! Agreement on Trade in Services (GATS), the EC and its Member States have committed themselves to allow third country nationals to pursue economic activities in the EU according to schedules allowing the presence of natural persons without requiring an "economic needs test" for the provision of services under specific cases. Future commitments will be agreed under the GATS 2000 negociations

[15] This is already the case with respect to labour legislation for the nationals of certain third countries e.g. Turkey, Morocco, and the Countries of Eastern and Central Europe (CEEC) within the framework of specific EU Association or Co-operation Agreements with the countries concerned.

[16] COM(1999) 3 final of 27.01.99

[17] Specific cases as defined by the GATS agreement: intra-corporate transferees, business visitors and the supply of services from outside the EU.

[18] Amended proposal for a Council Decision on Guidelines for Member States' employment policies for the year 2001.

[19] Demographic Report 1997, DG Employment and Social Affairs, p. 29

[20] Eurostat Working Paper on National and Regional Population Trends in the European Union, 3/1999/E/ni8, p. 39

[21] Ibid, page 16

[22] Figures from Eurostat. In these figures on net migration (the difference between immigration and emigration in a particular year) the effect of births and deaths in the year concerned is also taken into account

[23] "Replacement migration: is it a solution to declinin! g and ageing populations", UN Secretariat (ESA/P/WP.160), 21 March 2000

[24] The rate has continued to fall during 2000 and is currently at 8.4% or just over 14 million unemployed.

[25] "The future evolution of social protection from a long-term point of view: safe and sustainable pensions" (COM(2000)622)

[26] COM(2000)551 (final)

[27] "Assessment of possible migration pressure and its labour market impact following EU enlargement to Central and Eastern Europe, Part 1, John Salt et al, Research Report RR138, Department of Education and Employment (UK), December 1999

UNHCR'S POSITION

TOWARDS A COMMON EUROPEAN MIGRATION MANAGEMENT POLICY

UNHCR observations on the European Commission Communication on a Community Immigration Policy (COM (2000) 757 final)

Geneva, November 2001

1. Introduction

1. Europe, particularly Western Europe, has been for many decades a major pole of attraction for migrants from much of the rest of the world. This is for the most part because of the region's relative prosperity and its centuries old tradition of democracy, respect for human rights and the rule of law. However, since the labour immigration "stop" in the mid-1970s, Western Europe has become increasingly control-oriented in its immigration policies.

2. The introduction of immigration restrictions and control measures may have slowed the inflow into Western Europe, but generally have not succeeded in stopping it. As the deep-rooted causes of south-north migration have been left largely unaddressed, control measures have not dissuaded desperate would-be migrants from using alternative means to escape poverty and destitution. Prevention of irregular migration has consequently become one of the top policy priorities of States across Europe.

3. The European debate on migration, while still heavily concentrating on deterrence and prevention of "unwanted" migration, is now widening to include the issues of family reunification, skilled labour shortages and population ageing. With the entry into force of the Treaty of Amsterdam, which has placed the question of immigration and asylum policy under the jurisdiction of the European Communities, the European institutions and the Member States are currently working towards a common migration management strategy. This is of great interest to UNHCR not least because the protection of refugees in Europe has long been beset by difficulties attributable, at least in part, to the complexity of international migration.

4. The present Note seeks to bring UNHCR's contribution to the current debate in respect of a comprehensive European policy approach to migration management. The Note's central focus is on the European Commission's Communication on Community immigration policy, issued in November 2000. The Note first sets out a short explanation behind UNHCR's interest in migration issues. It then briefly reviews the key proposals set out in the Communication. Finally, building on the ideas and approaches discussed in the Communication, the Note attempts to delineate, from a UNHCR perspective, the broad framework for a comprehensive European migration management policy.

5. Issues of asylum policy, including questions relating to access to asylum procedures, the operation of the asylum system in general and the standards of treatment of asylum-seekers and refugees, are beyond the scope of this Note. The European Commission has addressed these issues in a separate Communication "Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted

asylum." UNHCR had the opportunity to comment on this Communication, as well as on a number of asylum-related legislative measures proposed by the Commission.

2. UNHCR's Interest in Migration Issues

6. In the contemporary world, more and more people are moving, not only from one country to another, but also from one continent to another. These increasingly long-distance migratory movements are being prompted and facilitated by a wide variety of factors, most of them related to the broader process of globalisation. These include growing disparities in the level of prosperity and human security experienced by different societies; improved transportation, communications and information technology; the expansion of trans-national social networks; and the emergence of a commercial (and often criminal) industry, devoted to the trafficking and smuggling of people across international borders.

7. Much of the international migration currently taking place is uncontroversial, involves no protection or human rights issues, and is therefore of no concern to UNHCR. Leisure, business and student travel, as well as the movement of contracted workers, all fall within this category. Indeed, recognising the economic and social value of such migratory movements, States in several parts of the world - the European Union, West Africa and South America, for example - have taken significant steps to abolish controls on the movement of people and to facilitate the process of intra-regional migration.

8. It is evident that States generally acknowledge the positive value of international migration when it takes place in a regulated and predictable manner. They are alarmed, however, by irregular migratory movements, especially when they involve the arrival of people who come from unfamiliar cultures and who bring little financial or social capital with them. Such fears have contributed to the widespread belief that substantial numbers of people seek asylum in other countries not because they have a valid claim to refugee status, but because they want to improve their standard of living and wish to circumvent established forms of migration control.

9. Confronted with the growing scale of irregular migration, States have introduced a barrage of measures intended to obstruct or dissuade people from gaining access to their territory. But such measures have had only a limited success in meeting their intended objectives. In fact, there is growing evidence to suggest that the imposition of such controls has had the effect of diverting migrants and asylum-seekers alike to new destinations and prompting them to resort to clandestine forms of movement.

10. These problems have been exacerbated by the inability of States, including some in the European Union, to establish expeditious, effective and efficient systems for the determination of refugee status. Such problems have been manifested in the prevalence of asylum backlogs, delays in status determination and the failure to remove unsuccessful asylum-seekers. Public confidence in asylum systems is consequently low, a situation compounded by the widespread confusion between asylum-seekers and economic migrants. Such confusion has been intentionally generated by certain politicians and pressure groups, in both developed and developing countries.

11. The outcome of these factors seems likely to be a growing reluctance on the part of States to tolerate the arrival and presence of asylum-seekers on their territory, especially when those people form part of a larger migratory flow. This trend is particularly

pronounced in Western Europe and the other industrialised States, which in many respects set a standard and a precedent for other parts of the world. Unsurprisingly, the restrictive migration and asylum measures introduced by less developed States have frequently been justified in terms of the example set by the world's more affluent nations.

12. In the context described above, UNHCR's primary challenge is to preserve the institution of asylum and to ensure that effective international protection is provided to those people who need it in accordance with the obligations of States deriving from binding international refugee treaties and human rights instruments. At the same time, and for the same reasons, UNHCR has a legitimate interest in ensuring that people are able to experience an acceptable degree of human security without leaving their homeland. Similarly, if people feel obliged to leave their country of origin, then they should be able to do so without resorting to irregular and clandestine forms of movement.

13. The forces which determine the scale, pattern and direction of international migration are extremely powerful. As recent events have shown time and again, control and deterrence measures by themselves will have little lasting impact when the need to move prevails. Some will move from choice, some because they are forced to, and others for reasons that include elements both of choice and coercion. If one door narrows or closes, the pressure is directed at another one.

14. There is an evident tension between the right of people in need of protection to seek and enjoy asylum in another country and the right of States to control migration by regulating the entry, residence and expulsion of foreign nationals. While that tension is not easily resolved, it could at least be mitigated. The challenge is how to manage refugee flows and migratory movements in a way that upholds human rights and humanitarian principles while addressing the legitimate concerns of States. In this respect, it needs to be stressed that while there are obvious inter-linkages between refugee and migratory movements, they nevertheless each raise fundamentally different concerns and require distinct policy responses. Of course, refugee law and protection principles also play a crucial role in providing the framework of clarity and consistency within which States' migration concerns can be accommodated and addressed.

3. Community Immigration Policy: The Commission Communication

15. The Commission's Communication on a Community immigration policy clearly recognises that there is a migration management problem confronting European countries. Indeed, many of the existing migration-related policies at the national and EU levels are generally reactive and pursued piecemeal, rather than in a comprehensive and integrated manner. There is little internal co-ordination between the different governmental departments having varying responsibilities for migration-related matters, nor is there any degree of inter-regional harmonisation of approaches. Another difficulty is the lack of effective dialogue, co-operation and partnership with countries of origin of migrants in a way that links migration management strategies to the overall EU foreign policy framework.

16. Underpinning the European Commission's proposals for a new Community immigration policy are the milestones agreed by the European Council in Tampere to realise an area

of freedom, security and justice. The Tampere European Council agreed that "[t]he separate but closely related issues of asylum and migration call for the development of a common EU policy…" This common EU policy would include partnership with countries of origin, a common European asylum system, fair treatment of third-country nationals and management of migration flows.

17. The Commission's Communication examines the challenges and objectives of a new immigration policy against the background of the contextual concerns about the consequences of the "zero" immigration policies of the past 30 years, the growing shortages of both skilled and unskilled labour and the projected decline in population in the EU over the next few decades. The Commission argues that the EU's current skilled labour and demographic deficits necessitate a shift to a proactive immigration policy. Such a shift requires strong political leadership and a clear commitment to the promotion of pluralistic societies.

18. The Communication highlights that the overall framework within which the new Community immigration policy should be framed and managed must reflect not only the interests of the EU, but also European values of democracy, human rights and economic and human development. To this end, it calls for a responsible EU attitude towards the effects of emigration on the counties of origin, in particular the problem of brain-drain which is only going to grow in scale with the increasing demands in Europe and other parts of the developed world for highly skilled labour force.

19. The Communication calls for an integrated EU immigration policy that takes into account migration of all types -- economic, humanitarian and family reunion. It considers effective integration policy aimed at granting migrants rights and obligations comparable to those of EU citizens as the essential corollary of the admission policy. At the same time, the Communication stresses the need for coherent and co-ordinated measures for combating irregular migration and especially smuggling and trafficking as an important element of a more open and transparent EU immigration policy.

20. The Commission's central proposal in the present Communication is the development of a common policy for the admission of economic migrants to the EU in order to respond quickly and efficiently to labour market requirements. The Commission argues that, although "immigration will never be a solution in itself to the problem of the labour market, migrants [have] a positive contribution to make to the labour market, to economic growth and to the sustainability of social protection systems." In addition to labour admission on the basis of an offer of employment in an EU Member State, the Commission also suggests the introduction of a special "job-seeker visa" scheme for potential migrants.

21. While recognising that the response to the problems posed by today's migratory movements must be coherent and comprehensive enough to cover the full range of international migration issues, the Communication from the Commission nonetheless focuses on the development of a Community immigration policy. A normative framework for legal immigration channels, whether for employment, family reunification or studies, is of course an important element of a comprehensive migration management policy. In UNHCR's view, an orderly system of admitting economic migrants could result in an easing or at least a balancing of the pressure which people on the move in search of a better life put on the "asylum back door" and switch the approach to where it should be: managing migration through migration policy and managing the asylum system through asylum policy.

4. Towards A Comprehensive Migration Management Policy: Some Reflections from UNHCR

22. The starting point for a new, comprehensive migration management policy must be acceptance of two realities. Firstly, it must be accepted that Europe is a region of immigration and a multi-cultural society. Secondly, it must be recognised that international migration is today, as it was in the past, one of the most powerful and positive forces of progress and human development. Both countries of origin and of destination stand to gain from orderly movement of people: it supplies human resources where these are needed; facilitates the acquisition and transfer of skills, know-how and remittances to less developed communities; and contributes to the cultural, economic and social enrichment of host societies.

23. A comprehensive approach, by definition, must address all the essential aspects of international migration within an inter-disciplinary and multi-disciplinary response mechanism, but maintaining the particularities of asylum and refugee protection in contradistinction to the legislative and policy framework applicable to economic migrants. This is quite a challenge in the face of differing national priorities, socio-economic situations and cultural sensitivities, as well as immigration traditions. It is equally a challenge since it is, from one perspective, a response to acute human needs and problems.

24. It should also be borne in mind that regional policies and solutions with respect to international migration necessarily affect other regions. Given the inherently global dimension to the movements of persons across borders, a comprehensive approach must be based on the general principle of international co-operation and solidarity. Members of the United Nations have committed themselves, under Article 1.3 of the Charter, "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

25. Finally, at issue when it comes to population movement are the basic principles of international human rights law, international humanitarian law, refugee law and migration law. These principles should therefore provide the backdrop against which States can appropriately determine the scope and content of a comprehensive approach to what are essentially human problems. Basing a comprehensive approach on generally accepted principles and rules of international law governing the movement of persons across international borders would enhance co-operation and partnership not just at the regional level, but also at the global level.

26. The following sections of this Note briefly examine some of the principal broad objectives that a comprehensive migration management policy should pursue.

4.1. Addressing migration pressure

27. Today, more than ever, refugees are part of a complex migratory phenomenon in which people are prompted to leave their own country by a combination of fears, hopes and aspirations that are often difficult to unravel. The immediate causes of refugee flows are, of course, readily identifiable: serious human rights violations, persecution, violent

political, ethnic or religious conflict, or international armed conflict. However, these causes often overlap with, or may themselves be provoked or aggravated by, such factors as economic marginalisation and poverty, massive unemployment, environmental degradation, population pressure and poor governance.

28. International efforts to address the root causes of refugee movements and emigration from less stable and prosperous countries have a chequered history. While many key actors in the international community have given rhetorical support to the notion that prevention is better than cure, it is not very easy to identify concrete initiatives which have sought to operationalise this principle. More often than not, the response to migratory movements (whether or not they involve people of concern to UNHCR) has been to place more stringent obstacles and deterrents in the way of those people who wish or feel compelled to leave their country of origin.

29. While the recent record of achievement in this area might not be particularly impressive, serious attempts are evidently required to deal with the complex factors that prompt people to leave their own country and to seek admission to other States. The intention should not be to prevent or discourage international migration. But action is clearly required to provide individuals and communities with greater degrees of security in their countries of origin, so that if they decide to migrate, they do so out of choice, and not of necessity. The actions required are essentially the same as those identified for many of the most pressing global issues confronting world diplomacy today: respect for human rights and fundamental freedoms; resolution of conflicts; promotion of democracy and the rule of law; eradication of poverty through increased economic co-operation, liberal trade, investment, development aid and debt relief; environmental conservation.

30. Tackling the root causes of induced migration is by no means a simple task. Common sense suggests that an improvement in the economic performance of poorer and less stable States should help to remove or at least diminish some of the pressures that induce people to migrate. And few experts would dispute the notion that well directed investment, more equitable trading arrangements, a reduction of the debt burden and intelligently used development assistance can all help to raise living standards and provide the people of low-income countries with less incentive to travel and work abroad.

31. Even so, such strategies do not represent a panacea to the question of international migration. There is now considerable evidence to suggest that economic growth raises expectations and provides people with the resources that they need to migrate. Such short-term outcomes do not invalidate the "development in place of migration" strategy, but they do point to the need for this strategy to be pursued over a considerable period of time. States, international and regional organisations and other relevant actors need to take a longer-term view of the international migration phenomenon, rather than resorting to the use of short-term and restrictive measures that jeopardise the human rights of migrants, as well as those of refugees and asylum-seekers.

32. Greater attention should be given to the negative consequences of certain macro-economic policies that entail economic liberalisation, the withdrawal of public services, reduction of Government subsidies and increased unemployment and underemployment – factors that have undoubtedly contributed to the scale of emigration from many countries in the developing world. In this connection, Governments and international financial institutions may consider conducting a

"migration impact assessment" before embarking on major infrastructure projects and structural adjustment policies. It would also be useful to undertake additional socio-economic analysis of those countries that have made the transition from being migrant-sending to migrant-receiving States, so as to identify the forms of economic intervention which have the greatest impact on people's livelihood so as to render emigration unnecessary.

33. If UNHCR has a legitimate interest in advocacy efforts related to the migratory consequences of economic policy, then it has an even more explicit concern to advocate on behalf of human rights, democratic values, conflict prevention and the peaceful resolution of disputes. For the necessity for survival will dictate the path elsewhere if people's security is threatened at home. In the context of a comprehensive migration policy, the EU could therefore make far greater efforts to ensure that the action which it takes in other policy domains are consistent with the Union's objectives in relation to refugees and the displaced.

34. If the European States really want to make it possible for people in other regions to live safely in their own country, then they should be encouraged to use all means at their disposal to influence the course of events in many refugee-producing countries. For example, they could place respect for human rights and good governance in their trade and investment relations. They might also be expected to provide more consistent support to the work of the United Nations in the area of peacekeeping and peace-building in war-torn States. Recent efforts within the United Nations to implement a global ban on illicit trading in "conflict diamonds" are a clear demonstration of what the international community can do to reduce internal armed conflict causing refugee movements and internal displacement. In the same vein, curbing the sale of arms to regimes which are intent on persecuting their citizens and discriminating against minority groups could be one of the most important steps towards reducing the number of asylum-seekers.

35. UNHCR's role in the creation and maintenance of global human security is clearly a very limited one. It simply does not have the mandate, resources or political leverage to address the root causes of population movement and displacement. If UNHCR has a comparative advantage in relation to the strategies and action aimed at removing the necessity for flight or irregular migration, it is in the area of sustainable return and reintegration of refugees. For unless returning refugees and internally displaced people are able to establish new livelihoods and enjoy a satisfactory standard of living, then there is a risk that they will join the stream of irregular migrants, looking for and moving to new opportunities in other States. UNHCR's reintegration programmes in countries of origin should thus be seen and supported not only in terms of the achievement of durable solutions, but also in terms of averting irregular migration.

36. Likewise, it should be pointed out that in some situations - Bosnia and pre-1999 Kosovo being two examples - UNHCR's work on behalf of the internally displaced might have had the effect of averting the need for some people to leave their own country. However, the organisation's programmes for internally displaced people should not be seen as being undertaken with this intention. Nor should they be used as a pretext for the introduction of restrictive asylum measures in neighbouring and nearby States.

4.2. Managing and controlling migration

37. Clearly, no State, even several States acting jointly with common purposes and objectives (the European Union, for instance) could have all the necessary answers -- let alone the technical and financial means -- to stop migratory flows at source. The best that States can do is to bring some meaningful order to population movements through flexible and co-ordinated migration management policies that work with the tide rather than against it.

38. Effective management of migration requires integrated policy responses at various levels. Basically it involves, on the one hand, designing positive admission polices once having defined the objectives international migration can serve from the perspectives of both receiving and source countries as well as the migrants themselves and, on the other hand, dealing effectively with irregular migration. It is generally believed that where migration policies offer legal avenues, the clandestine alternatives for entry would lose attraction to a certain extent.

4.2.1. Labour migration policy

39. Transparent and equitable labour migration policies should be seen not only from the perspective of economic imperatives, but also as a means to addressing the asylum issue. The immigration restrictions introduced by Western Europe in 1973 and succeeding years have contributed to the growth of asylum applications in the 1980s and 1990s in two important ways. On the one hand, they have prompted some would-be migrants to turn to the asylum stream as an alternative means of entry. On the other hand, whereas in the past many refugees made use of the various labour immigration avenues for escaping from persecution, the refugees of the 1980s and 1990s had only the asylum channel available to them.

40. It might, therefore, be assumed that a reopening of such channels might relieve some of the migration pressure in low and middle-income countries, thereby helping to disentangle people in need of protection from the broader flow of economic migrants. As well as reducing the number of non-refugees who feel obliged to make use of asylum procedures, such an approach would also help to encourage a greater understanding of international migration and its value to receiving countries.

41. As highlighted in the Commission Communication, the developing Community immigration policy must not contribute to the problem of brain-drain. Substantial investments in support of economic and human development in the migrants' countries of origin would certainly help compensate for the brain-drain problem. Mobility -- i.e. a back-and-forth movement of migrants between the country of residence and the country of origin -- may also serve as one of the key factors for promoting development in the country of origin. As an additional measure, UNHCR would advocate for effective use of refugee labour migration.

42. Firstly, rather than importing highly skilled personnel from countries that can ill-afford to lose them, labour recruitment could in the first instance focus on refugees present in the EU Member States. Secondly, use could be made of the immigrant labour available within the refugee community in first countries of asylum. In many such countries in the less developed regions of the world, there are highly skilled, educated and talented refugees who simply do not have the opportunity to make use of those skills. Some of

these refugees may arrive in Europe in an irregular manner not necessarily in search of better protection, but with the hope to practice a liberal profession or engage in wage-earning employment. Enrolling them into a labour immigration scheme would simultaneously serve economic, humanitarian and migration management objectives.

4.2.2. Addressing irregular migration

43. Irregular migration is of concern to both countries of origin and receiving countries. Dealing effectively with this phenomenon should therefore involve appropriate action at both ends, in a spirit of partnership and with relevant international organisations -- especially the International Labour Organisation, the International Organisation for Migration and UNHCR -- having a role to play. The challenge for UNHCR is, together with States, to provide effective protection for refugees within the category of irregular migrants. The International Organisation for Migration has the mandate to provide migration services to individuals, as appropriate, either as regards return to their country of origin or admission to another country.

44. Combating irregular migration is not just a matter of introducing more rigorous legislative and policy measures aimed at strengthening border controls. It should be recognised that the existence of irregular population movements may be a result of certain failures or weaknesses in other policy areas. Therefore, irregular migration should be seen as only a part of a more general global problem of migration management.

45. The current concentration on irregular migration as largely a problem of border control limits awareness of the desperate conditions that migrants have to tolerate to arrive or remain in their destination countries irregularly. There is much silence on the rightless existence that irregular migrants lead in Europe. While some of them constitute an underworld, many live and work in the mainstream of the host societies with governments turning a blind eye to the illicit, cheap labour they provide to fill the less glamorous jobs that nationals are not inclined to take up.

46. There are at present an estimated three to five million irregular migrants in the 15 Member States of the European Union. Finding themselves outside the basic protections of criminal and civil law, they are vulnerable to exploitation, abuse and deception. From the perspective of States, extending basic rights and protections to these irregular migrants unlawfully residing in their territory might conflict with the objective of preventing or reducing the irregular migration phenomenon. It should be possible to strike a proper balance between, on the one hand, humane treatment that an irregular migrant needs and deserves by virtue of his or her humanity and, on the other hand, legitimate State concerns about creating a "pull factor" for more uninvited migrants.

47. The issue of irregular migration is also currently entangled with that of asylum. On the one hand, asylum-seekers are very often treated like irregular migrants until and unless they discharge the ever more stringent burden of proving that they are refugees deserving of the protection of the concerned State. On the other hand, there is evidence to suggest that increasing numbers of persons who would otherwise qualify for refugee status or other forms of international protection, had it not been for the restrictive asylum policies, are opting for a life as an irregular migrant.

48. The most effective approach to addressing the problem of irregular migration is, therefore, the development and implementation of a comprehensive migration management policy. As part of such a policy the EU could take a number of measures, which -- although they will not bring irregular migration to a complete halt -- may at least reduce the problem to more manageable levels. These measures would include: providing some legitimate avenues by which aspiring migrants might enter the EU; efforts aimed at preventing and combating trafficking in persons and migrant smuggling; appropriate regularisation programmes (amnesties) for the status-less irregular migrants living in the EU; and measures to deal humanely and effectively with the return of irregular migrants and unsuccessful asylum-seekers.

4.2.2.1. Combating human smuggling and trafficking

49. Human smuggling and trafficking, as well as the increasingly restrictive measures - including interdiction - that States have introduced to counter these growing phenomena have become a compounding feature of the migration landscape. This is an inherently problematic issue. On the one hand, it is evident that many people - including those with a valid claim to refugee status - make use of smugglers because they have no other way of reaching their intended destination. As a result, measures to combat smuggling inevitably have the consequence of limiting access to asylum procedures.

50. On the other hand, it is equally evident that, although some of the smugglers may be humanitarian altruists, there are many evils associated with criminal human smuggling and trafficking. Stealing and forging travel documents, work and residence permits have become an important industry. To get people across borders, it is often necessary to pay bribes to the police, immigration officers and local government officials. Those migrants who manage to reach their intended destination, usually after much exploitation and physical hardship, may find that they have to live underground and turn to crime to pay off their debts. Many of the victims of smuggling or trafficking never actually reach their expected destination, and must resort to irregular movement again in order to leave the country where they have been stranded.

51. UNHCR considers that the distinction between smuggling of migrants and trafficking in persons as set out in the two Protocols to the United Nations Convention against Transnational Organised Crime is evidently a useful starting point for designing the appropriate response to this problem. Furthermore, the need for anti-smuggling and anti-trafficking measures to grant special treatment to refugees and asylum-seekers cannot be stressed enough. And active co-operation between sending, transit and receiving countries is of particular importance, as is the need for States to find appropriate solutions for smuggled or trafficked persons who have been interdicted or apprehended.

52. For its part, UNHCR does have a role to play in the improvement of protection standards in countries of first asylum. There is evidence to suggest that some refugees and asylum-seekers in developing countries embark upon long transcontinental journeys by irregular means because the standard of protection and assistance available in those countries is so inadequate. To address this dimension of the migration/asylum nexus, UNHCR calls on the world's richer nations to provide, in a true spirit of international solidarity and burden-sharing, meaningful support to low-income countries that host significant numbers of refugees and asylum-seekers. This is the most effective battle against criminal smugglers and traffickers operating out of those countries.

4.2.2.2. Information campaigns

53. One means of reducing the transnational and transcontinental irregular movement of people is to be found in the form of information campaigns, targeted at potential migrants. For there is evidence to suggest that the impetus to migrate is often based on ill-founded perceptions of the conditions and opportunities that exist in other countries, as well as a limited awareness of the dangers associated with irregular migration. Information programmes in countries or origin and transit may help to dispel such misconceptions, discouraging people from moving by illegal and irregular means.

54. More specifically, such initiatives can fulfil a number of different functions: informing potential migrants about any regular migration opportunities that exist, including in-country job-seeker visa processing schemes; warning them about the risks they may run if they put their fate into the hands of traffickers or smugglers; and providing them with details of the likely consequences of exploiting the asylum system to achieve their migration objective for non-refugee reasons.

55. Information campaigns of this kind are a very modest antidote to the rosy images of life abroad which are disseminated by the mass communications industry. They should evidently not be used as a means of preventing the flight of people who are in need of international protection, and must therefore be scrupulously honest, impartial and accurate in their content. And they should always be implemented in conjunction with practical measures to address the root causes of movement.

56. Because information campaigns may be interpreted as a form of deterrence to refugee flight, UNHCR would not normally be involved in their implementation. For the same reason, UNHCR would have to insist that such programmes should be strictly limited to those situations where the great majority of people who are leaving a country are demonstrably not in need of international protection.

4.2.2.3. The return of irregular migrants

57. Clearly, opening up legal opportunities for immigration into the EU will not completely stop irregular migration. Likewise, regularisation programmes (amnesties) that may be implemented from time to time are most unlikely to benefit all irregular migrants present in the EU at any given moment. Therefore, effective management of migration should necessarily include a return component. When it comes to the issue of return, the distinction sometimes made between irregular economic migrants and unsuccessful asylum-seekers serves no useful purpose. What may be needed is focusing on comprehensive return policies and programmes for irregular migrants in general, which by definition include failed refugee claimants.

58. For UNHCR, the primary concern in regard to return migration is, of course, the situation of unsuccessful asylum-seekers. UNHCR appreciates that European states have invested considerably in the development of complex asylum procedures. However, the credibility of these procedures risks to be undermined by the non-return of those who, after a fair and objective assessment of their claims, have been found not to be in need of international protection on any valid grounds. This could also erode public confidence in the effectiveness of the international system of refugee protection.

59. There is, therefore, an inter-dependence between admission policies and return policies. Society's readiness to support the legal admission of non-nationals, whether on economic or humanitarian grounds, depends to a large extent on how governments deal with irregular forms of migration. Yet, the lack of effective return policies and programmes remains a major unresolved problem in virtually all EU Member States.

60. States have faced a number of obstacles to the orderly and humane return of irregular migrants and unsuccessful asylum-seekers with no legal right of residence. They include difficulties of tracing them; lack of co-operation on the part of countries of origin to provide travel documents, or outright refusal to take back their citizens; and logistical problems in enforcing returns, including transit through third countries. Also, the economic importance of remittances and the inadequacy of reception and re-integration facilities in some countries of origin are additional elements hindering return.

61. An essential pre-requisite for successful return programmes is active dialogue and co-operation between the EU Member States and countries of origin and of transit. Such co-operation, at both bilateral and multilateral levels, may need to concentrate on developing long-term, mutually beneficial arrangements for return. Evidently, a comprehensive approach to the question of return migration cannot ignore the causes of original departure from the country of origin. Likewise, it has to include financial and technical assistance in support of the reintegration of the returnees.

62. From the perspective of the prospective returnee, access to proper and thorough information and sensitive counselling often appear to be keys to a successful implementation of return. It is essential that the persons concerned by a return measure be prepared for such an eventuality. For return to succeed, they must be helped to retain or regain their self-esteem and self-respect. Assisting those in the asylum procedures in maintaining contact with their families and friends in the country of origin may facilitate their return when their asylum claims eventually fail. It may be likewise if they are supported in acquiring or developing skills and knowledge that they can take back home.

63. There are a number of ways in which UNHCR could usefully be involved, in co-operation with other relevant actors, in assisting States to resolve the difficult problem of return of unsuccessful asylum-seekers. These include the following: undertaking the systematic dissemination of information on developments in the country of origin as they affect the process of return; facilitating dialogue and negotiations between countries of asylum and origin; identifying possibilities for post-return re-integration assistance; and "passive monitoring" of the situation of returnees once in their country of origin. The key criterion for UNHCR's involvement with the return of unsuccessful asylum-seekers must remain the organisation's full satisfaction with the fairness and accuracy of the refugee status determination procedure. This, in turn, presupposes an effective UNHCR monitoring role in relation to those procedures.

64. UNHCR can also explore with EU Member States the possibility of extending, as appropriate and feasible, its programmes for the voluntary repatriation of refugees to unsuccessful asylum-seekers. The availability of repatriation and initial re-integration assistance provided by UNHCR in the country of origin may encourage unsuccessful asylum-seekers who have no right to remain in the asylum country to comply voluntarily with the obligation to return. It needs to be stressed however that such assistance from UNHCR would be considered only in situations where the organisation implements a voluntary repatriation programme for refugees.

4.3. Effective integration policy

65. The integration of legally resident immigrants is an important concern for both the individuals concerned and the host States. It has an impact on immigration policies in so far as it may influence the receiving societies' attitude towards immigrants. Successful integration will improve the image of the immigrant in the public eye, thus opening doors to greater understanding and tolerance.

66. Experience has shown the deficiencies and long-term negative consequences of the previous general policy of so-called "differential exclusion" that characterised the guest-worker recruitment strategy of many Western European countries. It was a policy largely based on fear of threat by the migrant workers to the economic, social, cultural and political structures of the host societies. Even after a protracted period of stay, they were still regarded as "guest" workers and excluded from establishing a solid relationship with their host societies by way of citizenship, political participation and equality of opportunity for insertion into the shared system of rights and obligations.

67. The treatment of immigrants should not be an all or nothing matter involving either complete assimilation that implies abandoning one's distinctive cultural, linguistic and social characteristics, or retaining these values but with the consequence of isolation. Between these two extremes lies the integration model that enables immigrants to enjoy equality of rights and opportunities in all spheres of society while preserving their cultural identity. Integration emphasises the value of cultural, national, ethnic and linguistic diversity. Particularly in this era of globalisation in economies, cultures and communication, diversity and pluralism are essential requisites for societal and personal development. But integration is a two-way process, involving rights and obligations on the part of the immigrant as well as the host community; both sides should be willing to adapt to changes in lifestyle.

68. Following the entry into force of the Treaty of Amsterdam, the importance of integration of third country nationals lawfully residing in the European Union has gained momentum. The Tampere European Council stressed that "the European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States" and that "a more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens."

69. The current challenge to the integration of immigrants and refugees alike is to a considerable extent rooted in ignorance and fear. Many people feel that their societies are being flooded by foreigners who make little or no contribution to the life of the country and who represent an alien way of life. At the same time, such citizens appear to have lost confidence in the ability of their States to address the issue of migration and asylum in an effective manner. All of which creates a very negative context in which to advocate for an open door policy for qualifying immigrants or refugees.

70. More could be done to make the public aware of the positive contribution that immigrants and refugees can make to their host country, not just economically, but also socially and culturally. Care has to be exercised on this issue, however, if the distinction between refugees and other migrants is to be maintained: refugees should be admitted to countries because they are in fear of their lives and in need of protection, not because of the economic contribution they may make to the society where they settle.

71. Effective integration policies necessarily require sustained efforts to eliminate racial discrimination and to combat xenophobia and intolerance against people perceived as "aliens." This would only be possible through the determination and political will of all States acting on an individual and collective basis to address with sufficient vigour not only the symptoms of xenophobia and intolerance, but equally the economic, political and social causes that give rise to this phenomenon. Given that racism and xenophobia are often symptoms of intolerance of difference, rather than a reaction to the presence of foreigners, restricting immigration will not necessarily solve the problem. Likewise, measures to combat racism and xenophobia should not be used as a justification for restricting the access of lawfully-residing immigrants and refugees to full membership in the social, political, economic and cultural life of the host country.

72. Effective integration also requires that public authorities be made more responsible and accountable for stereotyping certain non-nationals. Racists and xenophobes must not be let to set the immigration and asylum agenda. The media should not be allowed to be used as an instrument to propagate hatred and intolerance. The judicial system must ensure that perpetrators of racist and xenophobic violence are subjected to the full weight of criminal justice. And greater use should be made of such educational vehicles as public service announcements, sports, music and entertainment to promote a positive message about tolerance, pluralism and bridge-building.

5. Conclusion

73. The problems raised by today's movements of migrants, refugees, asylum-seekers and displaced persons are international issues requiring international responses through a combination of national, regional and global responsibilities and capacities. What makes such responses challenging is the multidimensional nature of international migration. It intersects with issues of demography and labour market, trade and development, human rights and democratic values, environment and foreign policy. It requires a balancing act in reconciling the interests of States with their obligations to implement international standards, whether applicable to refugees, stateless persons, migrants or migrant workers and their family members.

74. Visa regimes, carrier sanctions, interception on the high seas and other control measures may help in the management of migration flows, but only as short-term defensive responses and often with adverse consequences for the international refugee protection regime. And unilateral policies and practices with respect to population movement or displacement necessarily affect other States and regions. Problems will only be resolved, rather than shifted, if a more holistic, coherent and multi-disciplinary approach to international migration is found to take up a triple challenge: to manage population movements in a way which upholds basic human rights and the institution of asylum; to safeguard the legitimate interests of the States and communities affected by these movements; and to invest the necessary political will and resources in removing or at least diminishing some of the pressures that cause people to abandon their homes with greater or lesser degrees of coercion.

UNHCR
Geneva, November 2001

Commission Communication on a Common Policy on Illegal Immigration, COM (2001) 672 final of 15 November 2001

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON A COMMON POLICY ON ILLEGAL IMMIGRATION
COM (2001) 672 final of November 2001

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1. Summary

Shortly before the European Council in Laeken, a crucial stage has now been reached in the implementation of both the Amsterdam Treaty and the conclusions of the Tampere Summit. Since the Commission has tabled most of the proposals on asylum and legal immigration it is necessary to cover also illegal immigration as the missing link of a comprehensive immigration and asylum policy. The Commission hereby transmits to the Council and the European Parliament this Communication on a Common Policy on Illegal Immigration.
The Commission has identified six areas for possible actions preventing and fighting illegal immigration:

1. Visa policy
2. Infrastructure for information exchange, co-operation and co-ordination
3. Border management
4. Police co-operation
5. Aliens law and criminal law
6. Return and readmission policy

Based on existing instruments and measures at national level the Commission is striving to make further progress aiming at the creation of synergy effects of national efforts by adding the European dimension. Moreover, the Commission is keen to enrich current discussions at European level:

- Bearing in mind that any action to counter irregular migratory flows should take place as close as possible to the irregular migrants concerned, the EU should promote actions in, and support actions of, countries of origin and transit, taking into account the EU policy on human rights. These actions should comprise intensive information exchange, knowledge transfer and financial support for justified control efforts.

- Respecting the importance to enforce existing common rules particularly relating to the common standards for visa issuance and border controls the EU should strengthen its monitoring efforts.

- Administrative co-operation should be intensified, e.g. with the further development of the network of liaison officers or the promotion of the concept of having joint teams for border controls.

- Towards enhancement of co-operation and co-ordination of Member States' law enforcement agencies, a permanent technical support facility could be established to assist in information gathering, analysis and dissemination, to co-ordinate administrative co-operation and to manage common databases for migration management.

- All possibilities of modern technology and telecommunication should be utilised to improve operative co-operation, e.g. in the case of the Early Warning System on irregular migratory flows.

- Exchange of information including statistics and analysis should be advanced by various actions such as improving the quality of statistics or the creation of a European Migration Observatory.

- The concept of adequate and comparable sanctions against promoters of illegal

immigration should be further upgraded and harmonised. This includes, in particular, severe punishment of criminal activities. The seizure of illegally obtained financial advantages is also identified as a key factor.

- Undeclared work of illegal residents is another subject of major concern, which requires further action to diminish the attractiveness for employers and the pull factor for potential irregular migrants.

- Police co-operation must be strengthened with the assignment of an advanced role to Europol.

- The development of a Community readmission policy should be pursued and the current negotiations with third-countries should be finalised in due course.

In addition the Commission intends to launch discussions on a number of new and innovative concepts to tackle illegal immigration:

- Return policy must be further built up with a focus on internal co-ordination such as the creation of common standards and the initiation of common measures. The Commission will, therefore, forward a Green Paper on the Community Return Policy in the nearest future.

- Towards the creation of a European Border Guard, first steps will be outlined to facilitate this process. Further details will be presented in a Communication on European Border Management, which will be provided by the Commission in the near future.

- The EU should reflect on the establishment of a European Visa Identification System, which would allow an exchange of information on issued visas among Member States. To that end the Commission will undertake a feasibility study on the creation of a European Visa Identification System.

2. Part I - Introduction

The prevention of and the fight against illegal immigration are essential parts of the common and comprehensive asylum and immigration policy of the European Union. [1] With the entry into force of the Treaty of Amsterdam, new competences have been created, with the inclusion of the new Title IV in the EC Treaty. While Art. 62 TEC is the legal basis for regulations relating to border controls and visa policy, Art. 63 paragraph 3 TEC refers explicitly to measures on illegal immigration and illegal residence, including repatriation of illegal residents. Moreover, since facilitation of illegal immigration involves, in most cases, organised criminal networks operating at an international level, the relevant provisions of Title VI of the Treaty on European Union on police and judicial co-operation in criminal matters (Art. 29, 30, 31 TEU) also apply.

The Vienna Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, of December 1998 [2], already mentioned that in line with priority to be given to controlling migration flows, practical proposals for combating illegal immigration more effectively needed

to be brought forward swiftly.

In addition, the European Council emphasised in the conclusions of its Tampere summit of October 1999 [3] the need for more efficient management of migration flows at all stages and to tackle illegal immigration at its source. Moreover, the European Council called for closer co-operation between Member States and confirmed the requirement for new Member States to accept in full the relevant acquis including the standards which have been set within the Schengen co-operation. [4] Within the framework of the Council, the common interest in the fight against illegal immigration, the need for co-operation and the determination to combat networks was highlighted again by the recent agreement reached on the Directive defining the facilitation of unauthorised entry, movement and stay, and the accompanying Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence, as well as the Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third country nationals lacking the documents necessary for admission.

The Commission has consolidated a first set of objectives to enhance the fight against illegal immigration in the Scoreboard reviewing progress on the creation of an area of "freedom, security and justice" in the European Union. [5] Besides improvements in the exchange of information and statistics, the enhancement of the fight against trafficking in human beings and the economic exploitation of migrants is mentioned, as well as co-operation with countries of origin and the establishment of a coherent common policy on readmission and return.

In its Communication on a Community Immigration Policy [6], adopted in November 2000, the Commission stressed the need for a comprehensive common migration policy, which takes account of the changing economic and demographic needs of the European Union. Immigration should take place within a clear legal procedural framework in order to manage migratory flows effectively and to avoid any competitive distortion: Illegal entry or residence should not lead to the desired stable form of residence. There is a growing need not only for high skilled workers but also for low skilled workers in the legal labour market. Anyway illegal residents cannot be considered as a pool to meet labour shortages, although it has to be recognised that the possibility to have access to undeclared work might be perceived as the most important "pull factor" for potential migrants. Nevertheless opening or re-opening legal channels for migration cannot be seen as a panacea against illegal immigration.

In July 2001 the Commission adopted a further Communication which sets out its proposals for an open method of co-ordination for the Community Immigration Policy as a complement to the legislative framework [7]. This will involve the definition of European guidelines which Member States will implement at the national level. In this Communication the Commission has suggested that initially six guidelines should be established in the key areas already identified by the European Council in Tampere. The third guideline put forward by the Commission, under the theme of managing migration flows, concerns the reinforcement of the fight against illegal immigration, smuggling and trafficking.

The Commission is considering to address the issue of illegal immigration with a comprehensive approach, which should make best possible use of the different institutional possibilities as set out in the Treaties. Nevertheless, different notions at stake, like smuggling and trafficking in human beings as described below in 4.7, should be constantly borne in mind.

Taking account of the relevant European guidelines on immigration, which need to be implemented at the national level, it remains to be defined in detail, what the fight against

illegal immigration at EU level should comprise. Many areas can be recognised as having links to the irregular movements of persons towards the EU and illegal residence within the EU. The purpose of this communication is to bring current developments, which might only be seen as the first steps, and possible future initiatives at EU level into a coherent framework. It intends to identify the key elements of such a policy (Part II) and to outline, in a structured way, which future measures and forms of co-operation could lead to the proper development of an effective common fight against illegal immigration (Part III).

3. Part II - Guidelines, Targets and Requirements

3.1. Understanding the Phenomenon

Illegal immigration is multifaceted in terms of the individuals concerned and the patterns of their illegal entry and residence. First there are those who illegally enter the territory of a Member State. This can take place either with an illegal border crossing or at a border post using false or forged documents. Often these illegal entries happen on an individual and independent basis. However, illegal entries are increasingly organised by facilitators, who provide transport, temporary shelter, travel documents, information, surveillance or other supportive services starting in the countries of origin, continuing in transit countries and ending in the country of destination. The prices of smuggling services are very high, so that many illegal immigrants have to hand over most or all of their savings. In cases where illegal immigrants are not able to pay the price, they often become victims of traffickers, who employ exploitative means to gain "reimbursement" for the cost of the journey.

There is also a large number of illegal residents in the European Union who have entered with a valid visa or residence permit but have "overstayed". Others simply enter with valid travel documents, when their nationality is exempted from a visa requirement for a short-term stay. This legal residence, however, becomes illegal, when the person concerned embarks on self-employed or employed activities not authorised by the visa exemption or the visa obtained. In many cases persons with a proper residence and work permit simply overstay their period of legal residence or violate residence regulations in other ways.

Due to the nature of undocumented residence it is not possible to assess the exact proportions between the different categories of illegal residents. It seems clear, however, that each one represents a significant part of the whole phenomenon of illegal immigration and that any future action needs adequately to address each category. To do so effectively, however, requires further in-depth analysis of the phenomenon, so as to be able better to determine the adequate instruments for the different categories of illegal residents and patterns of illegal residence.

The Commission favours further efforts to analyse the patterns of illegal residence in the European Union in order to adjust future measures more specifically to the real problems which need to be tackled to prevent and fight illegal immigration effectively. To this end the Commission advocates in Part III the establishment of proper instruments and structures to make EU wide analysis possible.

3.2. Compliance with International Obligations and Human Rights

Measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection. This concerns, in particular, obligations for protection arising from the European Convention on Human Rights, particularly is Art. 3, and the Geneva Convention on Refugees, most notably Articles 33 and 31. The latter article states that "states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

Effective action against illegal immigration plays an essential part in contributing to public acceptance of admission for humanitarian grounds by preventing misuse of the asylum system. Nevertheless, the fight against illegal immigration has to be conducted sensitively and in a balanced way. Member States should, therefore, explore possibilities of offering rapid access to protection so that refugees do not need to resort to illegal immigration or people smugglers. This could include greater use of Member States' discretion in allowing more asylum applications to be made from abroad or the processing of a request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by resettlement scheme. Such approaches could ensure sufficient refugee protection within and compatible with a system of efficient countermeasures against irregular migratory flows. Finally, whatever measures are designed to fight illegal immigration, the specific needs of potentially vulnerable groups like minors and women need to be respected.

As mentioned in the Communication towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, of November 2000 [8] the Commission is of the opinion that processing requests for protection in the region of origin and facilitating the arrival of refugees on the territory of the Member States by resettlement schemes could be ways of offering rapid access to protection without refugees being drawn towards of illegal immigration or smuggling gangs. To that end the Commission has committed two studies on this new approach of protection.

3.3. Actors-in-the-Chain Approach

Efforts on migration management cannot have their full impact, if measures are not implemented at the beginning of the migration chain i.e. the promotion of peace, political stability, human rights, democratic principles and sustainable economic, social and environmental development of the countries of origin. To that end, migration issues should be integrated in the existing partnerships, which are the general framework of our relations with third countries.

As a next step, co-operation should be further developed with transit countries. Smugglers of human beings use different modes of transportation and different routes for their illegal activities. Usually, direct connections from the main source countries are not available. Thus, transit through third countries is the norm. Irregular migrants take advantage of gaps at border controls and other deficiencies in control measures. Some transit countries show a certain reluctance to deal with irregular migration flows properly due to their interest in not becoming a country of destination. It is necessary, therefore, to enter into a dialogue with transit countries in order to support their effort to deal with the problem. For instance the

establishment of refugee determination and reception capacities in those countries could be supported substantially.

In the context of enlargement the candidate countries have to adopt, in their domestic legislation and practices, the existing EU acquis on the fight against illegal immigration. This also implies full acceptance of the Schengen acquis as stated in Article 8 of the Schengen Protocol; the candidate countries are also required to produce detailed national Action Plans for implementation of the Schengen acquis.

It is important to recognise that, despite the control measures in place, irregular migration flows may continue within the external borders of the EU, as illegal migrants seek to reach their preferred Member State by transiting other Member States. Notwithstanding measures already in place to manage illegal migration and co-operation between Member States, illegal movements should continue to be monitored and influenced even inside the territory of Member States, with an emphasis being placed on information sharing and intensified co-operation.

The EU and its Member States should continue to participate actively in other international fora and to conclude multilateral agreements on the subject. Further international co-operation could also facilitate and promote third country co-operation and other efforts which aim to fight illegal immigration. In particular, when measures on illegal immigration are conducted in third countries, the expertise of international organisations, such as UNHCR or IOM, could be very helpful in many respects. First, such organisations could confirm that measures do comply fully with justified needs for protection. Secondly, effects of synergy could result by using existing infrastructures instead of establishing new ones. Finally, such an involvement could lead to a better mutual understanding between actors.

An efficient management of migration flows has to take place at all stages to keep track of irregular movements. For future policy making the Commission will apply the actors-in-the-chain approach in order to monitor and influence irregular movements from the countries and regions of origins via the transit countries to the destination countries. Therefore, the fight against illegal immigration requires also the mobilisation of a number of external policy aspects.

3.4. Prevention of Illegal Immigration

It has already been recognised at European level, in the specific field of trafficking in human beings, that only a multidisciplinary approach covering both repression and prevention would be able to tackle the phenomenon in an efficient and coherent way. The development of a balanced policy in the area of illegal immigration must also encompass prevention as a crucial element in the European Union's strategy. The prevention dimension in the field of illegal immigration should include research on the causes, improving understanding of the phenomenon and detection of new trends, the launching of information campaigns as well as promoting new partnerships and developing existing networks. Attention in this field should also be given to the outermost regions of the Union, having regard to their geographic situation which exposes them very particularly to these migratory movements.

The European Forum on prevention of organised crime, that has been launched by the Commission in May 2001 and has already devoted attention to the prevention of trafficking on human beings, could serve as a catalysis for the promotion of such initiatives.

3.5. Enforcement of Existing Rules

Obviously, a legal framework for the fight against illegal immigration already exists in all EU Member States as do regulations on the issuance of visas, border controls, illegal entry and stay, on smuggling, trafficking, illegal employment and carrier liability. Certain common principles on these issues have been laid down in several recommendations under the regime of the Maastricht Treaty. [9] In addition, and much more importantly, a large number of binding rules has been established within the Schengen framework.

It does not make any sense to introduce new rules or to harmonise rules at EU level, if present regulations are not enforced with sufficient resources and, most importantly, the necessary will. Common efforts are condemned to fail, if Member States' services and practices do not follow the rules adopted in common, i.e. relating to visa issuance and external border controls. Whether as countries of transit or destination, Member States must, therefore, work intensively towards a genuine partnership based on mutual confidence in each others law enforcement activities.

The creation of an area of freedom, security and justice requires all Member States to effectively apply common rules. The common security system is only as strong as its weakest point. Consequently, it is crucial to enforce existing rules properly as a main priority.

Only the practical implementation and efficient enforcement of existing rules as well as of future common measures will ensure the credibility of the rule of law in the area of freedom, security and justice as foreseen in the Treaty of Amsterdam. Consequently monitoring the enforcement of existing common rules, e. g. by undertaking regular joint screenings of consular posts and external borders, should be strengthened.

3.6. Adequate Sanctions for Criminal Activities

Criminal activities, which are regularly connected with irregular migration flows, are a major common concern in all Member States. Trafficking and smuggling in human beings especially are seen as totally unacceptable. Appropriate criminal provisions have, therefore, to be put in place. At the EU level, no Member State should be considered by would-be criminals as being relatively "safer" for the conduct of unlawful activity. This would strengthen justice in the EU and send a clear signal that Member States are willing to provide for severe sanctions. In Tampere Conclusions No. 23, the European Council has, therefore, urged the adoption of legislation providing for severe sanctions against serious crimes.

In September 2001 the JHA Council reached political agreement on a Framework Decision on combating trafficking in human beings. [10] The Framework Decision provides in particular a common definition of trafficking which will contribute to the facilitation of law enforcement and judicial co-operation in criminal matters. In addition to articles on liability of legal persons, sanctions on legal persons, jurisdiction and prosecution, the Framework Decision also provides for a common level of penalties set at a level of not less than eight years' imprisonment if the offence has been committed in specifically defined circumstances.

Following the political agreement reached at the Council in May 2001 on the proposal for a Framework Decision on smuggling of migrants, work needs also to be completed with a view to harmonise the Member States penal legislation and to ensure as soon as possible the implementation at national level. Furthermore, common standards are important for dealing with illegal employment, the liability of carriers and regulations on illegal entry and residence.

Moreover, it should be borne in mind that financial advantage is the key incentive for nearly all actors who promote illegal immigration. Criminal punishment alone is not sufficient to take effective action. The cost of illegal immigration should be raised by a number of measures with financial impact on traffickers and smugglers, but also on employers of illegal residents. The set of measures should at first comprise the freezing and confiscation of assets which have been gained by traffickers and smugglers. The obligation for reimbursement of all costs related to the return of illegal residents should be passed on to traffickers, smugglers and employers of illegal workers. In addition, the competitive advantages enjoyed by employers of illegal workers could be negated by financial sanctions.

Considering the growing involvement of international criminal organisations in illegal migration and trafficking of human beings, the Council should identify, in implementation of the 1997 action plan on organised crime, measures of particular relevance and, where needed, give priority to their adoption or implementation. In a broader context the UN Convention against Transnational Organised Crime in Palermo on December 12 - 15 2000 and its two accompanying protocols on trafficking in persons and smuggling of migrants [11] now form the basis for a global recognition of the problem and a comparable approach to tackle it. It is, therefore, essential to ensure a swift ratification of these instruments as well as a co-ordinated implementation of their provisions at EU level.

4. Part III -Action Plan

4.1. Visa Policy

Acording to Article 61 TEC, visa policy is a directly related flanking measure to the free movement of persons with respect to external border controls. Whilst facilitating the free movement of persons, visa policy can also significantly contribute to the prevention of illegal immigration. Visa policy alone cannot, however, counter illegal immigration relating, for example, to third country nationals who enter legally but "overstay".

4.1.1. Visa lists

The adoption of the Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, provides further development for an harmonised visa policy and instrument for preventing entries into the Member States territory of non-authorised persons. [12]

4.1.2. Uniform visa and security standards

Security and identification issues have been covered by the use of secure documents, which should allow for clear identification of the person concerned. In addition, travel documents aim to prove that the holder is entitled to exercise certain rights. Since travel documents have existed, they have been targets of forgery and misuse for obvious reasons. States have, therefore, tried on an ongoing basis to raise the security standard of these documents. An example of a very successful co-operation in the field of security documents is the evolution

of the EU / Schengen visa sticker. Based on the Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas, it has become a document of the highest standard, effective against counterfeiting or attempts at falsification. Third countries should also be encouraged and even supported to strengthen their efforts in order to render their travel documents more secure.

Improving the security of the visa is an ongoing process. In this respect, new and innovative solutions have to be developed, which would lead to further improvements in the security of the use of documents. One aspect is the clear linking of the identity of the persons to the visa sticker. This has been taken into account by the Commission proposal amending regulation 1683/95 of October 9th 2001 [13] aiming at the integration of a photograph produced according to high security standards into the uniform format for visas. This is only the first concrete step towards the integration of further high security measures, which should be developed using new technologies.

4.1.3. Creation of Common Administrative Structures

The Tampere Conclusions (Nr.22) stressed that "a common active policy on visas and false documents should be further developed, including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices."

Information exchange on visa-issuing practices and trends in document forgery already takes place both formally and informally. This useful co-operation should be further promoted and enhanced by mutual assistance in the training of staff. It is also common practice in several places to represent other Member States in countries, where a Member State does not have its own representation.

In this context, the idea of joint visa posts has been raised from time to time, but unfortunately without any concrete result till now, due to practical, legal and cost-sharing difficulties.

However, it seems quite obvious that one of the expected advantages of joint visas posts would be to reduce the cost of visa issuance. Such a burden sharing approach could provide the financial means needed by the Member States in order to improve the technical equipment used for the purposes of issuing visas (detection of counterfeit or forged documents, access to online databases of sample travel documents, secured storage conditions for blank visa stickers etc.). In addition, staff sharing would also mean sharing of experience and know-how in the field of risk assessment of illegal immigration or potential overstayers . In a medium or long term perspective, one more substantial positive outcome of joint post visas would consist of more uniform implementation of the common rules and the reduction of visa shopping.
The establishment of joint visa posts should be pursued starting with a pilot project at a suitable location. In order to overcome the legal, financial and to a certain extend psychological difficulties that may arise, the Commission recommends a step by step approach: to start with the use of common buildings and facilities, then to share technical equipment and finally to exchange staff with the view of setting up common teams.

4.1.4. Development of a European Visa Identification System

The creation of common administrative structures could, in itself, be a major step forward in harmonising Member States policies and practices with regard to visas. Nevertheless, an alternative and complementary approach could be envisaged making use of the possibilities of modern communication and computer technology.

Indeed, even high-standard visa sticker cannot have its full impact, when the passport to which it is attached is not of a comparable standard. Secure documents are of no use when the holder has hidden them or has thrown them away in order to veil their identity, the travel route or the expiry of the visa. Besides it is very difficult to identify and verify even bona-fide travellers with a valid visa, when they are not carrying their travel documents.

In the context of the prevention of terrorist threats, the conclusions of the JHA Council held on 20 September invite the Commission to make proposals on the creation of a system to be used for the purpose of exchanging information on issued visas. Reflections and feasibility studies that should be launched could explore whether such a common electronic online system could complement the concept of security documents in order to create a dual identification process based on secure documents and a corresponding database.

Such a system could include information, which is already gathered or required from the visa applicant today, such as personal particulars. In addition, an electronic photo could be taken and stored. Travel documents should also be scanned and stored, which would have two major advantages. First, subsequent manipulations of the travel document could be easily detected by comparison of the travel document with its image. Secondly, the stored image of the travel documents could be used to obtain new travel documents quickly, when a person is obliged to leave the country, but tries to veil his or her identity. Anyway, the development of such a system should be based on a clear definition of needs and objectives as well as a thorough evaluation of existing initiatives (including the possibilities already offered by the SIS and VISION) and resources to be mobilised. Any such system should be devised in conformity with current rules on the protection of personal data.

The Commission proposes to assess the feasibility of a European Visa Identification System in order to establish a timely instrument to ensure proper admission for short-term stays and return after the expiration of the visa. At a later stage, it could be envisaged to test the possibility of setting-up such a system, in an initial phase, for some countries or regions of origin.

4.2. Information Exchange and Analysis

4.2.1. Statistics

It is a widely shared assessment that the level of illegal immigration is significant and cannot be neglected due to its social, economic and political implications in the countries of destination. However, by definition it is impossible to have a clear picture of the scale of the phenomenon of illegal immigration in the Member States of the European Union. An estimate of the scale of illegal migration can only be derived from existing hard data which have a link to the phenomenon such as refused entries, apprehensions of illegals at the border or in the country, rejected applications for international protection, applications for national regularisation procedures and escorted or forced returns.

The Council of May 2001 decided to introduce a public annual report consisting of a statistical overview and an analysis for the purpose of discussing trends in asylum and migration flows and the relevant policy developments in the European Union. This would include a section analysing data on illegal immigration.

The Commission will bring forward an Action Plan to implement the decision of the Council and other actions necessary with a view to improve the data collection on asylum and migration as laid down in the April 2001 Commission staff working document [14].

4.2.2. Gathering Information, Intelligence and Analysis

However, mere figures are not sufficient for understanding the phenomenon and to prepare decisions for operative purposes. This requires further in-depth analysis of its causes, the methods of entry and the consequences for our societies. Member States have gathered considerable information and have gained expertise in this field, but the European dimension to the phenomenon has not yet been sufficiently explored. Although formal and informal networks to exchange information have been developed over the years for this purpose, further improvement of the exchange of intelligence and information on a European level is required to enable the Community to develop adequate common policies.

In order to establish constant information exchange among Member States, a centre for information exchange, CIREFI [15], has been set up. On a nearly monthly basis, experts from Member States share information, in particular on current trends in irregular migratory flows. However, this form of co-operation could be strengthened, requiring more intense networking among Member States operational services, especially in the field of analysis.

The Commission is examining the creation of a European Migration Observatory, which could monitor and carry out comparative analysis of both legal and irregular migratory flows. Moreover the Commission underlines the necessity to further develop adequate structures at EC level in order to allow for more co-ordinated action of Member States enforcement bodies.

4.2.3. Development of the Early Warning System

With a Council Resolution of May 1999 an Early Warning System for the transmission of information on illegal immigration and facilitator networks has been introduced. The aim was to set up a standardised, permanent communication framework enabling a Member State to report illegal migration phenomena instantly. However, the Early Warning System (EWS) is still in a rudimentary phase. The main problems are the insufficient use of it, a lack of information distribution within the concerned services of the Member States and a poor technical infrastructure. As a first step common guidelines, concerning cases in which the system should be used, could be further elaborated. Nevertheless, the administrative and technical infrastructure seems to be the key obstacle. Operational services have to be given the chance to deliver and to obtain information as easily as possible, seven days a week, 24 hours a day. That is the reason why the EWS should be developed as a web-based secure intranet site. Admittedly, the success of this approach depends very much on the possibility of operational services accessing the system without difficulty.

The Commission will forward a proposal on how such an advanced Early Warning System could be implemented and administered.

4.3. Pre-Frontier Measures

4.3.1. Advice and Support by Liaison Officers

First steps have been taken to develop the concept of liaison officers in countries of transit and origin and to co-ordinate these efforts among Member States. [16] Along the lines of the conclusions, which have been approved by the Council in November 2000 and May 2001, networking is being intensified among liaison officers of Member States, for example in co-operation in the Western Balkan area.

In the future, the EU should continue in building up the network of immigration and airline liaison officers by promoting desirable closer co-operation. Permanent information exchange between immigration and airline liaison officers as well as with police liaison officers and other intelligence officers of Member States should be guaranteed. Common training should be conducted regularly on the basis of previously defined tasks and assignments. The mutual support of liaison officers should be assisted.

Co-ordination should take place efficiently regarding tasks, training and liaison officers postings. In addition, ad-hoc co-ordination in the target area seems to be useful, e. g. in order to establish contacts with other actors on the field level.

4.3.2. Financial Support of Actions in Third Countries

While applying the actors-in-the-chain approach, it is essential to support targeted measures in the countries of origin and transit. Some of these forms of assistance were already identified in the conclusions of the Tampere European Council in view, in particular, to help these countries to strengthen their capacity to combat trafficking in human beings, and to cope with their readmission obligations (see 4.8.). In this framework, targeted migration and asylum projects could be financed in the following areas:

* Support of asylum seekers infrastructure;
* Development of public registration structures;
* Awareness raising campaigns;
* Improvement of document security;
* Deployment of liaison officers;
* Expert meetings, training and seminars;

With regard to the specific situation in transit countries the following additional elements could be financed:

* Supporting returns of irregular migrants;
* Improvement of border control management and equipment.

Building upon lessons learned from the implementation of the action plans prepared by the High Level Working Group on Immigration and Asylum and adopted by the Council, and to complement national actions carried out within the framework of the European guidelines on immigration, the Commission will propose a new programme to that end. This programme could complement other existing regional programmes, in which, despite their much broader scope, migration issues also are one of the priorities. In any case, particular attention should be given to the overall coherence of our external actions.

4.3.3. Awareness Raising Campaigns

In No. 22 of its Tampere conclusions, the European Council mentioned information campaigns in the countries of origin as another instrument to influence irregular migration. The concept of information campaigns as such should be interpreted in a broad sense. Initiatives aimed at raising awareness among the public at large of the problems and risks related to illegal migration could be considered, as well as concentrated initiatives targeted at specific groups such as unemployed, women or students. Initiatives could make use of various means to convey messages such as seminars, round tables, the written press and radio and television broadcasts.

The preparation of information campaigns requires a tailor-made solution for the respective country of origin or even region. The cultural dimension is a fundamental element of such campaigns. The elaboration of information campaigns has, therefore, to be conducted carefully in a way, which ensures that the campaign has the desired effect on the target region and audience.

The Commission will further develop the concept of awareness raising campaigns taking due account of regional and cultural identities in order to create an efficient and focussed instrument in the countries of origin.

4.4. Border Management : Towards the Development of a European Border Guard

High standard external border controls are an important contribution in order to prevent illegal immigration. It should be highlighted as well that border management is not focussing solely on the immigration aspect but also on other purposes: customs purposes, traffic security, prevention of the entry of dangerous or illegal goods, identification of persons wanted for arrest or extradition at a request of a competent judicial authority etc.

All these elements have to be integrated into a coherent strategy. The setting-up of a European Border Guard as a core element of such a strategy has already received strong political support, and exploratory work, financed by the ODYSSEUS programme, is underway. This being said, first steps can be taken in the short term, which will form the nucleus of such an overall approach.

4.4.1. Common Curriculum and Training

As already emphasised, border checks are carried out in accordance with uniform principles based on a common standard. However, these elements have to be developed further. A key factor to enhance the quality of the co-operation could be the elaboration of a harmonised curriculum of Border Guard officials by taking into account the particularities of the national training traditions.

Another measure in order to strengthen co-operation between border control authorities is the harmonisation of the training of Border Guard officials. First attempts are being made within the planned police school (CEPOL). However, it should be outlined in that context, that a clear distinction between immigration and respectively border control issues and police co-operation must be drawn. Border control issues should be conducted by a specialised service, which calls for specific know-how. A professional border guard management requires clearly

focussed education and training. In addition it should be recalled, that the legal framework differs.

It should therefore be considered whether these specific needs would not be better matched by setting-up an independent and dedicated instrument based on a network of existing national training facilities and offering appropriate and targeted services like programme design, seminars, workshops, etc. This in turn could become the initial phase of a European Border Guard School. Such a school could also offer training to the staff of transit countries that are engaged in any form of co-operation with the Union.

4.4.2. Border Controls and Border Surveillance by Joint Teams

Article 7 and Article 47 of the Schengen Convention implementing the Schengen Agreement call for closer co-operation in the field of border controls. Such co-operation may take the form of an exchange of liaison officers. On the basis of bilateral agreements, reciprocal secondment of liaison officers already takes place. These liaison officers can be posted to executive border guard authorities at the external borders. They are not carrying out any tasks relating to the sovereignty of States but advise and support the competent border guard authorities. It should be examined how an exchange of this kind could be improved and further developed not only by bilateral co-operation of the Member States, but also by a coherent Community approach. The technical co-operation support facility referred to under 4.5. could be instrumental to that end.

The Commission intends to develop further these suggestions in a Communication on European border management to be released in the near future. A main feature of this overall approach will be the development of an operational concept leading - in the medium-term - to a European Border Guard.

4.5. Improvement of Co-operation and Co-ordination at the Operational Level

As a result of intensified common efforts, Member States' actions could be better adjusted and co-ordinated in many instances :

* Co-ordinating the deployment of liaison officers and experts (see 4.3.1.);
* Co-ordinating action among liaison officers and experts as well as other actors in the target area (see 4.3.1.);
* Networking and connecting Member States operational services (see 4.4.2.).

Until now, many valuable initiatives have been either taken by individual Member States or developed within the Council, very often with the support of Community funding offered by the ODYSSEUS programme. Nevertheless, the moment has come to depart from such a piecemeal approach and to ensure coherence and consistency.

The Commission has duly taken this need for enhanced co-operation into consideration when preparing its proposal [17] for the successor to ODYSSEUS, which has reached the end of its lifetime. Consideration should also be given to the establishment of a permanent technical co-operation support facility, which could contribute to the initiation, channelling and co-ordination of concrete actions.

Other areas are identified in the present communication where improvements of co-ordination and co-operation could imply the creation of new instruments or structures, with regard, for instance, to gathering, analysing and dissemination of intelligence and information (see 4.2.), administering existing or future electronic systems (see 4.1.4. and 4.2.3.) or training (see 4.4.1.). If the Council follows these suggestions, in order to avoid uncoordinated proliferation, the Commission will recommend to follow a step-by-step, incremental approach, building upon the ongoing reflection on externalisation, which could lead in the medium-term to the creation of one single technical support agency. The latter could perform the three main functions of information gathering and dissemination (European Migration Observatory, Early Warning System), co-ordination of administrative co-operation (training, European Border Guard School, co-ordination and planning of operational co-operation) and systems management (SIS, Eurodac, European Visa Identification System), with regard to migration management in general.

As a successor to the ODYSSEUS programme, the Commission proposes a new pluriannual programme, ARGO, aiming at supporting the administrative co-operation needed for a proper implementation of the policies and instruments based on Art. 62 and 63 TEC. Many of the above-mentioned objectives will be taken into consideration in this framework. The Council is therefore invited to adopt its legal basis as soon as possible.

Moreover, the creation of adequate structures at Community level should be envisaged in view of ensuring co-ordination and efficiency in carrying out operational tasks flowing from enhanced co-operation. This should be done in a coherent way, based on a shared assessment of existing needs and available resources both at national and Community level, as well as avoiding duplications and overlappings.

4.6. The Advanced Role of Europol

Detection and dismantlement of criminal networks are high priorities in the fight against illegal immigration. This action is promoted by police co-operation, in which the role of Europol could be advanced.

The purpose of Europol's work in the field of combating illegal immigration is, as in other areas, to provide support to the Member States in the prevention, investigation and analysis of the crimes involved. Europol provides for strategic products, which comprise not only descriptive but also predictive elements. These allow for an appropriate threat and risk assessment. Europol carries out operational support with intelligence bulletins and analysis work files. It also supports joint investigations and operations. The joint operations, which have already been conducted, have led to the development of follow-up investigations and to the observation, arrest and conviction of several suspects.

The EU Police Chiefs Operational Task Force invited Europol to organise experts meetings, elaborate threat assessments and analysis work files on the smuggling of migrants and trafficking in human beings, and to report back to the Task Force. To this end, the Task Force called on Member States to provide Europol with the information required. Europol was also invited to draft a strategy paper on illegal immigration and trafficking in human beings.

To strengthen its role, Europol should be given more operative powers to enable them to work together with national authorities on trafficking or smuggling of human beings, as also concluded by the EU Police Chiefs Operational Task Force in March 2001.

To that end, Art. 30 TEU should be fully utilised and Europol should be enabled in a legally binding manner to:

* further facilitate and support the preparation, co-ordination and carrying out of specific investigative actions by the competent authorities of Member States, including operational actions of joint investigation teams, comprising representatives of Europol in a support capacity;
* ask the competent authorities of the Member States to conduct investigations in specific cases and develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases on trafficking or smuggling of human beings;
* be instrumental in the collation and exchange of information by the law enforcement agencies of reports on suspicious financial transactions relating to trafficking and smuggling of human beings. The Europol management board is invited to consider the establishment of agreements with transit countries to foster the operational exchange of information.

4.7. Aliens Law and Criminal Law

A "classical" approach to fight illegal immigration is to adopt regulations under the law on aliens, such as carrier sanctions or measures against illegal employment. In summary, all regulations in the law on aliens comprise a set of measures, which have an internal as well as an external preventive effect, if properly enforced.

Many legal and practical instruments which the EU is progressively building in closely related matters, such as police and judicial co-operation, must also be mobilised in a concrete way in order to find a comprehensive approach in fighting against smugglers and traffickers in human beings. The liaison magistrates, where they exist, the European judicial network, and especially Eurojust, should improve their activities to focus on this type of offence. Furthermore, the adoption of the Convention on mutual legal assistance of 29 May 2000, as well as the recent developments on its protocol on improving mutual assistance in criminal matters, in particular in the area of combating organised crime, laundering of the proceeds from crime and financial crime, will constitute important tools to increase the efficiency of judicial co-operation in the fight against smuggling and trafficking. It is necessary to call for a swift ratification of the Convention and later of its protocol.

4.7.1. Smuggling of Human Beings

* Distinction between Smuggling and Trafficking of Human Beings

The expressions "smuggling" and "trafficking" are often used synonymously, although a clear distinction should be drawn due to substantial differences. This is also useful from a law enforcement perspective. A clarification of terminology and definitions has been made in the framework of the United Nations Convention against Transnational Organised Crime and its two accompanying protocols on smuggling and trafficking, which were signed in Palermo on December 12-15th 2001. [18]

These definitions make it clear that smuggling is connected with the support of an illegal border crossing and illegal entry. Smuggling, therefore, always has a transnational element. This is not necessarily the case with trafficking, where the key element is the exploitative purpose. Trafficking involves the intent to exploit a person, in principal independent from the

question as to how the victim comes to the location where the exploitation takes place. This can involve, in cases where borders are crossed, legal as well as illegal entry into the country of destination. Illegal immigration can also cover parts of the trafficking situation, but has indeed a wider scope and relates more to the general illegal entry and residence of persons. Illegal immigrants in a wider sense are, therefore, not necessarily victims of traffickers.

* Measures against Smuggling of Human Beings

As regards the issue of smuggling of migrants, Art. 27 of the Schengen Implementation Agreement requires "to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside the territory of one of the Contracting Parties in breach of that Contracting Party's law on the entry and residence of aliens".
The Council recently reached political agreement on a Directive defining the facilitation of unauthorised entry, movement and stay and an accompanying Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence. [19]

On the basis of the outcome of this agreement, it has to be assessed, whether there is a continuing need to harmonise further the rules on smuggling in human beings. The minimum result should be that there is a binding framework for the prosecution of facilitators of illegal entries or their instigators and accomplices. This should include not only common definitions and basic requirements for the maximum sentence but also new minimum sanctions for the crimes concerned.

4.7.2. Trafficking of Human Beings

As indicated in point 3.6 the Council reached political agreement on a Framework Decision addressing the substantial criminal law aspects of trafficking. Furthermore, in the field of legislative measures against trafficking in human beings, it is also important to underline that the victims must be put in focus. The adoption of the Framework Decision on the standing of victims in criminal procedure on 15 March 2001 is especially relevant here. It provides measures to safeguard for instance the victims right to information and protection in relation to the criminal procedure. It is, however, also important to clarify the status of the victims of trafficking in terms of their right of residence when they are prepared to co-operate in investigations against their exploiters. On the one hand, such a clarification would provide a platform for a more structured assistance and protection focusing directly on the victims individual situation and needs, and, on the other hand, on the need of the law enforcement and the judiciary to conduct efficient in investigations against traffickers.

After final adoption and evaluation of the implementation of the Framework Decision on combating trafficking in human beings, the need to approximate further minimum rules relating to the constituent elements of criminal acts and to penalties in the field should be assessed with due respect to the principle of subsidiarity. Furthermore the Commission will present a legislative proposal on short-term residence permits for victims of trafficking that are prepared to co-operate in investigations and criminal procedure against their exploiters.

4.7.3. Illegal Employment

A significant number of illegal migrants have entered the country of destination legally, but overstayed the time limits for residence because of the possibility to continue working. Since

the Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals, [20] the sensitive issue of illegal employment of third-country nationals has not been tackled again in the Council. [21] The Commission adopted a Communication on illegal work in 1998, which also deals with illegal employment of illegally resident third-country nationals. [22] This Communication intended to initiate a debate in the Member States and among the social partners on the most appropriate strategy to fight illegal work.

It would seem clear that in order to address the problem of illegal immigration comprehensively, the illegal employment of illegal residents should be put back on the political agenda. The demand for illegal workers is especially caused by their employers. Sanctions against illegal employment should be harmonised for the elimination of all competitive advantages, which is a very basic principle of Community law. This includes minimum criminal penalties. In addition, financial gains should be diminished, as described below.

The Commission will further examine the opportunity of tabling a proposal for a Directive on the employment of illegal residents from third countries which would focus on the specific requirements needed to tackle this issue.

4.7.4. Illegal Immigration and Financial Advantages

The adoption of the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of means and assets from crime represents an important instrument for the prevention and repression of smuggling of migrants and trafficking of human beings.

As a common principle, the confiscation of all financial gains from criminal activities relating to illegal immigration should be given priority. Therefore, regulations on confiscation have to be established and adequately enforced, if this is not already the case. This should include provisions on the liability of legal persons, who are involved in these activities. Penalties for legal persons could be, for instance, the exclusion from entitlement to public benefits or the disqualification from practising commercial activities. Furthermore, traffickers, smugglers or liable legal persons should be fully charged for all return related costs, including costs for social welfare and other public expenditure during the stay.

Employers of illegal workers create the demand for illegal labour migration. The pull factor to immigrate illegally would be questioned when it is difficult to find a job and to earn money. This causal link justifies taking effective measures with considerable financial consequences. Such measures would also contribute to avoid unfair competition.

On a subsidiary basis employers of illegal workers could also be charged in full for the return costs of returning their illegal workers, including all costs of their stay until return, which are, at present, usually covered by social welfare or other public means. Financial sanctions for employers of illegal workers could be introduced in order to decrease the financial attractiveness of illegal employment. These financial sanctions could be assessed according to the estimated savings made from the illegal employment. The resources from the financial sanctions could be used for voluntary return programmes, thus creating a perspective for returned migrants in their countries of origin. These financial measures would significantly diminish the interest in promoting illegal immigration. Member States should ensure that this business does not pay.

At the EU level, the Commission recommends to address the seizure of financial advantages more intensively with the aim to develop a legal framework and common rules. As a first, more concrete step a set of binding minimum sanctions and a catalogue of optional sanctions concerning means of transports and return-related costs should be adopted on the basis of a proposal presented by the Commission.

4.7.5. Carrier Liability

Carriers today are already responsible for returning those aliens who are refused entry on the basis of Art. 26 of the Convention implementing the Schengen Agreement of 14 June 1985. In addition, carriers are obliged to take all necessary measures to ensure that an alien is in possession of valid travel documents. The Council adopted in June 2001 a Directive supplementing the provisions of Article 26, which contains three optional models of penalties for carriers, who do not fulfil their obligations.

Nevertheless, there should be a reflection on future, more harmonised regulations with regard to carrier liability in an in-depth discussion among all interested parties. To this end trilateral talks will be held between Member States, the transport industry and the Commission.

These talks could help to find a balance to ensure the necessary liability of carriers by acknowledging their difficulties in exercising control measures. In the framework of these talks, consideration should be given to the different characteristics of passenger traffic and transport of goods. In addition, commercial carriers should be supported with training and technical advice to enable them to carry out their responsibilities properly.

4.8. Readmission and Return Policy

A Community return policy should be based on the three elements: common principles, common standards and common measures. Important common principles are, for example, the priority of voluntary return over forced return and the strengthening of the obligation under international law to readmit own nationals. On the basis of such principles, common standards on expulsion, detention and deportation could be developed. Another subject of further consideration should be the consequences of illegal entry and residence regarding each individual illegal resident, including the feasibility of exit controls.

Common measures and regulations should tackle administrative co-operation of Member States. For instance, it should be noted that a European Visa Identification System, as described above, could significantly facilitate the process of identification of illegal residents and the provision of travel documents for return purposes. On the basis of the experience gathered in implementing the European Refugee Fund, it could also be assessed, whether a specific financial instrument should be available for return purposes in order to create an incentive for Member States to strengthen their efforts.

Closer co-operation is also needed on the issues of transit and readmission. The concept of readmission agreements, which has been endorsed in conclusion No. 27 of the European Council in Tampere, has to be developed. Nevertheless, before the negotiation of any readmission agreement, the political and human rights situation in the country of origin or transit should also be taken into account. When the first Community readmission agreements are concluded and implemented, their effects have to be evaluated and

assessed.Furthermore, readmission clauses should be included in all future Community association and co-operation agreements. Targeted technical assistance, if needed supported by Community funding, could be offered where appropriate. The EU should also use its political weight to encourage third countries, which show a certain reluctance to fulfil their readmission obligations. In addition Member States should envisage regulating the procedures for readmission among themselves as well. Closely related to readmission is the transit issue. At EU level rules on transit of returnees should be put in place as well as with third countries, where appropriate.

Return policy is also an integral and crucial part of the fight against illegal immigration. Due to its independent importance, it will be the subject of a more detailed reflection in a separate Green Paper on a Community Return Policy. The wide discussion of the issues listed in this paper will form the basis e.g. of the preparation by the Commission of a draft Council directive or minimum standards for return procedures.

5. Conclusion

At Tampere, the European Council has required the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it. Border controls must in particular respond to the challenges of an efficient fight against criminal networks, of trustworthy action against terrorist risks and of creating mutual confidence between those Member States which have abandoned border controls at their internal frontiers. Efficient action in preventing and fighting illegal immigration and trafficking in human beings is therefore a key element for the successful completion of the ambitious programme set up by these conclusions as well as by the Treaty. It is also crucial in building up the necessary confidence and support of public opinions for a much needed common asylum regime based on the highest humanitarian standards, as well as a genuine immigration policy, in line with Europe's tradition of hospitality and solidarity, taking into account the new dimensions of the migration phenomenon world-wide and ensuring a proper integration in our societies of legal migrants.

The civil society must also be intensively involved in the efforts to prevent and fight illegal immigration. Relevant actors like political parties, trade unions, representatives of industry and economy as well as of relevant non-governmental organisations have to be heard to develop a widely accepted set of measures. This integrative method should apply both at national and at EU level in the framework of the open method of co-ordination proposed for the Common immigration policy.

The Council is invited to endorse the action plan., if possible before the end of the year in order to ensure rapid development, indicating which of the potential actions it considers to be elaborated with priority. For its part, the Commission will take into account the main elements of this approach in drawing up the first set of guidelines to be proposed to the Council by the beginning of 2002 in view of initiating an open co-ordination policy in the area of immigration.

Footnotes;

[1] Cf. COM 2000 755 final.; COM (2000) 757 final.

[2] Cf. OJ C 19 of 23 January 1999, p. 1.

[3] Cf. paragraphs 22 - 25.

[4] Cf. OJ L 239 of 22 September 2000, p. 1.

[5] Cf. COM (2000) 782 final; COM (2000) 167 final.

[6] Cf. Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, COM (2000) 757 final.

[7] COM (2001) 387 final.

[8] Cf. no. 2.3.2. of COM (2000) 755 final.

[9] Cf. e. g. OJ C 5 of 10 January 1996, p. 1; OJ C 5 of 10 January 1996, p. 3; OJ C 304 of 14 October 1996, p. 1; OJ L 342 of 31 December 1996, p. 5.

[10] Cf. COM (2000) 854 final.

[11] Cf. UN Doc. A/55/383 of 2 November 2000 and COM (2000) 760 final.

[12] OJ L 81 of 21 March 2001, p. 1.

[13] COM (2001) 577 final.

[14] Cf. SEC (2001) 602, of 9 April 2001.

[15] Centre d'information, de réflexion et d'échange à l'égard des frontières extérieures et de l'immigration, cf. OJ C 274 of 19 September 1996, p. 50.

[16] Within the Schengen Framework these concepts have already been set up in the field of document advisers and external borders, cf. SCH/Comex (98) 59 rev = OJ L 239 of 22 September 2000, p. 308 and SCH/Comex (99) 7 Rev 2 = OJ L 239 of 22 September 2000, p. 411.

[17] Cf. proposal for a Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (ARGO), COM (2001) 567 final.

[18] Art. 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air stipulates that "smuggling of migrants" means "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".

[19] The formal adoption is still pending due to procedural necessities (state as of begin of November 2001). The texts are based on the initiative of a Directive defining the facilitation of unauthorised entry, circulation and residence, and a Framework Decision on the strengthening of the penal framework to prevent the same actions; OJ C 253 of 4 September 2000, p. 6.

[20] OJ C 304 of 14 October 1996, p. 1.

[21] But cf. Council Decision of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001 and the employment guidelines for 2001, OJ L 22 of 24 January 2001, p. 18/23 on combating undeclared work in general.

[22] COM (1998) 219 final.

UNHCR'S POSITION

Communication from the European Commission on A Common Policy on Illegal Immigration COM(2001) 672 final UNHCR's Observations, Geneva, July 2002

Executive Summary

The European Union and its Member States generally acknowledge the positive value of international migration when it takes place in a regulated and predictable manner. They are alarmed, however, by irregular migratory movements. Indeed, in the face of the perceived threat posed by this phenomenon, States have introduced a series of measures to deter or prevent migrants from gaining unauthorised entry into their territories. The blanket enforcement of such measures makes it increasingly difficult for refugees and asylum-seekers to secure access to international protection. With this concern in mind, UNHCR must stress that the Action Plan contained in the Commission Communication on a Common Policy on Illegal Immigration and subsequently adopted by the Member States strike a proper balance between migration control priorities and refugee protection imperatives.

(i) In implementing their visa policies, Member States should give due humanitarian considerations to the particular situation in which persons who have to flee from persecution in their country of origin find themselves. In certain situations, States could facilitate the legal entry of refugees through embassy procedures for processing asylum claims within countries of origin.

(ii) UNHCR would welcome the development at the EU level of a networked system for information gathering, analysis, exchange and dissemination. Such a system could draw usefully on UNHCR's wide-ranging operational experience as lead international organisation in complex situations of population displacement.

(iii) Immigration and airlines liaison officers tasked with pre-embarkation controls should have clear instructions and adequate training for dealing with cases which might come within the purview of the international refugee protection regime. UNHCR stands ready to provide its expertise in the design and implementation of such training programmes.

(iv) Financial and technical assistance programmes for third countries aimed at stemming irregular immigration into the European Union should be balanced with adequate support for the establishment or strengthening of asylum systems, reception capacities and refugee integration programmes.

(v) Credible, impartial and accurate awareness-raising campaigns in countries of origin and transit have an important role to play in reducing irregular migration. Such campaigns should evidently not be used as a means of preventing the flight of refugees.

(vi) Effective border management in a common area, while legitimate and necessary, must have built-in mechanisms and procedures for identifying and referring to the competent central authority refugee claimants.

(vii) Interception measures aimed at strengthening controls at sea borders must ensure, in addition to general rescue-at-sea obligations, adequate protection safeguards for refugees and asylum-seekers. The fact that asylum-seekers and refugees were smuggled by sea does not in any way deprive them of any rights as regards access to territory and to asylum procedures.

(viii) The common curriculum and training envisaged for border guards should include a comprehensive asylum component. UNHCR stands ready to contribute to the development and implementation of such programmes.

(ix) A comprehensive and integrated migration management strategy should necessarily include an effective return policy for irregular migrants and unsuccessful refugee applicants. There are a number of ways in which UNHCR could play a supportive role in assisting Member States to deal with the return of persons determined not to be in need of international protection.

(x) Re-admission agreements are one of the essential tools for addressing the problem of irregular migration. However, UNHCR considers that such agreements designed for the return of nationals do not effectively meet the situation of asylum-seekers whose claims have not been determined. This is best addressed through the establishment of co-ordinated approaches to the allocation of State responsibility for determining refugee status.

(xi) UNHCR notes the interest of Member States in an enhanced role for Europol in the fight against irregular migration. An important guarantee that must be upheld in the work of Europol is the protection of the personal data of asylum-seekers and refugees to ensure that it is not disclosed to or shared with the authorities of the country of origin.

(xii) UNHCR supports the work of the European Union against organised criminal smuggling of human beings so long as it is consistent with the Smuggling Protocol supplementing the United Nations Convention against Organised Crime. It must be recognised that many genuine asylum-seekers have no viable option to reach safety, but to resort to the services of smugglers. Therefore, the need for anti-smuggling measures to grant special treatment to refugees and asylum-seekers deserves particular attention.

(xiii) Policies and strategies to combat trafficking in human beings and related exploitation must be accompanied by specific protective and assistance measures for victims and witnesses of this criminal activity. Putting in place such measures would also ensure that national asylum procedures are not inappropriately used. At the same time, it should be recognised that there may be certain individual victims whose protection needs can best be addressed through the grant of asylum and to whom access to asylum procedures must not be denied.

(xiv) The problem of illegal employment is not of direct concern to UNHCR in relation to its refugee protection mandate. However, the Office has an interest in the issue from the perspective of a comprehensive approach to migration management that implies addressing both "push" and "pull" factors.

(xv) UNHCR's position on carrier liability is that sanctions should not apply where a person lacking the required documentation for admission seeks international protection because of a well-founded fear of persecution or other threats to his or her life or freedom.

I. Introduction

1. In recent years, irregular migration has become a major concern for the Member States of the European Union, thereby prompting them to pursue wide-ranging preventive, deterrence and punitive measures. Yet, despite such concerted efforts at both national and Community levels, the numbers of irregular migrants arriving in the European Union do not seem to be declining. Indeed, current predictions with respect to economic, demographic and political pressures in many parts of the globe permit the inference of growing migratory movements towards the European Union and the rest of the industrialised world where the projected population decline and ageing are likely to accentuate the demand for foreign labour.

2. The prevention and control of irregular economic immigration into the European Union have long been considered essential elements of the emerging common immigration and asylum policy of the Union. To this end the European Commission issued on 15 November 2001 a Communication on a common policy on illegal immigration, setting out a comprehensive Action Plan to prevent and combat irregular immigration and trafficking of human beings in the European Union. On 28 February 2002, the Justice and Home Affairs Council approved the proposed Action Plan with some amendments.

3. The Action Plan expressly provides that "measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection." This reflects the proclamation made by the Tampere European Council that the common policies in asylum and immigration, while ensuring a consistent control of external borders to prevent irregular migration, must be based on principles which "offer guarantees to those who seek protection in or access to the European Union."

4. The present Note seeks to bring UNHCR's contribution to the European debate as to how to manage migratory movements in a way that upholds human rights and humanitarian principles, while addressing the legitimate concerns of States regarding irregular migration. The Note's central focus is, therefore, on the need to clearly distinguish – in admission policies and in the public debate – between asylum-seekers fleeing persecution and violent conflict, and people moving for purely economic and social reasons.

II. Irregular Migration and Refugee Protection: An Overview

5. The starting point for a principled approach to the issue of irregular migration must be that while States have the sovereign right to control the entry and residence of non-nationals, the operation of their immigration policies has to be consistent with obligations of States deriving from international refugee, human rights and humanitarian law. Indeed, fearing "uncontrolled" migration in this era of globalisation, European States have individually and collectively introduced a series of measures to obstruct or dissuade third-country nationals from gaining access to their territories. Generally, however, a one-dimensional view of the phenomenon of irregular migration and its causes has hitherto dominated the policy orientations and public debate, thereby leading to no effective response.

6. From the perspective of UNHCR, a major problem common to virtually all of the immigration control measures introduced by States is that too often they fail to make distinctions between, on the one hand, refugees and asylum-seekers and, on the other hand, economic migrants. In some cases, these measures are also self-defeating in that would-be migrants and asylum-seekers turn to increasingly more sophisticated human smuggling networks that are able to circumvent the immigration controls. A vicious circle then sets in motion, with States continually in search of more and more restrictive measures while the smugglers find new ways to get around them.

7. Irregular migration does not exist in a vacuum. It is a dynamic, multi-faceted problem, having social, political and ethical dimensions. Global economic and demographic imbalances and the resulting poverty, unemployment and environmental degradation, combined with the absence of peace and security, poor governance, a generalised lack of respect for human rights and tides of violence and persecution are all key factors prompting population displacement and irregular movements today as in the past centuries. To these "push" factors and the economic "pull" of the north are now added proximate determinants of movements: readily available information about other places and the opportunities they offer, cheaper and accessible transportation facilities and available services of professional migration agents.

8. Experience shows that control and deterrence measures by themselves will have little lasting impact when the need to move prevails. So long as certain basic necessities of life are not met in one's own country, the imperative of survival will continue to dictate the path elsewhere irrespective of the geographical, legal, political and financial barriers erected along the way. Some will move from choice, some because they are forced to, and others for reasons that include elements both of choice and coercion. In the circumstances, the best that States can do is to bring some order to population movements through a coherent mix of migration management policies.

9. Dealing effectively with irregular migration is not, therefore, just a matter of introducing more rigorous legislative and policy measures aimed at strengthening border controls. As acknowledged by the Tampere Conclusions, Governments will be in a better position to address the problem if they are equipped with a broad range of migration management strategies going beyond measures to prevent unauthorised entry. Such a strategy implies, first and foremost, tackling the economic, security, human rights, environmental and demographic problems that prompt people to leave their own country and to seek admission to other States. Addressing the root causes of refugee movements and emigration from less stable and prosperous countries is by no means a simple task. But the European Union could use the various policy instruments it has at its disposal in the fields of common foreign and security policy, development assistance and humanitarian aid to influence the course of events in those countries.

10. A comprehensive, multi-disciplinary response to migration must also address or touch on all the dimensions of refugee protection. Migration management cannot work efficiently without coherent systems and procedures for the protection of refugees. Similarly, asylum policies will not function properly in the absence of comprehensive and transparent immigration policies. If the asylum channel remains the only avenue of entry for those seeking economic opportunities, unravelling the confusion between asylum-seekers and irregular migrants will continue to be difficult.

11. In the final analysis, refugee protection is first and foremost about meeting the needs of vulnerable and threatened individuals. These needs, of course, have to be

accommodated and addressed within a framework of sometimes competing interests and rights. But clearly, the international refugee protection regime was never devised with migration control as its object. It is essential, however, that the 1951 Convention and its 1967 Protocol, as expressions of pre-eminent international law, should provide guidance and direction for the implementation of immigration policies that may impact on refugee protection. Concerns about irregular migration, however legitimate, cannot outweigh the fundamental importance of States honouring their international obligations under the 1951 Convention, particularly the Article 33 prohibition not to return or refoule a refugee, in any manner whatsoever, to a country in which his or her life or freedom would be threatened.

12. States may not discharge themselves of their non-refoulement obligations by moving border controls away from their own frontiers or by invoking the inadequacies in, or the provisions of, their internal laws. In UNHCR's understanding, the overriding importance of the observance of the principle of non-refoulement does not imply any geographical limitation, but extends to all State agents acting in an official capacity within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition to the non-refoulement obligation, States parties to the 1951 Convention are required to effectively implement Article 31 of the Convention, which recognises that there are reasons justifying a refugee's unauthorised entry or presence in an asylum country.

III. Community Measures and Actions

13. On the basis of the Commission's Communication on a common policy on illegal immigration, the Council has recently adopted a number of specific measures and actions to be implemented in the short- and medium-term. In the paragraphs that follow, each of these measures and actions is analysed from the perspective of its potential interference with the ability of persons at risk of persecution or other forms of threat to their life or liberty to seek asylum in the European Union. The analysis generally reflects the UNHCR's Global Consultations on International Protection and their recommendations in the Agenda for Protection.

A. Visa Policy

14. Visa policy is a traditional and legitimate instrument at the disposal of States to control the entry of non-nationals into their territory. It is both a mechanism for deterrence and exclusion, and a means for dictating the specific conditions under which a non-national can enter the State of destination. States often retain the right to refuse entry into their territory even those granted a visa.

15. A harmonised EU visa policy intended for preventing unauthorised entry into the territory of Member States is provided for by the Council Regulation of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. The

present common list of 131 countries whose nationals are subject to EU visa requirements under the Council Regulation includes a number of countries where there is documented evidence of grave human rights violations, widespread persecution or violent political, ethnic or religious conflict.

16. In its present form, the EU common visa policy is therefore problematic insofar as it does not differentiate between persons in need of international protection and other third-country nationals. Where strict visa policies, operating in combination with sanctions on transport companies carrying passengers without proper documentation, inhibit escape to safety and access to asylum procedures of persons with a well-founded fear of persecution, they threaten to undermine basic principles of refugee protection. Such measures, which more often than not divert the flow of asylum-seekers into other countries and regions, may also have an adverse effect on international co-operation to resolve refugee problems.

17. UNHCR would recommend that in implementing their visa policies States should give due humanitarian considerations to the particular situation in which persons who have to flee from persecution in their country of origin find themselves. Such persons will very often have serious difficulties in meeting visa prerequisites such as the possession of a valid national passport, monetary sums to cover the costs of their stay abroad and their return travel, or family ties in the country of intended destination. Where, therefore, a person establishes to a reasonable degree that his or her continued stay in the country of origin would expose him or her to a risk of persecution or ill-treatment, this should cause States to be flexible on their visa requirements in a spirit of justice and understanding. It is likewise in the case of a person in an intermediate country where -- in the absence of or with limited resettlement opportunities -- the inability to leave that country would, for relevant refugee protection reasons, endanger his or her life or freedom there, or put him or her at risk of refoulement to his or her country of origin.

18. As a complement to the easing of visa requirements for persons in fear of persecution or ill-treatment in their country of origin or in countries of first asylum as suggested above, considerations could be given, in certain situations, to the possibility of processing asylum applications within countries of origin. "In-country processing" of asylum applications of persons in fear of persecution by the State of origin is, beyond dispute, fraught with many difficulties. As noted above, cases in which a refugee can request and obtain a national passport from the same authorities that are the cause of the refugee's fear of persecution are the exception rather than the rule. Even if the refugee is able to obtain a national passport surreptitiously, it could be dangerous for him or her to contact a foreign embassy with an asylum application. The scheme may, however, be feasible where the feared harm emanates from non-State agents and there is no State complicity, but the State is unable to provide the necessary protection in any part of the country. While promoting and supporting mechanisms that facilitate the legal entry of refugees into the European Union, UNHCR must stress that any such possibility should in no way undermine access to asylum procedures of asylum-seekers arriving at the EU borders without proper documentation.

19. There is another aspect of the above-mentioned Council Regulation on visa requirements and exemptions that UNHCR finds problematic. According to Article 3 of the Regulation, the decision as to the visa requirement or exemption in the case of recognised refugees and stateless persons is based on the third country in which these persons reside and which issued their travel documents. However, the harmonisation in this area takes an “exclusionist” approach, in the sense that the visa requirement

imposed on recognised refugees and stateless persons is mandatory if the third country where they reside and which issued their travel document is under visa obligation for its nationals. On the other hand, exemption from visa requirement in the case of recognised refugees and stateless persons who reside in a third country whose nationals are exempt from the Community visa requirement is left to the absolute discretion of the individual Member States. UNHCR believes that full harmonisation of such exemptions would ensure equal treatment of refugees and stateless persons in all Member States.

B. Information Exchange and Analysis

20. UNHCR supports the Council's plan of action as regards the compilation and analysis of migration and asylum data. Good policy-shaping and decision-making depend on good information and analysis. However, the scale and magnitude of irregular migration is by definition difficult to accurately estimate. Even statistical information relating to the levels and trends of legal migration is often partial and incomplete. Given this concern, the United Nations General Assembly, in its Resolution 56/203, has stressed the need for more migration data, analysis of the causes and patterns of international migration, including irregular migration, as well as its social, economic and demographic impacts.

21. Collection and dissemination of statistical data and information relating to asylum-seekers and refugees is a key statutory function of UNHCR. Moreover, UNHCR routinely collects, analyses and provides to decision-makers up-to-date information on conditions in countries of origin of asylum-seekers and refugees and in countries of asylum. UNHCR would welcome, and stands ready to contribute to, the development at the EU level of a networked system for sound information gathering, analysis, exchange and dissemination. Such a system could draw usefully on UNHCR's wide-ranging operational experience as lead international organisation in complex situations of population displacement.

C. Pre-Frontier Measures

Posting abroad of immigration and airline liaison officers

22. A number of EU Member States have posted immigration and airline liaison officers at major international airports and seaports in countries of origin and transit with the task of preventing the embarkation of undocumented or improperly documented travellers. The stated intention of such measure is to complement, and improve the efficiency of, visa requirements as a means of entry control. The present Action Plan proposes that the EU should continue to build up the network of such immigration and airline liaison officers.

23. Several of the countries to which EU immigration and airport liaison officers are posted are major refugee-producing nations, whose citizens figure high on the list of recognised refugees in the various EU Member States. In these circumstances, the question is how such officers tasked with "externalised" border control would deal with persons desperate to flee their country for a well-founded fear of persecution. Clearly, Article 31 of the 1951 Convention recognises that a person fearing persecution in his or her country of origin may have no other choice but to resort, for example, to forged documents both to leave that country and to obtain admission elsewhere.

24. In view of the above considerations, UNHCR would urge Member States to ensure that their immigration and airlines liaison officers tasked with pre-embarkation controls have clear instructions for dealing with cases which might come within the purview of the 1951 Convention and other relevant international refugee and human rights instruments. UNHCR stands ready to provide its expertise and advisory services in the design and implementation of training programmes for such officers.

Financial and technical assistance to third countries

25. Another pre-frontier measure contained in the Action Plan is the provision of EU financial and technical assistance to countries of origin and transit. UNHCR welcomes the fact that such assistance may not focus exclusively on migration control, but could also include the strengthening of refugee reception and protection capacities of countries of first asylum and transit. Indeed what is required is a truly comprehensive, multi-disciplinary approach to the migration and asylum challenges facing third countries, recognising that the European migration and asylum issues cannot be solved in Europe alone.

26. UNHCR has a strong interest in ensuring that refugees are able to enjoy effective protection in any country in which they find themselves. At the same time, UNHCR considers that responsibilities for refugee protection and the resulting costs should not be a matter of a State's geographic position, but rather a coherent, planned strategy for a collective humanitarian response to the victims of human rights violations, persecution and armed conflict.

27. It remains a fact that the great majority of refugees lives, and in all likelihood will continue to live, in countries of first asylum that have to contend with protracted refugee situations, with no immediate prospect for voluntary repatriation. They are faced with serious financial, political and security costs associated with the presence of large refugee populations. Given, therefore, that meeting international refugee protection responsibilities may place unduly heavy burdens on these countries, UNHCR regards it as its mandate responsibility to ensure that their burdens are ameliorated in order to qualitatively improve the political climate and the asylum possibilities for refugees in those countries.

28. UNHCR's policy in this regard is geared towards supporting the establishment of functioning asylum systems, reception capacities and viable integration programmes with the ultimate aim of achieving a globally recognised and consistently applied regime of refugee responsibilities. These activities are not only in the interest of refugee protection but also in the interest of all States. In this field, as in others, however, UNHCR can only be as effective as the support it receives from the donor community.

Awareness-raising campaigns

29. Credible information available or disseminated to potential migrants has an important role to play in reducing irregular migration. For there is evidence to suggest that the impetus to migrate is often based on ill-founded perceptions of the conditions and opportunities that exist in other countries, as well as a limited awareness of the dangers associated with irregular migration. Information programmes in countries of origin and transit may help to dispel such misconceptions, discouraging people from moving by irregular and clandestine means and informing potential migrants about any regular immigration opportunities that

exist, including in-country job-seeker visa processing schemes.

30. Information campaigns of this kind should evidently not be used as a means of preventing the flight of refugees, and must therefore be scrupulously honest, impartial and accurate in their content. UNHCR would have to insist, therefore, that any information campaign programmes should be strictly limited to those situations where the great majority of people who are leaving a country are demonstrably not in need of international protection.

D. Measures relating to Border Management

Border management in a common area

31. UNHCR is preparing a detailed commentary on the European Commission Communication "Towards integrated management of the external borders of the Member States of the European Union," issued on 7 May 2002. Suffice here to stress that border management measures must be designed and implemented taking into account the special situation of asylum-seekers arriving at the EU external borders without the required entry documentation. Such measures must not inhibit the entry and access to asylum procedures of persons who seek the protection of EU Member States. This would require more than a policy declaration to respect international obligations. An integrated border management system must have built-in mechanisms and procedures for identifying and referring to the competent central authority persons claiming to be in need of international protection.

Controls at sea borders

32. From UNHCR's perspective, the main concerns at stake when it comes to sea border controls are the following common core understandings emanating from international refugee law, international human rights law and fundamental humanitarian principles: absolute respect for the principle of non-refoulement, including non-rejection at the frontier; rescue of people in distress at sea and their disembarkation; admission of asylum-seekers, at least on a temporary basis, and their access to fair and effective asylum procedures.

33. It is, therefore, critically essential that any interception measures aimed at stemming boat arrivals must ensure adequate protection safeguards for refugees and asylum-seekers arriving by sea. The fact that asylum-seekers and refugees were smuggled by sea does not in any way deprive them of any rights as regards access to territory and to asylum procedures. Any interception and related sea border measures -- whether of legislative or operational nature -- which the European Union is envisaging to adopt should also set out specific guidelines for rescue-at-sea obligations and procedures. It is recalled, in this regard, that the question of rescue-at-sea and specific aspects relating to asylum-seekers and refugees were a subject of the UNHCR's Global Consultations.

Common curriculum and training

34. Border guards are often the Government officials who first come into contact with asylum-seekers. Unless these officials have clear instructions, knowledge and skills for

dealing with persons who might come within the purview of the relevant international refugee instruments, they may, by their actions or inactions, violate the rights of asylum-seekers and refugees. This may involve, for instance, denial of access to territory or referral to the competent refugee status determination authority, which may result in a breach of the non-refoulement obligation.

35. The requirement for border officials and immigration officers to have instructions and the necessary training for dealing with applications for asylum is expressly provided for in the Commission proposal for a Council Directive on "minimum standards on procedures in Member States for granting and withdrawing refugee status." Within the Council of Europe, both the Council of Ministers and the Parliamentary Assembly have adopted specific Recommendations on the training of border officials. These Recommendations stress that all officials who first come into contact with asylum-seekers should be fully cognizant not only of rules and principles of refugee protection deriving from international and domestic legal instruments but also of their responsibility for treating asylum-seekers with humanity, sensitivity and discernment.

36. UNHCR therefore strongly recommends that the common curriculum and training programmes envisaged for border guards include a comprehensive asylum component. This should include, at a minimum, learning and on-going skills development in the following key areas: principles of international refugee law under the 1951 Convention/1967 Protocol and the European Convention on Human Rights; asylum rules and procedures in national legislation; the limitations under international and national law on the use of detention; developments in the political and human rights situation in countries of origin of asylum-seekers; interviewing techniques, including intercultural and interpersonal communication; management of cases with special needs, such as those of separated children, victims of torture, etc. UNHCR stands ready to contribute to the development and implementation of appropriate and adequate curriculum and training programmes in these important areas.

E. Readmission and Return Policy

Return policy

37. The recent Green Paper on "a Community return policy on illegal residents" issued by the European commission rightly places the return question in the broader context of asylum, migration and human rights issues. UNHCR welcomes, in this regard, the initiative of the European Commission to organise a broad consultation on the issue, and intends to contribute to the debate in a separate submission.

38. For UNHCR, the primary concern in regard to the return issue is, of course, the situation of unsuccessful asylum-seekers. The Office appreciates that EU Member States have invested considerably in the development of complex asylum procedures. However, the credibility of these procedures risks to be undermined by the non-return of those who, after a fair and objective assessment of their asylum claims, have been found not to be in need of international protection on any valid grounds. This could also erode public confidence in the effectiveness of the international system of refugee protection.
39. The right of everyone to leave his or her country and to return thereto is fully recognised in international law. The General Assembly of the United Nations has, in a series of resolutions, underlined the responsibility of countries of origin in relation to the return of their nationals who are not refugees. The question of return of unsuccessful asylum-

seekers has also received the constant attention of UNHCR's Executive Committee. At the European level, the Committee of Ministers of the Council of Europe adopted Recommendation R(99)12 which provided Member States of the Council of Europe with guidelines on how best to facilitate the return of this group of persons to their country of origin.

40. While the international legal framework for the return of unsuccessful asylum-seekers is clear, a number of obstacles stand in the way of orderly and humane return. Some countries of origin are not fully co-operative to facilitate the return of their own nationals. In countries of destination, some sectors of the economy may benefit from the presence of people willing to work in physically difficult and menial jobs for less than the minimum wage and without social benefits. There are also logistical problems relating to arrangements for transit through third countries. From the perspective of the potential returnee, a number of elements may hinder or facilitate the implementation of a return measure. These include, for example, the length of the asylum procedure, the resources or skills the individual has acquired while in the country of asylum, the availability of accurate information on conditions in the country of origin.

41. Greater international co-operation is needed to deal with the return of irregular migrants and unsuccessful asylum-seekers to their countries of origin. Formal re-admission agreements offer the best mechanism for a collaborative response to this problem. For its part, UNHCR could play, within its humanitarian mandate, a supportive role in encouraging the return of unsuccessful asylum-seekers in a number of ways: undertaking the systematic dissemination of information on developments in the country of origin as they affect the process of return; promoting voluntary return through collaborative counselling measures; facilitating dialogue and negotiations between countries of asylum and origin; identifying possibilities for post-return initial re-integration assistance where this is needed; and in certain cases monitoring the situation of returnees once in their country of origin. The key criterion for UNHCR's involvement with the return of unsuccessful asylum-seekers must remain the fairness and accuracy of the refugee status determination.

Re-admission agreements

42. Re-admission agreements are, indeed, one of the essential tools for addressing the problem of irregular migration. Such formal agreements, whether bilateral or multilateral, have a significant advantage over unilateral return measures in that they spell out the mutual responsibilities and commitments of the contracting parties for the re-admission of their respective nationals.

43. Increasingly, however, re-admission agreements are being concluded to address the situation of third-country nationals who are present on the territory of either contracting party without authorisation. These third-country provisions of re-admission agreements make no differentiation between irregular migrants and persons seeking international protection. This is clear, for example, from the specimen re-admission agreement proposed by the Council of the European Union in November 1994. UNHCR considers that re-admission agreements designed for the return of nationals do not effectively meet the situation of asylum-seekers whose claims have not been heard and who may risk to be returned to situations where their security cannot be guaranteed.

44. It is true that the irregular movement of asylum-seekers is just as problematic as that of

economic migrants. Yet, it remains essential to clearly distinguish – in both admission and return policies – between persons in need of international protection and people moving for purely economic and social reasons. In the case of nationals found in an irregular situation in a given State, their re-admission by the State of nationality is, in effect, an end in itself. When it comes to asylum-seekers, however, neither irregular presence nor nationality is as such the determining factor for return. What is at stake is the determination of the State responsible for receiving and adjudicating the refugee claim of the asylum-seeker on the basis of agreed criteria for apportioning such responsibilities. Whichever State is ultimately found responsible, its commitment goes beyond the re-admission of the asylum-seeker and includes the obligation to observe the cardinal principle of non-refoulement, to consider fairly and objectively the person's asylum claim, and to treat him or her in accordance with accepted international standards.

45. UNHCR agrees with States that appropriate measures are necessary to limit the possibilities for refugees to seek asylum in one country after another where there are no valid reasons for doing so. This is best achieved through the establishment of co-ordinated approaches to the allocation of State responsibility for determining refugee status, preferably in the form of binding agreements similar to the Dublin Convention. Such agreements must contain, alongside criteria for apportioning responsibility, agreed mechanisms for the transfer of the asylum applicant without undue delays. In defining the allocation criteria, the fact that a person has the possibility to seek and enjoy asylum in a given country should not take precedence over every other consideration. Most importantly, the connections which an asylum-seeker may have with a particular country, whether through the presence of family members or linguistic, cultural or historical ties, are key considerations.

F. Europol

46. UNHCR notes the Council's interest in an enhanced role for Europol in the fight against irregular migration. One proposed measure in this regard is for Europol to enter into agreements with transit countries to foster the operational exchange of information. From the perspective of refugee protection, an important guarantee that must be upheld in the work of Europol is the protection of the personal data of asylum-seekers and refugees to ensure that it is not disclosed to or shared with the authorities of the country of origin.

G. Penalties

Smuggling of human beings

47. UNHCR shares the concern of EU Member States that the organised smuggling of migrants, including persons with a valid claim to refuge status, is increasingly in the hands of transnational criminal organisations that have scant regard for the lives of their customers. Precisely because UNHCR recognises that many genuine asylum-seekers have no viable option to reach safety but to resort to the services of smugglers, it cannot allow immigration control concerns to overshadow the need to protect the victims, or the commitment to uphold the right to seek asylum from persecution.

48. Through the adoption of two Protocols on Trafficking in Persons and Smuggling of Migrants, supplementing the United Nations Convention Against Transnational Organised Crime, the international community has made a significant contribution towards preserving this delicate balance between the repression of crime and the protection of humanitarian interests. Of particular significance to the current European debate is the definition, in the United Nations Protocol, of "smuggling of migrants" as:

    "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident."

49. It is clear from the terms of the United Nations Protocol on Smuggling that the criminal character of the facilitation of unauthorised entry or residence results from the combination of two elements, namely, the violation of immigration provisions and the pursuit of a financial or other material benefit. These elements are indissociable. Should it be otherwise, those individuals who facilitate the unlawful entry or residence of migrants or refugees out of compassion, with no other purpose than to help people in need, would be treated on the same footing as "professional" smugglers exploiting the distress of their fellow human beings. Regrettably, these two key elements are not made an integral part of the definition of smuggling in the Council Directive defining the facilitation of unauthorised entry, movement and residence and the accompanying Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence.

50. The need for anti-smuggling measures to grant special treatment to refugees and asylum-seekers deserves particular attention. Although some human smugglers may be humanitarian altruists, most are unscrupulous criminal gangs aiming to make profit out of compelling human needs. Many refugees and asylum-seekers who, of necessity, resort to human smugglers are thus doubly victimised: firstly, by the situation of persecution or danger that forced them to leave their country and secondly, by the greed of the criminal smugglers.

51. The international community must find better ways of managing the global movement of people so that they no longer fall prey to those who thrive and profit on the desperation of the weak and the powerless. In developing effective measures to combat smuggling, the underlying causes which force people to resort to irregular and clandestine movement must be addressed. This would necessarily include, aside from determined efforts to provide individuals and communities with greater degrees of security in their countries of origin, the adoption and implementation of a normative framework for legal immigration channels for employment, family reunification and studies.

Trafficking in human beings

52. UNHCR supports the work of the European Union against trafficking in human beings and related exploitation so long as it is consistent with the Protocol on Trafficking supplementing the United Nations Convention against Transnational Organised Crime. The Trafficking Protocol defines "trafficking in persons" in terms of three constituent elements: (i) it is an action consisting of recruitment, transportation, transfer, harbouring or receipt of persons; (ii) it is carried out by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of

vulnerability, or the giving or receiving of payments or benefits to achieve consent of a person having control over another; and (iii) the action is for the purpose of exploitation that includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery or servitude.

53. The Trafficking Protocol also sets out the basic obligations of protection and assistance to victims and witnesses of trafficking. These include, for example, adequate legal protection and standing in judicial or administrative proceedings; measures for physical, psychological and social recovery of victims; provisions for the physical safety of victims; and possibilities of temporary or permanent residence in appropriate cases.

54. UNHCR acknowledges that being a victim of human trafficking does not alone suffice to establish a valid claim for refugee status under the 1951 Convention and 1967 Protocol. There will, nevertheless, be individual victims whose protection needs can and should best be addressed through the grant of asylum and to whom access to asylum procedures must not be denied. At the same time, it is essential that anti-trafficking policies and strategies are accompanied by specific protective and assistance measures for victims and witnesses of trafficking. Putting in place such measures would also ensure that national asylum procedures are not inappropriately used.

55. As in the case of smuggling of migrants, measures to combat trafficking must necessarily include tackling the root causes of this abhorrent phenomenon: economic factors such as poverty and massive unemployment; social and cultural factors such as violence against women and girls, gender discrimination in the family, the community and by the State; and political and legal factors such as lack of appropriate legislation and public sector corruption. A truly comprehensive action plan against trafficking in persons, by definition, must address all the dimensions of the problem including its preventive aspect.

Illegal employment

56. UNHCR notes that the European Commission issued a Communication on Undeclared Work in 1998, which also touches on the unauthorised employment of irregular third-country residents. As far as UNHCR is aware, however, the suggestions and recommendations contained in that Communication have not been taken any further and translated into concrete plan of action to address this problem.

57. While the problem of illegal employment is not of direct concern to UNHCR in relation to its refugee protection mandate, the Office has an interest in the issue from the perspective of a comprehensive approach to migration management that implies dealing with both "push" and "pull" factors. It is generally recognised that irregular economic migration is often the consequence of the disconnect between, on the one hand, labour demand and availability of supply and, on the other hand, the non-existence or non-accessibility of legal channels of economic migration.

58. There are, at the same time, human rights concerns that the continuing concentration on irregular migration as largely a problem of border control limits awareness of the desperate conditions that irregular migrants have to tolerate in order to earn basic subsistence without authorisation to work. While some of them constitute an underworld, many live and work in the mainstream of the host societies, underpaid and

filling the less glamorous jobs that nationals have long disdained. Finding themselves outside the protections of criminal and civil law and with no legal avenues by which to claim humane treatment, they are often vulnerable to exploitation, abuse and deception by employers.

Carrier liability

59. The question of sanctions on transport companies for carrying undocumented or inadequately documented persons is a very delicate area, into which interests of various sorts converge. The fundamental concern which UNHCR has consistently voiced on this issue refers to the very real danger that measures, such as carrier sanctions, aimed at curbing irregular migration may inadvertently prevent persons at risk from leaving the place in which they fear persecution or other forms of violence.

60. UNHCR recognises that the lack of proper and adequate documentation on the part of asylum-seekers and refugees complicates the asylum process and the task of determining refugee status. The identity of such applicants may be difficult, if not impossible, to establish; it may be unclear whether some other State has in fact already accorded residence or protection; and removal of those found not to be in need of international protection may be frustrated. Nevertheless, these problems cannot in themselves justify refusal to admit or summary exclusion from asylum proceedings. By requiring a refugee to obtain proper travel documentation before fleeing his or her country to seek asylum in another country, States in fact ignore the very problems which give rise to the need for refugee protection and, in effect, deny the possibility of asylum to some refugees. As noted above, this is inconsistent with Article 31 of the 1951 Convention.

61. It is with this concern in mind that when commenting on the Council Directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement, UNHCR insisted on a "savings clause" to be incorporated into the Directive. In UNHCR's view, the sanctions foreseen by the Directive should not apply where the third-country national lacking the necessary documents for admission seeks international protection under the 1951 Convention and the 1967 Protocol or other international human rights instruments because of a well-founded fear of persecution or other threats to his or her life or freedom. It needs also to be stressed that airlines and other carrier personnel are not authorised by international law to either make asylum determinations on behalf of States or to assume immigration control responsibilities. They are neither qualified to identify cases which might come within the purview of international refugee instruments, nor inclined -- in light of penalties on their corporate employer -- to permit transport of those to whom the State might otherwise extend protection.

IV. Conclusion

62. With the adoption of the Treaty of Amsterdam, Member States of the European Union agreed to communitarise key policy aspects of asylum and immigration matters. The Tampere European Council, held shortly after the entry into force of the Amsterdam Treaty, firmly set the stage for the development of common European asylum and immigration policies based on principles which "offer guarantees to those who seek protection in or access to the European Union." This implies that the present Action Plan to combat irregular immigration into the European Union strike a proper balance between migration control priorities and refugee protection imperatives.

63. UNHCR recognises, of course, the dilemma of EU Member States faced by the problem of irregular, disorderly migration. The problem cannot be solved in Europe alone by harmonising laws, policies and practices. Likewise, combating irregular migration is not just a matter of introducing more rigorous measures aimed at strengthening border controls; it requires integrated policy responses at various levels, including appropriate orderly channels for the admission of labour migrants.

64. A greater coherence of internal and external policies of the European Union is required to effectively address the problems raised by today's movements of migrants, refugees, asylum-seekers and displaced persons. UNHCR has wide-ranging experience and expertise in dealing with the multiple facets of population displacement, including building asylum systems and capacities where needed, promoting international refugee law standards world-wide, and leading and co-ordinating the regional and global responses to refugee crises. UNHCR's Global Consultations and the Agenda for Protection resulting therefrom have also advanced thinking on these issues.

UNHCR prefers the term "irregular" or "undocumented" migrants to describe the situation of those who seek entry to the territory of a State without meeting that State's legal requirements for entry, residence or exercise of an economic or any other activity. The label "illegal migrants" connotes the imagery of persons who, finding themselves outside the immigration law, are without any legal identity or entitlement to just and humane treatment.

Presidency Conclusions, Tampere European Council (15-16 October 1999), Conclusion No 3.
By virtue of Article 27 of the 1969 Vienna Convention on the Law of Treaties, it is an established principle of international law that a State may not invoke its domestic legislation as a basis or justification for failure to perform its international obligations.
As part of its Global Consultations on International Protection and the resulting Agenda for Protection, UNHCR is currently in the process of elaborating comprehensive guidelines on refugee protection safeguards that must be built into States' interception measures.

Council Regulation (EC) No 539/2001, OJ L 81/1, 21.3.2001.
The right to seek asylum is now generally recognised as forming part of customary international law. It is enshrined, inter alia, in Article 14(1) of the Universal Declaration of Human Rights, Article 1(2) of the United Nations Declaration on Territorial Asylum, Article 3 of the Council of Europe Declaration on Territorial Asylum and Article 18 of the Charter of Fundamental Rights of the European Union. The right to seek asylum overlaps with and complements the right to leave any country, including one's own as provided for in Article 13(2) of the Universal Declaration of Human Rights and Article 12(2) of the International Covenant on Civil and Political Rights.
For a detailed UNHCR-commissioned study on State practice and a recommended

framework for Community action, see "Safe Avenues to Asylum: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests," A Preliminary Study by Gregor Noll and Jessica Fagerlund, Danish Centre for Human Rights, April 2002.

While Article 3 of the Council Regulation provides that the decision as to the visa requirement or exemption in the case of recognised refugees and stateless persons is without prejudice to obligations under the 1959 Council of Europe Agreement on the Abolition of Visas for Refugees, it should be noted that not all EU Member States are signatories to this Agreement, which in any event is limited in its geographical scope.

United Nations General Assembly, Fifty-sixth Session, A/RES/56/203, 21 February 2002.
This is clear from the formulation of Article 19 of the Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime: "nothing in this Protocol shall affect the other rights, obligations, and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein."

See background note and summary of Expert Round-table, Lisbon, 25-26 March 2002.

Commission of the European Communities, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 20.9.2000, COM(2000) 578 final.

Recommendation No. R (96) 15 of the Council of Ministers and Recommendation (1309) 1996 of the Parliamentary Assembly.
See, for example, Resolution 46/150 of 14 December 1990, 46/106 of December 1991, and 47/105 of 16 December 1992.

See, for example, Executive Committee Conclusion No. 85 (XLIX) of 1998.

Committee of Ministers of the Council of Europe, Recommendation R(99)12, May 1999.
The link between restrictive immigration control measures and the rise in smuggling and trafficking has been made by many observers, including the European Parliament and the Council of Europe. In its resolution "on illegal immigration and the discovery of the bodies of 58 illegal immigrants in Dover," the European Parliament had cause to observe: "…as a result of these barriers to immigration, refugees often fall victim to organised gangs of smugglers who demand substantial sums for their services." The Parliamentary Assembly of the Council of Europe has echoed similar concerns pointing out that "draconian restrictions on lawful immigration introduced by European countries increase the likelihood of people illegally entering Europe since they encourage recourse to the services of unscrupulous traffickers of human beings, using increasingly sophisticated and inhuman means to make money out of clandestine migration," (Recommendation 1449 and 1467).
Communication of the European Commission on Undeclared Work, Brussels COM (98) 219 final.
The incompatibilities between carriers' liability and the protection of refugees have been consistently pointed out by the Parliamentary Assembly of the Council of Europe, for example, in Recommendation 1163 (1991): "…airlines sanctions…undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from the immigration officers."

Council Directive on the Right to Family Reunification

UNHCR'S POSITION

UNHCR's Comments on the Amended Proposal of the European Commission for a Council Directive on the Right to Family Reunification (COM (2002) 225 final, 2 May 2002)

1. On 2 May 2002, the European Commission issued an Amended Proposal for a Council Directive on the Right to Family Reunification (COM(2002) 225 final). The original version of the Proposal had been issued on 1 December 1999 (COM (1999) 638 final) and had been slightly modified on 10 October 2000 (COM(2000) 624 final). UNHCR had commented on the original proposal in a paper issued on 9 March 2001. The present paper reflects the views of UNHCR regarding the Commission's Amended Proposal.

2. UNHCR welcomes that the Amended Proposal retains a number of the positive elements which were contained in the original text. In particular, UNHCR appreciates that the Amended Proposal:

(i) Exempts refugees from needing to establish conditions of support for family members —namely evidence of adequate accommodation, sickness insurance and economic resources.

(ii) Adopts flexible criteria as regards proof of family relationship for refugees, allowing alternative means of proof where the necessary documentary evidence is not available.

(iii) Generally accords members of the family the same residence rights as those accorded to the head of the family and, under certain circumstances, allows them to obtain an autonomous residence permit.

(iv) Generally accords members of the family (as a minimum, members of the nuclear family) the same treatment as that accorded to the head of the family as regards access to education, access to employment and self-employed activity and access to vocational guidance.

(v) Grants the right to appeal the rejection of an application for family reunion.

(vi) Recognizes the special needs of unaccompanied refugee children, and contains special provisions relating to reunification with their families.

3. UNHCR regrets, however, that some of the suggestions that it made when commenting on the original Proposal, have not been reflected in the Amended Proposal. UNHCR is, in particular, concerned about the fact that the Amended Proposal retains the criterion that family reunification may be refused on grounds of public health. UNHCR considers that reasons of health should not be invoked to deny refugees the right to family reunification.

4. UNHCR further regrets that the scope and contents of the Amended Proposal is in some

respects less comprehensive than of the original version, and that some of the standards of treatment as regards refugees are less favourable than those embodied in the previous text. The following are matters of particular concern to UNHCR:

Definition of the family

4.1 The definition of the family for the purposes of reunification has been narrowed. The previous version of the Proposal recognized the right to reunion not only to married spouses and their minor children, but also to unmarried couples forming a genuine and stable family unit. It also extended this right to other dependent members of the refugee's family who formed part of the same household. By contrast, the Amended Proposal restricts this right exclusively to the reunification of spouses and minor children, leaving to the discretion of Member States whether or not to authorize the reunification of other members of the refugee's family.

4.2 UNHCR considers that a flexible approach towards this matter is of primary importance if an appropriate response to the humanitarian plight of refugees is to be ensured. It is worth recalling in this connection that the Executive Committee of UNHCR has recommended States to apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family. Accordingly, the notion of "family" should not be exclusively circumscribed to the so-called "nuclear family", but should also encompass those dependent family members who are living in the same household, and, in addition, it should encompass not only legally married couples but also couples forming a genuine and stable unit (including couples of the same sex).

Beneficiaries of subsidiary protection

4.3 While the original version of the Proposal accorded the right to family reunion to beneficiaries of subsidiary protection who met certain specified conditions, the Amended Proposal excludes this category of persons from its scope of application.

4.4 Considering that the humanitarian needs of persons benefiting from subsidiary protection are not different from those of Convention refugees, UNHCR submits that there is no valid reason to treat these two categories of persons differently as regards their entitlement to family reunification. UNHCR's concern about the exclusion of beneficiaries of subsidiary protection from the scope of the Amended proposal is heightened by the absence of any provisions on the right to family reunion in the draft Directive on minimum standards for the qualification as a refugee or beneficiary of subsidiary protection.

Qualifying period of residence

4.5 The previous version of the Proposal exempted refugees from the need to complete a certain period of residence before allowing their family members to join them. The Amended Proposal makes this exemption discretionary.

4.6 While it my be understood that a qualifying period of residence may be required for the family reunification of ordinary aliens, there is wide consensus that the reunification of the families of refugees should be treated as a matter of priority and that it should

implemented as soon as possible. It is recalled in this connection that the Executive Committee of UNHCR has expressed the desirability that countries of asylum and countries of origin, "support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay".

5. In addition, UNHCR wishes to submit the following suggestions for amendments to specific provisions of the present text:

Article 3, paragraph 1

5.1 According to this provision, a third-country national applying for family reunification with members of his or her family who are also third-country nationals, must possess a residence permit valid for one year or more, and must have "reasonable prospects of obtaining the right of permanent residence". In connection with the latter requirement, the Proposal's Explanatory Memorandum indicates that the aim of it is to exclude from the application of the Directive persons who stay only temporarily in the Member State, such as au pairs or exchange and placement students.

5.2 In the light of the above explanation it may be concluded that refugees will always be eligible for family reunification. Nevertheless, in order to avoid any possible misunderstanding, UNHCR suggests that the text of the Directive should specifically provide that the requirement of having "reasonable prospects of obtaining the right of permanent residence" will not apply to persons admitted as refugees.

Article 16, paragraph 1(b)

5.3 According to this Article, Member States may withdraw or refuse to renew the residence permit granted to family members, in case the applicant and his or her family members do not or no longer live in a full marital or family relationship.

5.4 This provision is at variance with UNHCR's longstanding position on this matter, as expressed in paragraph 187 of its Handbook on Procedures and Criteria for Determining Refugee Status. UNHCR therefore strongly suggests that an exception in relation to refugees be included in the Directive.

6. UNHCR hopes that the concerns raised above will be given due consideration during the re-examination of the Proposal, and that the humanitarian principles to which mention has been made, specifically applicable to the treatment of refugees and other persons of concern to UNHCR, will be appropriately reflected in the final text.

(UNHCR Geneva)
10 September 2002

The observations that follow relate mainly to the provisions contained in Chapter V of the Proposal –which specifically deals with refugees. However, comments and references are also made, where appropriate, to provisions contained in other Chapters.

Article 12, para.1.

Article 11, para.2.

Article 13, para.2 and Article 15.

Article 14.

Article 18.

Article 10, para.3.

Article 6, para.1.

Article 10.

Cf. Conclusions No. 24 (XXXII) of 1981, para.5; and No. 88 (XLX) of 1999, para. (b)(ii).

Cf. UNHCR Handbook, para.185.

Article 3, para.2(c).

Article 12, para.2.

Conclusion No. 24 (XXXII) of 1981, para.2.

Paragraph 187 of UNHCR's Handbook reads: "Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees".

UNHCR notes that Article 15(3) of the Amended Proposal provides for the issuance of an independent residence permit to family members in the case of widowhood, divorce, separation or death of any family member in the descending or ascending line. While that provision UNHCR goes some way towards meeting UNHCR's concerns, it cannot be seen as sufficient insofar, according to this provision, Members States are under no obligation to issue such an independent residence permit before the person concerned has completed five years of residence in their territory. Before the completion of such period, the issuance of an independent residence permit to the member of the family remains a matter of administrative discretion.

Council Framework Decision on Combating Trafficking in Human Beings, 2002/629, 19 July 2002

Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the proposal of the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(3), the Tampere European Council on 15 and 16 October 1999, the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the Scoreboard, and the European Parliament in its Resolution of 19 May 2000 on the communication from the Commission "for further actions in the fight against trafficking in women" indicate or call for legislative action ag! ainst trafficking in human beings, including common definitions, incriminations and sanctions.

(2) Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children(4) needs to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to the development of an efficient judicial and law enforcement cooperation against trafficking in human beings.

(3) Trafficking in human beings comprises serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion.

(4) The UN protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN Convention against transnational organised crimes, represents a decisive ste! p towards international cooperation in this field.

(5) Children are more vulnerable and are therefore at greater risk of falling victim to trafficking.

(6) The important work performed by international organisations, in particular the UN, must be complemented by that of the European Union.

(7) It is necessary that the serious criminal offence of trafficking in human beings be addressed not only through individual action by each Member State but by a comprehensive approach in which the definition of constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, forms an integral part. In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.

(8) It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for trafficking in human b! eings to be included within the scope of instruments already adopted for the purpose of combating organised crime such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime(5) and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union(6).

(9) This Framework Decision should contribute to the fight against and prevention of trafficking in human beings by complementing the instruments adopted in this area such as Council Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children (STOP)(7), Council Joint Action 96/748/JHA of 16 December 1996 extending the mandate given to the ! Europol Drugs Unit(8), Decision No 293/2000/EC of the Eu! ropean Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women(9), Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network(10), Council Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union(11) and Council Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters(12).

(10) Council Joint Action 97/154/JHA should accordingly cease to apply in so far as it concerns trafficking in human beings,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation

1. Each Membe! r State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

(a) use is made of coercion, force or threat, including abduction, or

(b) use is made of deceit or fraud, or

(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or

(d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation,! including in pornography.

2. The consent of a victim of t! rafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used.

3. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable trafficking offence even if none of the means set forth in paragraph 1 have been used.

4. For the purpose of this Framework Decision, "child" shall mean any person below 18 years of age.

Article 2
Instigation, aiding, abetting and attempt

Each Member State shall take the necessary measures to ensure that the instigation of, aiding, abetting or attempt to commit an offence referred to in Article 1 is punishable.

Article 3
Penalties

1. Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.

2. Each Member State shall take the necessary m! easures to ensure that an offence referred to in Article 1 is punishable by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the following circumstances:

(a) the offence has deliberately or by gross negligence endangered the life of the victim;

(b) the offence has been committed against a victim who was particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;

(c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim;

(d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart f! rom the penalty level referred to therein.

Article 4
Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for an offence referred to in Articles 1 and 2, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

(a) a power of representation of the legal person, or

(b) an authority to take decisions on behalf of the legal person, or

(c) an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 have rendered possible the commission of an offence referred to in Articles 1 and 2 for the benefit of that legal person by a person under its authority.

3. Liability of lega! l persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in an offence referred to in Articles 1 and 2.

4. For the purpose of this Framework Decision, legal person shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 5
Sanctions on legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

(a) exclusion from entitlement to public benefits or aid, or

(b) temporary or permanent disqualification from the practice of commercial activities, or

(c) placing under judicial supervision, or!

(d) a judicial winding-up order, or

(e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 6
Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in Articles 1 and 2 where:

(a) the offence is committed in whole or in part within its territory, or

(b) the offender is one of its nationals, or

(c) the offence is committed for the benefit of a legal person established in the territory of that Member State.

2. A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) as far as the offence is committed outside its territory.

3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence ref! erred to in Articles 1 and 2 when it is committed by its own nationals outside its territory.

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

Article 7
Protection of and assistance to victims

1. Member States shall establish that investigations into or prosecution of offences covered by this Framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where Article 6(1)(a) applies.

2. Children who are victims of an offence referred to in Article 1 should be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings(! 13).

3. Where the victim is a child, each Member Stat! e shall take the measures possible to ensure appropriate assistance for his or her family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family referred to.

Article 8
Territorial scope

This Framework Decision shall apply to Gibraltar.

Article 9
Application of Joint Action 97/154/JHA

Joint Action 97/154/JHA shall cease to apply in so far as it concerns trafficking in human beings.

Article 10
Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision before 1 August 2004.

2. By the date referred to in paragraph 1, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. The Council will, by 1 August 2005 at the latest, on the basis of a report estab! lished on the basis of this information and a written report transmitted by the Commission, assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 11
Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Brussels, 19 July 2002.
For the Council
The President
T. Pedersen

Footnotes:

(1) OJ C 62 E, 27.2.2001, p. 324.
(2) OJ C 35 E, 28.2.2002, p. 114.
(3) OJ C 19, 23.1.1999, p. 1.
(4) OJ L 63, 4.3.1997, p. 2.
(5) OJ L 333, 9.12.1998, p. 1. Joint Action as last amended by Framework Decision 2001/500/JHA (OJ L 182, 5.7.2001, p. 1).
(6) OJ L 351, 29.12.1998, p. 1.
(7) OJ L 322, 12.12.1996, p. 7.
(8) OJ L 342, 31.12.1996, p. 4.
(9) OJ L 34, 9.2.2000, p. 1.
(10) OJ L 191, 7.7.1998, p. 4.
(11) OJ L 105, 27.4.1996, p. 1.(12) OJ L 191, 7.7.1998, p. 1.
(13) OJ L 82, 2! 2.3.2001, p. 1.

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UNHCR'S POSITION

Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees on the Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings

Introduction

1. The United Nations High Commissioner for Human Rights (HCHR) and the United Nations High Commissioner for Refugees (UNHCR) wish, at the outset, to express their support for the work of the European Union against trafficking in human beings and related exploitation. They do so from the viewpoint of two United Nations bodies with different but complementary mandates in this area. Both organisations believe that the present proposal to strengthen common approaches to this issue through the adoption of a Council Framework Decision is an important and timely step forward.

2. HCHR and UNHCR understand from the explanatory memorandum that the proposed Framework Decision seeks to extend the obligations contained in the recently adopted UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime (A/55/383). While supporting this effort, HCHR and UNHCR are concerned that adopting an approach which differs from that contained in the United Nations Protocol on Trafficking may weaken the link between the two instruments. In addition, it is cause for concern that several aspects of the proposed Framework Decision, in particular those dealing with protection of victims and witnesses, fall considerably short of established international standards. The lack of reference to even basic protective measures for victims and witnesses of trafficking, as well as the omission of a saving clause concerning asylum-seekers and refugees, may create an impression that such protections are both unimportant and optional in the fight against trafficking.

3. On 21 March 2001, the High Commissioner for Human Rights submitted to the European Commission and the Swedish Presidency of the European Union a note addressing the above issues in some detail with the view to assisting the European Union in ensuring that this new regional instrument reinforces the letter and spirit of existing international legal standards. It is not clear as to whether the Council, in reviewing the Commission proposal, has considered taking account of these key concerns of HCHR. In the circumstances, HCHR and UNHCR are making the present joint submission, on the basis of HCHR's earlier comments, to urge the Commission and the Member States of the European Union to ensure the proposed Framework Decision's compatibility with established international standards. It is significant to note that most of the concerns of HCHR and UNHCR regarding the main shortcomings of the proposed Framework Decision are also shared by the European Parliament as evinced by its deliberations during its session on 12 June 2001, including a call for incorporating the definition of trafficking of the Palermo Protocol into the Framework Decision.

Victims and Witnesses of Trafficking

4. The proposed Framework Decision contains only minimal provisions for the protection of victims of trafficking. HCHR and UNHCR have taken note of the provisions of the Council Framework Decision of 15 March 2000 on the standing of victims in criminal proceedings yet believe that the special needs of trafficking victims are not sufficiently covered by these provisions and, moreover, should have their place in a specific EU instrument on trafficking in persons. Therefore, HCHR and UNHCR urge the Commission and Member States to consider the following issues for inclusion in a revised Article on this issue.

Prosecution for status related offences

5. Victims of trafficking should be protected from prosecution for the illegality of their coerced entry or residence, or for the activities they may be coerced to perform as a consequence of their status as trafficked persons. Victims of trafficking should, for example, be able to use the fact of their being trafficked as a defence against status-related offences.

Protection of and assistance to victims

6. In order to promote uniformity and minimum standards, the protection and assistance provisions of the United Nations Protocol on Trafficking should be incorporated into the proposed Framework Decision as basic obligations. To this end, the proposed Framework Decision should require EU Member States to provide for the physical safety of trafficking victims within their territory, counselling and information as well as basic measures for their physical and psychological recovery. The instrument should also provide for adopting legislative or other measures that permit victims of trafficking to remain in an EU Member State, temporarily or permanently, in appropriate cases. In addition to providing a measure of safety, such a provision would encourage victims of trafficking to co-operate with the authorities and thereby contribute to achieving the law enforcement objectives of the Framework Decision. It is important, in this context, to note that victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting authorities to act as witnesses in criminal proceedings.

Witness protection

7. Trafficked persons who agree to testify against their traffickers are at considerable risk of acts of retaliation by trafficking networks. Depending on the circumstances on the case, such witnesses require appropriate protective measures, including preventive measures during the investigation, in-camera hearings at the trial stage, or the granting of temporary or permanent residence. The adoption of separate measures for the protection of witnesses, while meeting their humanitarian needs, can also help to maintain the integrity of asylum systems and procedures in EU Member States.

Repatriation of trafficked persons

8. Safe, and as far as possible, voluntary return must be at the core of any credible protective strategy for trafficked persons. The draft Framework Decision should include a provision on the return of trafficked persons in safety and dignity. Such return should occur only after a proper identification of the protective needs of trafficked persons, including in relation to measures for victims and witness protection.

Protecting the right of asylum

9. HCHR and UNHCR acknowledge that being a victim of human trafficking normally does not suffice to establish a valid claim for refugee status. However, this does not exclude that, under exceptional circumstances, trafficked persons may be in need of international refugee protection, for instance if the acts inflicted by the perpetrators would amount to persecution for one of the reasons contained in the 1951 Convention definition, in the absence of effective national protection. For such persons, HCHR and UNHCR strongly urge the Commission and Member States to incorporate a "saving clause" into the proposed Framework Decision which will maintain the right to submit an application for asylum, in accordance with the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and other relevant international instruments. This clause should state that "nothing in this Framework Decision shall adversely affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and human rights law and, in particular, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement set out therein."

Remedies

10. Victims of human rights violations, such as trafficking, have a right under international law to be provided with access to adequate and appropriate remedies. The effective exercise of this right requires that States provide trafficking victims with information on the possibilities of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and legal and other assistance to enable them to obtain the remedies to which they are entitled.

Protecting the Rights and Interests of Trafficked Children

11. Although a separate Framework Decision on combating the sexual exploitation of children and child pornography is currently being discussed, it is essential to acknowledge that the problem of child trafficking is a distinct one requiring separate attention. The power of the Framework Decision to protect the rights and interests of trafficked children would be strengthened through an explicit reference to the fact that children have special rights under international law, in particular the Convention on the Rights of the Child; that child victims of trafficking have special needs that must be recognised and met by EU Member States; that EU Member States are obliged to take measures to prevent trafficking of children; and that in dealing with child victims of trafficking, the best interests of the child (including the right to physical and psychological recovery and social integration) are to be at all times paramount. It is also important to ensure that the trafficked child is not criminalised in any way (for example, through

prosecution for status-related offences) and that sensitive and appropriate measures should be taken to reconcile the child with her or his family or to otherwise meet her or his best interests.

Preventing Trafficking

12. The acknowledged root causes of trafficking include economic factors such as poverty, unemployment and indebtedness; social and cultural factors such as violence against women and girls, gender discrimination in the family, the community and by the State; political and legal factors such as a lack of appropriate legislation and public sector corruption; and international factors such as the growing feminisation of labour migration, on the one hand, and increasingly restrictive immigration policies of recipient countries, on the other. While it is clearly beyond the scope of the proposed Framework Decision to address these issues in any depth, the lack of any reference to prevention of trafficking is a source of concern for HCHR and UNHCR.

The Need for a Non-discrimination clause

13. The principle of non-discrimination is a fundamental rule of international law and one of particular relevance to the situation and vulnerabilities of irregular or illegal migrants. Measures aimed at prevention of trafficking have been used in some situations to discriminate against women and other groups in a manner amounting to a denial of their basic right to leave a country and to migrate legally. The inclusion of a general non-discrimination clause would go some considerable way towards ensuring that such discrimination does not become an unintended side effect of the proposed Framework Decision.

27 June 2001

Council Directive defining the facilitation of unauthorised entry, transit and residence, 2002/90/EC, 28 November 2002

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(a) and Article 63(3)(b) thereof,

Having regard to the initiative of the French Republic(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) One of the objectives of the European Union is the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated.

(2) Consequently, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.

(3) To that end it is essential to approximate existing legal provisions, in p! articular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence(3).

(4) The purpose of this Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of framework Decision 2002/946/JHA in order to prevent that offence.

(5) This Directive supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

(6) As regards Iceland and Norway, this Directive constitutes a development of provisio! ns of the Schengen acquis within the meaning of the Agreement! concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis(4), which fall within the area referred to in Article 1(E) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement(5).

(7) The United Kingdom and Ireland are taking part in the adoption and application of this Directive in accordance with the relevant provisions of the Treaties.

(8) 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 taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds upon the Schengen acquis under the provisions of Title IV of Part Three of! the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide within a period of six months after the Council has adopted this Directive whether it will implement it in its national law,

HAS ADOPTED THIS DIRECTIVE:

Article 1
General infringement

1. Each Member State shall adopt appropriate sanctions on:

(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applyi! ng its national law and practice for cases where the aim of t! he behaviour is to provide humanitarian assistance to the person concerned.

Article 2
Instigation, participation and attempt

Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who:

(a) is the instigator of,

(b) is an accomplice in, or

(c) attempts to commit

an infringement as referred to in Article 1(1)(a) or (b).

Article 3
Sanctions

Each Member State shall take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 are subject to effective, proportionate and dissuasive sanctions.

Article 4
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 5 December 2004. They shall forthwith inform the Commission thereof.

   When Member States adopt these measures, they shall contain a re! ference 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.

2. Member States shall communicate to the Commission the text of the main provisions of their national law which they adopt in the field covered by this Directive, together with a table showing how the provisions of this Directive correspond to the national provisions adopted. The Commission shall inform the other Member States thereof.

Article 5
Repeal

Article 27(1) of the 1990 Schengen Convention shall be repealed as from 5 December 2004. Where a Member State implements this Directive pursuant to Article 4(1) in advance of that date, the said provision shall cease to apply to that Member State from the date of implementation.

Article 6
Entry into force

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

Article 7

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

Done at Brussels, 28 November 2002.

For the Council
The President
B. Haarder

Footnotes:

(1) OJ C 253, 4.9.2000, p. 1.
(2) OJ C 276, 1.10.2001, p. 244.
(3) See page 1 of this Official Journal.
(4) OJ L 176, 10.7.1999, p. 36.
(5) OJ L 176, 10.7.1999, p. 31.

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Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, 2002/946/JHA, 28 November 2002

Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,

Having regard to the initiative of the French Republic(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) One of the objectives of the European Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters.

(2) In this framework, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict! sense and for the purpose of sustaining networks which exploit human beings.

(3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence(3) and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of this framework Decision.

(4) It is likewise essential not to confine possible actions to natural persons only but to provide for measures relating to the liability of legal persons.

(5) This framework Decision supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

(6) As regards Iceland and Norway, this! framework Decision constitutes a development of provisions o! f the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis(4), which fall within the area

referred to in Article 1(E) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement(5).

(7) The United Kingdom is taking part in this framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis(6).

(8) Ireland is taking part in this framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 6(2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis(7),

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1
Penalties

1. Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

2. Where appropriate, the criminal penalties covered in paragraph 1 may be accompanied by the following measures:

   - confiscation of the means of transport used to commit the offence,

   - a prohibition on practising dire! ctly or through an intermediary the occupational activity in the exercise of which the offence was committed,

   - deportation.

3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:

   - the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA(8),

   - the offence was committed while endangering the lives of the persons who are the subject of the offence.

4. If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable! gravity.

Article 2
Liability of legal persons

1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the infringements referred to in Article 1(1) and which are committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

   - a power of representation of the legal person,

   - an authority to take decisions on behalf of the legal person, or

   - an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the infringements referred to in Article 1(1) for the benefit of that legal person by a person under its autho! rity.

3. Liability of a legal person under paragraphs 1 an! d 2 shall not exclude criminal proceedings against natural persons who are perpetrators or instigators of or accessories in the offences referred to in paragraph 1.

Article 3
Sanctions for legal persons

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order.

2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 4
Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction with regard to the infringements referred to in Article 1(1) and committed

(a) in whole or in part within its territory;

(b) by one of its nationals, or

(c) for the benefit of a legal person established in the territory of that Member State.

2. Subject to the provisions of Article 5, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

- paragraph 1(b),
- paragraph 1(c).

3. Each Member State shall inform the Secretary-General of the Council in writing if it decides to apply paragraph 2, where appropriate with an indication of the specific circumstances or conditions in which its decision applies.

Article 5
Extradition and prosecution

1. (a) Any Member State which, under its law, does not extradite its own nationals! shall take the necessary measures to establish its jurisdict! ion over the infringements referred to in Article 1(1) when such infringements are committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State the infringements referred to in Article 1(1) and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution, if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the prosecution initiated and of its outcome.

2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declarati! on made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition, where appropriate as amended by any declarations made with respect to the Convention relating to extradition between the Member States of the European Union(9).

Article 6
International law on refugees

This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.

Article 7
Communication of information between the Member States

1. If a Member State is informed of infringements referred to in Article 1(1) which are in breach of the law on the entry and residence of! aliens of another Member State, it shall inform the latter a! ccordingly.

2. Any Member State which requests another Member State to prosecute, on the grounds of a breach of its own laws on the entry and residence of aliens, infringements referred to in Article 1(1) must specify, by means of an official report or a certificate from the competent authorities, the provisions of its law which have been breached.

Article 8
Territorial application

This framework Decision shall apply to Gibraltar.

Article 9
Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this framework Decision before 5 December 2004.

2. By the same date, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them by this framework Decision. On the basis of a report established using this information by the Commission, the Council shall, before 5 June 2005, asse! ss the extent to which Member States have complied with the provisions of this framework Decision.

Article 10
Repeal

The provisions of Article 27(2) and (3) of the 1990 Schengen Convention shall be repealed as from 5 December 2004. Where a Member State implements this framework Decision pursuant to Article 9(1) in advance of that date, the said provisions shall cease to apply to that Member State from the date of implementation.

Article 11
Entry into force

This framework Decision shall enter into force on the day of its publication in the Official Journal.

Done at Brussels, 28 November 2002.

For the Council
The President
B. Haarder

Footnotes:

(1) OJ C 253, 4.9.2000, p. 6.
(2) OJ C 276, 1.10.2001, p. 244.
(3) See page 17 of this Official Journal.
(4) OJ L 176, 10.7.1999, p. 36.
(5) OJ L 176, 10.7.1999, p. 31.
(6) OJ L 131, 1.6.2000, p. 43.
(7) OJ L 64, 7.3.2002, p. 20! .
(8) OJ L 351, 29.12.1998, p. 1.
(9) OJ C 31! 3, 23.10.1996, p. 12.

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UNHCR'S POSITION

UNHCR comments on the French Presidency proposals for a Council Directive and Council Framework Decision on preventing the facilitation of unauthorised entry and residence

1. The United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the French Presidency initiatives to combat unauthorised entry and residence . UNHCR shares the concern of the Member States of the European Union, and other States, that both criminal and organised trafficking in persons and migrant smuggling is posing a growing problem to States and endangering the lives of those individuals on whose fate these criminal organisations thrive and profit. Whereas the draft Directive defines the offence of intentionally facilitating illegal entry, through trafficking or smuggling, the draft Framework Decision is aimed at harmonising and strengthening among EU Member States the penal framework to prevent this phenomenon.

2. One issue that UNHCR would like to raise at the outset is the question of the relationship between the EU's draft Directive and draft Framework Decision and the ongoing efforts in Vienna under the auspices of the United Nations to elaborate two Draft Protocols in relation to the smuggling of migrants and the trafficking in persons. In UNHCR's view, the two draft Protocols provide a useful opportunity to establish a universal legal framework for addressing effectively a problem that is recognised to be global in scope and nature.

3. One of the important elements of the two draft Protocols is the distinction in legal terms between "trafficking in persons" and "smuggling of migrants". The draft Trafficking Protocol defines "trafficking in Persons" to mean "the recruitment, transportation, transfer, harbouring of persons, either by the threat or use of abductions, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation, as specified in article … of this protocol". In the draft Smuggling Protocol, "smuggling of migrants" is defined as "the procurement of the illegal entry into or illegal residence of a person in a State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit".

4. UNHCR considers that the distinction that has been made between trafficking in persons and smuggling of migrants is evidently a useful starting point for designing the appropriate legislative or policy framework to deal effectively with the criminal trafficking and smuggling organisations. While UNHCR recognises that the primary objective of the Presidency draft Framework Decision is to prevent "the facilitation of unauthorised entry and residence", there is a clear need to also set out provisions for ensuring the protection of victims of criminal exploitation by the facilitators – i.e. the trafficking gangs. In this context, it is regrettable that, as a result of States' increasingly restrictive immigration policies, resorting to the services of smugglers has often become the only viable option for many genuine asylum-seekers who seek sanctuary in the European Union.

5. UNHCR is further concerned that the provisions of the draft Directive and draft Framework Decision do not attempt to reconcile the proposed measures to prevent "the facilitation of unauthorised entry and residence" with States' existing international legal obligations towards refugees and asylum-seekers. Therefore, whilst supporting the efforts of the European Union and the international community as a whole in combating trafficking in persons and migrant smuggling, UNHCR is seriously concerned that these efforts do not impinge upon the basic human right of individuals to seek and enjoy in other countries asylum from persecution.

6. The lack of proper or adequate documentation on the part of asylum-seekers cannot in itself justify refusal to admit to a State's territory or summary exclusion from asylum proceedings. The 1951 Convention also provides in Article 31 (1) that States shall not impose penalties, on account of their illegal entry or presence, on refugees who present themselves without delay to the authorities and who show good reasons for their illegal entry and presence. Keeping in mind that there may be a valid justification for a refugee's unauthorised entry or presence in an asylum country, the European Council stressed in its Tampere Conclusions that the Union's common policies on asylum and immigration "… must be based on principles which … offer guarantees to those who seek protection in or access to the European Union".

7. In the light of the above considerations, UNHCR would urge the Presidency to ensure that anti-smuggling/trafficking measures do not jeopardise refugee protection by incorporating into the Directive and the Framework Decision the following general "savings clause":
"Nothing in this Directive/Framework Decision shall affect the protection afforded to refugees and asylum-seekers under international refugee law and international human rights law, in particular the compliance of Member States with their obligations under Articles 31 and 33 of the 1951 Convention relating to the Status of Refugees."

   A similar savings clause has been effectively incorporated in both Vienna draft Protocols. UNHCR urges that any future EU legislative instruments related to combating and penalising the facilitation of illegal immigration, organised crime, trafficking and smuggling, ensure that these instruments do not conflict with, or otherwise undermine, accepted international legal standards for the protection of refugees.

8. UNHCR would further suggest that the scope of draft Article 1 (General Offence) of the proposed Directive should be narrowed down to acts of "facilitating unauthorised entry and residence" committed for the purpose of unlawfully acquiring financial or other material benefits. The element of unlawful payment or benefit is absolutely essential in order to avoid that those assisting asylum-seekers and refugees purely out of humanitarian motives would risk criminal prosecution. Asylum-seekers generally rely on individuals and non-governmental organisations for information, advice and guidance as to the procedures to be followed in applying for asylum. They are often dependent on the care and assistance of their own community or non-profit organisations during the initial period of their arrival in the asylum country. To ensure that Article 1 of the draft Directive preserves humanitarian principles, UNHCR would suggest, at a minimum, the following alternative wording:

   "Each Member State shall take measures necessary to ensure that the act of facilitating intentionally, by providing direct or indirect assistance in order to receive unlawful payment or material benefit, the illegal entry or residence in its territory of an alien who is not a national of a Member State of the European Union is regarded as an offence."

9. UNHCR would also suggest that Article 4 of the draft Directive includes, among persons to be exempted from criminal prosecution, in addition to spouses or relatives, individuals who purely out of humanitarian reasons assist asylum-seekers arriving in an irregular, unauthorised manner in their efforts to seek access to territory and access to the asylum procedure.

(UNHCR Geneva)
22 September 2000

UNHCR observations on the Draft Council Directive defining the facilitation of unauthorised entry, movement and residence and the Draft Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence

1. In a note dated 22 September 2000, UNHCR shared with the Council, the Commission and the Parliament its views on the original proposal of the French Presidency concerning the above two instruments. In a follow-up letter addressed to the French Presidency on 14 November 2000, UNHCR reiterated its serious concern that the provisions of the draft Directive and draft Framework Decision did not attempt to reconcile the proposed measures to prevent the facilitation of unauthorised entry, movement and residence with States' existing international legal obligations towards refugees and asylum-seekers.

2. To ensure that the proposed Council instruments do not inadvertently jeopardise refugee protection, UNHCR has made two specific proposals: (i) that a general "saving clause" providing for respect for international refugee law and international human rights law be incorporated into the two instruments; and (ii) that the definition of the general offence with which the proposed Directive is concerned be narrowed clown to acts of facilitating unauthorised entry and residence committed for the purpose of unlawfully acquiring financial or other material benefits.

3. In making the above proposals, UNHCR was guided, inter alia, by the principles on refugee protection embodied in the 1951 Convention, in particular in Article 31, as well as by the international legal framework set out by the United Nations Convention against Transnational Organised Crime and its two Protocols (the Protocol against Smuggling and the Protocol against Trafficking). The Protocol against Smuggling, which is of direct relevance to the proposed Council instruments, contains a number of provisions designed to ensure the rights of refugees and asylum-seekers are adequately protected. For example,

   – the acquisition of financial or other material benefits is a key definitional element of smuggling as a criminal offence;

   – there is a provision expressly exempting from criminal liability migrants who have been the object of any of the smuggling offences set out in the Protocol;

   – there is a "saving clause" designed to safeguard the rights of asylum-seekers and refugees under the 1951 Convention and the 1967 Protocol;

4. UNHCR has been informed that its proposals have, in some measure, been favourably received by members of the Council, and that a "saving clause" has been reflected in the latest version of the draft Framework Decision under consideration. On the

understanding that the debate on these instruments is still ongoing, UNHCR wishes to strongly reiterate its position that:

– The Directive include mandatory wording reflecting the principle that penalties should not be imposed to persons who, for exclusively humanitarian reasons, have facilitated the unauthorised entry of an asylum-seeker into the territory of a Member State. UNHCR urges that this be clone through the incorporation of the "financial gain" element in the definitional criteria of the offence. UNHCR recalls that this formula has been included in the Protocol on Smuggling of Migrants, to the United Nations Convention against Transnational Organised Crime, and it also figures in Article 27(1) of the Schengen Implementing Agreement.

– The Directive include a provision expressly exempting from criminal liability asylum-seekers and refugees who may be the object of the criminal offence defined in that instrument.

– A general "saving clause", recalling the international obligations of Member States towards refugees under refugee and human rights instruments, be incorporated not only in the draft Framework Decision, but also in the draft Directive.

5. UNHCR's essential conclusion is that unless the provisions of these otherwise legitimate immigration control instruments are accompanied by appropriate safeguards, the protection of asylum-seekers, some of whom must resort out of necessity to the services of smugglers, may be prejudiced.

12 March 2001

Council Directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 ('Carriers Sanctions' Directive), 2001/51/EC, 28 June 2001

Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(a) and Article 63(3)(b) thereof,

Having regard to the initiative of the French Republic(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) In order to combat illegal immigration effectively, it is essential that all the Member States introduce provisions laying down the obligations of carriers transporting foreign nationals into the territory of the Member States. In addition, in order to ensure a greater effectiveness of this objective, the financial penalties currently provided for by the Member States for cases where carriers fail to meet their control obligations should be harmonised to the extent possi! ble, taking into account the differences in legal systems and practices between the Member States.

(2) This measure is among the general provisions aimed at curbing migratory flows and combating illegal immigration.

(3) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

(4) The freedom of the Member States to retain or introduce additional measures or penalties for carriers, whether referred to in this Directive or not, should not be affected.

(5) Member States should ensure that in any proceedings brought against carriers which may result in the application of penalties, the rights of defence and the right of appeal against such decisions can be exercised effectively.

(6) This Directive builds on the Schengen acquis, in accordance with the Protocol integrating it into the f! ramework of the European Union, as laid down by Annex A to Co! uncil Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the

legal basis for each of the provisions or decisions which constitute the acquis(3).

(7) 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 the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 25 October 2000, of its wish to take part in the adoption and application of this Directive.

(8) Pursuant to Article 1 of the aforementioned 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.

(9) In accordance with Articles 1! and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive, and is therefore not bound by it or subject to its application. Given that this instrument aims to build upon the Schengen acquis under the provisions of Title IV of the Treaty establishing the European Community, in accordance with Article 5 of the abovementioned Protocol, Denmark shall decide within a period of 6 months after the Council has adopted this Directive whether it will implement it in its national law.

(10) As regards the Republic of Iceland and the Kingdom of Norway, this Directive constitutes a development of the Schengen acquis within the meaning of the Agreement concluded on 18 May 1999 by the Council of the European Union and those two States concerning the lattter's association with the implementation, application and development of the Sche! ngen acquis(4),

HAS ADOPTED THIS DIRECTIVE:

Article 1

The aim of this Directive is to supplement the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990(5) (hereinafter referred to as "the Schengen Convention") and to define certain conditions with respect to their implementation.

Article 2

Member States shall take the necessary steps to ensure that the obligation of carriers to return third country nationals provided for in the provisions of Article 26(1)(a) of the Schengen Convention shall also apply when entry is refused to a third-country national in transit if:

(a) the carrier which was to take him to his country of destination refuses to take him on board;

(b) or the authorities of the State of destination have refused him entry and have sent him back to the Member State through which he transited.

Article 3

Member States shall take the necessary measures to oblige ca! rriers which are unable to effect the return of a third-country national whose entry is refused to find means of onward transportation immediately and to bear the cost thereof, or, if immediate onward transportation is not possible, to assume responsibility for the costs of the stay and return of the third-country national in question.

Article 4

1. Member States shall take the necessary measures to ensure that the penalties applicable to carriers under the provisions of Article 26(2) and (3) of the Schengen Convention are dissuasive, effective and proportionate and that:

(a) either the maximum amount of the applicable financial penalties is not less than EUR 5000 or equivalent national currency at the rate of exchange published in the Official Journal on 10 August 2001, for each person carried, or

(b) the minimum amount of these penalties is not less than EUR 3000 or equivalent national currency at the rate of exchange published in the Off! icial Journal on 10 August 2001, for each person carried, or(c) the maximum amount of the penalty imposed as a lump sum for each infringement is not less that EUR 500000 or equivalent national currency at the rate of exchange published in the Official Journal on 10 August 2001, irrespective of the number of persons carried.

2. Paragraph 1 is without prejudice to Member States' obligations in cases where a third country national seeks international protection.

Article 5

This Directive shall not prevent Member States from adopting or retaining, for carriers which do not comply with the obligations arising from the provisions of Article 26(2) and (3) of the Schengen Convention and of Article 2 of this Directive, other measures involving penalties of another kind, such as immobilisation, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence.

Article 6

Member States shall ensure that their laws, regulations and administrative provisi! ons stipulate that carriers against which proceedings are brought with a view to imposing penalties have effective rights of defence and appeal.

Article 7

1. Member States shall take the necessary measures to comply with this Directive not later than 11 February 2003. They shall forthwith inform the Commission thereof.

2. When 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 reference shall be laid down by Member States.

3. Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

Article 8

This Directive shall enter into force 30 days after its publication in the Official Journal of the European Communities.

Article 9

This Directive is addressed to the Member States in accordance with the Treaty establishi! ng the European Community.

Done at Luxembourg, 28 June! 2001.

For the Council
The President
B. Rosengren

(1) OJ C 269, 20.9.2000, p. 8.
(2) Opinion delivered on 13 March 2001 (not yet published in the Official Journal).
(3) OJ L 176, 10.7.1999, p. 1.
(4) OJ L 176, 10.7.1999, p. 3.
(5) OJ L 239, 22.9.2000, p. 1.

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UNHCR'S POSITION

Draft Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission

UNHCR's comments

Sanctions on carriers

UNHCR has long taken the position that sanctions imposed on transport companies for having carried undocumented or inadequately documented persons have an indiscriminate impact on persons in need of international protection, and may seriously limit the right of these individuals to seek and enjoy asylum from persecution, as recognised in Article 14 of the Universal Declaration of Human rights and other international instruments, as well as the Constitutions or domestic legislation of Member States. In the view of UNHCR, where sanctions interfere with the ability of persons at risk of persecution to gain access to safety, sanctions seem incompatible with the humanitarian tenets on which the international regime for the protection of refugees is based.

Since the principle of carrier sanctions has been enshrined in a number of domestic laws, as well as in Article 26 of the Convention Implementing the Schengen Agreement (which has now become part of the EU acquis), UNHCR suggests that the draft Directive include a general clause similar to the one in Article 26 (2) of the Convention Implementing the Schengen Agreement, stipulating that the common regime proposed, including provisions concerning the return of undocumented asylum-seekers, is subject to Member States' obligations resulting from their accession to the 1951 Convention as amended by the 1967 New York Protocol, and in accordance with Member States' constitutional laws.

In addition, and more specifically, UNHCR suggests to include in the proposed EC Directive a provision exempting carriers from liability if the third-country national brought into the territory of a Member State without the required documentation lodges an asylum application and has a plausible claim to be in need of international protection. UNHCR believes that an exculpatory provision of this nature may limit the detrimental effect of carrier sanctions on the possibility for persons in need of protection to seek and enjoy asylum.

Suggestion for amendment

New Article 5

"Articles 2, 3 and 4 of this Directive shall not apply where the third-country national lacking the necessary documents for admission seeks international protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees or other international human rights instruments because of a well-founded fear of persecution or other threats to his or her life or freedom."

Justification

Article 31 of the 1951 Geneva Convention recognizes that there may be a valid justification for a person with a well-founded fear of persecution to attempt illegal entry into the territory of an asylum country. Such a person maybe forced to resort to, for example, forged documents as the only means of escaping imminent threats to his or her life or freedom. Exempting carriers from penalties in the case of asylum-seekers not in possession of the necessary documents for admission is consistent with one of the milestones agreed by the European Council in Tampere to achieve an area of freedom, security and justice: the European Union's common policies on asylum and immigration must be based on principles which "…offer guarantees to those who seek protection in or access to the European Union."

UNHCR observations on the Commission proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM (2001) 127 final)

1. On 13 March 2001, the European Commission issued a proposal for a Council Directive on the status of third-country nationals who are long-term residents. The adoption of such Directive is one of the measures envisaged by the Conclusions of the Tampere European Council for the purpose of establishing an area of freedom, security and justice in the Union, as mandated by Article 63 of the Amsterdam Treaty.

2. The aims of the proposed Directive are:

(i) to establish common criteria for the granting and withdrawal of long-term resident status to third-country nationals;

(ii) to set common standards of treatment of long-term residents; and

(iii) to establish the conditions in which long-term residents may reside in a Member State other than the one where they enjoy long-term resident status.

3. The most salient feature of the Commission's proposal is the recognition to long-term residents of a right to freedom of movement within the Union, comparable to that enjoyed at present by citizens of the Union. According to the proposal, persons who have acquired long-term resident status in one Member State will have the right to reside in the territory of other Member States, for the purpose of exercising an economic activity in an employed or in a self-employed capacity, or in order to pursue studies or vocational training. The exercise of this right is, however, conditional upon the possession by the person concerned of adequate resources –including sickness insurance arrangements– so as not to become a burden on the second Member State.

4. Although the proposed Directive is not, properly speaking, a refugee instrument, refugees may become beneficiaries of the standards of treatment that it provides for, by meeting the qualifying period of residence. UNHCR has, therefore, an interest in this instrument, and welcomes the fact that the proposal contains special provisions dealing with the situation of refugees. In particular, UNHCR appreciates that, under Article 6 of the proposed Directive, refugees are exempt from meeting the qualifying requirements concerning economic means and insurance coverage, and that Article 5 provides that the time that the refugee has spent in the territory of the Member State as an asylum-seeker or as a beneficiary of temporary protection, shall be taken into account for the purpose of calculating the qualifying period of residence.

5. UNHCR has consistently maintained that, since the needs of persons eligible for subsidiary forms of protection are, in many ways, similar to those of refugees, the standards of treatment applicable to these categories of persons in needs of protection should also be similar. UNHCR is, therefore, concerned about the fact that Article 3 of

the proposal excludes beneficiaries of a subsidiary form of protection from the scope of the instrument. UNHCR notes, however, that the draft's Explanatory Memorandum states that the reason for this exclusion is that the concept of subsidiary protection is not yet harmonised at Community level, and adds that the Commission believes that such persons, who are legal residents, must have access to long-term resident status if they fulfil the criteria. UNHCR further notes that Article 22 of the draft Directive on refugee status and subsidiary protection, provides that, notwithstanding Article 3 (2) (b) of Directive on long term residence, Member States shall grant beneficiaries of subsidiary protection long term-residence status on the same terms as those applicable to refugees under that Directive. UNHCR therefore hopes that the exclusion provided for in Article 3 of the draft Directive on long term-residence will be corrected in due course, and that beneficiaries of subsidiary protection will be also covered by that Directive.

Brussels, 4 October 2001

Council Directive concerning the status of third-country nationals who are long-term residents

UNHCR'S POSITION

Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities

UNHCR'S POSITION

Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration (ARGO programme) 2002/463/EC, 12 June 2002

Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (2002/463/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 66 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Whereas:

(1) Administrative cooperation between the Member States in the areas covered by Articles 62 and 63 of the Treaty is part of the Community's objective of progressively establishing an area of freedom, security and justice.

(2) Joint Action 98/244/JHA of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treat! y on the European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus programme)(3) has come to an end now that the budget allocation has been exhausted in 2001.

(3) Responsibility for controls at the EU's external borders will become all the more important now that a significant enlargement of the Union is scheduled to take place during the period in which the administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO) will be operational. Accordingly, ARGO should be seen simply as a modest forerunner of more extensive activities in this field.

(4) In accordance with the conclusions of the European Council in Tampere on 15 and 16 October 1999, the Commission has defined in its communication to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creati! on of an area of freedom, security and justice in the Europea! n Union (first half of 2001) an ambitious legislative programme that should lead to a new body of Community rules in the area of justice and home affairs that will have to be implemented by the Member States.

(5) Uniformity between the practices of the Member States when applying Community law

can be obtained by strengthening cooperation and collaboration among their national agencies, and between them and the Commission.

(6) Individual action by each administration is incapable of achieving such results. A Community framework is therefore necessary for improving mutual understanding between the competent national agencies and the way they implement the relevant Community legislation, and for defining the priority areas of administrative cooperation required.

(7) A high level of training of equivalent quality throughout the Community is needed to guarantee the success of this action programme, taking advantage of the experience gained with the Od! ysseus programme.

(8) The implementation of a Community action programme constitutes one of the most effective ways of achieving these objectives and will provide a basis to the Commission for assessing whether establishing a common training institution would be a suitable way of improving the training in Community law given to the staff of the Member States.

(9) The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(4).

(10) Action under this programme is to be complementary to and coordinated with other cooperation and training activities financed by the Community budget.

(11) 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 Decision, and i! s therefore not bound by it or subject to its application.

(12) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 29 January 2002, of its wish to take part in the adoption and application of this Decision.

(13) In accordance with Article 1 of the Protocol on the position of the United Kingdom and Ireland annexed to the European Union and to the Treaty establishing the European Community, Ireland is not participating in the adoption of this Decision. As a result, and without prejudice to Article 4 of the said Protocol, the provisions of this Decision do not apply to Ireland.

(14) A financial reference amount within the meaning of point 34 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 6 May 1999 on budgetary dis! cipline and improvement of the budgetary procedure(5) is included in this Decision for the entire duration of the programme, without thereby affecting the powers of the budgetary authority as they are defined in the Treaty,

HAS ADOPTED THIS DECISION:

CHAPTER I
INTRODUCTORY PROVISIONS

Article 1
Subject-matter and duration

This Decision establishes a Community action programme to be called the "ARGO programme" to support and complement the actions undertaken by the Community and the Member States in the implementation of Community legislation founded on Articles 62, 63 and 66 of the Treaty.
The ARGO programme shall cover the period from 1 January 2002 to 31 December 2006.

Article 2
Definition

For the purposes of this Decision "national agencies" means the administrative and judicial authorities of the Member States or other bodies delegated by those authorities to implement Community legislation founded on Articles! 62 and 63 of the Treaty and on Article 66 of the Treaty in s! o far as it concerns cooperation between national agencies in the areas covered by the said Articles 62 and 63.

Article 3
General objectives

The ARGO programme shall contribute to the following objectives:

(a) to promote cooperation between national agencies in implementing Community rules with special attention to the pooling of resources and coordinated and homogeneous practices;

(b) to promote uniform application of Community law in order to harmonise decisions taken by the national agencies of Member States, thereby avoiding malfunctioning likely to prejudice the progressive establishment of an area of freedom, security and justice;

(c) to improve the overall efficiency of national agencies in the carrying out of their tasks when implementing Community rules;

(d) to ensure that proper account is taken of the Community dimension in the organisation of national agencies contributing to the implementation of Community rules; (e) to encourage transparency of actions taken by national agencies by strengthening their relations with the relevant national and international governmental and non-governmental organisations.

CHAPTER II
ACTIVITIES COVERED BY ARGO

Article 4
Activities in the area of external borders

In order to achieve the objectives set out in Article 3, the ARGO programme shall support the activities of the Member States in the area of external borders intended:

(a) to ensure that Member States carry out border controls in compliance with the common principles and implementing rules laid down by Community legislation;
(b) to provide an equivalent level of effective protection and surveillance at external borders;
(c) to reinforce the effectiveness of controls at border crossing points and surveillance between crossing points.

Article 5
Activities in the area of visas

In order to achieve the objectives set out in Article 3,! the ARGO programme shall support the activities of the Membe! r States in the area of visas intended:

(a) to ensure that Member States issue visas in compliance with the common principles and implementing rules laid down by Community legislation;

(b) to promote an equivalent level of control and security when issuing visas;

(c) to promote harmonisation in the examination of visa applications and in particular supporting documents regarding purpose of journey, means of subsistence and accommodation;

(d) to promote harmonisation of exceptions applied by Member States to certain categories of applicants for visas to facilitate controls at the external borders and freedom of movement between Member States;

(e) generally to enhance consular cooperation between Member States.

Article 6
Activities in the area of asylum

In order to achieve the objectives set out in Article 3, the ARGO programme shall support the activities of the Member States in the area of asylum intended:

(a) to promote the establishment and operation of the common European asylum system by supporting measures and standards leading to a common asylum procedure and a uniform status for those granted asylum valid throughout the Community;

(b) to facilitate the determination of the State responsible for examining an asylum application;

(c) to support the approximation of rules on the recognition and content of refugee status, complemented with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection;

(d) to reinforce the efficiency and fairness of asylum procedure and to increase convergence in decisions dealing with asylum applications;

(e) to develop resettlement and entry facilities, and legal means for admission into Member States on humanitarian grounds.

Article 7
Activities in the area of immigration

In order to achieve the objectives set out in Article 3, the ARGO progra! mme shall support the activities of the Member States in the ! area of immigration intended:

(a) to ensure that Member States issue residence and work permits in compliance with the common principles and implementing rules laid down by Community legislation;

(b) to promote the knowledge of the rules of residence and work permits for third-country nationals;

(c) to encourage verification of the effects and the perception of Community immigration policy in migrants' countries of origin;

(d) to ensure effective, efficient and homogeneous application of the relevant common rules and policies in relation to irregular migratory flows and illegal immigration while safeguarding a sufficient level of access to international protection;

(e) to enhance cooperation in the field of the return of nationals of third countries and stateless persons without residence permits and refused asylum applicants, including transit through other Member States and third countries;

(f) to strengthen the fig! ht against illegal immigration networks and prevention of illegal flows of immigrants.

Article 8
Types of actions

With a view to pursuing the objectives set out in Article 3 and the activities laid down in Articles 4, 5, 6 or 7, the ARGO programme may support the following types of actions:

(a) training actions including, in particular, the elaboration of harmonised curricula and common core-training programmes to be organised by national agencies and complementary actions aimed at making national agencies receptive to the best working methods and techniques developed in other Member States;

(b) staff exchange ensuring that seconded staff participate effectively in the work of the host national agencies;

(c) actions promoting, on the one hand, the use of computerised handling of files and procedures, including use of the most up-to-date techniques for electronic data exchange and, on the other hand, the collection, analysis, distributio! n and exploitation of information making the fullest use of i! nformation technology, in particular, the establishment of information points and websites;

(d) evaluation of the impact of common rules and procedures based on Articles 62 and 63 of the Treaty;

(e) actions intended to promote the development of best practices with a view to improving working methods and equipment, simplifying procedures and shortening deadlines;

(f) operational activities which might include the setting up of common operative centres and of teams composed of staff drawn from two or more Member States;

(g) studies, research, conferences and seminars involving staff of the Member States and the Commission and, where appropriate, staff of the relevant national and international governmental and non-governmental organisations;

(h) mechanisms for consulting and associating the relevant national and international governmental and non-governmental organisations;

(i) Member States' activities in third count! ries, in particular fact-finding missions in countries of origin and transit;

(j) the fight against document fraud.

Article 9
Specific actions

Other modalities of cooperation between national agencies in the policy areas covered by Articles 62 and 63 of the Treaty, in particular urgent joint operations and actions with a limited scope and duration arising from situations which require an immediate reaction, may be included in the framework of the ARGO programme. The annual work programme referred to in Article 12 shall set out a framework for the financing of these specific actions including objectives and evaluation criteria.

CHAPTER III
FINANCIAL PROVISIONS, MANAGEMENT AND MONITORING

Article 10
Eligibility

1. To be eligible for co-financing under the ARGO programme, actions referred to in Article 8 and proposed by a national agency of one Member State must:

(a) involve:

- at least two other Member States, or
- another Member State and a candidate country, where the aim is to pre! pare for its accession, or
- another Member State and a third country, where this would be beneficial for the purpose of the action proposed;

(b) pursue one of the general objectives referred to in Article 3;

(c) implement one of the activities in the respective policy area referred to in Articles 4, 5, 6 or 7.

2. Actions referred to in Article 8 may associate participants of the national agencies of any Member State not bound by this decision.

3. Actions proposed by the Commission will promote and facilitate administrative cooperation pursuing the general objectives referred to in Article 3 and support activities in the respective policy areas referred to in Articles 4, 5, 6 or 7.

Article 11
Financing

1. The financial reference amount for implementing the ARGO programme shall be EUR 25 million.

2. The annual appropriations shall be authorised by the budgetary authority within the limits of the financial perspective.

3. Actions referred to in Article 10(1) on the one hand and actions referred to in Article 10(3) on the other shall receive an equitable share of the annual amount.

4. The co-financing of an action referred to in Article 10(1) by the ARGO programme shall be exclusive of any other financing by another programme financed by the budget of the European Communities.

5. Financing decisions concerning actions referred to in Article 10(1) shall be subject to grant agreements between the Commission and the national agencies proposing the actions. The financing decisions and contracts arising therefrom shall be subject to financial control by the Commission and to audits by the Court of Auditors.
6. The proportion of financial support from the budget of the European Communities for actions referred to in Article 10(1) shall generally not exceed 60 % of the cost of the action. However, in exceptional circumstances this proportion may be raised up to 80%.

Article 12
Implementation

1. The Commission shall be res! ponsible for the management and implementation of the ARGO programme, in partnership with the Member States.

2. The Commission shall manage the ARGO programme in accordance with the Financial Regulation.

3. To implement the ARGO programme, the Commission shall, within the scope of the general objectives set out in Article 3:

(a) prepare an annual work programme comprising specific objectives, thematic priorities, a description of the actions referred to in Article 10(3) which the Commission intends to undertake and, if necessary, a list of other actions;

(b) evaluate and select the actions proposed by national agencies.

4. The annual work programme and the specific actions provided for in Article 9 as well as actions proposed by the Commission shall be adopted according to the procedure referred to in Article 13(2). The list of selected actions shall be adopted according to the procedure referred to in Article 13(3).

5. The Commission shall evaluate and select actions proposed by the national agencies on the basis of the following criteria:

(a) conformity with the annual work programme, the general objectives set out in Article 3 and the activities in the respective policy area set out in Articles 4, 5, 6 or 7;

(b) the European dimension of the proposed action and/or scope for participation by the candidate countries;

(c) compatibility with the work undertaken or planned within the framework of the Community's political priorities in the areas covered by Articles 62 and 63;

(d) complementarity to other past, present or future administrative cooperation actions;

(e) the ability of national agencies to implement the proposed action;

(f) the inherent quality of the proposed action in terms of its conception, organisation, presentation and expected results;

(g) amount of the support requested under the ARGO programme and proportionality wi! th the expected results;

(h) impact of the expected ! results on the general objectives set out in Article 3 and on the activities in the respective policy area set out in Articles 4, 5, 6 or 7.

CHAPTER IV
GENERAL AND FINAL PROVISIONS

Article 13
Committee

1. The Commission shall be assisted by a Committee, hereinafter referred to as "the ARGO Committee".

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.

   The period provided for in Article 4(3) of Decision 1999/468/EC shall be set at three months.

3. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

4. The ARGO Committee shall adopt its rules of procedure.

5. The Commission may invite representatives from the candidate countries to information meetings after the ARGO Committee's meetings.

Article 14
Monitoring and evaluation

1. The Commission and the Member States shall monitor and evaluate the implementation of the AR! GO programme on a continuous basis.

2. Each year the Commission shall submit a report to the European Parliament and the Council on the implementation of the ARGO programme.

The report shall analyse all the progress achieved and shall be accompanied where necessary by any proposals for ensuring homogeneous application in the Member States of Community legislation based on Articles 62 and 63 of the Treaty. The Commission shall submit the first report by 31 December 2003 at the latest and the final report by 31 December 2007 at the latest.

Article 15
Applicability

This Decision shall apply from the date of its publication in the Official Journal of the European Communities.

Article 16
Addressees

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

Done at Luxembourg, 13 June 2002.

For the Council
The President
M. Rajoy Brey

Footnotes:

(1) OJ C 25 E, 29.1.2002, p. ! 526.
(2) Opinion delivered on 9 April 2002 (not yet p! ublished in the Official Journal).
(3) OJ L 99, 31.3.1998, p. 2.
(4) OJ L 184, 17.7.1999, p. 23.
(5) OJ C 172, 18.6.1999, p. 1.

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Commission Green Paper on a Community Return policy on Illegal Residents, COM (2002), 175 final, 10 April 2002

GREEN PAPER
on a community return policy on illegal residents (presented by the Commission) COM(2002) 175 final

Brussels, 10.04.2002

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Foreword

The European Council on 14 and 15 December in Laeken asked the Council in its Conclusion No. 40 – inter alia - to develop an action plan on the basis of the commission's Communication on a Common Policy on Illegal Immigration of 15 November 2001. Consequently the Council adopted, on 28 February 2002, a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union. This plan contains also a section on readmission and return policy, in which this policy area is identified as an integral and vital component in the fight against illegal immigration. The Council action plan asks for progress on the issues of transit and readmission, the identification of illegal residents, the issue of travel documents for return purposes and common standards for return procedures.

In the aforementioned Communication on illegal immigration the Commission already announced the release of this Green Paper referring to the need to create common standards and to initiate common measures on return.

The Green Paper builds upon the elements as defined in the Council's action plan and explores various issues related to the return of third-country nationals. In Part I it is emphasised that a Community return policy has to fit in and to complement the existing Community policies on immigration and asylum as described in the relevant Communications from the Commission, whose policy goals are explicitly acknowledged once again. The various dimensions of voluntary and forced returns in relation to migration, in the context of asylum and the relation to third-countries, are briefly sketched. The following parts are focussed on the future co-operation on return of illegal residents among Member States (Part II) and the development of the readmission policy together with third countries (Part III).

Due to the very complex and sensitive nature of return issues this paper only intends to open a discussion on the return of illegal residents and should not be seen as an effort to cover all dimensions connected with the return of third-country nationals.

The discussion on the return of illegal residents might start with a reflection on the following general issues before tackling some indicative questions and looking at the issues in more detail, as laid down in the following sections of the Green Paper:

(1) The development of a common return policy as a contribution to a comprehensive immigration policy as advocated for by the Commission in its Communication of 22 November 2000.
(2) The compatibility of a common return policy with the need for protection under international and European law in the evolving common European asylum system.
(3) The implementation, with regard to return, of Conclusion No 40 of the European Council in Laeken, calling for the integration of the policy on migratory flows into the European Union's foreign policy.
(4) The necessity of common standards for return procedures and the question of whether they should be legally binding.
(5) The improvement of the co-operation of Member States' services and whether a future financial instrument could be conducive to that end.
(6) The determination of the elements of a common readmission policy, which should encompass a balanced co-operation with the third countries concerned.

1. INTRODUCTION

Following the establishment in the Treaty of Amsterdam of Community competence in the areas of migration and asylum, the Heads of State and Government, at the European Council in Tampere in October 1999, called for the development of a common EU policy on these issues. Since then the Commission has put forward proposals for a Community asylum and immigration policy based on a two-step approach: the adoption of a common legal framework as outlined in the Treaty and the development of an open co-ordination method.

The objective of the Commission's proposals on immigration policy is to ensure more efficient management of migratory flows at all their stages. The comprehensive approach which has been put forward focuses on the adoption of common procedures for the legal admission of third-country nationals, involving closer dialogue with the countries of origin and supported by more co-ordinated integration policies at national level. The underlying assumption, which has been generally supported by the Member States in the debate on the Communication of November 2000[1] is a recognition that migratory pressures will continue and that, in the light of the current economic situation and of demographic forecasts, migration has a role to play in the economic and social development of the EU.

In the field of asylum, the aim is the establishment of a Common European Asylum System, based on a full and inclusive application of the 1951 Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. Harmonisation is divided in two steps leading in the longer term to a common asylum procedure and a uniform status for those granted asylum.

The Commission has emphasised that these policies must be accompanied by additional measures to combat illegal migration and in particular smuggling and trafficking of human beings. The Commission has recently made comprehensive suggestions for the reinforcement of common actions in this area in its Communication on the Common Policy on Illegal Immigration[2]. In this Communication, the Commission has underlined that the return and readmission of third-country nationals, who are illegally resident in the EU, must be an integral part of the common policy. Article 63 (3) b TEC lays down that the Council adopt measures on illegal immigration and illegal residence, including repatriation of illegal residents. In addition, the Treaty of Amsterdam has also integrated the – in this respect rather weak - Schengen acquis on return issues into the European Union, in particular Article 23 of the Convention implementing the Schengen Agreement [3 4].

As announced in the Communication on Illegal Immigration the Commission considers that the issue of return merits an in-depth reflection in order to develop a coherent Community approach which takes into account the complexities of this important subject. In preparation for this Green Paper various publications by international organisations, governmental bodies, non-governmental organisations and the academia have been taken into account[5]. The purpose of this Green Paper is to examine the complex return issues for people residing illegally in the EU and to put forward suggestions for a co-ordinated and efficient policy based on common principles and standards, and respectful of human rights and human dignity. The premise is that a return policy is needed in order to safeguard the integrity of the legal and humanitarian admission systems.

2. PART I – RETURN AS AN INTEGRAL PART OF A COMPREHENSIVE COMMUNITY IMMIGRATION AND ASYLUM POLICY

2.1. The Broader Context of Return

The return issue is a vast one, which covers a large number of situations. They can be broadly divided in two categories. The first one concerns persons legally residing in a country, who, after a certain time, express a wish to return to their country of origin. In several cases, these persons face difficulties in doing so, because they lack financial means or have lost everything in their country of origin or because it would affect their possibilities of returning to the Member State concerned either to take up residence again or for shorter periods to visit family and friends. People who have spent many years working legally in the EU might want to return to their country of origin on retirement but are prevented from doing so because this would affect their pension entitlements. Another situation might apply to entrepreneurs and highlyskilled workers who after some years of legal residence would like to be able to leave the host country for lengthy periods (temporary return). A specific situation in this category concerns recognised refugees who, when the situation in their country of origin has stabilised, would like to return, and, in particular for skilled people, take part in its reconstruction and development. This is now the case for Afghanis residing in Europe. The EU is currently working on a programme to help them in this objective.

In general, concrete administrative solutions and supportive programmes could be developed to help migrants who wish to return. Ways to encourage these kinds of situations could be explored in the dialogue with countries of origin, in particular to improve the benefits they can obtain from the emigration of their citizens. As part of the open method of co-ordination for the Community immigration policy[6], the Commission proposed European guidelines, which would encourage policies to support patterns of mobility between the EU and third countries:

– Reviewing legislation which restricts the possibility for legal migrants to move freely between their country of residence and their country of origin;

– Encouraging migrants to take an interest in development projects, business and training ventures in their countries of origin;

– Financial and other support, including the provision of venture capital, to assist returning migrants to re-settle in their countries of origin.

The second category of return concerns persons with no specific protection need and residing illegally in the EU. These persons do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the Member States of the European Union either because they entered illegally or overstayed their visa or residence permit, or because their asylum claim has been finally rejected. These persons have no legal status enabling them to stay in the territory of the Member States and can be either encouraged to leave the EU voluntarily, or forced to do so. It might well be the case that illegal migrants or rejected asylum seekers volunteer to return. This could be encouraged and supported by specific schemes.

This Green paper focuses on this second category i.e. the return of persons residing illegally in the EU, in its two aspects: forced or voluntary. The return of persons legally residing in the EU is not dealt with here. However, for many thirdcountry nationals legally residing in the EU

eventual return may be a desirable or relevant option. This is an important topic in its own right and deserves also to be discussed intensively, in particular with regard to the effects in relation to the countries of origin. It will be, therefore, subject to further reflection from the Commission at a later stage.

2.2. Immigration and Return

In its Communication on a Community Immigration Policy of 22 November 2000[7], the Commission suggested that the EU could best achieve its objective of more efficient management of migration flows through a comprehensive approach. The Commission argued that, as part of a comprehensive immigration policy, the adoption of common procedures for labour migrants could to a certain extent also reduce pressure on channels for humanitarian admission and that illegal migrants would be further deterred by more effective joint action against smuggling and trafficking. The Commission noted that the practice of regularising illegal migrants who met certain criteria, notably that they were employed in a Member State, exists and that this could be seen as an acknowledgement of labour market needs and as a reflection on the difficulties of implementing return policies successfully.

In principle, third-country nationals without a legal status enabling them to stay, either on a permanent or a temporary basis, and for whom a Member State has no legal obligation to tolerate the residence have to leave the EU. This is essential to ensure that admission policy is not undermined and to enforce the rule of law, which is a constituent element of an area of freedom, security and justice.

To all extents possible, priority should be given to voluntary return for obvious humane reasons. In addition, voluntary return requires less administrative efforts than forced return.

However, the forced return of illegal residents can have a signal effect both on illegal residents in the Member States and on potential illegal migrants outside the EU. Combined with further efforts to combat undeclared work in the EU, more transparent procedures, awareness raising campaigns against smuggling of human beings and better information about legal channels for admission, efficient return policies can encourage potential migrants to prefer to explore the possibilities of obtaining legal residence in the EU and discourage those who do not fulfil the necessary requirements for legal immigration. It can also help to ensure public acceptance for more openness towards new legal immigrants against the background of more open admission policies particularly for labour migrants.

2.3. Asylum and Return

Voluntary return is one of the three long- term solutions identified to the problem of refugees, together with integration and resettlement. At the same time, an efficient return policy for persons, whose applications for international protection are rejected, is needed in order to safeguard the integrity of a common asylum system and of the common asylum procedure as described in the Commission's Communication of 22 November 2000[8]. When a person seeking protection has benefited from a fair, qualitative and comprehensive procedure, when all protection needs have been examined and if there is no other ground for a legal stay in a Member State, the person must leave the territory and return to his/her country of origin or, where appropriate, of transit.

It is in the spirit of the common asylum procedure and the uniform status that persons seeking protection or having benefited from international protection in the EU must, in the long term, expect comparable treatment in all Member States, according to their respective situation, as far as returns are concerned. Improvement of the efficiency and quality of the asylum procedure and of the assessment of protection needs is a prerequisite. The effectiveness of the return policy must also be seen against the background of the fact that although an asylum claim has been rejected on the basis of the Geneva Convention, individuals might be still otherwise in need of international protection. Putting in place an appropriate subsidiary protection system is therefore crucial.

Again voluntary return must be given priority. However, forced returns may be necessary as a last resort. This may also apply to persons whose international protection needs (under refugee or subsidiary protection status or under a temporary protection scheme) have ceased to exist, after they have enjoyed such protection for a period of time in a Member State. These returns must also be in compliance with international protection and the human rights of returnees. This comprises the obligation to provide protection against refoulement under the Geneva Convention of 1951 on the status of refugees and the 1967 Protocol, in particular Art.32 and 33 thereof. Refugees shall not be expelled lawfully from the territory save on grounds of national security or public order. In addition, the ECHR, in particular Art.3 thereof, and the respective case law of the European Court of Human Rights must be mentioned in the context of the prohibition of torture and inhuman or degrading treatment or punishment as well as Art. 4 of the Charter of Fundamental Rights.

Art.18 and 19 of the Charter of Fundamental Rights of the EU are also relevant. According to Art. 18 the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community. Art. 19 deals with the protection in the event of removal, expulsion or extradition and firstly states that collective expulsions are prohibited. Secondly, no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Large return movements to countries of origin of people who have benefited from protection after a preceding mass influx situation due to, most of time, a situation of conflict, which usually go together with reconstruction and development challenges, may require, in some cases, certain specific solutions or a gradual approach in host Member States and in countries of origin and transit such as postponing the implementation of the removal decisions, allowing exploratory visits or stays, drawing up assistance "packages", from basic ones (information, transport, small financial allowances) to more developed and tailored ones prepared some time in advance (training, incentives for non-skilled, skilled and high skilled persons etc…), and transit and transport agreements.

The open method of co-ordination for asylum as suggested by the Commission[9] could also be utilised for return issues relating to rejected asylum seekers and persons who have been under protection regimes. Some of the areas of examination relating to voluntary and – where appropriate - forced returns might be relevant for return of illegal residents:

– by identifying measures to improve co-operation between receiving states, countries of origin, the UNHCR, IOM and NGOs with a view to facilitating voluntary and involuntary returns.

– by developing services providing information and helping to prepare people for return. This might include evaluating the merits of exploratory visits.

– by looking at ways of improving the number of expulsion decisions that are actually enforced, possibly by setting specific targets and assessing their practical impact.

– by preparing guides to good practice on the various issues raised by the return of individuals, including involuntary repatriation (escorts, means of transport, detention conditions prior to removal, etc.), which might serve as a basis for EUwide guides.

2.4. Human Rights and Return

A European return policy should be fully respectful of human rights and fundamental freedoms and as such be seen in the context of the European Union's human rights policies both within the European Union and in its external relations. Article 6 of the Treaty on European Union, reaffirms that the European Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

Both the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000[10] contain provisions which are applicable to a policy on return of illegal residents (Art. 3, 5, 6, 8 and 13 of the ECHR and Art. 3, 4, 19, 24 and 47 of the Charter of Fundamental Rights). The articles specifically relevant to all forms of international protection have already been described in the section on "Asylum and Return".

Furthermore, illegal residents must have adequate possibilities to lodge an appeal before a court during the return procedure. In this context, Art. 6 of the ECHR and Art. 47 of the Charter of Fundamental Rights, which ensure the right to an effective remedy and to a fair trial, are relevant. Human rights issues are at stake also in the context of detention of illegal residents: the principle of judicial control over detention must always be respected, in accordance with Art. 5 of the ECHR.

Family life is protected by Art. 8 of the ECHR and by Art. 7 of the Charter of Fundamental Rights; it should also be recalled that the rights of the child deserve special consideration, in accordance with Art. 24 of the Charter of Fundamental Rights and the Convention for the Right of the Child of 1989; in all actions related to children, the child's best interest must be a primary consideration.

Finally, another issue that deserves careful consideration is the protection of personal data as enshrined in Art. 8 of the Charter of Fundamental Rights and the existing provisions on the protection of personal data.[11]

2.5. Co-operation with Countries of Origin and Transit on Return and Readmission

A successful return policy regarding illegal residents depends on fruitful cooperation with the countries of origin or transit concerned. By its very nature, the mutual understanding and co-operation of all responsible authorities involved have to be developed. This co-operation is critical at various stages and levels of the return process. For example, assistance is needed

at administrative level to obtain return travel documents for illegal residents who are not in possession of valid travel documents. In addition, when arriving in the country of return, the readmission process at the points of entry, often at airports, needs support. In fact, many countries co-operate on a very open and pragmatic basis and facilitate returns.

However, other countries are more reluctant to readmit returnees and often require more extensive administrative procedures to determine the nationality or the identity of the person concerned. In such cases it might be helpful to negotiate a readmission agreement at political level, which sets out the practical procedures and modes of transportation for return and readmission.

Nevertheless, the return of illegal residents has also significant implications for countries of origin and transit. The possibility of developing a return policy that would avoid negative effects on the situation in these countries should be carefully considered. Returning people on a large scale could have a considerable impact on the development of a country and on the willingness of the authorities to co-operate in controlling migration. Willingness to co-operate will be enhanced if the countries concerned have an interest in receiving illegal residents back. The EU should, therefore, consider, which forms of support are adequate also in order to ensure that returns are sustainable.

In particular, willingness to voluntary return will also be enhanced if returnees are given opportunities in their country of origin. Some voluntary return projects have seemingly been less successful because of a lack of preparation in the country to which people were returned. At the same time, it needs to be recognised that returnees must be given assurances that they will have basic means at their disposal to allow them to settle. In this respect, the establishment of a financial aid system to bridge the first period after return could be considered.

The European Council in Tampere of October 1999 put emphasis on the need for a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. Co-operation with third countries concerned was considered to be the key element for the success of the external migration policy and this includes the return aspect as well. Furthermore the European Council in Laeken of December 2001 stressed that the policy on migratory flows, in particular on readmission, must be integrated in the EU foreign policy. Return and readmission is, therefore, one dimension among others of a comprehensive EU migration policy towards third countries and a balance between admission and readmission needs to be found.

3. PART II- APPROXIMATION AND IMPROVED CO-OPERATION ON RETURN AMONG MEMBER STATES

3.1. Common Standards

Forced return is a very significant encroachment on the freedom and the wishes of the individual concerned. Common standards relating to expulsion, detention and removal could be set. These standards could establish an adequate and similar treatment of illegal residents, who are the subject of measures terminating a residence, regardless of the Member State, which enforces the removal. In addition, common standards could also aim to facilitate the work of the services involved and may result in more efficient procedures by applying best

practices found in the Member States.

The Commission could propose and promote the establishment of common standards relating to all phases of return. Basic requirements for the ending of legal residence could be set, in particular with regard to expulsion decisions. Moreover minimum standards for detention as well as for removal could be determined. To this end the Commission envisages to build upon the outcome of the discussion of this Green Paper to prepare a proposal for a Council Directive on Minimum Standards for Return Procedures, as has already been indicated in the Communication on illegal immigration[12].

3.1.1. Definitions

The terminology in the field of return differs substantially due to differences in the legal systems in the Member States. Often the synonymous uses for different terms create confusion. For clarification purposes common definitions are necessary in order to avoid any misunderstandings which might occur. A first set of proposed definitions is attached in Annex I.

Is this first set of common definitions suitable and which further definitions could be added?

3.1.2. Ending of legal residence

Enforcement measures are not only applicable for persons who have entered illegally and have no right to remain. A number of persons receive expulsion orders if they have become a danger to public security or public order e.g. due to conviction for serious crimes. Overstayers also, whose residence permits have expired, are the subject of return measures as well as legal residents whose residence permits have been revoked. All these persons have principally a legal obligation to leave the country immediately or, if a time limit for departure has been set, before the expiry of the time limit.

The legal obligation to leave might not be deemed to have been met by persons entering into another Member State, when the entry and residence is not permitted there. Member States should ensure that measures terminating illegal residence are applicable throughout the whole EU.

3.1.2.1. Preconditions for Expulsion Decisions

Legal residence can be terminated by an expulsion decision based on specified statutory preconditions. Initial standards for expulsion decisions have been set in Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals, which was adopted in May 2001[13]. Under this Directive a third-country national is the subject of an expulsion decision in cases of a serious and actual threat to public order or to national security in two groups of cases:

First an expulsion decision may be based upon the conviction of a third-country national for an offence punishable by a penalty involving deprivation of liberty of at least one year. Moreover, the existence of serious grounds for believing that a thirdcountry national has committed serious criminal offences or the existence of solid evidence of his or her intention to commit such offences within the territory of a Member State are sufficient. Secondly a

third-country national can be the subject of an expulsion decision, when he or she fails to comply with rules on the entry or
residence of aliens.

However, on the basis of these general definitions more detailed, specific statutory grounds for an expulsion decision could be developed. In doing so a distinction could e.g. be drawn between mandatory reasons for expulsion decisions on the grounds of extraordinary danger and other legitimate reasons, which would normally lead to an expulsion decision.
It could, therefore, be examined whether mandatory expulsion decisions could be foreseen in the following cases:

1) if a third-country national has been sentenced by a court to deprivation of liberty for one or more intentional criminal acts for a period to be commonly defined.

2) if the third-country national has been sentenced to deprivation of liberty for specified intentional criminal acts (such as production, transport and sale of drugs, the smuggling or trafficking of human beings, terrorism and other offences against national security).

Moreover, it could be assessed whether other compelling reasons, such as the threat to national or public security, can be identified.

Nonetheless expulsion decisions cannot be taken regardless of the character of the residence status. Certain groups require special protection against expulsion. Privileged third-country nationals such as long-term residents[14], family members of a Union citizen or a national of the Member State concerned respectively and refugees as well as persons under other forms of international protection may only be removed for grave reasons of public security and public order. Special protection might also be envisaged for third-country nationals, who are born in a Member State and have never lived in their country of nationality. The existence of these grave reasons has to be thoroughly assessed and adequately motivated in the expulsion decision.

Finally it should be emphasised that in all cases the individual situation has to be taken into account. The human rights of the person concerned and the proportionality of the measure must be adequately considered, especially in cases of extreme hardship with regard to mandatory reasons for expulsion or unreasonable hardship in cases of other reasons for expulsion.

Should more detailed preconditions for expulsion decisions be set and which elements should they comprise?

In addition to the groups mentioned above, which other groups require special protection against expulsion and what should it look like?

3.1.2.2. Preconditions for Further Ending of Legal Residence

In cases where the residence permit has expired the person should be legally obliged to leave the country, if he or she has not obtained a renewal or another kind of a residence title. It could be considered that an appeal against a subsequent removal order would have a suspensive effect.

The obligation to leave the country could also apply in cases, where persons overstay their period of visa exemption. Legal residence could therefore end if someone enters a country legally where a visa is not required but fails to apply for a first residence permit within the statutory time limits.

The reasons for revocation of a residence permit could be restricted by law to a limited number of significant situations such as the absence of a valid passport or passport replacement, change or loss of nationality and other reasons of indispensable administrative orderliness. In any case responsible authorities should be obliged to consider and adequately motivate whether it is proportionate to revoke the residence permit due to the changes and if the person should be accountable or not.

Which further preconditions for the ending of legal residence should be set?

Which reasons should justify the revocation of a residence permit?

3.1.3. Detention Pending Removal

In order to safeguard enforcement measures, namely removals, it is often the practice to make use of coercive measures. It should be noted that all coercive measures are a significant encroachment on the personal liberty of those concerned. This is true, in particular, in the case of detention pending removal, which takes place to facilitate the identification of the illegal resident concerned in order to obtain return travel documents or to hinder the illegal resident from absconding before removal.

Minimum standards for detention orders could be set at the EU level defining the competence of responsible authorities and the preconditions for detention. They could cover the identification of the groups of persons who should generally not or only under specific conditions be detained. In any case, the detention order should be issued or confirmed without delay within statutory limits by a judicial authority.

Moreover minimum rules on the conditions of detention, in particular on accommodation standards, could be envisaged in order to ensure a humane treatment in all detention facilities in the Member States. In any case, it should be ensured, if specific detention facilities are not available or capacities are exhausted, that returnees, who are detained in ordinary prisons, might be separated from convicts in order to avoid any criminalisation.

The possible time limits for detention pending removal differ widely among Member States between statutory limits of a few days, extendable limits of several months up to no explicit statutory limits at all. Consequently, the possibility to give indications on the regular and maximum duration of detention for return purposes could be further explored. Finally, technical or legal alternatives for detention, which would be equally efficient, should also be thoroughly assessed.

Should binding standards on detention be established and which alternatives to detention should be considered?

Which binding standards in terms of legal preconditions and enforcement relating to detention pending removal should be set at Community level?

Which groups should not or only under exceptional circumstances be detained?

Which accommodation standards should apply to detained returnees?

Which time limits should be set to limit the maximum duration of detention?

3.1.4. Removal

Removal as the act of enforcing the return of the person concerned could also be subject of harmonisation efforts at EU level. Minimum standards could be created in four areas.

First a final safeguard for non-refoulement requirements according to obligations under international law could be considered in this framework as long as it is not covered by other Community legislation on international protection.

Secondly basic requirements for the physical state and mental capacity of the persons concerned could be set in order to react properly to an illness claimed by the returnee immediately before departure or the psychological health of the returnee. In addition the treatment of vulnerable groups such as minors could be tackled as well as the sensitive question, as to whether it could be possible to separate families during removal procedures.

Thirdly enforcement standards could be envisaged, viz., security standards for the removal itself, on the use of restraints and on the competencies of escorts.

Finally a mechanism could be considered, how the Member States could streamline their present return practise in relation to specific countries of origin, where the actual situation makes removals questionable due to compelling humanitarian reasons (a contemporary example is Angola). Member States might try to find a common ass essment of the feasibility for removals and might establish a list of countries, to which persons should temporarily not be removed. To that end opinions of organisations such as UNHCR or UN Administrations (e.g. UNMIK in Kosovo) or other relevant actors could be adequately taken into account.

Is there a necessity to incorporate a final safeguard for non-refoulement requirements in a future Directive on Minimum Standards for Return Procedures?

Which standards should be considered relating to the physical state and mental capacity of the returnees?

Which standards should be defined as far as the use of restraints or the competencies of escorts are concerned?

Should a common assessment take place regarding the removal to specific countries, where the actual situation makes removals questionable?

3.1.5. Mutual Recognition of Return Decisions

The Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals[15] must be seen as a very first step towards making it possible for an expulsion decision issued by one Member State to be enforced in another Member State without the latter's having to issue a new expulsion decision.

However, the Directive does not imply a binding framework for the mutual recognition of

these decisions. Nevertheless, this is a logical step in order to provide for the efficient return of illegal residents, who have absconded after expulsion decisions issued by one Member State and have been apprehended in another Member State. The same legal consequence could be applied in cases of illegal residents, who have to transit through other Member States during removal. It could be appropriate to set up common legal standards in conjunction with the establishment of a legally binding framework for mutual recognition of all measures terminating a residence, in particular expulsion decisions.

A binding framework for the mutual recognition of return related administrative or judicial acts could be integrated in a future proposal on return procedures by taking also the necessary progress of harmonisation in the field of asylum duly into account. This could include appropriate criteria and practical arrangements relating to the financial imbalances which may result from such decisions.

Should a binding and comprehensive system of the mutual recognition of return decisions be established, which goes beyond the Directive 2001/40/EC?

Which approach would ensure a fair solution for possible financial imbalances which may result from the mutual recognition of return decisions?

3.1.6. Proof of Exit and Re-entry

A satisfactory proof of exit seems important, in particular in cases of voluntary return to ensure sustainable return and to allow giving preferential treatment to voluntary returnees, namely to avoid that in these cases persons are being banned from a later legal re-entry due to a lack of proof of their previous voluntary exit. Different possibilities for this proof could be considered. A certificate of crossing the border only provides information that the person concerned has crossed a border of a Member State, but not that he or she has reached the country of supposed destination. However, such a certificate can be delivered only at external border posts, since the abolition of internal border controls. Another option is to develop incentives for returnees to report back personally at a consular post of a Member State in the country of origin. If applicable, the proof of exit could also be issued by a reliable organisation, which has been involved in the return process. The co-operation of the returnee in this verification process could be promoted in different ways. First payments from a voluntary return programme, which are designated for initial expenditure after arrival or as a start-up could be paid in the destination country only, either by an authority conducting the voluntary return or a consular post of the Member State concerned.

The legal consequences of the return on an application for a subsequent re-entry could also be subject of further consideration. It might be desirable to establish a coherent approach to the grounds for future refusal of entry. To that end it would be necessary to define under which circumstances a new application for a visa or a residence permit is excluded. In this context better harmonised prerequisites of notification in the refusal of entry list of the SIS according to Art. 96 of the Convention implementing the Schengen agreement or respectively in a future European Visa Identification System could be discussed.

Applying the principle of the priority of voluntary return, it could be considered, whether a distinction could be introduced, in which persons who returned voluntarily are privileged over those who have had to be removed. A refusal of a future visa application in order to re-enter into the EU some time in the future might not be based only upon the fact, that he or she has previously stayed in a Member State illegally, if the person has returned voluntarily. The voluntary return could

thereby destigmatize the previous illegal residence. In addition, this legal consequence would be an incentive to fulfil obligations to report back at the responsible authority in the country of origin. On the other hand restrictions could be imposed on persons, who have been expelled or removed. Certain time limits for different categories, such as third-country nationals, which have been convicted of serious crimes, or removed persons, could be introduced.

Should a mechanism be incorporated in a future proposal on return procedures, as to how the exit of the returnee can be proved and rules on the legal consequences of applications for re-entry to the EU?

Should the prerequisites for the notification in the refusal-of-entry-list of the Schengen Information System be defined? Which categories should be covered?

3.2. Readmission Rules Among Member States

Apart from the framework of the Dublin Convention and the mechanism for the determination of the responsibility for asylum claims, and Art. 11 of the Council Directive 2001/55/EC on temporary protection[16], readmission among Member States takes place solely on the basis of bilateral readmission agreements or informal cooperation.[17] In 1999 Finland presented an initiative with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals.[18] However, this Community approach has not led yet to concrete results.

The possibilities of progress on the basis of the Finnish initiative or taking forward a revised proposal could be evaluated in order to establish a clear legal framework for readmission in the Member States, which appears to be necessary and useful. The scope of such a readmission system would be broader than the one for determination of the responsibility for asylum claims according to the Dublin Convention or its successor Council Regulation.[19] It would comprise provisions on the readmission to another Member State concerning all illegally resident third-country nationals.

Should a legal framework for readmission among Member States concerning all illegal residents be put in place?

3.3. Transit Rules Among Member States

A common framework could be set for questions relating to transit during the return process. Often it is necessary to use airports of other Member States due to a lack of connections to the country of return. In such cases it seems important to establish a clear legal framework for the transit procedure, e. g. the use and competencies of escorts in transit and regulations on failure of return.

In addition it is necessary to find pragmatic solutions for returnees crossing internal borders of Member States, in particular in cases of voluntary return. This problem is particularly relevant when the returnee is a national of a country, which is under visa obligation, and would, therefore, need a visa to transit through the territory of other Member States. In such a case, the use of a secure standard travel document issued by the Member State returning the person – which would be recognised by all Member States and made equivalent to a visa – could be envisaged to make return as "unbureaucratic" as possible. An exemption from visa requirements might also be envisaged, bearing in mind that such an exemption would imply

a change of the existing Community legislation.

Which proposals on transit issues during return procedures should be put forward taking current discussions in the Council duly in account?

3.4. Operational Co-operation

Member States often face numerous hurdles when implementing returns, in particular forced ones: unknown residence or identity of the person, missing travel documents or difficulties in co-operation with some states in issuing identity or travel documents; resistant behaviour of the returnee; absence of adequate means of transportation.

The improvement of co-operation between the Member States could contribute to solve these practical problems. Such co-operation could be facilitated by setting up the Technical Support Facility, which has been proposed in the recent Communication on the Common Policy on Illegal Immigration[20] as well as by a proper use of the financial support offered by the proposed action programme ARGO.[21]

How could the operational co-operation at technical level be improved?

3.4.1. Improved knowledge of the phenomenon

Some figures on return are gathered at EU level. According to the available figures 367.552 persons have been removed in total in the year 200022, for 1999[23] the number of removed aliens amounts to 324.206 persons. In the framework of assisted voluntary return programmes conducted by IOM 87628 persons emigrated in the year 2000 out of the EU voluntarily, for 1999 the number is 78273 persons.[24]

Nevertheless, complete[25] and more detailed information on voluntary return and removals could be shared among Member States based on common definitions, which allow for a clear comparability. The Commission will bring forward an Action Plan[26] to implement the decision of the Council of May 2001 to introduce a public annual report on asylum and migration. This would include a section analysing data on return. A virtual European Migration Observatory, which is now being developed, might also contribute to an improved knowledge on return.

How could the basis for information on return be further improved?

3.4.2. Identification and Documentation

The main obstacle for return in due course is unclear identity and the lack of proper travel documents. Countries of origin often delay or deny the issuing of travel documents because of missing information on nationality or identity. EU Member States have, therefore, introduced a standard travel document for return purposes.[27] Nevertheless countries of return do not at all, only exceptionally, or only on a caseby- case basis, accept this EU laissez-passer and mostly insist on making use of their own return documents.

A key issue to solve return related-problems is, therefore, the carrying out of suitable identification measures during administrative procedures, when the person concerned has an interest in providing correct data. As far as this is not already done Member States could introduce appropriate identification measures during visa application procedures. In its Communication on illegal immigration, the Commission has expressed support for the establishment of an on-line

European Visa Identification System whose data could also be made available for return purposes. This approach was endorsed in the Council's action plan on illegal immigration of 28 February 2002. Such a system must also address the question of the necessary balance between justified identification needs and the privacy of bona-fide migrants and travellers.

How could the identification of undocumented illegal residents and the issuance of return travel documents be improved?

Which elements should be included in the future European Visa Identification System to ensure identification of an undocumented illegal resident?

3.4.3. Role of Immigration Liaison Officers

Immigration liaison officers, who are posted in countries of origin or transit, could also be available for return related tasks. Existing contacts with the local authorities might ensure a smoother handling of the admission to the country concerned, as well as assistance to incoming returnees and, where needed, escorts. The network of immigration liaison officers could be further developed to that end.

Could the Member States offer and provide mutual assistance in facilitating returns?

3.4.4. Best Practices, Training and Information Exchange

The situation of all staff, which is responsible for carrying out the very difficult and demanding task of return enforcement, could be improved. In that context it should be stressed that special training could be provided, which enables the staff to conduct removals in an appropriate manner.

To that end experience could be shared among Member States' experts and staff involved in both, voluntary return programmes and removal procedures. It could be considered not only to hold seminars, but also to have joint training of staff.

Furthermore the information exchange on concrete return operations could be built up in order to share resources. A Technical Support Facility could also be helpful to co-ordinate this specific information exchange.

How could the exchange of best practices be improved?

Should the idea of joint training be developed in the area of return?

How could the information exchange on concrete return operation be built up?

3.5. Return Programmes

3.5.1. Lessons Learned from the Implementation of Return Programmes

The Commission has experience in the management of projects to encourage the voluntary return of refugees, rejected asylum seekers and other migrants to their countries of origin. Since 1997 many projects have been financed both in the framework of the Joint Actions28 and the European Refugee Fund[29]. The orientation of these projects has been to finance projects run by government, both at national and regional level, as well as by international

and non-governmental organisations. Thus the emphasis has been on influencing the individual and his or her family to take the decision to return, running the project essentially in the Member State itself. Experience showed that it was often very important for the project to have a follow up component in the country of origin otherwise the returnee had a tendency to attempt to go back to the host country in the face of physical hardship, lack of employment or other difficulties.

As far as the Joint Actions were concerned the projects concentrated on: vocational training, preparation for return through subsidised exploratory visits and general counselling concerning the situation in the country of origin, employment, assistance in creation of small enterprises in the country of origin, post-return assistance and follow-up. The difficulties encountered in running the projects were indeed very numerous but not insurmountable in many cases: political obstacles linked to the situation in the country of return, barriers relating to the reluctance to return to a country with little perspective, issue of travel documents to potential returnees who then had the right to go back to the host country if they so wished, and not infrequently an element of abuse by the target returnees. It was also found that unless return projects were carefully dovetailed with re-construction (for example in Bosnia) there was little point in trying to return people to villages with no housing or employment prospects.

In spite of these difficulties, the Commission can also point to return projects, which have had more success. There are some examples of training programmes to foster entrepreneurial skills, especially for Bosnians living in Germany, that exceeded their targets. Generally speaking, projects run by organisations with long experience and highly developed methodology had greater success.

However, the following elements, which formed part of the more successful projects leading to sustainable return, might be highlighted:

– sufficient knowledge on the part of the implementing organisation of the country of origin;

– implementing organisation's links to the country of origin, whether an office, contact person or use of another organisation's infrastructure in the country of origin and collaboration with local civil society organisations;

– selection of potential returnees according to their needs and what was offered by the project (professionally run small enterprise projects (e.g. that assessed marketability of enterprises, skills of would-be entrepreneurs, etc.);

– comprehensive projects tended to be more successful: i.e. those that included counselling, vocational training, pre and post-return assistance and follow-up;
– follow-up and (at least) counselling post-return often had a measurable impact on the sustainability of return;

– projects that helped the return community to a certain degree were more likely to succeed. Where local communities benefited from the return, local hostility to returnees was diminished or altogether avoided;

– given the fact that the projects were based in the EU Member States, those projects that managed to avail of what was on offer via other country of origin based projects and programmes (construction, infrastructure, creation of schools, creation of employment, etc.) improved their success rates.

Can you give a general assessment of existing return programmes?

Do the aforementioned elements ensure a better implementation of return programmes and which other elements should be mentioned as well?

3.5.2. Consideration of a European Return Programme

As Member States have also earmarked considerable budgets in view of implementing voluntary return programmes and forced return operations, all abovementioned elements, and others, should be taken into consideration in a joint evaluation exercise to be conducted in the framework of the open co-ordination method. The conclusions of such an assessment should be taken into consideration at the time of the renewal of the European Refugee Fund, which will expire, in its present form, in 2004.

Following further evaluation of the experience with the European Refugee Fund the creation of an independent European Return Programme could be considered for the long-term insofar as an added value of a EC funded programme can be clearly identified. It might be considered necessary to support the efforts of Member States to return illegal residents appropriately based on the assumption that every sustainable return of an illegal resident is in the common interest of all Member States in order to avoid secondary movements. The scope of an autonomous European Return Programme could cover voluntary return, forced return and support for return of irregular migrants in transit countries.

Repatriation and reintegration could be the main policy goal in the framework of the voluntary return element in a return programme. Moreover it is conceivable to provide support for settlement in a third country which is willing to admit migrants. Financial assistance could be granted for individual travel costs, transport of personal possessions, the first expenses after return and a limited start-up support.

The financial support of enforcement measures could be an additional element of a European Return Programme and could also contribute emphasising the need for solidarity among Member States on the return with regard for instance to travel costs for returnees and escorts.

Furthermore third countries could be assisted in returning irregular migrants insofar as they do not fulfil the entry conditions of the country concerned and the persons are in transit with a view to entering the EU illegally.

Is the creation of an independent European Return Programme advisable?

Should such a programme cover voluntary return, forced returns and the assistance to third countries in their efforts to return persons to countries of origin?

4. PART III - TOWARDS A COMMON READMISSION POLICY

The European Council referred in No. 26 of its Tampere conclusions of October 1999 to the international obligation on states to readmit their own nationals. It also confirmed, in conclusion No. 27, that the Amsterdam Treaty conferred powers on the Community in the field of readmission. The Council was, therefore, invited to conclude readmission agreements or to include readmission standard clauses in other agreements between the European Community and relevant third countries or groups of countries. This conclusion was based on the recognition that, generally, such agreements constitute a valuable instrument in an active return policy as they set out clear obligations and procedures in order to facilitate and speed-up returns. Moreover, they provide a reliable institutional framework for co-operation and help to undermine the credibility and financial interests of the smuggling networks involved.
These principles were reaffirmed and enhanced by conclusion No. 40 of the Laeken European Council of December 2001. Herein it was called for the integration of the policy on migratory flows into the European Union's foreign policy, in particular, that European readmission agreements must be concluded with the countries concerned on the basis of a new list of priorities and a clear action plan.

The assessment of future target countries could ensue from the following criteria:

(1) the immigration pressure on the EU, and / or
(2) regional coherence, and / or
(3) the geographical proximity to the EU.

Should additional criteria for this assessment taken into consideration?

4.1. Readmission Agreements and Readmission Clauses in Association or Cooperation Treaties

4.1.1. Community Readmission Agreements

As far as Community readmission agreements are concerned, the Commission has so far been authorised to negotiate Community readmission agreements with Russia, Morocco, Pakistan, Sri Lanka and the Chinese Special Administrative Regions of Hong Kong and Macao in accordance with Art. 300 TEC. On 22 November 2001, the Commission initialled the Community readmission agreement with Hong Kong which is now likely to become the first ever readmission agreement to be concluded by the European Community.

The Commission will push forward the current negotiations in order to complete them in due time and – to the extent possible - in line with the negotiating directives. But from the very diverging course of negotiations with this first set of six countries, it is already possible to draw one important conclusion. As readmission agreements are solely in the interest of the Community, their successful conclusion depends very much of the "leverage" at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return. In particular visa facilitation or the lifting of visa requirement can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not. The Commission would, therefore, invite the Council to discuss this complex aspect in more depth, in particular by reflecting about the possibility of increasing complementarity with other Community policies in order to help achieving the Community's objectives in the field of return and readmission.

How could the complementarity and coherence between the various Community policies be further enhanced?

4.1.2. Readmission Standard Clauses

Parallel to these activities, the Commission will also continue to insert readmission standard clauses in all future association or co-operation agreements. The present clauses were adopted by the Council on 3 December 1999[30], revising the 1996 clauses[31] in order to adapt them to the new legal situation arising from the entry into force of the Amsterdam Treaty. These clauses do not constitute readmission agreements in the strict sense as they are "enabling clauses" only, i.e. they are only intended to commit the contracting parties to readmit own nationals, third-country nationals and stateless persons. But the actual operational arrangements and procedural modalities are left to implementing agreements to be concluded bilaterally by the Community or individual Member States. When adopting the present clauses in December 1999, the Council made it clear that they would have to be inserted in all future agreements to be concluded by the Community whereas the "old" 1996 clauses were to be inserted on a case-by-case basis only which, in negotiations, often left the EU side open to accusations of discrimination. Although partly deviating from the standard text, since 1996, readmission clauses have been included, inter alia, in the agreements with Algeria[32], Armenia[33], Azerbaijan[34], Croatia[35], Egypt[36], Georgia[37], Lebanon[38], Macedonia[39], Uzbekistan[40] and the Cotonou Agreement between the EU and the ACP-Countries[41]. They are currently subject of negotiations with a number of other countries.

4.2. Transit and Admission Arrangements and Agreements With Other Third Countries

Other avenues of collaboration with third countries on return-related matters could also be helpful in finding solutions when a direct return to the country of origin is not possible or appropriate. In cases of missing or lacking travel connections to the country concerned it could be assessed whether third countries are willing to help relating to the transit of persons to the country of origin. Where suitable, transit arrangements could be concluded.

Moreover, the feasibility of approaching third countries to find alternatives to repatriation could be assessed. Consideration could be given as to whether other third countries are willing to admit persons for a limited time or as a sustainable solution, if this is acceptable for the Member State and adequate for the returnee concerned.

Which alternative concepts for repatriation could be assessed in dialogue with other third countries?

5. CONCLUSION

The Commission has tried to shape a sketch for a Community return policy, which is a necessity in the process developing a comprehensive European asylum and immigration policy. The primary aim of the Green Paper is to call for reactions from interested parties and to launch a broad discussion among all relevant stakeholders. The European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions, the candidate countries, third country partners, international governmental organisations, non-governmental organisations, the academia and other interested civil society organisations and individuals are invited to contribute to this discussion.

In order to integrate the results of the discussion launched by this Green Paper and to prepare a hearing on the Community Return Policy in summer 2002, the Commission invites all interested parties to comment in writing no later than 31 July 2002 to:

The Director General
Directorate General Justice and Home Affairs
European Commission
Rue de Luxembourg 46
B-1049 Brussels
jai-immigration-asile@cec.eu.int

ANNEX I – Proposed Definitions

Return
Genus of the policy area. Return comprises comprehensively the preparation or implementation aiming at the way back to the country of origin or transit, irrespective of the question, whether the return takes place voluntarily or forced.

Illegal resident
Any person who does not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the Member States of the European Union

Voluntary return
The return to the country of origin or transit based on the decision of the returnee and without use of coercive measures.

Forced return
The return to the country of origin or transit with the threat with and/or the use of coercive measures.

Compliant forced return
Forced return with the threat and minor use of coercive measures such as escorts.

Non-compliant forced return
Forced return with the major use of coercive measures, such as restraints.

Readmission
Decision by a receiving state on the re-entry of an individual.

Readmission agreement
Agreement setting out the practical procedures and modes of transportation for the return and readmission by the contracting parties of persons illegally residing on the territory of one of the contracting parties.

Repatriation
Return to the country of origin, in both voluntary or forced return situations.

Expulsion
Administrative or judicial act, which terminates the legality of a previous lawful residence e.g. in case of criminal offences

Expulsion order
Administrative or judicial decision to lay the legal basis for the expulsion

Detention
Act of enforcement, deprivation of personal liberty for law enforcement purposes within a closed facility

Detention order
Administrative or judicial decision to lay the legal basis for the detention

Removal[42]
Act of enforcement, which means the physical transportation out of the country

Removal order
Administrative or judicial decision to lay the legal basis for the removal.

Re-entry
New admission to the territory of a state after prior departure.

Rejection
Refusal of (legal) entry at a border post

Transit
Sojourn in or passage through a third country while travelling from a country of departure to the country of destination.

Footnotes

(1) Cf. COM (2000) 755 final and COM (2000) 757 final of 22 November 2000.

(2) COM (2001) 672 final of 15 November 2001.

(3) Cf. EU Schengen Catalogue, External borders control, Removal and readmission: Recommendations and best practices, Council of the European Union, 28 February 2002.

(4) See also the proposal for a Council directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months (COM (2001) 388 final) of 10 July 2001, which will communitarise Article 23 of the Schengen Convention.

(5) Cf. e.g. among many others: Recommendation No. R(99) 12 of the Committee of Ministers of the Council of Europe on the return of rejected asylum seekers; IOM, The return and reintegration of rejected asylum seekers and irregular migrants, Geneva, May 2001; UNHCR, Legal and practical aspects of the return of persons not in need of international protection, Geneva, May 2001; ICMPD, Study on comprehensive EU return policies and practices for displaced persons under temporary protection, other persons whose international protection has ended and rejected asylum seekers, Vienna, January 2002; IGC, Modular Structures on Return (not published); Nascimbene (ed.), Expulsion and detention of aliens in the European Union countries, Milan, 2001.

(6) COM (2001) 387 final of 11 July 2001; see section 3.3..

(7) COM (2000) 757 final.

(8) COM (2000) 755 final.

(9) COM (2001) 710 final of 28 November 2001, see section 5.2..

(10) OJ C 364 of 18 December 2000, p. 1.

(11) Cf. the Directive 1995/46/EC, OJ L 281 of 23 November 1995, p. 31; the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data; and – when appropriate – the legally non-binding Recommendation No.R (87) 15 of the Committee of Ministers of the Council of Europe regulating the use of personal data in the police sector.

(12) COM (2001) 672 final., cf. section 4.8..

(13) Cf. OJ L 149 of 2 June 2001, p. 34.

(14) Cf. Art. 13 of COM (2001) 127 final.

(15) Cf. OJ L 149 of 2 June 2001, p. 34.

(16) Art. 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."

(17) But cf. also COM (2001) 127 final., Art. 26 of the proposal on long-term residents.

(18) OJ C 353 of 7 December 1999, p.6.

(19) Cf. COM (2001) 447 final.

(20) COM (2001) 672 final.

(21)Cf. COM (2001) 567 final.

(22) Source: Eurostat - no data available from IRL, NL and UK, missing data from B, DK and LUX.

(23) Source: Eurostat - no data from DK, IRL, NL and UK, missing data from FIN.

(24) Source: IOM. Most assisted voluntary returns have taken place from Germany (year 2000: 68648; year 1999: 58469).

(25) Figures on removed aliens for 2001 cannot be presented yet due to missing delivery of data by some Member States.

(26) Cf. also SEC (2001) 602 of 9 April 2001.

(27) OJ C 274 of 19 September 1996, p. 18.

(28) Cf. OJ L 114 of 1 May 1999, p. 2; OJ L 138 of 9 May 1998, p. 6; OJ L 205 of 31 July 1997, p. 3.

(29) Following "ERF", cf. Council Decision of 28th September 2000 establishing a European Refugee Fund, OJ L 252, of 6 October 2000, p. 12 – 18.

(30) Cf. Council Doc. 13409/99.

(31) Cf. Council Doc. 4272/96.

(32) Initialled on 19 December 2001.

(33) OJ L 239 of 9 September 1999, p. 22.

(34) OJ L 246 of 17 September 1999, p. 23.

(35) COM (2001) 371 final of 9 July 2001, p. 46.

(36) OJ C 304E of 30 October 2001, p. 16.

(37) OJ L 205 of 4 August 1999, p. 22.

(38) Initialled on 10 January 2002.

(39) OJ C 213E of 31 July 2001, p. 44.
(40) OJ L 229 of 31 August 1999, p. 22.
(41) OJ L 317 of 15 December 2000, p. 10/11.
(42) The word "deportation" is also used in this context.

UNHCR'S POSITION

Commission Green Paper on A Community Return Policy on Illegal Residents

UNHCR's Comments, Geneva, July 2002

The Scope of the Challenge

1. UNHCR welcomes the Green Paper as an important contribution to the development of a Community return policy. Such a policy is an essential element of a Community migration management strategy. In the view of UNHCR, the paper addresses all relevant issues and is to be commended for situating the return issues within the wider context of a comprehensive Community immigration and asylum policy. From a UNHCR perspective, the emphasis on the responsibilities and needs of countries of origin and transit, the need for common standards for return procedures, the compatibility of a return strategy with asylum and admission policy, as well as the beneficiary effects of involving international organisations, is to be welcomed.

2. UNHCR is interested in this issue because it believes that the return of properly rejected asylum-seekers is an important condition for ensuring the integrity of the asylum system. By "properly rejected asylum-seekers", UNHCR means those who, after due consideration of their claims in fair procedures, have been found not to qualify for refugee status on the basis of the 1951 Convention, nor to be in need of protection on other grounds, including, but not exclusively, obligations under international human rights instruments, and who are not authorised to stay in the country concerned for other compelling reasons. For UNHCR, the key consideration is that the rejection has taken place in accordance with international protection standards, and that persons whose asylum applications have been rejected on purely formal grounds, such as the "safe third country" policy, will be ensured a substantive examination of their asylum claim somewhere.

3. UNHCR welcomes the approach taken by the Green paper which situates the return issue within the broader context of a comprehensive policy of migration management, bearing in mind the individual responsibilities of States of origin, transit and destination. Community return policies cannot be developed and implemented on their own, but must be conducted in conjunction with other policies, as stated in the Green paper. These include policies which create legal channels for labour migration which can contribute to reducing the pressures on the asylum system and preventing and combating migrant smuggling and human trafficking. Such complementary policies should also be aimed at strengthening the asylum system, i.a. by harmonising standards of treatment, creating subsidiary forms of protection, and developing services preparing for return. Most importantly, the Green paper recognises that readmission and return policies can only be effective if they are coupled with targeted development assistance for the sustainable reintegration of returnees. Although countries of origin have international legal obligations to take back their own nationals, compliance with such obligations is sometimes difficult to ensure and technical and financial assistance may be necessary to arrange for sustainable return and reintegration.

4. The preferred option for return is always voluntary return, also for unsuccessful asylum-

seekers. Where forced return is necessary, it should be conducted with due regard for standards of safety and dignity. The proposal to draw up a Council Directive on minimum standards for return procedures is expected to include clear benchmarks for safe and dignified return and is thus to be welcomed.

The Legal Framework

5. Returns are best effectuated on the basis of bi- or multi-lateral agreements laying down rights and obligations of all actors concerned, and respecting the human rights of those to be returned. Readmission agreements with countries of origin should be phrased and implemented in a manner compatible with States' obligations under international refugee law and international human rights law, and respect the principle of non-refoulement. Due attention should also be given to the standards laid down by the UNHCR Executive Committee and other relevant bodies such as the Council of Europe1.

6. The specimen re-admission agreement adopted by the Council of Justice and Home Affairs Ministers in November 1994 does include a clause to the effect that Member States' obligations arising from the 1951 Convention and the 1967 Protocol and other relevant international treaties will not be affected by the re-admission of those subject to the agreement, yet in regard to the readmission of third country nationals, it fails to differentiate between irregular migrants and persons seeking international protection . Where asylum-seekers would be returned under such agreements, without additional safeguards their protection claims risk not to be examined. This can best be avoided by explicitly excluding asylum-seekers from the scope of readmission agreements - as well as readmission clauses in co-operation agreements - and by establishing co-ordinated approaches to the allocation of State responsibility for determining refugee status.

Implementing returns

7. The Green paper recognises that individuals whose claims have been rejected on the basis of the 1951 Convention may be still otherwise in need of international protection and that therefore appropriate forms of subsidiary protection must be put in place. Returns should affect indeed only those who have been clearly determined not to be in need of any form of protection, including protection based on wider human rights standards.

8. UNHCR appreciates that the paper recalls that special rules apply for the protection against expulsion of recognised refugees, who can only be removed for grave reasons of national security or public order - a principle which the paper acknowledges.

9. UNHCR welcomes the proposals in the Green paper to develop common minimum rules and conditions for pre-removal detention, in particular accommodation standards, in order to ensure humane treatment, including provisions to subject such detention to regular judicial review, and, where possible, maximum time limits. UNHCR also welcomes the suggestion made in the paper to explore technical and legal alternatives for detention pending expulsion.

10. UNHCR also welcomes the suggestion made in the paper to develop common minimum rules for the enforcement of removals, inter alia on security standards for the

removal itself, and the need to exercise restraint and define clear competencies of escorts. Prior to returning irregular residents and unsuccessful asylum-seekers, it is indispensable that their nationality be acknowledged by their country of origin and that corresponding identification and travel documents be issued to them. It is appreciated that the paper refers to the physical and psychological condition of those to be returned, particularly those with special needs such as minors and separated children, and the risk of separating families as a result of expulsions as important factors to be taken into account when implementing returns.

11. UNHCR appreciates that the paper acknowledges that the actual situation in some countries of origin renders returns questionable, if not impossible, for compelling humanitarian reasons. UNHCR encourages Member States, in drawing up common assessments of the feasibility of removals to such problematic countries or regions, to seek the opinion of international organisations and other independent actors present on the humanitarian situation, absorption capacity or any other factors which may - temporarily - militate against return.

12. The Green paper lists a number of conditions which are to be met in order to render returns sustainable. These point at the necessity for comprehensive projects covering pre- and post-return assistance. The paper lists a number of relevant elements which would contribute to sustainable return and reintegration, such as pre-departure counselling and vocational training, the facilitation of contacts with families and friends in the country of origin, the establishment, where appropriate, of a monitoring presence in the country of return, the identification of the reintegration needs of potential returnees, and the involvement of the receiving local community in the return and reintegration, thus also being able to benefit from assistance measures.

13. Measures in which UNHCR, together with other relevant actors, could usefully assist EU Member States in the return of unsuccessful asylum-seekers, provided returns are voluntary, and depending on the particular situation, could include the following: systematic dissemination of information of developments in the country of origin as they affect the process of return; promoting voluntary return through collaborative counselling measures; identifying possible projects for post-return reintegration assistance; and in certain cases monitoring the situation of returnees once in their country of origin.

14. UNHCR can explore with EU Member States the possibility of extending, as appropriate and feasible, its programmes for the voluntary repatriation of refugees from neighbouring countries to unsuccessful asylum-seekers who are returned from EU Member States. The availability of repatriation and initial re-integration assistance provided by UNHCR in the country of origin may encourage unsuccessful asylum-seekers who have no right to remain in the asylum country to comply voluntarily with the obligation to return. Such assistance from UNHCR would be considered only in situations where the organisation implements a voluntary repatriation programme for refugees. Re-integration assistance given to returned unsuccessful asylum-seekers should be proportional to the often modest repatriation grants offered to refugees returning from the region. Where appropriate, reconstruction and development assistance could address, in addition to the needs of the local community, the specific situation of returnees, including returned unsuccessful asylum-seekers.

Among these standards are Recommendation No. R (99) 12 of the Committee of Ministers of the Council of Europe, and EXCOM Conclusion No. 85 (XLIX) of 1998 . Protocol No. 4 of the European Convention on Human Rights prohibits collective expulsions of aliens.

Communication from the commission to the council and the European Parliament on a Community Return Policy on illegal Residents
COM (2002) 564 final, 14 October 2002

Communication from the commission to the council and the European Parliament on a Community Return Policy on illegal residents COM(2002) 564 final

COMMISSION OF THE EUROPEAN COMMUNITIES
Brussels, 14.10.2002

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FOREWORD

The Commission stressed the need for a common return policy in its Communication of 15 November 2001 on a Common Policy on Illegal Immigration. As it had pledged, on 10 April 2002 it tabled a Green Paper on a Community Return Policy on Illegal Residents to serve as a basis for wide-ranging consultations on this sensitive issue. This process, which was concluded on 31 July, attracted many contributions from Member States, candidate countries, third countries, international, governmental and non-governmental organisations and other national and local authorities. It culminated in a public hearing on 16 July attended by over 200 people at which some thirty experts spoke.

The importance of the matter was restated in the conclusions of the Seville European Council, which called, as a matter of priority, for an action programme to be adopted in this field before the end of the year. Return policy was also discussed in detail at the informal ministerial meeting in Copenhagen on 13 and 14 September. Like the results of the consultation, the pointers provided by these discussions were an invaluable contribution for preparing this Communication.

The Commission would point out that a common approach on return would be inconceivable outside the general framework of the Community policy on immigration and asylum, the foundations of which were laid in the Treaty of Amsterdam and in the conclusions of the Tampere, Laeken and Seville European Councils. In this sense, the Communication is just one part of a much larger whole, the other components of which can be found in the many proposals and Communications, which the Commission has tabled in recent years.

As the title itself suggests, the only issue addressed is that of the return of illegal residents, i.e. those who do not, or no longer, fulfil the conditions for entry to, presence in or residence on the territories of the Member States. It does not tackle the wider topic of the return of legal residents and, for example, how such return could benefit the country of origin. These points will be addressed elsewhere, for instance in a forthcoming Communication on the relationship between migration and development.

The effectiveness of Community action for return of illegal residents is therefore an essential aspect for the credibility of any policy for fighting illegal immigration. But for it to be fully effective, it must fit smoothly into a genuine management of migration issues, requiring crystal-clear consolidation of legal immigration channels and of the situation of legal immigrants, an effective and generous asylum system based on rapid procedures offering access to true protection for those needing it and enhanced dialogue with third countries, which will increasingly be invited to be partners in dealing with migration.

Against this background, and given the specific purpose of this Communication, the Commission intends to highlight four items in particular:

– A rapid response is required to the need to step up operational cooperation. Member States are very keen on this. It is essential that contacts and the exchange of information be made easier on the basis of common terms of reference, practices and training be brought into line and common moves be encouraged so that obstacles can be removed and resources coordinated in areas such as the identification and documentation of the persons concerned, co-ordination of return operations and mobilisation of the necessary resources.

– This operational cooperation will, however, soon reveal its limitations if there is no suitable legal framework. A first target for the medium term will be the adoption of common standards to facilitate the work of the national authorities handling return operations and in particular to ensure full mutual recognition of removal decisions, moving on from the first step represented by the directive adopted in May 2001. Subsequently these arrangements will have to be spelled out in even more detail on points such as the situation of a person who may be the subject of a return decision.

– On the basis of the experience of Member States and international organisations, the basic elements of an integrated programme should be worked out to form a common framework which could be adjusted to the specific needs of the populations and countries concerned. Such a programme would have to cover not only return proper but also the different stages of its preparation and its follow-up in order to give it every chance of being sustainable. The Commission is prepared, if necessary, to consider the possibility of releasing Community financial resources to support the establishment of such programmes.
– Here, as elsewhere, closer co-operation with third countries is a sine qua non for the success of the policy. This co-operation will, of course, have to develop first at administrative and operational level, concerning the documentation and reception of the persons concerned and also as regards transit in some cases. In formal terms it may involve conclusion of readmission agreements, the importance of which has been regularly underlined by the European Council and the Council. Care will also have to be taken to ensure that the ground is prepared for profitable reintegration both for the returnee and for the place of origin. This will require both a firm commitment on the part of the third country and the readiness of the European Union and its Member States to provide the necessary assistance where required.

1. RETURN AS AN INTEGRAL PART OF A COMPREHENSIVE COMMUNITY IMMIGRATION AND ASYLUM POLICY

1.1. Introduction

The European Council of Seville on 21 and 22 June 2002 called for the speeding up of the implementation of all aspects of the programme adopted by the European Council of Tampere in October 1999 for the creation of an area of freedom, security and justice in the European Union, in particular the common policy on immigration and asylum. The need to fight effectively against illegal immigration was reaffirmed as an essential part of such a common and comprehensive policy. The European Council of Laeken on 14 and 15 December 2001 had already called for an action plan on illegal immigration[1]. On the basis of the Commission's Communication on a common policy on illegal immigration of 15 November 2001[2], the JHA Council adopted on 28 February 2002 a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union[3]. Return and readmission policies are identified as integral and vital components of that plan.

To follow up those aspects of this plan the Commission on 10 April 2002 tabled a Green Paper on a Community Return Policy on Illegal Residents[4]. Its purpose was to invite reactions from interested parties and to launch a broad discussion among all relevant stakeholders. To that end the Commission hosted a public hearing on 16 July 2002, where on the basis of the ideas set out in the Green Paper, the present practices of return policies and options for a future common EU policy on the return of illegal residents were discussed. The hearing

allowed an open exchange of views of representatives of the European institutions, Member States, candidate countries, countries of origin and transit, other countries of destination, international organisations, regional authorities, non-governmental organisations and academia[5]. In addition, as requested in the Green Paper, written contributions were submitted to the Commission[6].

The informal JHA Council meeting of 13 and 14 September 2002 debated the elements of a future return action programme as requested in Seville Conclusion No 30, which, inter alia, stated:

"(…) The European Council calls on the Council and the Commission, within their respective spheres of responsibility, to attach top priority to the following measures contained in the plan: (…)

– *as regards expulsion and repatriation policies, adoption by the end of the year, of the components of a repatriation programme based on the Commission Green Paper; those components should include the best possible facilities for early return to Afghanistan; (…)"*

The discussion at the JHA Council meeting stressed in particular the need to enhance operational co-operation among Member States in order to make return policies more efficient in practice. The purpose of this Communication is to respond to this call and to put forward an outline for a return action programme taking into account, inter alia, the contributions and discussions in response to the Green Paper. The Communication focuses on the first element of the Seville European Council's requirement, namely the concrete measures deriving from the general policy on the return of illegal residents, valid for all regions or countries of origin or transit.

With respect to Seville's more specific reference to the case of Afghanistan, this is being addressed in a separate framework. Nonetheless, it is clearly closely linked and must be coherent with the general policy line on return as set out in this Communication. The identification and implementation of such elements for early return to Afghanistan in particular will create a unique opportunity for the Member States and the Commission to test the effectiveness of the new Community return policy.

1.2. Working premises following the Commission's Green Paper

In its Green Paper on a Community Return Policy on Illegal Residents, the Commission set out a number of working premises for the purpose of incorporating return policy as an integral part of a comprehensive Community immigration and asylum policy[7]. This Communication is based on those same premises, the most important elements of which are briefly recalled below.

1.2.1. Focussing on the return of illegal residents

Although return policy in principle also covers the return of persons legally residing in the EU but willing to return to their country of origin, this Communication concentrates mainly on the return of persons residing illegally in the EU. These persons do not or no longer fulfil the conditions for entry to, presence in, or residence on the territories of the Member States of the European Union either because they entered illegally or overstayed their visa or residence permit, or because their asylum claim has been finally rejected. The term "illegal resident" is

used following the legal terminology of Article 63 (3) b) of the Treaty of the European Community. This term must not be perceived as qualifying the persons as being illegal, but as qualifying their status of not being in compliance with the law on entry and/or residence.

Nevertheless, it is useful to extend slightly the focus of this Communication, only as far as voluntary return is concerned, to certain groups of legal residents, who have a temporary status or whose removal has been temporarily suspended. This concerns in particular persons under any form of international protection and which is principally of a temporary nature. Experience shows that in the context of voluntary return programmes it makes sense not to limit the scope of such a programme too much.

1.2.2. Safeguarding the integrity of immigration and asylum systems by the return of illegal residents

The Communication deals with both aspects of the return of illegal residents: voluntary or forced. To every extent possible, priority should be given to voluntary return for obvious humane reasons, but also due to costs, efficiency and sustainability. More efficient ways to promote voluntary returns should therefore be developed and implemented.

However, in cases where voluntary return fails, the forced return of illegal residents becomes a necessity. A credible threat of forced return and its subsequent enforcement send a clear message to illegal residents in the Member States and to potential illegal migrants outside the EU that illegal entry and residence do not lead to the stable form of residence they hope to achieve[8]. It must be made clear that, in principle, third-country nationals, without a legal status enabling them to stay, either on a permanent or a temporary basis, and for whom a Member State has no legal obligation to tolerate the residence, have to leave the EU.

The possibility of forced return is essential to ensure that admission policy is not undermined and to enforce the rule of law, which is a constituent element of an area of freedom, security and justice. A credible policy on forced returns helps to ensure public acceptance for more openness towards persons who are in real need of protection, and for new legal immigrants against the background of more open admission policies, particularly for labour-driven migration.

1.2.3. Respecting international obligations and human rights

Article 6 of the Treaty on European Union affirms that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. In consequence, the full respect of human rights and fundamental freedoms is the natural and basic prerequisite for a European return policy.

As already set out in the Green Paper on a Community Return Policy on Illegal Residents, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000[9] contain provisions which are applicable to a policy on return of illegal residents (Articles 3, 5, 6, 8, 13 and 14 of the ECHR and Articles 3, 4, 7, 19, 21, 24 and 47 of the Charter of Fundamental Rights). Specifically relevant to international protection are Article 18 of the Charter of Fundamental Rights and the provisions of the Geneva Convention of 28 July 1951 on the status of refugees and the Protocol of 31 January 1967, in particular Articles 32 and 33 thereof. Finally, it should be emphasised that, according to the United Nations Convention on the Rights of the Child of 1989; in all actions related to children, the

child's best interest must be a primary consideration.

1.2.4. Co-operating with countries of origin and transit on return and readmission

The European Council of Seville highlighted – once again – the importance of the co-operation with countries of origin and transit on migration management, in particular in the field of return and readmission. Third countries must readmit their own nationals unlawfully present in a Member State and, under the same conditions, nationals of other countries who can be shown to have passed through their territories before arriving in the EU10. Member States' Justice and Interior Ministers recently expressed their view that the main problem does not lie in strengthening the cooperation between Member States, but is rather attributable to the unwillingness of third countries to take back their nationals and to ensure sustainable return. They have, therefore, the clear expectation that the third countries concerned should be put under pressure to be more co-operative both by the Community and by the Member States.

Co-operation is needed at an administrative level to obtain return travel documents for illegal residents who are not in possession of valid travel documents. In addition, when arriving in the country of return, the readmission process at the points of entry, often at airports, requires support. In certain cases it might be helpful to negotiate a readmission agreement at political level, which goes further than establishing the principles of readmission and sets out the practical procedures and modes of transportation for return and readmission.

Co-operation with countries of origin and transit on return and readmission is vital and might be backed up – where appropriate and within the limits of the resources allocated in the framework of the financial ceilings – with technical or financial assistance from the EU side. Moreover, the refusal of constructive co-operation should trigger the phased mechanism as defined in the Seville Conclusion No 36, which could, in case of persistent and unjustified denial of such a co-operation, include the unanimous adoption of measures or positions under the Common Foreign and Security Policy and other European Union policies after full use has been made of existing Community mechanisms without success.

2. RETURN ACTION PROGRAMME

2.1. Phased integrated approach for interdependent elements of a Community return policy

All Member States face the same obstacles to a smooth and timely return of illegal residents to their country of origin: lack of willingness to return voluntarily, unknown residence or identity of the person, missing travel documents or difficulties in co-operation with some states in issuing identity or travel documents; resistance to return of the returnee; absence of adequate means of transportation. Member States have, therefore, developed a variety of practices in order to overcome these difficulties. Experience has been gained with different concepts or countries of return. The improvement of co-operation between the Member States based on the experience gained is vital to solve practical problems.

Information exchange on such experience is clearly the first step of any co-operation among Member States. The improvement of existing schemes to exchange knowhow and best practices is, therefore, important and the best starting point for further successful co-operation. This includes the exchange of return statistics, the networking of authorities and

the development of certain guidelines on best practices.
Such non-binding guidelines require to some extent mutual consent to the effect of a given best practice11. Moreover, when considering the question of whether joint training of return practitioners should be organised, a basic common understanding or certain minimum rules on return enforcement appear indispensable. Certain predefined training schemes or standards are needed to achieve common training results.

Concrete operational co-operation in terms of assistance in individual cases again requires that certain rules be developed and adhered to, in particular for cases ofidentification where the exchange of personal data is envisaged. Moreover, mutual assistance or even joint operations are destined to fail if the enforcement staff of oneMember State cannot comply with the legal requirements of another Member State. Common standards could, therefore, at least facilitate, if not create the possibility of having joint operations. The legality of the enforcement act must be beyond doubt during all stages of the return operation. This is to be taken into account in particular in cases of returns in transit through another Member State.

A binding regime for the mutual recognition of return decisions must be seen as thekey factor for an effective operational co-operation. The Commission believes that it is time that the EU takes a fresh look at this key factor, as co-operation between Member States would otherwise remain rudimentary. A return should be assumed as being successful only if the illegal resident concerned has left the territory of the EU rather than of a particular Member State, if no other Member State has granted legal residence. The preferred option is – as a matter of course – the sustainable return to the country of origin. The mere continuation of illegal residence in another Member State is anyway an unsatisfactory option, even if it at present occurs in practice.

Consequently, Member States must ensure that the effect of a return measure is not limited to their own territory. Only the binding mutual recognition of return decisions can lay the foundations so that in the medium-term enforcement activities, including mutual assistance and co-operation, finally lead to the desired results. To that end an approximation of the legal conditions for the ending of residence is a prerequisite.

A comprehensive Community return policy should be gradually developed by identifying short-term measures that can be implemented immediately. These shortterm measures could focus on some practical steps for operational co-operation. Nevertheless, a fully-fledged return action programme must additionally contain medium-term legislative measures, which will smoothen the co-operation among Member States, such as the binding mutual recognition of return decisions.

2.2. Operational co-operation among Member States

2.2.1. Definitions

Due to different concepts and legal systems, the terminology in the field of return differs and often causes confusion. Some common definitions would already facilitate the practical co-operation by improving mutual understanding. The discussion on the first set of definitions as proposed in the Green Paper has begun. These definitions are for now of preliminary and non-binding character. However, they may serve at a later stage as a starting point for legislative work in the field of return. An updated set of definitions is attached (see Annex I).

The common definitions should be used in future documents insofar as possible inorder to streamline terminology and thereby to avoid linguistic confusion.

2.2.2. Statistics and information exchange

The Conclusions of the JHA Council of May 2001 regarding common analysis and the improved exchange of Statistics on Asylum and Migration12 consider that there is a need for a comprehensive and coherent framework for improving statistics in the area of asylum and migration. The Commission will put forward an Action Plan to implement the Council Conclusions shortly. The Action Plan will cover a variety of measures, such as new statistical methods and the extension of existing data collections. It shall be applicable to existing Community statistics on return measures as well as to any future statistics the Council may decide to start collecting.

Work has already started on one particular objective of the Conclusions, namely the publication of a comprehensive annual report on statistics in the area of asylum and migeation. It is envisaged that the first report, on 2001 data, will be published in early 2003. In the section on return, figures will include the total number in each Member State of rejected applicants for asylum returned and other persons removed. In addition, figures shall be broken down according to the type of return (voluntary or forced). Reliable and comparable figures will help to demonstrate more clearly the scale of the challenges faced by Member States in the area of return.

After the publication of the report an assessment should be made of what other figures may be collected and how the return figures on types of return can be made more comparable.

2.2.3. Networking authorities

Co-operation starts with using contacts and with an informal exchange among individuals. In recent years the information exchange on return among Member States has taken place mostly at ministerial expert level. Member States' practitioners tended to contact each other on an ad hoc basis, on the occasions of bilateral or multilateral talks, workshops, meetings, conferences or seminars, which did not necessarily take place in the EU context. A systematic overview of the organisation and responsibility of Member States' return enforcement services, which would facilitate working contacts amongst different Member State officials, does not exist.

An up-to-date and easily accessible list of national contact points, including contact points in national return travel document units and other related enforcement services, would, therefore, assist in addressing other Member States' enforcement services.

The Commission has started to develop a web-based Information and Co-ordination Network (ICONet), which is designed as a secure Intranet website for Member States' migration management services provided by the Commission. This site could include a section for return services. This return section could provide lists of (central) return enforcement authorities, which could be updated in real time.

The Commission will include a return section in the web-based Information and Coordination Network (ICONet), which would provide contact details for Member States' return enforcement services.

2.2.4. Best practices and guidelines

The exchange of best practices is another important tool of operational co-operation. Based on the experience in the Schengen context Member States have already developed a catalogue with recommendations and best practices on removal and readmission on 28 February 2002[13]. On the same date the Council adopted conclusions on the particular aspect of obtaining travel documents for the return of illegal residents. On the basis of Member States' contributions to a questionnaire, an overview will be established on the different experiences made in the practice with laissez-passer documents, e.g. if the EU standard travel document[14] is regularly accepted by a third country or not.

This overview - and in the future other summaries on return and readmission related matters - should be compiled, analysed and discussed. The creation of a handbook of best practices, focusing on both, their implementation and the resources for their implementation, could be envisaged. This would help operational services to profit from the experience of others and to ensure coherence from third countries in the processing of requests for the issuing and acceptance of return travel documents. Moreover, such a handbook could contain certain guidelines, which would also be the common basis for joint training.

A handbook of best practices on return and readmission should be developed, which contains guidelines for better performance based on best practices in Member States. The first edition should focus on obtaining return travel documents.

2.2.5. Joint training

Return enforcement is a very difficult and demanding task and should be carried out by a specialised service, which calls for specific know-how. Any person responsible for carrying out such a high-profile task needs to have various skills such as proper knowledge of the legal competencies, adequate treatment of returnees, the management of incidents, intercultural understanding and negotiation techniques. Member States must provide special training, which enables staff to conduct removals in an appropriate manner.

The challenges of enforcing returns should be the subject of joint seminars or regular meetings of persons responsible for the development of training schemes used in the training facilities. For the sake of efficiency it seems advisable to use initially the network of national training facilities for border management, which was foreseen by the Council's action plan on illegal immigration of 28 February 2002[15]. In case of diverging responsibilities, consideration could be given to the establishment of a similar network of responsible return training facilities. In addition, Member States should offer training courses to officials from other Member States in their training facilities. This could start with subjects that are – without further adjustment - of common interest and that are not focussed on specific needs due to national legislation.

Nevertheless, joint training schemes could be developed, which would also cover subjects

where national practices differ, such as in the case of the use of restraints. Such schemes could be worked out more easily on the basis of common standards laid down in guidelines as described before in 2.2.4. Common standards have already been requested in the Council's plan for the management of the external borders of the Member States of the European Union of 13 June 2002 as far as standard security measures are concerned, which should be set up with regard to return in aeroplanes, ships and other means of transportation[16].

Intensive joint training should be made possible with the creation of common security standards, a network of return training facilities, the development of joint training schemes and the participation in training courses of other Member States.

2.2.6. Better identification and documentation

It should be recalled that the main obstacle to return is unclear identity and the lack of proper travel documents. Potential returnees are mostly responsible for this lack of documentation since it is generally known that countries of origin often delay or deny the issuing of return travel documents because of missing information on nationality or identity. In order to avoid removal, illegal residents therefore may hide or destroy their travel documents and not infrequently claim a completely false identity and/or nationality. As a consequence, lengthy and expensive procedures have often to be carried out, which include presentation at several embassies of neighbouring third countries or a language or dialect analysis.

A key element in solving return-related problems is, therefore, the carrying out of suitable identification measures during administrative procedures, e.g. at visa posts, when the person concerned has an interest in providing correct data. Following the Commission's proposal the Council agreed on the establishment of an online European Visa Identification System[17] in its action plan on illegal immigration of 28 February 2002. The Commission is currently assessing the technical feasibility of such a Visa Information System.

The study should assess in particular an important return related component: the storage of an electronic photo or other biometric identifier combined with the scan of the travel document as shown by the visa applicant. The availability of this information in a central database would have a substantial added value, despite the fact that photos are already today mostly requested for visa applications and travel documents copied. The difficulty is that even existing information is only accessible under the condition that the corresponding travel document is available. This creates a dependence on the willingness of its holder to present it, which, in cases of illegal residence, is obviously low. The aim is, therefore, to overcome this obstacle and to identify persons without the need for their co-operation. With the help of the biometric identifers in the Visa Information System apprehended undocumented illegal residents could be retrieved and, in cases of prior visa applications, identified. The scan of the travel documents could be used as a clear proof for the third country concerned, when return travel documents are requested.

It is expected that the system will reduce significantly the time and costs incurred as a result of illegal residence, including the detention time for the returnee pending removal. In addition, the visa issuing practice could be reconsidered due to an obvious change in the risk assessment. The return component in the Visa Information System could allow a quicker and smoother handling of the whole visa practice, because Member States would have a real chance to identify and remove mala fide travellers, independent from the paper

documentation or irrespective of in which Member States' representation a visa has been issued. Consequently, bona fide travellers would profit from this system.

A central function of the future Visa Information System should be the return component so that undocumented persons can be identified after apprehension in the Member States with biometric means in order to retrieve the existing personal information, in particular a scan of the travel document as presented in the visa post.

2.2.7. Readmission and transit rules among Member States

As mentioned in the Commission's Green Paper, readmission among Member States takes place mostly on the basis of bilateral readmission agreements or informal cooperation[18]. In 1999 Finland presented an initiative with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals[19]. The discussion was suspended due to the negotiations on the transfer of the mechanism for the determination of the responsibility for asylum claims into Community law, Dublin II[20]. Since the negotiations on this subject have progressed substantially, the general framework for readmission among Member States concerning all illegally resident third-country nationals should be put on the agenda again.

Moreover, a common framework could be set for questions relating to transit during the return process. Often it is necessary to use airports of other Member States due to a lack of connections to the country of return. In such cases it is important to establish a clear legal framework for the transit procedure, e.g. the use and competencies of escorts in transit and regulations on failure to return. To that end Germany has launched an initiative for a Council Directive on assistance in cases of transit for the purpose of return by air[21]. In this context, account should be taken of annex 9 of the Convention on International Civil Aviation[22]. Furthermore, it should be discussed how other countries of destination could be integrated in an EU air transit regime.

In addition it is necessary to find pragmatic solutions for returnees crossing internal borders of Member States, in particular in cases of voluntary return. This problem is particularly relevant when the returnee is a national of a country, which is under visa obligation, and would, therefore, need a visa to transit through the territory of other Member States. In such a case, the use of a secure standard travel document issued by the Member State returning the person – which would be recognised by all Member States and made equivalent to a visa – could be envisaged.

The general framework for readmission among Member States should be put back on the agenda once the Regulation on Dublin II is adopted based on a proposal by the Commission.

Assistance in cases of transit in particular for the purpose of return by air should be subject to certain rules. Subsequently the transit by other means of transportation should be tackled.

2.2.8. Mutual assistance by immigration liaison officers

Immigration liaison officers (ILO), who are posted in countries of origin or transit, have regular

contacts with the local authorities, in particular the border guard and immigration authorities at airports. Such working relations should be made available for return-related tasks.

On the arrival of returnees in the country of return the presence of an ILO may be helpful for a smoother hand-over procedure for readmission. In addition, assistance for the escorts could be offered. The network of immigration liaison officers should be further developed to that end. Wherever possible Member States should offer and provide mutual assistance in facilitating returns in the country of return.

2.2.9. Joint Return Operations

Removals are increasingly carried out with charter flights for different reasons. Some Member States use small charter jets in cases of non-compliant forced returns, which have proven extremely expensive. Some Member States charter larger aircraft to allow for higher numbers to be returned with the necessary escorts. This practice is also costly especially when the capacity cannot be fully utilised, which often happens due to the unavailability of the returnee because of absconding, illness or major resistance of the returnee or legal action at a very late stage to avoid removal.

Member States could enforce returns more efficiently if they could share existing capacities by organising joint operations. Provided that adequate transit arrangements are established, Member States should seek to carry out joint charter flights for voluntary and forced returns. Joint charter flights have already been organised as pilot projects on a bi- or trilateral basis among Member States or other destination countries. The development of this practice would not only have financial advantages, but the signal effect would be higher as well.

Joint return operations should be organised by Member States starting with bi- and multilateral joint charter flights. In addition, other joint return operations by land or sea could be envisaged, where appropriate.

2.2.10. Better co-ordination

Enhanced co-operation as described above requires an adequate framework for coordination. As mentioned before[23], the creation of ICONet, the secure web-based Information and Co-ordination Network, could be conducive to that end. Apart from contact information this website could provide for other return-related services. It could contain a tool, which allows an online transit notification from one Member State to another using a unified form as suggested in the German initiative on transit by air. Additionally, ICONet could be used to co-ordinate among Member States joint charter flights to enforce returns. Furthermore, ICONet could also give information on contact points in third countries or other information on third countries that is relevant for return operations.

Nevertheless, a website cannot replace personal interaction, which is clearly needed to reach an advanced level of co-operation. Co-operation and in particular coordination could be assisted by setting up a technical support facility as advocated by the Commission in the recent Communication on the Common Policy on Illegal Immigration[24]. Multiple tasks would be entrusted to such a facilitating body. Gathering, analysing and disseminating information on return, moderating a dialogue among return practitioners, organising expert meetings, preparing joint training courses or helping to organise joint operations are just some examples of what could be done. In order to prove the usefulness of such a technical support facility it

should be limited in the beginning to a small secretariat, where a number of national experts should concentrate on certain priority activities. A technical support facility could be financed with support offered by the ARGO administrative co-operation programme[25], which is also available for return co-operation among Member States.

Better co-ordination of an enhanced operational co-operation on return should be achieved with the development of the Information and Co-ordination Network. In addition, the creation of a technical support facility could be envisaged to that end.

2.3. Common minimum standards to ensure efficient return policies

Co-operation among Member States as described in the chapter 2.2 above is likely to be successful if based on a common understanding on key issues. Consequently, common standards should be set in the medium-term in order to facilitate the work of the services involved and to allow enhanced co-operation among Member States. In the long term such standards should establish rules for adequate and similar treatment of illegal residents, who are the subject of measures terminating a residence, regardless of the Member State which enforces the removal. For these reasons the Commission intends to take the appropriate initiatives.

2.3.1. Mutual recognition of return decisions

The efficient return of illegal residents, who have absconded after expulsion decisions issued by one Member State and have been apprehended in another Member State is of major importance to the operational co-operation on return enforcement in the EU, in particular, where inner border controls do not exist. An expulsion decision issued by one Member State should be enforced in another Member State without the latter having to issue a new expulsion decision. The Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals[26] underlines this necessity, although it has not established a binding framework.

The mutual recognition of expulsion decisions regarding persons who have applied for asylum requires special attention, for Member States interpret the Geneva Convention in different ways and also have different grounds for subsidiary protection. According to the Tampere European Council of 1999, a common asylum procedure and a uniform status is the objective in the longer term. The Seville Council of June 2002 confirmed this objective, adding deadlines for specific Directives to be adopted. The Commission therefore reiterates its step-by-stepapproach, proposed in its Communication of November 200027, emphasising the link between mutual recognition and harmonisation on asylum.

The establishment of a legally binding framework for mutual recognition of all measures terminating a residence, in particular expulsion decisions, should be integrated in a future proposal on return procedures.

2.3.2. Removal

Removal, as the closing act of enforcing the return of the person concerned, should be subject to minimum standards, safeguarding both the rights of the person concerned and the effectiveness of the removal. Minimum standards will facilitate operational co-operation between Member States during transit or joint removal operations as well.

As long as Member States have different asylum systems in place, a final safeguard for non-refoulement appears necessary to enable Member States to comply with their international obligations, if the risk for refoulement has not been examined before.

Such a final safeguard should refer to the asylum procedure in place, which includes an effective remedy.

Minimum standards should also strike a proper balance between preventing abuse due to feigned diseases while taking into account the real physical state and mental capacity of the persons concerned. If the returnee claims physical or mental illness immediately before departure, this could be an attempt to frustrate the removal, but it could also be a genuine claim. A proper assessment must be carried out, especially with regard to vulnerable groups such as minors and pregnant women. Minimum standards should also deal with the conditions under which a family can be separated during the removal procedure.

Member States should be allowed to remove a person despite his or her (physical) resistance. Yet it must be clear that coercive measures have their limits. The physical integrity of the returnee during the removal is of utmost importance. The returnee's psychological condition must also be respected. Standards are needed covering the intensity of coercive measures. As far as removals by air are concerned the IATA/CAWG Guidelines on Deportation and Escort could provide the basis for developing EU provisions on escorting and use of restraints.

Co-operation on removals touches on the question of how Member States can streamline their present return practice in relation to specific countries of origin in case the actual situation makes removals questionable due to compelling humanitarian reasons (a contemporary example is Angola). If Member States want to co-operate on this, it seems logical to have minimum standards on the assessment of such situations. This could include consultation of organisations such as UNHCR or UN Administrations (e.g. UNMIK in Kosovo) or other relevant actors.

Minimum standards on removal should be set at EU level, setting a final safeguard for non-refoulement requirements in a future Directive on Minimum Standards for Return Procedures, defining common guidelines for removal on the physical state and mental capacity of the returnee as well as on the returnee's integrity during the removal operation. Moreover, an assessment mechanism should be established, which would allow assessment of the actual situation in certain countries as to whether removals are feasible or not.

2.3.3. Preconditions for expulsion decisions

Decisions on expulsion are taken at Member States level, until now according to national law. The Council already provided for initial standards for expulsion decisions in Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals adopted in May 2001[28]. This Directive provides, inter alia, that a third-country national is the subject of an expulsion decision in case of a serious and actual threat to public order or to national security in two groups of cases.

In order to further develop the idea of mutual recognition of expulsion decisions, the Commission takes as a starting point the distinction between mandatory reasons for expulsion decisions on the grounds of extraordinary danger for public order or national

security and other legitimate reasons, which would normally lead to an expulsion decision.

This distinction should take proper account of the conditions and safeguards that have to be fulfilled in order to end the legal residence of certain groups. Privileged third-country nationals such as long-term residents[29] or family members of a Union citizen may only be removed for grave reasons of public security and public order.[30] Special considerations should also apply in the case of third-country nationals who are born in a Member State and have never lived in their country of nationality.

The expulsion of refugees as well as other persons under other forms of international protection requires special attention, for they can only be removed in accordance with international obligations such as the 1951 Geneva Convention and the European Convention on Human Rights. In general, a decision for expulsion should in all cases be based on the individual situation. The human rights of the person concerned and whether the measure is proportionate must be adequately considered. A judicial remedy should be available, including the possibility to ask for suspensive effect.

Minimum standards on expulsion decisions should be set at EU level, defining mandatory and other grounds for expulsion, identifying groups with specific protection needs and setting minimum safeguards for judicial review in the framework of a future Directive on Minimum Standards for Return Procedures.

2.3.4. Ending of legal residence

The Commission proposes that a person can be obliged to leave the territory of a Member State from the moment legal residence has ended. This includes rejection of an application for residence (either on grounds related to international protection or migration), expiration of a residence permit or withdrawal / revocation of it (e.g. on grounds of public order or national security), but also the ending of illegal residence of a person who has never had legal residence in the Member State concerned. Legal residence is also considered to have ended if a remedy against a decision concerning the right to stay on the territory of the Member State has no suspensive effect. All these persons should have a legal obligation to leave the Member State immediately or, if a time limit for departure has been set, before the expiry of the time limit. Seen from the EU level, the obligation to leave should be an obligation to leave the EU and not just a Member State.

Co-operation among EU Member States would ensure that persons who have no legal residence in one Member State will not leave for another Member State if they will not be allowed legal entry and residence there. To that end, the Commission will elaborate on the approximation of measures terminating illegal residence applicable throughout the EU.

2.3.5. Detention pending removal

The Commission acknowledges the need for Member States to provide for the possibility of detention pending removal. However, a fair balance should be struck between the Member States' need for efficient procedures and safeguarding the basic human rights of the illegal resident. Minimum standards at EU level defining the competencies of responsible authorities and the preconditions for detention should be set also in order to make operational co-operation between Member States during transit or joint removal operations easier.

These minimum standards could cover:

- Grounds for detention pending removal. This covers detention of the illegal resident concerned in order to obtain return travel documents or to prevent the illegal resident from absconding during the removal or during transit.

- Identification of the groups of persons who should generally not or only under specific conditions be detained:
  – unaccompanied children and persons under the age of 18
  – the elderly, especially where supervision is required
  – pregnant women, unless there is the clear threat of absconding and medical advice approves detention
  – those suffering from serious medical conditions or the mentally ill
  – those where there is independent evidence that they have been tortured or mistreated while being detained before they arrived in the EU
  – people with serious disabilities

- Rules concerning the issuing of a detention order. This could include the proportionality of detention and the possibilities of suitable alternatives to detention such as reporting duties, obligatory residence, bail bonds or even electronic monitoring.

- Provisions on the judicial control. A judicial body should be competent to issue or to revise the detention order.

- Time limits for the duration of detention pending removal. Although the grounds for detention (e.g. identification or prevention from absconding) has an inherent limitation of the duration, the Commission considers it necessary to provide for an absolute time limit and time limits for judicial review on the continuation of detention.

- Rules on the conditions of detention, in particular on accommodation standards but also on legal assistance, to ensure humane treatment in all detention facilities in the Member States. The Commission's considered opinion is that for accommodation purposes returnees should as far as possible be separated from convicts in order to avoid any criminalisation.

Minimum standards on detention pending removal should be set at EU level, defining competencies of responsible authorities and the preconditions for detention in the framework of a future Directive on Minimum Standards for Return Procedures.

2.3.6. Proof of exit and re-entry

As indicated in the Green Paper a satisfactory proof of exit is important, in particular in cases of voluntary return to ensure sustainable return and to allow preferential treatment to voluntary returnees, namely to avoid that in these cases persons are banned from a later legal re-entry due to a lack of proof of their previous voluntary exit. One possibility would be to develop incentives for returnees to report back personally at a consular post of a Member State in the country of origin. Where applicable, the proof of exit could also be issued by a reliable organisation, which has been involved in the return process.

Applying the principle of the priority of voluntary return, the legal consequences of the voluntary or forced return on an application for a subsequent re-entry should be assessed. A refusal of a future visa application in order to re-enter the EU some time in the future should not be based only upon the fact that he or she has previously stayed in a Member State illegally, if the person has returned voluntarily. On the other hand restrictions should be imposed in cases of forced return.

Common definitions are needed for determining the circumstances under which a new application for a visa or a residence permit is excluded. The refusal of entry list of the SIS according to Art. 96 of the Convention implementing the Schengen agreement or the future Visa Information System could be used for this purpose.

2.4. Elements for integrated return programmes

Different patterns of return programmes and models for their execution have been developed by the international community in general over the last decade. There are fundamentally two types of return processes: strictly voluntary return where an individual decides of his or her own accord to return and is helped to do so; and situations where the state authorities oblige return with due and proper regard to international law and the human rights of the persons concerned. There is also a hybrid situation in which a person accepts the obligation of the return process but also accepts assistance from the authorities.

International organisations have been particularly active in this field for all types of returns and have managed both European Community and nationally-financed projects with varying degrees of success, again depending on circumstances. In general, the Commission's experience, starting with the Joint Actions in the framework of the "Third Pillar" of the Maastricht Treaty from 1997 to 1999[31] which preceded to the establishment of the European Refugee Fund in 2000[32] has shown that successful return projects require all or most of the following elements: prereturn advice and counselling, training/employment assistance, assistance for travelling to and/or re-establishment in the country of origin/housing, follow-up assistance and counselling post-return. Moreover, the implementing agency must have sufficient links to the authorities and non-governmental community in the country of origin as well as adequate facilities in the field (for example, locally-based staff, at least on a temporary basis, with knowledge of local languages) and the skills necessary to select, where this is appropriate, returnees with the potential to succeed once returned. Analysis of the return-related projects accepted for financing by all these instruments strongly suggests that such projects are mainly concentrated in a limited number of Member States. This is due to the circumstances in the Member State, both the number of potential returnees and the competing needs of other issues needing finance such as reception facilities or integration programmes.

Against these factors must be weighed the cost/benefit of return programmes. Some projects (for example concerning Somalis living in Europe) can be very costly per head. Furthermore, there are practically non-quantifiable factors such as the likelihood of returnees attempting to come back to their host country. Whether a person, once returned to his or her country of origin, will remain there, depends on a series of factors, such as the legal status in the host country and the issuing of a travel documents that permit re-immigration, their economic and family circumstances, etc.

Information should be made available - as early as possible - for potential returnees on the

possibilities for voluntary return to the country of origin. Such information should comprise information on return programmes, vocational or other training available, on the situation in the country of return and on possibilities for establishing a new life. Vocational or other training, which could be of use in the country of return, might be offered, either before return or in the country of return. Assistance and counselling should be offered at all stages of the return process starting from an early stage of residence in the Member States until some time after arrival in the country of destination ensuring sustainable return. In general, incentives should be assessed, which would encourage potential returnees to go back voluntarily. The Commission has, therefore, ordered a study on incentives for return, which will be available by the end of the year. On the basis of the study further steps should be considered to create sufficient incentives for return.

The general conclusion to be drawn from past experience in managing return programmes is that they must be flexible regarding their timing and administration in order to respond to circumstances on the ground. This requires a more cohesive use of Community-based programmes and national programmes backed by clear policy guidelines to that end.

In addition to the Joint Actions of 1997 to 1999 and the European Refugee Fund (ERF), the Commission has also used budget line B7-667 (for which a legal basis will be proposed by the end of 2002) in relation to the activities of the High Level Working Group on Asylum and Immigration for return-related issues. The Commission will shortly be entering a phase when it will be considering the future of the ERF one of whose main strands is voluntary return. Given the requirements of the European Council in Seville[33], the Commission will need to reflect on both the optimum financial and co-ordination mechanisms for return. The Commission will present a report to the Council in the early autumn of 2002 on the budgetary aspects of the conclusions of the European Council.

The scope of financial assistance for return should cover voluntary return, forced return and support for return of irregular migrants in transit countries.

The voluntary return element in a financial assistance for return would target return and reintegration of both illegal residents and legal residents, if they wish to return and there is a public interest in supporting this. Items like individual travel costs, transport of personal possessions, the first expenses after return and a limited start-up support could be taken into consideration in this framework.

The second element of such a financal assistance scheme strictly limited to illegal residents - would be the financial support for enforcement measures. This element would contribute emphasising the need for solidarity and burden-sharing among Member States on return with regard for instance to travel costs for returnees and escorts.

The third element of a financial assistance for return would focus on interception. Third countries could be assisted in returning irregular migrants insofar as they do not fulfil the entry conditions of the country concerned, they are not in need for international protection and the persons are in transit with a view to entering the EU illegally.

The EU should develop its own approach for integrated return programmes. Such programmes should cover all phases of the return process, starting with the predeparture phase, the return as such, the reception and reintegration in the country of return.

Integrated return programmes should be tailored to specific countries to take the specific situation, the case load and needs of the country duly into account.

Further consideration should be given to a financial instrument, which might cover voluntary return, forced return and support for return of irregular migrants in transit countries. The Commission will come back to this issue soon when presenting the report on financial instruments in the area of immigration and asylum.

2.5. Intensification of co-operation with third countries

In order to strengthen the co-ordination and improve complementarity and coherence of the external actions of the Union, the intensification of EU co-operation with third countries on return should be carried on, on a case by case basis, in the context of the elaboration or revision of the country strategy papers and regional strategy papers, which elaboration or revision falls under the Commission responsibility and to which the Member States are fully associated. Furthermore, the specific situation of the candidate countries shall always be taken into account, which includes making full use of the mechanisms of the Association agreements.

2.5.1. Enhanced administrative co-operation

The intensification of co-operation with third countries on return would start with enhancing administrative co-operation. Where appropriate, the EU could offer support in the institution and capacity building for the reception and reintegration of returnees. Technical co-operation might be envisaged as well. Principally, consideration should be given to all reintegration measures, which help to ensure the sustainability of the return, such as e.g. start-up support for housing or the reintegration in the labour market including vocational training. Finally, the return dimension should be part of the overall political dialogue on migration related issues with the country concerned.

The EU should promote enhanced administrative co-operation with third countries, which should address all stages and levels of the return process.

2.5.2. Community readmission agreements

The Seville European Council also called for the speeding-up of the conclusion of readmission agreements already being negotiated. As previously stated in its Green Paper, the Commission will therefore make a further effort to push forward the current negotiations in order to complete them in due time and – to the extent possible - in line with the negotiating directives issued to it. To achieve this, it will need a greater level of political and diplomatic support from the Member States than they have been willing to provide so far. However, from the very diverging course of negotiations with the first seven countries, it is already possible to draw one important conclusion. As readmission agreements work mainly in the interest of the Community, third-countries are naturally very reluctant to accept such agreements. Their successful conclusion, therefore, depends very much on the positive incentives ("leverage") at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return. In particular visa concessions or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not. It is, therefore, essential to give more thought to the crucial question of what other incentives, not only from the JHA area but from all Community areas (e.g. trade

expansion, technical/financial assistance, additional development aid etc.) could be offered to the relevant countries in return. Although the Seville European Council stressed – once again – the EU's willingness to provide, within the limits of the financial perspective, adequate technical and financial assistance, no satisfactory answer was given to the question of how to deal with countries that, despite this offer, are not interested in concluding a readmission agreement.

The Commission will, therefore, continue its reflection on incentives or compensations in the context of readmission agreements in consultation with the Member States, in particular by reflecting on the possibility of increasing complementarity with other policy areas, including political and diplomatic measures by Member States, in order to help achieve the Community's objectives in the field of return and readmission.

2.5.3. Transit and admission arrangements and agreements with other third countries

If direct returns to the country of origin are not possible or appropriate, other avenues of co-operation with third countries should be explored. In particular in the case of practical obstacles, such as complicated or non-existing travel connections to the country of origin, possible transit countries could be approached with a view to gaining their support relating to the – voluntary or involuntary – transit of returnees through their territory.

Transit provisions should be systematically included in any Community readmission agreement and, in the absence of such agreements, separate transit arrangements should be envisaged, where appropriate.

3. CONCLUSIONS

Following the mandate of the Seville European Council of 21 and 22 June the Commission herewith presents the essential elements of a Return Action Programme, which the Council is asked to endorse by the end of the year.

The Commission has identified a number of actions, in particular in the area of operational co-operation, which require a stronger commitment of the Member States enforcement services and could be achieved in the short term. In addition, a Community Return Action Programme requires a vision which would build a comprehensive package for medium-term measures at EU level. This should include enhanced operational co-operation based on common co-ordination and – where necessary – legislative adjustments.

The Council is invited to endorse the Return Action Programme before the end of the year in line with the mandate of the Seville European Council.

Annex 1

FINANCIAL RESOURCES AVAILABLE FOR POLICIES ON ASYLUM, IMMIGRATION AND MANAGEMENT OF EXTERNAL FRONTIERS 1998-2003

HEADING 3 OF THE FINANCIAL PERSPECTIVE (INTERNAL POLICIES)

Title	Description	Budget Heading	Outturn 1998	Outturn 1999	Outturn 2000	Outturn 2001	Budget 2002	PDB 2003
European Refugee Fund	Measures to improve he reception of refugees and displaced persons in the EU Member States and to facilitate the voluntary repatriation of persons who have provisionally found refuge there	B5-810 (1998-99: headings B3-4113, B7-6008 and B5-803)	26 559 894	34 918 413	25 500 270	34 404 166	45 810 000	40 000 000
Eurodac	Funding of the Eurodac system for the comparison of fingerprints for the effective application of the Dublin Convention	B5-812			7 428 048	1 158	1 100 000	1 000 000
European Migration Monitoring Centre	Preparatory measures for an action plan for joint analysis and improved pooling of asylum and immigration statistics and the establishment of a "virtual" migration monitoring centre	B5-814					1 400 000	2 600 000

Title	Description	Budget heading	Outturn 1998	Outturn 1999	Outturn 2000	Outturn 2001	Budget 2002	PDB 2003
Integration of nationals of non-member countries	Preparatory action for promoting the integration of nationals of non-member countries, developing dialogue with civil society, seeking out and evaluating best practice in the integration field, developing integration models, and setting up networks at European level	B5-815						3 000 000
Training, exchange and cooperation programmes in the fields of justice and home affairs (Odysseus, Argo)	Odysseus (1999-2001), Argo (2002-07)	B5-820	3 000 000	3 000 000	3 000 000	3 000 000	3 000 000	3 000 000
			29 559 894	37 918 413	35 928 318	37 405 324	51 310 000	49 600 000
Emergency measures in the event of mass influxes of refugees - reserve	Reserve in the event of mass influxes of refugees (Art. 6 ERF Decision)	B5-811	0	0	0	0	10 000 000	10 000 000
			29 559 894	37 918 413	35 928 318	37 405 324	61 310 000	59 600 000

ANNEX 2
FINANCIAL RESOURCES PROGRAMMED FOR EXTERNAL AID 2000-2006 AND LINKED TO THE MIGRATION ISSUE

HEADING 4 OF THE FINANCIAL PERSPECTIVE

		Community budget	EDF	Total	%
Management of migration flows	Management of borders	321 971 760	0	321 971 760	34.5%
	Combating illegal immigration	65 042 256	2 720 000	67 762 256	7.25%
	Management of migration flows	51 367 336	1 250 000	52 617 336	5.63%
Total management of migration flows		438 381 352	3 970 000	442 351 352	47.34%
General JHA programmes		96 500 000	0	96 500 000	10.33%
Link between relief, rehabilitation and development (LRRD)	Refugees and displaced persons	42 750 000	37 688 000	80 438 000	8.61%
	Voluntary return of refugees from other third countries	157 018 459	36 591 000	193 609 459	20.72%
Total LRRD		199 768 459	74 279 000	274 047 459	29.33%
Development (sources of emigration)		71 569 477	50 000 000	121 569 477	13.01%
GRAND TOTAL		806 219 288	128 249 000	934 468 288	100.00%
		86.3%	13.7%	100.0%	

Region	Country / Region	Amount	Budget line	Year(s)	Theme	Action	Description
LATIN AMERICA	Colombia	1.569.477	B7-703	2001-2002	Roots	Refugees and displaced population	Promoting peace and reconciliation in communities at risk of displacement in Urabá region
LATIN AMERICA	Colombia	4.300.000	B7-312	2002	LRRD	Refugees and displaced population	Aid to uprooted people in Colombia.
LATIN AMERICA	Colombia	10.000.000	B7-312	2003	LRRD	Refugees and displaced population	Aid to displaced people in Colombia, following up ECHO activities.
LATIN AMERICA	Colombia	11.000.000	B7-312	2004	LRRD	Refugees and displaced population	Aid to displaced people in Colombia, following up ECHO activities.
LATIN AMERICA	Ecuador	1.000.000	B7-701	2001-2002	Migration Management	Migration management	Strategies and actions to protect human rights of immigrants and their families and victims of trafficking.
ASIA	Afghanistan	9.700.000	B7-302	2002-2005	LRRD	Voluntary return	Direct assistance to returnees and IDP's in Afghanistan, Pakistan and Iran.
ASIA	Afghanistan	48.700.000	B7-302	2002-2005	LRRD	Voluntary return	Support to reintegration of IDP's and refugees.
ASIA	Afghanistan	1.494.569	B7-667	2002	Migration Management	Voluntary return	IOM/HLWG- return of qualified Afghans to the Public sector
ASIA	Afghanistan	1.137.984	B7-667	2002	Migration Management	Voluntary return	UNHCR -capacity building and returnees monitoring database
ASIA	Afghanistan	997.099	B7-667	2002	Migration Management	Voluntary return	IOM/HLWG- return of qualified Afghans to the Private sector
ASIA	Bhutan	1.000.000	B7-302	2002	LRRD	Refugees and displaced population	Protection and assistance to refugees.

ASIA	China	10.000.000	B7-300	2002-2006	Migration Management	Fighting illegal immigration	"Combating illegal migration": information campaigns, training for the civil service, administrative cooperation.
ASIA	Indonesia	1.720.000	B7-302	2004	LRRD	Refugees and displaced population	Primary education or displaced people in North Maluku.
ASIA	Iran	750.000	B7-302	2003	LRRD	Refugees and displaced population	Médecins sans Frontières: health assistance to Afghan refugees.
ASIA	Iran	1.250.000	B7-302	2002	LRRD	Refugees and displaced population	UNHCR: assistance to refugees.
ASIA	Pakistan	2.000.000	B7-302	2002	LRRD	Refugees and displaced population	UNHCR: assistance to Afghan refugees in camps.
ASIA	Pakistan	1.000.000	B7-302	2003	LRRD	Refugees and displaced population	MRCA: medical assistance to refugees.
ASIA	Pakistan	885.581	B7-667	2001	Migration Management	Voluntary return	UNHCR Protection of assistance to Afghan refugees in Pakistan ensure that all refugees and asylum-seekers are able to avail themselves of their rights and are treated in accordance with internationally accepted standards - ensure that needs of refugees wi
ASIA	Philippines	800.000	B7-302	2002	LRRD	Refugees and displaced population	Assistance to war affected families in Lanao del Sur and Maguindanao provinces
ASIA	Philippines	1.300.000	B7-302	2003	LRRD	Refugees and displaced population	Movimondo: integration of IDP's
ASIA	Sri Lanka	1.400.000	B7-302	2005	LRRD	Refugees and displaced population	CARE: assistance to IDP's and conflict affected households.
ASIA	Sri Lanka	1.950.000	B7-302	2003	LRRD	Voluntary return	UNHCR: assistance to IDP's and returnees.
ASIA	Sri Lanka	829.396	B7-667	2001	Migration Management	Migration management	ICMPD: establishment of IES field-based country of origin information systems.

ASIA	Sri Lanka	1.219.363	B7-667	2001	Migration Management	Migration management	IOM: capacity building in migration management and preparatory action for return and reintegration.
ASIA	Sri Lanka	508.011	B7-667	2002	Migration Management	Migration management	IOM-Capacity building in migration management and sustainable return
ASIA	Thailand	2.000.000	B7-302	2003	LRRD	Refugees and displaced population	Burmese Border Consortium: food aid to refugee camps in Kanchanaburi and Ratchaburi provinces
Balkans	Albania, Kosovo & FYROM	766.490	B7-667	2002	Migration Management	Migration management	IOM-Fostering sustainable reintegration by reinforcing local NGO capacities
BALKANS	Albania	1.500.000	B7-54	2001	Migration Management	Border management	Integrated project for management of external borders, emphasising de control systems to trafficking in Albanian territorial waters.
BALKANS	Albania	1.000.000	B7-54	2001	Migration Management	Migration management	Asylum and migration: information on best police practice, reinforcing the capacity of police forces and the courts to deal with migratory flows, improving the capacity for receiving illegal migrants and asylumseekers
BALKANS	Albania	2.000.000	B7-54	2002-2004	Migration Management	Migration management	Asylum and migration: reinforcing the country's capacity to develop and implement a common policy on asylum and migration complying with international standards.
BALKANS	Albania	20.000.000	B7-54	2002-2004	Migration Management	Border management	Establishing greater security at international borders to reduce illegal immigration.
BALKANS	Albania	471.760	B7-667	2001	Migration Management	Border management	ICMPD - Upgrading border control system of Albania along European standards.
BALKANS	Albania	741.830	B7-667	2001	Migration Management	Migration management	UNHCR - Development of the asylum system in Albania.

BALKANS	Albania	600.000	B7-667	2001	Migration Management	Migration management	IOM - Sustainable return, reintegration and development in Albania through consolidated preparatory actions for migration management.
BALKANS	Balkans	752.050	B7-667	2002	Migration Management	Migration management	CGI-Immigration liaison Network
BALKANS	Bosnia Herzegovina	2.000.000	B7-54	2001	Migration Management	Border management	Support for construction of a border control service.
BALKANS	Bosnia Herzegovina	1.000.000	B7-54	2002	Migration Management	Fighting illegal immigration	Reception center for illegal migrants.
BALKANS	Bosnia Herzegovina	23.000.000	B7-54	2002-2004	Migration Management	Border management	Construction of five border crossing points to provide appropriate facilities to implement border control.
BALKANS	Bosnia Herzegovina	45.500.000	B7-54	2002-2004	Migration Management	Voluntary return	Return of refugees and internally displaced persons. Housing, demining, employment, social infrastructure and flexible reaction mechanism for spontaneous and unassisted returns.
BALKANS	Bosnia Herzegovina	11.500.000	B7-54	2002-2004	Migration Management	Migration management	Asylum and migration: reinforcing the country's capacity to develop and implement a common policy on asylum and migration complying with international standards.
BALKANS	Bosnia Herzegovina	22.500.000	B7-55	2002-2004	JHA	JHA	JHA programme: Administration of justice, policing
BALKANS	Croatia	2.100.000	B7-54	2001	Migration Management	Migration management	Improvement of legislative and regulatory framework, enhance institutional/administrative capacity, training to asylum and migration staff.
BALKANS	Croatia	14.500.000	B7-54	2001-2002	Migration Management	Border management	Enhance border management and secure borders, capacity building for individual agencies, enhance inter-agency cooperation.
BALKANS	Croatia	23.000.000	B7-54	2002-2004	Migration Management	Border management	Integrated border management programme.

BALKANS	Croatia	42.000.000	B7-54	2002-2004	Migration Management	Voluntary return	Return of refugees and IDP's; demining, support to basic public and business infrastructure, strengthening of local government.
BALKANS	Croatia	20.000.000	B7-54	2002-2004	JHA	JHA	JHA programme : Administration of justice, policing and fight against organised crime
BALKANS	FYROM	5.000.000	B7-54	2001	Migration Management	Border management	Integrated programme for management of external borders.
BALKANS	FYROM	2.000.000	B7-54	2002	Migration Management	Migration management	Asylum and migration: reinforcing the country's capacity to develop and implement a common policy on asylum and migration complying with international standards.
BALKANS	FYROM	20.000.000	B7-54	2002-2004	Migration Management	Border management	Integrated border management programme.
BALKANS	FYROM	13.700.000	B7-54	2001	Migration Management	Migration management	Part of the "CARDS Additional Assistance Package" 2001 programme was devoted to supporting families receiving displaced persons and reforming the police, and other JHA initiatives, and reconstruction of housing and local infrastructure.
BALKANS	Regional	1.500.000	B7-54	2001	Migration Management	Border management	Regional JHA programme to evaluate the institutional and administrative base the capacity of countries in the region to apply border controls, including migration, asylum and visa policy questions; combating organised crime (trafficking in human beings, drugs, economic crime); fighting fraud and corruption.
BALKANS	Regional	13.000.000	B7-54	2002-2004	JHA	JHA	Regional JHA programme to evaluate the institutional and administrative base the capacity of countries in the region to apply border controls, including migration, asylum and visa policy questions; combating organised crime (trafficking in human beings, drugs, economic crime); fighting fraud and corruption.

BALKANS	Regional	1.000.000	B7-54	2002	Migration Management	Voluntary return	Regional return initiatives assessing different property laws and implementation realities and harmonisation of legislation.
BALKANS	Federal Republic of Yugoslavia	35.000.000	B7-54	2002-2004	JHA	JHA	Part of the JHA programme will be devoted to reforming and reconstructing the police and judicial system, including the fight a against trafficking in human beings and illegal immigration and developing the asylum system
BALKANS	Federal Republic of Yugoslavia	31.000.000	B7-54	2002-2004	Migration Management	Border management	Integrated border management programme.
BALKANS/ ACP/MEDITERRANEAN	Albania, Morocco and Nigeria	1.096.061	B7-667	2002	Migration Management	Voluntary return	ALNIMA-Return of vulnerable groups
CENTRAL ASIA	New Tacis Regional Programme for Central Asia	17.000.000	B7-520	2002-2004	Migration Management	Border management	Support for improving the management of border controls (Kazakhstan, Kyrghyszstan, Tajikistan, Uzbekistan, Turkmenistan) and the fight against drug trafficking.
MEDITERRANEAN	Iraq	130.384	B7-667	2001	Migration Management	Voluntary return	IOM: elaboration of an action plan to increase sustainability of returns to northern Irak through training and income generation activities.
MEDITERRANEAN	Iraq	596.800	B7-667	2002	Migration Management	Migration management	UNHCR-building up of migration and asylum system
MEDITERRANEAN	Morocco	70.000.000	B7-410	2002-2004	Roots	Development	Support for economic development of regions with high emigration such as Province du Nord, support for reintegration.
MEDITERRANEAN	Morocco	5.000.000	B7-410	2002-2004	Migration Management	Migration management	Organisation of legal emigration via creation of a migration centre.

MEDITERRANEAN	Morocco	40.000.000	B7-410	2002-2004	Migration Management	Fighting illegal immigration	Fight against illegal immigration by supporting improvement of management of border controls.
MEDITERRANEAN	Morocco	376.276	B7-667	2001	Migration Management	Fighting illegal immigration	CGED-DPG (Spain): technical equipment and training for border control, fighting illegal immigration and detection of falsified documents.
MEDITERRANEAN	Morocco	1.500.000	B7-667	2001	Migration Management	Migration management	AFD(France): development of the country of origin by Moroccans residing in France and through rural tourism and the creation of SME.
MEDITERRANEAN	Morocco	450.241	B7-667	2001	Migration Management	Migration management	Int Ent (Netherlands): support to entrepreneurs of Moroccan origin residing in Europe in setting up economic activities in Morocco.
MEDITERRANEAN	Morocco	665.980	B7-667	2001	Migration Management	Fighting illegal immigration	French MoI/National police: financial and technical assistance for combating illegal migration.
MEDITERRANEAN	Morocco	1.055.315	B7-667	2002	Migration Management	Migration management	IOM-socio economic development of migration prone areas
MEDITERRANEAN	Morocco	889.316	B7-667	2002	Migration Management	Migration management	COOPI- il migrante Moroccochino in Italia come agente di sviluppo Cooperazione
MEDITERRANEAN	Régional	6.000.000	B7-410	2002-	JHA	JHA	Regional JHA programme to combat organised crime, including trafficking in human beings, administrative cooperation, training for judges and police (creation of Euromed network for judicial training, training in international police cooperation, etc.), creation of permanent system for data, observation and analysis of migratory phenomena between Euromed countries.
MEDITERRANEAN	Regional	347.870	B7-667	2001	Migration Management	Migration management	ICMPD: establishment of intergovernmental dialogue on migration in the Mediterranean region.

ACP COUNTRIES	Africa	1.300.000	EDF	2000-2003	Migration Management	Voluntary return	Awareness and training of staff and social workers to promote the return and integration of children who are victims of trafficking.
ACP COUNTRIES	Angola	2.000.000	EDF	2002-2003	LRRD	Refugees and displaced population	Decision continuing support to IDP's in newly-accessible areas.
ACP COUNTRIES	Angola	30.000.000	EDF	2002-2003	LRRD	Refugees and displaced population	Emergency support to the peace process, all targeting IDP's and returnees.
ACP COUNTRIES	Benin	2.720.000	EDF	2001-2005	Migration Management	Fighting illegal immigration	Actions to combat transnational trafficking in children.
ACP COUNTRIES	Djibouti	2.000.000	EDF	2002	LRRD	Refugees and displaced population	Aid to IDP's. Support to the implementation of the peace agreement.
ACP COUNTRIES	Eritrea	15.000.000	EDF	2003	LRRD	Voluntary return	Rehabilitation of social an economic infrastructure in war-affected regions.
ACP COUNTRIES	Eritrea	2.175.000	EDF	2002	Migration Management	Voluntary return	Programme aimed at facilitating the return and re-integration of refugees from Sudan and at resettling IDP's in Gash Barka.
ACP COUNTRIES	Eritrea	6.250.000	EDF	2002	Migration Management	Voluntary return	Assistance for the social and economic reintegration of Eritrean returnees to the Gash Barka region.
ACP COUNTRIES	Eritrea	750.000	EDF	2002	Migration Management	Voluntary return	Assistance to war displaced and returnees.
ACP COUNTRIES	Ethiopia	6.500.000	EDF	2002	Migration Management	Voluntary return	Reintegration of Ethiopian displaced from Eritrea following the Ethio-Eritrean conflict.
ACP COUNTRIES	Liberia	488.000	EDF	2002	LRRD	Refugees and displaced population	Humanitarian services for recently displaced populations in Liberia.
ACP COUNTRIES	Regional (Gabon, Togo, Benin, Nigeria)	1.300.000	B7-6120	2000-2003	Migration Management	Voluntary return	Information and awareness of public opinion and families regarding the situation of children, and reinforcement of associations working for the integration of children who are victims of trafficking. Training for social workers supporting the return of children

ACP COUNTRIES	Dominican Republic	1.250.000	EDF	2003-2005	Migration Management	Migration management	Development and management of migration policy (management of Haitian immigration).
ACP COUNTRIES	Rwanda	616.000	EDF	1997-2001	Migration Management	Voluntary return	Return of students.
ACP COUNTRIES	Somalia	592.960	B7-667	2002	Migration Management	Voluntary return	Danish Refugee Council-community based repatriation assistance programme
ACP COUNTRIES	Somalia	533.821	B7-667	2001	Migration Management	Voluntary return	RADA BARNET - SAVE THE CHILDREN DENMARK : Model of integration and voluntary return
ACP COUNTRIES	Somalia	50.000.000	EDF	2002-2007	Roots	Development	General rehabilitation and reconstruction programme.
ACP COUNTRIES	Sudan	4.230.000	B7-20	2001	LRRD	Refugees and displaced population	Help the IDP's to recover self-reliance and social coherence through the financing of actions in food security, income generation and education. The target groups are part of the 53000 Dinka displaced from Bahr El Ghazal and settled in camps in South Darf
ACP COUNTRIES	Tanzania	4.000.000	EDF	2002	Migration Management	Voluntary return	Support to refugees in Tanzania - Preparation of repatriation in Burundi.
ACP COUNTRIES	Uganda	1.200.000	EDF	2002-2003	LRRD	Refugees and displaced population	Assistance to IDP's in Northern Uganda.
ACP COUNTRIES	Zambia	2.000.000	EDF	2002	LRRD	Refugees and displaced population	Assistance to refugees and local communities in refugee-affected areas.
ACP COUNTRIES/ MEDITERRANEAN	Maghreb and West Africa	1.500.000	B7-667	2002	Migration Management	Migration management	ILO-Proposal on management of Labour Migration as an instrument for Development
SOUTHERN CAUCASUS	Georgia	1.000.000	CFSP	2000	Migration Management	Border management	CFSP Assistance to Border Guards aimed at protecting the OSCE monitors at the border between Georgia and the Chechen Republic of the Russian Federation (equipment).
SOUTHERN CAUCASUS	Georgia	1.000.000	B7-520	2002-2003	Migration Management	Border management	Development of a strategy for reform of border guards, training and exchanges.

SOUTHERN CAUCASUS/ WESTERN NIS/ ASIA	Caucasus/ Russia/ Afghanistan	1.310.654	B7-667	2002	Migration Management	Migration management	IOM-Dialogue and technical capacity building programme in migration management
WESTERN NIS	Belarus, Moldova and Ukraine	2.000.000	B7-520	2002-2003	Migration Management	Fighting illegal immigration	Combating smuggling in human beings/illegal migration through provision of training; asylum management.
WESTERN NIS	Cross-Border Cooperation (CBC)	117.200.000	B7-521	1996-2003	Migration Management	Border management	Support for improvement of border control capacity at the Western NIS border crossings (infrastructure, equipment, training for customs officials and border guards) - Russian Federation, Ukraine, Belarus and Moldova.
WESTERN NIS	Moldova	1.900.000	B7-520	2001	Migration Management	Border management	Development of a modern border management system.
WESTERN NIS	Russia, Belarus	4.500.000	B7-520	2001	Migration Management	Border management	Training and equipment (Russia and Belarus).
WESTERN NIS	Russia, Belarus	11.000.000	B7-520	2002-2003	Migration Management	Fighting illegal immigration	Combating smuggling in human beings/illegal migration through provision of training and border related equipment (Russia and Belarus).
WESTERN NIS	Ukraine	33.500.000	B7-520	2001-2003	Migration Management	Border management	Improvement of the overall border management system in Ukraine with a view to facilitate movement of goods and people, while enhancing the local capacities to combat illegal activities. Construction and refurbishment of key border crossing points, equipment.
WESTERN NIS	Ukraine and Moldova	3.900.000	B7-520	2000	Migration Management	Border management	Training and equipment (Ukraine and Moldova).
TOTAL PROGRAMME		934.468.288					

ANNEX–Definitions

Return
Comprises the process of going back to one's country of origin, transit or another third country, including preparation and implementation. The return may be voluntary or enforced.

Illegal resident
Any person who does not, or no longer, fulfil the conditions for presence in, or residence on the territory of the Member State of the European Union.

Illegal entrant
Any person who does not fulfil the conditions for entry in the territory of the Member States of the European Union.

Voluntary return
The assisted or independent departure to the country of origin, transit or another third country based on the will of the returnee.

Forced return
The compulsory return to the country of origin, transit or another third country, on the basis of an administrative or judicial act.

Readmission
Act by a state accepting the re-entry of an individual (own nationals, third-country nationals or stateless persons), who has been found illegally entering to, being present in or residing in another state.

Readmission agreement
Agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not, or no longer fulfil the conditions of entry to, presence in or residence in the requesting state.

Expulsion
Administrative or judicial act, which states – where applicable – the illegality of the entry, stay or residence or terminates the legality of a previous lawful residence e.g. in case of criminal offences.

Expulsion order
Administrative or judicial decision to lay the legal basis for the expulsion.

Detention pending removal
Act of enforcement, deprivation of personal liberty for return enforcement purposes within a closed facility.

Detention order
Administrative or judicial decision which forms the legal basis for the detention pending removal

Removal[34]
Act of enforcement, which means the physical transportation out of the country.

Removal order
Administrative or judicial decision to lay the legal basis for the removal (in some legal systems synonymous with expulsion order).

Legal re-entry
Admission of a third-country national or stateless person to the territory of the Member State of the European Union after prior departure.

Rejection
Refusal of entry to a state

Transit
Passage through a country while travelling from a country of departure to the country of destination.

Commission Communication on Migration and Development "Integrating migration issues in the EU's relations with third countries", COM (2002), final, 3 December 2002

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT INTEGRATING MIGRATION ISSUES IN THE EUROPEAN UNION's RELATIONS WITH THIRD COUNTRIES

Brussels, 3.12.2002
COM(2002) 703 final

I. MIGRATION AND DEVELOPMENT

II. REPORT ON THE EFFECTIVENESS OF FINANCIAL RESOURCESAVAILABLE AT COMMUNITY LEVEL FOR REPATRIATION OF IMMIGRANTS AND REJECTED ASYLUM SEEKERS, FOR MANAGEMENT OF EXTERNAL BORDERS AND FOR ASYLUM AND MIGRATION PROJECTS IN THIRD COUNTRIES

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FOREWORD

Migration is at the heart of the political debate in industrialised countries. It is now a major strategic priority for the European Union. If carefully managed, it can be a positive factor for growth and success of both the Union and the countries concerned. Following the entry into force of the Amsterdam treaty and the Tampere European Council, the main components of a comprehensive migration and asylum policy are progressively being put in place.

The integration of concerns related to migration within the external policy and programmes of the Community forms part of this comprehensive effort to address migration issues in a coherent and efficient way at EU level. It is however a relatively new trend, reflected by the recent requests made by the European Council in Seville.

Heads of States and Government asked for the integration of immigration policy into the Union's relations with third countries and called for a targeted approach to the problem, making use of all appropriate EU external relations instruments. The European Council also asked the Commission to present a report on the effectiveness of financial resources available at Community level for repatriation of immigrants and rejected asylum seekers, for management of external borders, and for asylum and migration projects in third countries.

The Commission is firmly committed to delivering both objectives.

The Commission believes that these two questions must be looked at together, as they are the two faces of the same coin. We must assess the problem and agree a clear policy line, but we must also check whether our financial means match our political ambitions. Hence the dual nature and purpose of the attached document: the first part analyses the phenomenon of international migration, assesses its effects on developing countries, and explores ways to help them in managing migratory flows; the second part is the Commission report that was requested by the Seville European Council on the effectiveness of financial resources available at Community level for repatriation of immigrants and rejected asylum seekers, for management of external borders and for asylum and migration projects in third countries. It provides a description of existing resources and explains what is being done today in the context of ongoing co-operation. It also suggests means to increase our effort in support of these actions.

The Commission and the Member States have the collective responsibility and the difficult task of reconciling differing but complementary priorities. In integrating migration into the external policy of the Community, action must be based on the following four key principles:

(1) The integration of migration aspects in the external action of the Community must respect the overall coherence of our external policies and actions. The dialogue and actions with third countries in the field of migration must be part of a comprehensive approach at EU level, which must be fundamentally incitative by encouraging those countries that accept new disciplines, but not penalising those who are not willing or not capable to do so. Our approach must also be differentiated, taking due account of the situation of each individual third country.

(2) Regarding migration, the long-term priority of the Community should be to address the root causes of migration flows. One should duly recognise the effect of long-term development programmes on migratory flows, in particular in poverty eradication, institution and capacity building, conflict prevention. Development resources should concentrate on this objective. Besides, it is worth noting that the Commission already

supports a wide range of actions in the field of migration.

(3) Migration aspects should, in the first instance, be taken care of in the strategic framework proposed by the Commission and agreed by the Member States ("Regional and Country Strategy Papers" - CSP). CSP mid-term review, scheduled in 2003, offers a unique opportunity in this regard. This framework alone, by presenting a global development package to developing countries, will encourage them to enter into readmission agreements. The mid-term review should permit a case-by-case reassessment of migration in third countries and could lead to some reorientation in our priorities and some reallocation of funds within the National Indicative Programme of each country concerned.

(4) Without prejudging the results of the CSP review, it seems already clear that extra funding will be needed. New tasks are feasible only if new money is made available. The relevant budget line (B7-667: " Cooperation with third countries in the field of migration") should be significantly reinforced and should come as a complement to what can be achieved in the CSP review. It should be used to finance specific, targeted actions in the field of migration; these actions should be complementary to those financed under the more generic development lines. This approach should ensure stronger impact and higher profile to migration initiatives, and help avoiding duplication and confusion. The relevant budget line must also be managed in accordance with the principles of the RELEX Reform, so as to allow consistency and economies of scale.

Fully aware of the importance of migration issues in the context of EU's external relations, the Commission invites all stakeholders to act decisively in line with these orientations. It is the only way to face up with our collective responsibilities and to meet our shared interest with third countries to find appropriate answers to existing challenges.

This Communication, which is part of a comprehensive approach towards migration, will be followed by another Commission Communication scheduled for March 2003, dedicated to the various interactions between immigration, employment and social policies in the European Union.

I. MIGRATION AND DEVELOPMENT

INTRODUCTION

Over the past few years, international migration has become a central theme in the political discourse in industrialised countries. At EU level, the framework for the discussion of migration-related issues was defined in 1999 by the Amsterdam Treaty and the Tampere European Council. Several components of a comprehensive migration policy are currently on the table of the European Parliament and the Council. During the run-up to the Seville European Council of June 2002 special attention was given to the question of illegal immigration. In this context, Heads of States and Government drew attention to the contribution which the EU's various external policies and instruments, including development policy, could make in addressing the underlying causes of migration flows. As long ago as 1994, in its Communication to the Council and to the European Parliament on the immigration and asylum policies[1], the Commission demonstrated the need for an overall approach in this field, which would include in particular the reduction of migratory pressure by cooperation with the principal potential third countries of migration towards Europe.

As a preliminary remark, it is useful to recall that migration is not to be seen only as a problem, but also as an essentially positive phenomenon, which is of all times and all places, and which produces both opportunities and challenges. It is a fact that industrialised countries, including the European Union, benefit considerably from migration and will continue to need inward migration in the future, both in high-skilled and low-skilled sectors. However, the expected continuation, or even acceleration, of international migration flows will have major consequences for both the European Union and the third countries, including developing countries, from which these migrants originate. To successfully address these consequences, it will be necessary to strengthen policies that focus on the root causes of international migration while – at the same time – working towards a further strengthening of the migration management capacity of both the European Union and the countries of origin.

Ongoing European Community external policies and programmes in support of human rights, the consolidation of democracy, the reduction of poverty, the creation of jobs and the overall improvement of the economic situation in the migration countries, the maintenance of peace, etc., all have a bearing on migration given that they address the main factors on which it is necessary to act to reduce the migratory pressure.

This being said, the concerns connected with the consequences of the migratory phenomenon, such as they are expressed within the European Union in recent years, called for a more substantial and targeted contribution in the context of all Community external relations policies, programmes and instruments. This contribution is today in the process of being given concrete form. Since Tampere, the migration issue has been successfully introduced onto the agenda of the dialogue between the Community and many countries. Moreover, in cooperation with the relevant third countries, the Commission has programmed substantial Community assistance (see Annexes) to provide support to third countries in their efforts to address issues directly related to legal and illegal migration. These programmes have now to be implemented and their effects will be visible only in the medium and long term.

This Communication focuses on European Union relations with low and middle-income

developing countries in Africa, Asia, Latin America and Europe, with the exception of the European Union candidate countries. Its purpose is threefold. Firstly, it tries to put the migration issue back in its broader context, taking account of the driving forces of international migration, the specific case of people in need of protection and the effects of international migration on developing countries. Secondly, it gives an overview of the Community migration policy and how migration issues are being integrated in Community external cooperation programmes and policies. Thirdly, it tries to indicate the possible policy developments that could improve the Community contribution to a better management of migratory flows, including the curbing of illegal migration.

SECTION A – CONTEXT

1. THE EU AND INTERNATIONAL MIGRATION FLOWS

The UN estimates that world-wide some 150 million people (or about 2,5% of the world population) can be considered international migrants, as they have a nationality that does not coincide with their country of residence. The total number of international migrants is gradually growing, but is – in relative terms – not much different from the situation observed in the early 20th century.

Most analysts take the view that in a long-term perspective migration to the EU will either be stable or increase. The net annual official inward migration rate of the EU is currently at about 2,2 per 1000 population, which is less than current inward migration rates into traditional immigration countries such as the USA and Canada. In the year 2000, around 680.000 immigrants from outside the EU arrived in the Union[2].

Migration to the EU[3]

Arriving migrants from outside EU (2000) 680.000

Total number of migrants from outside EU 13.000.000

Region of origin

Europe . . . . . .45 %
North Africa . . . . . .18 %
Asia . . . . . .17 %
Sub Saharan Africa . . . . . .9 %
USA . . . . . .3 %
Other . . . . . .8 %

These legal migrants, for whom reliable statistics exist can be divided into asylum seekers, family members joining migrants already legally settled in an EU Member State, registered labour migrants and business migrants[4]. An important (legal) distinction is to be made between economic migrants and persons in need of protection. Under International Law there is no obligation for states to let economic immigrants enter their territory. Asylum however is a human right based on international protection standards, which states are obliged to provide as a result of their obligations under international agreements such as the 1951 Geneva Convention.

In addition to legal migrants, there is a substantial number of irregular or 'illegal' migrants, consisting of people that either illegally enter the territory of an EU Member State, or become illegal after 'over-staying' their valid visa or their residence permit, or after being rejected as an asylum seeker. By the very nature of the phenomenon there are no precise figures available and thus the number of irregular migrants in the EU can only be estimated[5].

The majority of 'economic migrants' present in the territory of EU Member States do not originate from low-income countries, but rather from middle income countries and economies in transition. Poor people in developing countries lack the connections and resources to engage easily in inter-continental migration. If these people migrate for economic reasons they will usually move to regional centres of economic growth. It is estimated that African countries host more than 20 million migrant workers from their own

continent[6].

This South–South labour movement is a very important phenomenon, and the facilitation of orderly South-South migration could be a relevant aspect of Community development cooperation with certain countries. Apart from its direct impact on development, better management of these South-South flows may also have an indirect impact on South-North migration, especially where international migration is related to rapid urbanisation.

2. THE DRIVING FORCES OF INTERNATIONAL MIGRATION

2.1. Push factors

Specific causes and patterns of migration vary over time and between countries and regions. Throughout history, people have migrated when their place of residence lacked the resources and opportunities to fulfil their needs and aspirations. The 'classical' conditions producing migration include factors such as [7]:

- Negative or low economic growth combined with unequal income distribution;
- Overpopulation, high population growth;
- High underemployment and unemployment rates, including as a result of major economic restructuring;
- High pressure on land and urban environments;
- Armed conflict, ethnic cleansing;
- Human rights abuses, discrimination, persecution;
- Natural catastrophes, ecological degradation.
- Poor governance

Inadequate or deficient domestic policies and the absence of reforms in the developing countries themselves are often responsible for the factors described above.

The economic 'push' towards migration will not quickly disappear. According to World Bank figures, the labour force of the low-income countries is set to grow from 1,4 billion to 2,2 billion in the year 2025[8]. The corresponding figures for middle-income countries (which are the larger supplier of international migrants) show a similar rate. Current levels of economic growth, trade and inward investments in developing countries are manifestly insufficient to absorb this labour force.

Unlike 'economic migration', forced migration primarily caused by conflict and insecurity is usually of a more cyclical nature. Refugee flows fluctuate. Mass departure is often (but not always) followed by mass return once the security situation has improved. This being said, people who migrate from conflict-ridden areas are usually steered by a combination of motivations, especially those that travel beyond their own region to developed countries.

2.2. Pull factors

Where conflict and poverty are the main push factors of migration, safety and socio-economic improvement stemming from labour demand in host countries are the major pull factors. Migrants move to places where protection is offered and/or jobs can be found. As indicated in the previous section, this does not lead primarily to inter-continental or South-North movements. About 85% of the world's refugees find shelter outside the EU, mostly in safe

havens within the region of conflict. More than 90% of the world's migrants live and work outside the EU, usually relatively close to their country of origin. Close to 50% of the 150 million migrants world-wide are women, working in areas such as nursing and domestic services. Also, most migrant workers in the sex-industry are women, many of them against their will.

Most immigration countries – including EU Member States – face labour shortages in both the highly skilled and low-skilled sectors. The first category includes IT specialists, medical staff, researchers and scientists, technicians and teachers. The second category involves farm labourers, construction workers, workers in the hotel and restaurant sector, etc. Increasingly, European governments and European based companies turn to the labour market of developing countries to recruit these workers, notably in high-skilled sectors. After arrival in the country of immigration, migrants would usually obtain a legal status but in fact, many of them, especially in the low-skilled sectors, will continue to find employment and residence in the EU without such a legal status.

In order to really make the step into outward migration one needs contacts for practical advice and support. Usually the practical aspects of migration are facilitated by family contacts or the wider network of the migrant diaspora. Such a network often serves a very specific part of the labour market in a receiving country and recruits countrymen and women from a limited number of villages or urban regions in the country of origin. Increasingly, this type of support is provided on a relatively low risk and highly profitable commercial basis by criminal organisations involved in human smuggling.

2.3. Migration hump

A successful development process may – in the short term – lead to an increase rather than a decrease of international migration. When a developing country manages to generate economic growth a first generation of dynamic men and women acquire the means, and the taste, to travel. Satisfying opportunities at home may still be limited, as adjustments and reforms are not completed and the domestic labour market has not reached its full potential. In this situation many people may want to test their luck in the job market of industrialised countries. This phenomenon - called the 'migration hump' – should normally disappear at a later stage, when the level of development in the country of origin reaches a more mature stage.[9]

In the long term, however, the reduction of poverty and the increase of job opportunities do reduce the pressure on people to enter into "survival migration". Similarly, when peace and development replace conflict and struggle, forced migration comes to a stop, and people have the opportunity to return to their home areas.

3. THE REFUGEE BURDEN

In accordance with the 1951 Geneva Convention relating to the Status of Refugees, a refugee is a person "who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...". Individuals fleeing their country have certain fundamental rights such as the right to seek asylum in another country and the right not to be expelled or

returned to their state of origin as long as there is a threat to their safety (non réfoulement). Furthermore, they have the right to submit a request for asylum before the appropriate authorities and to have their request examined by them.

Whereas the EU does host a very substantial number of refugees and asylum seekers10 it is a fact that many developing countries have to deal with refugee populations exceeding by far EU averages. In 2002 there are 13 million refugees and asylum-seekers world wide, of which 1,9 million (15%) reside in EU territory11. Furthermore, the world has about 20 million internally displaced persons; almost half of them in Africa, and more than a million in Afghanistan. According to UNHCR statistics, the number of asylum seekers arriving in the EU has halved over the last decade and is currently less than 400.000 people per year. By comparison, countries like Iran and Pakistan saw in the year 2001 alone more than a million arrivals each.

Refugees and asylum-seekers[12]	*Total*	*From non-European developing countries*	*From European countries*
Worldwide	13.000.000	12.000.000	1.000.000
In EU	1.900.000	1.600.000	300.000
In developing countries	9.000.000	9.000.000	0
Internally displaced persons			
In EU	0	0	0
In developing countries	20.000.000	20.000.000	0

The burden on host developing countries is exacerbated by the intrinsic limited financial and institutional capacities of these countries. Refugees can put considerable strain on the often fragile social and political structures of a host developing country. UNHCR research[13] has shown that when these factors are taken into account, the top-5 countries with the highest refugee burden are Iran, followed by Burundi, Guinea, Tanzania and Gambia. In Africa the ratio between refugee population and GDP per capita14 is more than 25 times higher than in Europe.

In order to alleviate the plight of refugee populations, the European Community provides humanitarian assistance. Indeed, one of the specific objectives of Community humanitarian aid is to cope with the consequences of population movements of refugees, displaced people or returnees. Community actions under Regulation 1257/9615 concerning humanitarian aid, for which the Community Humanitarian Aid Office, ECHO, is responsible, focus on providing the necessary funds to implementing partners to provide protection, care and maintenance to refugee populations for as long as it is needed.

In keeping with the core principles of International Humanitarian Law, namely impartiality and non-discrimination, Community humanitarian assistance is solely delivered in accordance with the needs of the affected populations, priority being given to the most vulnerable such as children, women, disabled and elderly.

Projects are funded to address refugee needs, assisting thereby also the host country in coping with an influx of refugees, their own infrastructure and institutional capacity usually being inadequate to deal with such problems. The Community is currently funding many such projects around the world. Furthermore, the impact of aid can have benefits on the infrastructure of the host country, to the incidental advantage of the local community and this

can help to reduce possible tensions between the two communities. Additionally, once refugees have returned to their country of origin, funding can be made available to carry out rehabilitation, such as re-afforestation, necessitated by the refugee presence in the host country.

Projects are also funded to assist repatriation to the country of origin provided that certain essential preconditions are met. Repatriation must be voluntary, and there must be an overall improvement in the situation in the country of origin. The country of origin must also have provided guarantees or adequate assurance for the safety of the repatriated population. In East Timor, for example, protection, shelters and resettlement aid have been provided for 300,000 returning refugees. In addition, the Community is providing funding for the reintegration of refugees once they have been repatriated in order to take the pressure off the countries of origin who often come out of a long period of conflict and destruction. In this spirit, the EC is funding UNHCR's repatriation of tens of thousands of Sierra Leonean refugees from Guinea at the same time as the re-integration packages in Sierra Leone itself. Similarly, projects that assist resettlement of refugees from the country of refuge to a third country, which has agreed to admit them, are also funded.

Protracted refugee situations increase pressure on scarce economic and environmental resources and sometimes causes tensions with local communities. This may give rise to security problems and localised crime. In many African countries refugees have been in host communities for 20 years or more. Many of these refugees have rural backgrounds and rely on access to common natural resources like water, arable land and forest for which they enter into competition with the rural poor in the host community. This problem can be addressed if host governments try and integrate these refugees by allocating land to them, if possible close to their areas of geographic and ethnic origin. Countries like Uganda and Belize have tried this strategy and successfully managed to integrate refugees in the process of national development. Similar actions to promote durable solutions, including through local integration, have been undertaken in collaborative effort with the UNHCR, e.g. on the 'Zambia Initiative'[16].

4. THE EFFECTS OF INTERNATIONAL MIGRATION ON DEVELOPING COUNTRIES

International migration can both contribute to the economic development of industrialised countries and have positive effects on the developing countries of origin. At the same time, some aspects of international migration, such as the outflow of highly qualified people and the movement of refugees between neighbouring countries can also pose direct challenges to developing countries. The effects of international migration on developing countries have to be assessed on a case by case basis, as their specific impact varies considerably amongst countries.

4.1. Migrant remittances

According to some estimates17, current annual remittance flows to developing countries are actually higher than total Official Development Assistance (ODA). For many countries remittances provide an important positive contribution to the balance of payments and are a major source of foreign exchange. In a country like Haiti remittances account for 17% of GDP18. In most countries the percentage is far lower, but still substantial. The influx of remittances is not evenly spread amongst developing countries. They go to lower-middle

income countries such as the Philippines, Egypt and Morocco and some large low-income countries like India and Pakistan[19]. Remittances to Sub-Saharan Africa are still low, but may hold a significant development potential.

Remittances are private money, which will first and foremost benefit the family of the sender, and will leave out the poorest groups that do not have family members abroad. In a first stage remittances are generally spent on family maintenance and debt repayment. In a later stage they are dedicated to housing improvement, consumer durables and education. In a third phase they appear to be invested in productive activities and the purchase of land or small businesses.

The important developmental potential of remittances has inspired some developing countries to try to introduce leverage mechanisms to encourage migrants to set aside a certain portion of each transfer for development funds. Also specific financial instruments are being introduced to capture a share of individual remittances, to supplement it with money from public sources, and to facilitate joint ventures between migrants and community development associations. The conclusions of the Financing for Development conference that took place in Monterrey in March 2002 also contain a reference to remittances. In its paragraph 18 it says that *'it is important to reduce the transfer costs of migrant workers' remittances and create opportunities for development-oriented investments, including housing'.*

While the Commission is conscious that migrant remittances are private money, that ought to be spent according to the wishes of the individuals concerned, it considers that public administrations in migrant-hosting countries may have a role to play in trying to ensure that these funds can be transmitted to developing countries by cheap, legal and secure means. Existing official financial transfer systems are often burdensome and costly, and drive migrants into informal networks of money traders. Hence, financial institutions, international banks and money traders have a responsibility to ensure that efficient and cost-effective systems will be available for the transfer of remittances to developing countries.

4.2. Brain circulation

Globalisation invites migration. Where globalisation promotes specialisation of economies and countries, it is only logical that specialised workers (either in high or low-skilled professions) wish to move from one territory to another. In those cases where comprehensive immigration policies are not yet in place – which is also for the EU – workers will find their own (illegal) way to enter the globalised labour market. Hence it is necessary to – as agreed by the European Council in Tampere – to develop a harmonised admission policy with a view to regulating the legal access of migrant workers into the EU. This policy takes account of both the interests of the EU and those of the third countries in which migrants originate, and is intended to be coherent with efforts to address the negative effects of 'brain drain' mentioned below.

Developing countries with high levels of unemployment and low economic growth rates may see benefits from emigration of low skilled citizens. Not just because of migrant remittances, but also because a reduction of the labour surplus will leave fewer people out of a job, and will have a positive effect on the competitive position and, therefore, income of those who remain. However, when skilled labour leaves the country the impact on the domestic economy may be less positive, especially in the short term. This 'brain drain' phenomenon may have direct negative repercussions on the development process.

Win-win scenarios do exist, where sending and receiving countries as well as the migrant him- or herself benefit from migration20, when the migrant maintains financial, social and economic links with his country of origin and return to it, either permanently or on a temporary basis. But these scenarios remain isolated cases. The 6th Community RTD Framework programme, which offers training to scientists from third countries, including LDCs, with the aim of increasing the overall scientific and technological capacity of developing countries, includes elements that promote the actual return of trainees, including re-entry grants.

Nevertheless, industrialised countries including EU Member States increasingly recruit skilled labour in developing countries, such as IT experts in India, medical doctors in Pakistan, teachers in the Caribbean and nurses in South Africa. For some developing countries the 'export' of qualified citizens is an established element of government policy. More often this process generates incoherence between host countries' domestic policies and development policy objectives.

Voluntary return of migrants, both temporary and permanent, brings back accumulated amounts of financial, human and social capital into developing countries. Traditionally, return has therefore been seen as an essential aspect in ensuring a positive relationship between migration and development21. This positive correlation assumes that a migrant has spent sufficient time abroad to acquire skills and resources, and that he or she is capable and willing to dedicate (part of) this capital to new activities in the country of origin. These countries of origin can facilitate a successful reintegration, which is also beneficial to the local society at large, by creating the right social, economic and institutional environment for the returning migrant.

In practice, returning migrants are often faced with major disincentives, including from their host country. Return may affect their pension entitlements, or their possibilities of returning to the EU to visit family and friends. In general, concrete administrative solutions and support programmes are necessary. Some of these are currently being prepared, e.g. a Community funded IOM project on the return of qualified Afghans who can contribute to the recovery, rehabilitation and reconstruction of Afghanistan.

A migrant can also provide positive inputs in the local development of his or her country of origin, without regaining permanent residence. Governments of migrant sending countries such as Tunisia, Senegal and Nigeria have set up active policies to intensify contacts with their diasporas and to involve them in the national development process, both in economic and political terms. At the other side, some migrant receiving countries and international organisations have experimented with 'co-development' schemes aimed at involving the migrant diasporas in the development process of their country of origin.

SECTION B - POLICIES IN PLACE

On the basis of the Amsterdam Treaty and following the policy orientations established by the European Councils of Tampere and Seville, the Commission has formulated the main components of a common policy on migration and asylum. In addition to this, through its development and cooperation policies, the Commission tries to improve dialogue and reinforce partnerships with third countries on the issue of migration. The policies and actions in place fall into three categories. The first category covers those actions recently programmed within the framework of the Community's cooperation programmes with third countries and which directly address the issue of migration. The second category covers other actions falling under the general heading of Relief and Rehabilitation. The third category is covered by the general thrust of the Community's development cooperation policy and development programmes, where the aim is to reduce the push factors behind migration by supporting sustainable growth and development and reducing poverty.

5. EU MIGRATION POLICY

The Commission has formulated the main components of a common policy on migration and asylum in two general communications and in individual legislative proposals. The work programme agreed in Tampere to realise this objective comprises two phases: the establishment of a basic common legal framework incorporating minimum standards in the areas covered by the Treaty; and secondly a gradual convergence of legislation, policy and practice through an open method of co-ordination between the Member States. In line with the comprehensive approach adopted by the Council, action is being taken on a range of different aspects of the migration phenomenon.

The Commission has now put forward all the legislative proposals necessary to establish the basic framework for the admission and conditions of stay of legal migrants and their families. This will provide transparent channels for the admission of labour migrants. Some of the proposals are also designed to facilitate mobility of third country nationals within the EU , e.g. for long-term residents or for third-country nationals who are students. At the same time action to reinforce the fight against illegal migration, smuggling and trafficking into the EU is being taken based on a comprehensive plan adopted by the Council in February 2002. Measures to improve co-operation on the return of illegal migrants are also being developed based on the Commission's Green Paper of April 2002 on this issue.

The Commission has also submitted to the European Parliament and the Council a number of legislative proposals as the basis of a common policy on asylum which fully respects the 1951 Geneva Convention on refugees and other international obligations of the Member States with respect to refugees, asylum seekers and those seeking international protection.

An examination of the interactions between immigration and the employment and social policies in the European Union was launched by the Commission in 2002 and, on that basis, the Commission intends to adopt a Communication in March 2003 to prepare the June session of the European Council.

Promotion of the integration and inclusion of migrants is taking place primarily within the framework of the European Social Fund, the EQUAL initiative and programmes to combat discrimination, including racism and xenophobia.

It goes without saying that the rapid adoption of the Commission proposals, an adoption which falls within the responsibility of the Council and its the Member States, would encourage the consolidation of the Community Migration Policy and would consequently contribute to making the position of the Community in this field more clear to third countries. The establishment of a clear Community framework in the field of the migration policy constitutes a condition of credibility for the Community in its relations with the third countries on the issue of migration management.

6. ASSISTANCE TO THIRD COUNTRIES DIRECTLY RELATED TO MIGRATION MANAGEMENT

The integration of the concerns related to migration in the external policy in general and in the Community external policies and programmes in particular is a recent trend. Actually, migration is a new field of action for the Community cooperation and development programmes. Since Tampere, the European Commission has begun to integrate several issues directly related to legal and illegal migration in its long-term co-operation policy and programmes. Substantial direct and indirect Community assistance has been programmed to provide support to third countries in their efforts to address legal and illegal migration issues. The annexes of this communication shows an inventory of programmes and activities related to migration at regional and national levels (a detailed description of these programmes is provided in the national or regional indicative programmes attached to the Country or Regional Strategy papers). Some of these programmes – those specifically dedicated to border management, fight against illegal migration, migration management – will contribute directly to strengthen third countries capacity to manage migration flows. Most of the programmes concerned should be implemented during the period 2002-2004. Certain are already in the launching phase. Without entering in a description of activities on a country by country basis, the main regional orientations can be summarised as followed:

In the Mediterranean region, in the newly adopted framework for a Justice and Home Affairs regional programme in MEDA, the Commission addresses the general issues of combating organised crime, including criminal networks involved in smuggling of migrants and trafficking in human being. In particular, the Commission examines the feasibility of joint police inquiry teams among Mediterranean partners and, if possible, between Member States and Mediterranean countries. Migration is given special attention in this regional programme and the Commission is committed to creating the basis for a comprehensive approach to migration with the Mediterranean countries. The ongoing consultations with Mediterranean partners on the implementation of this regional programme are very constructive and actions contributing to the fight against illegal immigration are now envisaged. They cover in particular police and judicial training and the establishment of a Euromed network of data collection and pluridiciplinary research on migratory phenomena. Moreover, in the framework of the various MEDA regional programmes, the Commission will examine how to introduce new actions relating to the fight against illegal migration. One aspect could be to look at the feasibility of a network between the southern Mediterranean ports, in order to, among others, facilitate the exchange of information concerning suspect boats and illegal migration. Finally, transit migration from Sub-Saharan Africa also merits attention. The Commission will analyse the main causes for this migration to better understand the forces behind this phenomenon and see how it could be addressed.

In the Western Balkans, the CARDS Regional program focuses on supporting the participation of Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia in the Stabilisation and Association process (SAP)

which is the cornerstone of the EU's policy in the region. The aim is to foster regional co-operation inter alia in the field of Justice and Home affairs. Being a neighbouring region of the EU and one with porous borders and weak infrastructures, the support to regional co-operation on migration issues is of particular importance. Support on border control will emphasise equipment and infrastructure and will be complemented by institution building, technical assistance and twinning-type arrangements. Particular emphasis will be placed on control on borders with Romania, at international airports and on sea approaches and harbors but also on control at major border crossing points, on the development of appropriate state border services, on strengthening police and other agencies' capacity nationally and regionally to tackle crime and illegal migration, on coordination between border control authorities, national police authorities and customs agencies, on sharing of information and joint investigations. International coordination will be enhanced both at the preventive level (eg. exchanges of information) and at the reactive level (eg. joint investigations against smuggling or repatriation of illegal immigrants).

In Eastern Europe and Central Asia, the current TACIS Regional Justice and Home Affairs Programme is focusing on three key areas: first, the development of a comprehensive border management, migration and asylum system in order to combat smuggling in illegal migrants and to reduce illegal migration flows (concrete actions include provision of border control equipment and training of border guards as well as strengthening the capacity of partner countries to administer legal migration and asylum matters); second, combating drug trafficking through the creation of a "filter system" between Afghanistan and the geographical areas along the "silk route"; third, the establishment of effective anti-corruption measures in the partner states aiming at adopting efficient legislation and developing suitable practices in the public service and in civil society for a sustained fight against corruption. This dimension will likely have an impact on illegal migration as well. In addition to this, the New Tacis Regional Programme for Central Asia will include co-operation on migration and related issues, in particular improvement of border management capacities ; construction of border crossings in the three-border region of the Ferghana valley, in order to promote cross-border trade and smooth movement of people and goods; promotion of cross-border co-operation among the relevant law enforcement services and border and customs guards in the region; continuation of anti-drug measures; introduction of anti-money laundering regimes in Kazakhstan and Uzbekistan.

If the programmed activities directly related to migration are particularly important for these three regions bordering the future enlarged Europe, the issue of migration is also becoming increasingly important in the discussion and cooperation with other regions even if it remains at an earlier stage.

In Asia, in the framework of ASEM, a dialogue on migration has already started and is now well on track. It has lead to the ASEM Ministerial Conference on Co-operation for the Management of Migratory Flows in April 2002, which resulted in a political declaration on migratory flows (the "Lanzarote Declaration"). Furthermore, it has been agreed that further co-operation will follow, with joint initiatives to be proposed by the interested ASEM partners. To that end, they further agreed to establish a network of contact points, when appropriate, for co-ordination and preparation of meetings at expert level between partners and future ASEM meetings at Director-General level of Immigration services on illegal migration flows as well as on the detection of false, counterfeit and falsified documents. The first meeting of this kind could take place before the end of the year.

In Latin America, on the basis of the political declaration of the EU-Latin America and the Caribbean Summit held in Madrid in May 2002, in which the States of the two regions

commit themselves "To carry out an integrated analysis of the different issues of migration between our regions…", the Commission has started to explore ways to develop a dialogue on migration between the two regions.

With reference to the ACP countries, the Cotonou Agreement, signed in June 2000 and soon to be entered into force, contains specific provisions on co-operation on migration and in particular to prevent and combat illegal immigration (Article 13). Migration shall be subject of in-depth dialogue in the context of the ACP-EU partnership and the ACP-EC Council of Ministers shall 'examine issues arising from illegal immigration with a view to establishing, where appropriate, the means for a prevention policy'. The Cotonou Agreement also contains a standard readmission clause, as well as the commitment to negotiate readmission agreements, if requested by one of the Parties. Within the legally binding arrangements of Cotonou it is therefore fully legitimate to put the issue of illegal migration or problems in the area of readmission on the Political Dialogue agenda of either the entire ACP group or concerned individual ACP countries (Article 8).

Complementary with these regional approaches to co-operation in the migration field, various co-operation programmes directly related to migration have also been developed at the country level, notably with Morocco, the Balkan countries, the New Independent States, China, etc.

7. RELIEF AND REHABILITATION

Humanitarian assistance is neither sufficient nor adequate to address all needs arising from protracted crises such as protracted refugee situations and so, cannot of itself, ensure durable and sustainable solutions. Within the context of this Communication the important link between relief, rehabilitation and development (LRRD) merits special attention. In April 2001, the Commission published a Communication on this subject to ensure in particular that emergency assistance is designed in such a way that when that assistance is phased out, other instruments are phased in to assist with the long term development objectives.

Community actions under Regulation 2130/2001 on operations to aid uprooted people in Asian and Latin American developing countries are an example of an instrument which aims at linking humanitarian activities and development co-operation. It has done so by establishing the experience and pre-institutional mechanisms on which future development can be based. For other geographical regions, these actions in support of uprooted people are directly funded under other general financial instruments such as the European Development Fund (EDF) and MEDA[22].

Efforts to resettle refugees or support returning refugees in post-conflict situations require close cooperation between neighbouring states. In conflict areas, where deep divisions, collective social mistrust and trauma may remain high, premature return of refugees can generate new tensions, conflict or violence. Timing and coordination are therefore crucial. In the context of support to uprooted people several programmes are already being implemented or prepared (e.g. in CARDS context). The Community shall continue to support initiatives such as programmes to facilitate the settlement within the host country of refugees who do not want to return to their home country, and to reduce the social and political pressures that such semi-permanent settlement will produce (example: return of non-Albanian displaced persons in Former Republic of Yugoslavia) and programmes to facilitate cross-border return in a post conflict situation. Cooperation must be supported by the international community, especially as regards flow of information and agreeing common

approaches on citizenship, pensions, social insurance, health and education.

8. THE LONGER TERM; ADDRESSING THE PUSH FACTORS

The Commission considers that the Community's development cooperation policy contributes to the effectiveness of the EU migration policy and its objective of managing migration flows. The Community's development policy addresses the push factors that constitute part of the root causes of migratory flows, and is aimed at reducing the timespan of the 'migration hump'. The Community development policy also tries to prevent and reduce forced migration, both South-North and South-South, and helps developing countries coping with refugee flows and internally displaced persons. Against this background it appears that the poverty focus and the current priority areas of the EC development cooperation policy should be maintained.

The European Council has endorsed this approach when it confirmed, at its meeting in Seville, that 'an integrated, comprehensive and balanced approach to tackle the root causes of illegal immigration must remain the European Union's constant long-term objective'. In this context the Council pointed out that 'closer economic cooperation, trade expansion, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned and thereby reducing the underlying causes of migration flows'[23].

In November 2000 Council and Commission adopted a policy statement on Community Development Policy. One of its objectives was to concentrate Community development cooperation on a limited number of priority areas. The overall framework of the development policy is by now well established and should not be overturned by new priority areas. The European Community's Development identifies six priority sectors of development policy, with an overall focus on poverty reduction24. Furthermore, the Council and Commission Statement identified three 'horizontal', or 'cross-cutting' concerns (gender, environment, human rights).

To maximise the potential positive effects of migration on development, and to reduce the negative ones, migration issues ought to be part and parcel of Community development policy, including poverty reduction strategies. To ensure coherence between the Community development and migration policy it is necessary to assess systematically the relationship between migration issues and the priority sectors and cross-cutting concerns of EU development policy, and to identify actions where appropriate. In this context some pertinent development policy areas to be considered for further action are the following:

Trade and Development

Providing and securing jobs in developing countries is the most effective way to address the number one push factor of international migration: unemployment and lack of economic prospects. To contribute to the objectives of the Community migration policy the Community should therefore continue to promote the improvement of effective market access of developing countries' products into the EU and other industrialised countries as well as the integration of developing countries in the world trading system, in line with the goals set out by the Doha Development Agenda. Furthermore, the Community shall continue to promote the enhancement of south-south trade, the promotion of foreign direct investments into developing countries and the promotion of core labour standards. Existing policies in these fields contribute to reaching the objectives of the Community migration policy and should

therefore – where possible – be strengthened.

Compared to the progress already made on the liberalising of goods and capital flows, international discussions on the free movement of people are still in a very early stage. The European Community should stimulate further debate and reflection on this subject, also within the context of relevant international organisations such as WTO, ILO and World Bank.

Conflict prevention, regional integration and co-operation

As EU history has taught, regional integration and cooperation is the best recipe against war and violent conflict. Likewise, the promotion of regional integration in developing countries is a structural contribution to avoid refugee-producing conflicts. Ongoing activities and programmes in the area of regional integration and conflict prevention will continue and where appropriate reinforced, notably the support to regional organisations with a clear conflict prevention mandate.

EC support to conflict prevention focused activities at regional level shall be strengthened (e.g. reconciliation activities, support to Demobilisation, Disarmament and Reintegration and Rehabilitation of combatants (DDRR) programmes, peace networks, shared management of scarce natural resources). The EC shall also continue to assist Border Region Cooperation programmes aiming at promoting regional reconciliation and easing border region tensions, e.g. through infrastructure projects that directly benefit productive sector activity and the local business environment, civil society and NGO activities.

Institutional capacity building and good governance

Ill-functioning democratic structures, weak institutions, the absence of the rule of law and bad governance are all major push factors for forced migration. The Community development policy addresses these challenges and will continue to do so, also in the context of the prevention of refugee flows. Relevant actions include institutional and constitutional reforms; supporting dialogue between state and opposition groups; reform of the electoral system and elections; strengthening party system, media, civil society; mediation between conflicting groups; measures to strengthen and guarantee human and minority rights; anti-corruption measures, and reform of police, judiciary, civil service

Food security and sustainable rural development

Hunger is a major push factor for migration. In recent history many notorious mass refugee flows were caused by droughts and failed harvests. Hence, development policies that contribute to food security and access to food and drinking water will limit 'survival' migration by poor people.

In a wider context, development policy aimed at sustainable rural development, providing sufficient jobs and satisfactory income to rural people will reduce the number of people moving from the rural areas to the cities. It is in that urban context where international migration usually starts.

The link between migration and rural development becomes particularly relevant in the context of South-South migration, when refugees with rural backgrounds take up agricultural activities in their host country. In this context EC development policy should assist host developing countries with the voluntary resettlement and integration of refugees in the process of rural development.

SECTION C – POLICY DEVELOPMENTS

9. POLICY DIALOGUE AND MIGRATION CLAUSE

Within the context of its current and future Association or Co-operation Agreements the European Union will systematically put the migration-development nexus on the agenda of its political dialogue as well as introduce migration issues in its economic and social dialogue. Such a dialogue should not limit itself to the question of how to address illegal migration and readmission but could also cover issues such as:

– The root causes of migration and the possibilities to address these in a comprehensive manner;

– Community legal migration policy and the management of migration by the third country concerned, as well as – where appropriate - the policies for preventing illegal migration, notably as regards smuggling and trafficking in human beings, and the facilitation of return and readmission of illegal migrants.

– The better integration of legal migrants living and working in the EU, with a special emphasis on the equal treatment of legally employed foreign workers and the policies which aim at non-discrimination of third country nationals; special attention should be given to the fight against racism and xenophobia and to education and training including the vocational integration of students in their countries of origin; ways of regulating demand and supply of low skilled labour, e.g. through temporary working permits, in view of a radical reduction of the pull factor for illegal migration into the EU;

– The question of how to facilitate 'brain circulation' and how to assist migrants legally residing in the EU who wish to contribute to the development process of their country of origin.

The European Council of Tampere underlined that partnership with the countries of origin and transit will be a key element in the external policies of the EU in the area of migration. The European Council of Seville of June 2002 urged that 'any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.'[25]

Like other recent Partnership and Cooperation Agreements, the Cotonou Agreement between EU and ACP states contains specific provisions on co-operation on migration, including in respect of preventing and combating illegal immigration. Taking account of the Council conclusions on intensified cooperation on the management of migration flows with third countries adopted in November 2002, the Commission considers that Article 13 of the Cotonou Agreement provides a comprehensive and balanced agenda for action, which could serve as a model for migration clauses to be negotiated in future agreements with other third countries. However, the Commission considers that this model should remain flexible enough to be adapted according to the negotiating circumstances and the particularities of each case.

10. SKILLED LABOUR

The Community development cooperation policy is often handicapped by the negative effects of the 'brain drain'. A fundamental approach to this phenomenon is to try to increase

the number of financially attractive local job opportunities. In this context the following strategies could be considered:

– Promotion of outsourcing arrangements between developed to developing countries, notably in the IT and RTD sectors Such schemes would generate global 'teleworking' where high-skilled (and relatively well-paid) people in developing countries would sell their services to companies in developed countries. Outsourcing arrangements may also involve short term postings in the EU, and Member States may wish to consider reviewing visa-restrictions in order to facilitate this.

– Promotion – within the context of the political dialogue – of labour policies by developing countries which aim to attract and reintegrate skilled migrants currently working abroad. Such policies shall include the provision of favourable working conditions, but also practical arrangements such as the recognition of education and experience obtained abroad.

– Facilitation of 'virtual return' of migrants that intend to contribute to the economic and social development of his or her country of origin, without permanently returning to it. In this context one area of attention could be the strengthening of communication facilities between trans-national communities and their country or region of origin (e.g. by facilitating 'tele-lectures' by academics in diaspora for local universities, in local languages).

The African health sector – struggling hard to overcome the AIDS pandemic - seems to be the major victim of the brain drain process. In Zambia three quarters of doctors with Zambian nationality left the country, in just a few years. Nigeria saw 21.000 medical doctors emigrating to industrialised countries. Nigerian and South African nurses are recruited in considerable numbers for jobs in the EU, where salaries are up to ten times higher.

– In view of the particularly dramatic health situation in these countries, the EU could explore the feasibility of introducing a code of conduct for public medical institutions to refrain from active recruitment of medical staff in sub-Saharan Africa and other developing countries facing domestic staff shortages.

Today some 100.000 Africans work in the EU and North America.26 At the same time about 100.000 non-African experts live and work in sub-Saharan Africa, most of them in relation to development assistance and humanitarian aid. These non-African economic migrants, including many medical staff, occupy positions that are usually not open to qualified Africans under the same favourable conditions.

– In this context the Community could offer jobs currently taken by expatriate staff – notably in the development cooperation sector – to local people under financial conditions that are sufficiently attractive to provide an alternative for emigration. To facilitate this mechanism modalities of technical assistance to developing countries shall be reformed, in coordination with UNDP.

11. READMISSION AGREEMENTS

The Community signed a readmission agreement with Hong Kong on 27 November 2002. Agreements with Sri Lanka and Macao have been initialled in May 2002 and October 2002 respectively. In addition to this, and following the Commission recommendations, the Council

has adopted Decisions authorising the Commission to negotiate readmission agreements between the European Community and Russia (2000), Pakistan (2000), Morocco (2000) and Ukraine (2002). Preliminary contacts with these countries have been made to prepare for the formal negotiations.

Following the Council conclusions of 29 April 2002 and the Sevilla conclusions, the Commission presented to the Council, in October 2002, recommendations for four Council Decisions authorising the Commission to negotiate readmission agreements between the European Community and Albania, Algeria, China, and Turkey.

Moreover, on behalf of the Community and if and when requested by it the Commission will start negotiations for new readmission agreements with ACP countries, on the basis of and after ratification of the Cotonou Agreement. Article 13 of the Cotonou Agreement already includes the explicit commitment for each of the ACP States to "accept the return and readmission of any of its nationals who are illegally present in the territory of a Member State of the European Union, at that Member State's request and without further formalities". However, as one of the main problems with illegal residents is the lack of identification documents and the corresponding difficulty in establishing his/her nationality, it would often be appropriate to extend that obligation to cover also third country nationals. Possible future Readmission Agreements with ACP countries could address this point and would furthermore focus on practical and administrative arrangements and other modalities of readmission and return. These agreements shall be negotiated in the broader context of implementation of Article 13, including its development elements and other aspects of particular importance for ACP countries – on which the Commission will present further proposals at a later stage, in conjunction with the upcoming Communication on the integration of legal migrants into the EU.

Experience so far has taught that the time needed to negotiate a readmission agreement, which is seen as being in the sole interest of the Community, should not be underestimated and no quick results should be expected. They can only succeed if they are part of a broader cooperation agenda, which takes duly into account the problems encountered by partner countries to effectively address migration issues. This is the reason why the Commission considers that the issue of "leverage" – i.e. providing incentives to obtain the co-operation of third countries in the negotiation and conclusion of readmission agreements with the European Community – should be envisaged on a country by country basis, in the context of the global policy, cooperation and programming dialogues with the third countries concerned.

In that context, the Commission could envisage, where appropriate, to provide a specific support for the preparation and implementation of the readmission agreements by third countries, aiming at increasing technical and financial assistance with a view to encouraging better management of migration flows. This specific support would be financed from the budget line B7-667, endowed with appropriate additional resources, taking into account the complementarity of this budget line with other funding and overall EU budgetary constraints. The programming of this line must also be coherent with the overall development strategy towards the country concerned and be implemented in conformity with the standing principles, procedures and modalities of the Community's external assistance programmes.

Moreover, it must be underlined that such support measures shall be developed jointly with the Member States based on a division of labour and a sensible burden sharing. In certain cases, this specific accompanying support may not be sufficiently attractive. Indeed, the readmission agreements can have important consequences for the third countries concerned. As transit countries, they can be confronted with considerable charges, of both a

technical and financial nature, since they will have to deal with the repatriation of the persons concerned. Even the reintegration of its own nationals can generate for a country additional constraints for its labour market or for its programmes of government aid. In those cases, and in the context of the global policy, cooperation and programming with the third countries concerned, the European Community and the Member States, should be ready to consider supplementary types of incentives. At Community level, the margin of manoeuvre for these incentives is however limited.

Indeed, incentives based on granting better market access or tariff preferences to co-operating third countries should only be considered to the extent that they are fully WTO compatible. Similarly, if the available funds remain constant, additional development aid for the countries with which the Community wishes to negotiate readmission agreements would result in a reduction of the aid granted to other third countries, penalising those which do not pose a significant problem as regards migration. Compensatory measures in the field of migration policy such as a more generous visa policy with respect to the co-operating countries or increased quotas for migrant workers seem equally difficult to negotiate at the level of the Community, not least since it would suppose substantial co-operation and co-ordination from and between the Member States.

Since Article 13 of the Cotonou Agreement already provides for clear legal obligations for the Parties to that Agreement as regards the readmission of own nationals illegally present on the territory of another Party and as regards the conclusion of bilateral readmission agreements, the Commission considers that such supplementary financial incentives are not necessary and herefore shall not apply to those countries.

Again, the Commission considers that a balanced approach requires the possible solutions to be examined on a case by case basis, taking into account not only the importance of the third country concerned in terms of emigration flows towards the European Union but also the specific situation of this third country and the state of its relations and cooperation with the Community and the Member States.

12. STRATEGIES AND PROGRAMMES; THE MID TERM REVIEW

In the multi-annual planning, programming and implementation of the actions mentioned in chapters 6, 7 and 8, the question of whether and in what form migration should receive special attention has been addressed on a case by case basis in the framework of the Country and Regional Strategy Papers process, to which the Member States have been fully associated. Incorporating migration in the Country and Regional Strategy Papers through the normal programming dialogue process has ensured full involvement and commitment by the country or region concerned as well as differentiation and prioritisation according to needs and policy situation. The Commission has also sought full co-ordination and complementarity between actions undertaken by the Community and EU Member States.

Along the same procedures, the Commission has already pointed out its willingness to use the opportunity of the Country Strategy Papers mid-term review (which should begin in 2003) to examine the extent to which greater priority should be given to specific programmes relating to migration, on a country by country basis and in the framework of the programming dialogue. This could lead to a readjustment of the external actions of the Community to give greater weight to migration policy and related issues.

However, the Commission has to stress that the review of the Country and Regional Strategy Papers must always be guided by the overall objectives of the Community cooperation, which will not have changed. Moreover, in determining the scope of the review, one has to keep in mind that multi-annual programmes are designed to give the partner country – and the Community – a long-term commitment to development, with a limited leeway of flexibility. In addition, migration is not the only concern which should be considered on the occasion of this review of our co-operation with third countries. The way to respond to other significant changes or new departures in Community policies – for instance in the trade area after Doha, in sustainable development after Johannesburg, or on crime and terrorism – must also be examined. And it goes without saying that in the context of the limited Community resources available, the Commission will have to make a decision as to which issues should be given greater priority and which lesser as regards the allocation of these resources. The Country and Regional Strategy Papers process is precisely the place where this allocation has to be decided, because it is there that, with the participation of all the actors concerned, a balanced and coherent Community strategy towards third countries can be built up.

13. FURTHER MEASURES AS REGARDS INSTITUTION BUILDING

The Community support foreseen in the section above for the preparation and implementation of the readmission agreements by third countries, based on the resources available to budget line B7-667, would build on existing experience regarding institution building and technical assistance, and would give more emphasis notably to:

– Improving national legislation and management of legal migration and asylum, with full respect to the international conventions in this area.

– Making national legislation more effective to prevent and combat illegal emigration, and to strengthen the fight against criminal activities, organised crime and corruption.

– Institution building and technical assistance to strengthen developing countries' capacities to combat the trafficking and smuggling of human beings.

– Capacity building in the field of customs and law enforcement, including providing equipment when necessary, but with all the necessary safeguards in particular regarding potential dual-use.

The conception and the implementation of the measures foreseen will be based on principles that will guarantee an harmonious articulation of the actions financed from that instrument with the action financed from other Community development and cooperation instruments, so that the overall coherence of the Community external action is preserved.

II. REPORT ON THE EFFECTIVENESS OF FINANCIAL RESOURCES AVAILABLE AT COMMUNITY LEVEL FOR REPATRIATION OF IMMIGRANTS AND REJECTED ASYLUM SEEKERS, FOR MANAGEMENT OF EXTERNAL BORDERS AND FOR ASYLUM AND MIGRATION PROJECTS IN THIRD COUNTRIES

1. INTRODUCTION

At its meeting in Seville on 21 and 22 June 2002, the European Council requested the Commission to submit "a report ... on the effectiveness of financial resources available at Community level for repatriation of immigrants and rejected asylum seekers, for management of external borders and for asylum and migration projects in third countries" (Presidency Conclusions, paragraph 38).

This communication is the response to that request, providing a survey of existing instruments that directly or indirectly correspond to the areas identified by the Council. But, the Commission considers that the scope of this examination can usefully be extended to cover not only financial instruments at present applied but instruments currently contemplated under the common policies on asylum and immigration. Incidentally the reference in the Conclusions of the Seville European Council to "financial resources available at Community level" does not provide a basis for departing from the rules applicable to all expenditure based on the Community budget (the need for a legal basis, compliance with the subsidiarity and proportionality principles, compliance with the financial perspective, multiannual programming and ex post and ex ante appraisals).

This report is based on the results of implementing the instruments currently available. But, the evaluation of the outcomes and impact of legislative and financial programmes and actions is a long-term process, whereas most of the initiatives in the fields in question are relatively recent and many of the programmes and projects assisted have not yet been implemented or are still under way.

In accordance with the strategy defined by the Commission regarding the evaluation and assessment of the impact of its policies,27 such programmes and actions are to be evaluated at regular intervals, preferably by external consultants. Accordingly, this document is not to be treated as a final appraisal.

Even so, prior experience can provide certain indications. In addition, in the case of many actions, 2003 and 2004 will be decisive years for the approach to be adopted both to programmes in motion or in preparation and to the application of new instruments and the response to new policy priorities. Hence the need also for a forward study of the optimum, consistent and coordinated use of financial resources in the Community's internal and external policies, in conjunction with the instruments and policies applied by Member States.

This report is also an opportunity for reflection on the longer-term challenges facing the Community and the Member States. The Commission therefore feels it must look ahead and define approaches to future Community requirements, particularly regarding financial resources to cover the response to the requests made by the Tampere, Laeken and Seville European Councils.

Those processes must naturally comply strictly with the applicable financial rules, the financial perspective agreed between the Community institutions and the principles of reasonableness and effectiveness in the use of the Community budget.

2. CONTEXT OF THE COMMUNITY'S FINANCIAL SUPPORT

The use of resources from the Community budget to implement or support policies within the scope of the powers of the Community or the European Union is governed by the Treaties. The principles that must be complied with in such use of resources include the subsidiarity and complementarity principles.

2.1. Requirement that Community action must comply with the subsidiarity and proportionality principles

Article 5 of the Treaty establishing the European Community provides that "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". This principle is no less applicable where an action is to be funded in whole or in part from the Community budget, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality.

Under those principles, all proposals for Community legislation, including proposals concerning the financing of actions from the Community budget, must:

– relate to a matter that has transnational aspects which cannot be satisfactorily regulated by action by Member States;

– concern an area or actions where action by Member States alone or lack of Community action would be contrary to the Treaty or would otherwise significantly damage Member States' interests;

– establish that action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

2.2. Management of Community expenditure – compliance with the financial perspective and multiannual programming

The development of financial instruments and proposals for new initiatives must take place within the framework of financial perspectives defined by the Interinstitutional Agreement of 6 May 1999.28 There is relatively little room for manoeuvre regarding internal policies (Heading 3), including measures linked to the establishment of a European area of freedom, security and justice, and external action (Heading 4).

All major developments in the use of those resources must comply with the prescribed limits and, if appropriate, be dealt with through arbitrations and reallocations between the Union's policy priorities. The Commission, as part of its planned annual policy, may of course decide to stress one or other policy priority, which will be reflected in the preliminary draft budget, but responsibility for the allocation of resources ultimately lies with the budgetary authority.

3. INTERNAL INSTRUMENTS AVAILABLE FOR ASYLUM AND IMMIGRATION POLICY AND THE MANAGEMENT OF EXTERNAL FRONTIERS

All financial instruments in those areas are covered by the legal bases established by agreement between the institutions and the budgetary authority, including the Council. They were initially developed as pilot projects or preparatory actions but have now been established by Council decision as multiannual programmes.

3.1. Development of Community financial resources allocated to asylum and immigration policy and management of external frontiers

The resources appropriated to Title B5-8 (Area of freedom, security and justice) of the Community budget for asylum, migration and management of external frontiers have been significantly increased since the entry into force of the Treaty of Amsterdam, rising from 29 559 694 in 1998 to 51 310 000 in 2002. The European Refugee Fund (ERF) alone receives 43% of the Title B5-8 appropriations. But the appropriations for Community policy on asylum, immigration and management of external frontiers account for scarcely 0.83% of expenditure for Community internal policies in 2002.

3.2. Financial instruments to implement or support the Tampere and Laeken strategies

As the common policy on immigration and asylum has developed, several financial instruments have been developed to cover two main types of assistance: the reinforcement of administrative cooperation and "measures ... promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons".[29]

3.2.1. Instruments strengthening administrative cooperation

The objective of the cooperation programmes is to complement the legislative provisions for the area of freedom, security and justice and thereby improve mutual understanding between the competent national services and their procedures for applying the Community legislation in order to develop a common administrative culture and uniform practice for applying Community law in the Member States.

The initial bases for those actions were not specifically founded on the areas identified by the Seville European Council but laid by the Sherlock pilot programme (1996-2000) for training, exchange and cooperation in the field of identity documents, particularly the detection of false documents. In 1998 the activities of that programme were integrated into the Odysseus programme. Odysseus, with a budget of €12 million for 1998-2002, was in fact terminated at the end of 2001 with all appropriations exhausted by then. The programme made it possible for 155 cooperation projects to be financed, involving mainly national civil services or international organisations but also, to a lesser degree, non-governmental organisations and educational or research institutions. Those projects, which focused on training and placements for administrators, exchanges of officials or other staff with duties in the relevant fields, and research and study activities, gave a breakdown almost equal to the three areas covered by the programme: asylum (28% of projects), immigration (28%), crossing of

external borders (23%) and multi-issue projects (21%). In the last two financial years (2000-01), an attempt was made to identify synergies between projects supported from Odysseus and new Community initiatives, such as cooperation with third countries concerning migration, the participation of candidate countries enjoying priority.

A new stage was reached with the adoption of the Argo programme, which was to be for five years with a financial reference amount of €25 million.30 Odysseus laid the bases for administrative cooperation, and Argo now forms a decisive step in the establishment of operational cooperation by supporting the implementation of specific joint projects involving the pooling of resources and the possibility of setting up joint operational centres and teams composed of staff drawn from two or more Member States. It also establishes procedures for linking the internal and external dimensions of Member States' policies, making it possible to assist Member States' activities in third countries, in particular in countries of origin and transit. Lastly, the Argo rules allow flexibility and immediate reaction in emergencies.

Immediately after the adoption of the decision establishing the Argo programme, the Commission initiated studies (feasibility study on controls of maritime borders, feasibility study on technical and financial aspects of a visa information system) and issued a call for tenders under the programme. The first projects presented under the programme were received by the Commission in October 2002 and are being evaluated. It will be possible to initiate them from the end of 2002.

3.2.2. European Refugee Fund (2000-04)

In terms of financial volume, the European Refugee Fund is currently the biggest programme under the common asylum and immigration policies.

3.2.2.1 Results of preparatory action (1997-99) and principles governing the European Refugee Fund

The Fund is based on the experience gained in preparatory action between 1997 and 1999 under budget lines B3-4113 (aid for the integration of refugees), B7-6008 (aid for the voluntary repatriation of refugees) and B5-803 (aid for the reception and residence of refugees and displaced persons, access to asylum procedures). Over these three years, 370 projects received support totalling over €80 million, including €14.3 million released to help Member States cope with the massive influx of displaced persons from Kosovo. Over the period 1997-99, 24% of the funds were allocated for reception conditions (36.7% counting the additional appropriations granted for Kosovo in 1999), 37.8% (31.1%) for integration measures and 38% (31.3%) for aid for voluntary repatriation.

The measures funded relating to reception served mostly to boost and improve the capacity and quality of structures for receiving asylum applicants and refugees in the Member States, in particular those most vulnerable (women and unaccompanied minors) and to develop assistance for access to asylum procedures.

The integration measures funded covered advice work and capacity-building, particularly in the fields of vocational training and access to employment, education and integration into the local community in the host country, health, and access to housing.

60% of projects supported under the preparatory action on aid for voluntary repatriation were

earmarked for the return of refugees or persons from Bosnia enjoying subsidiary or temporary protection.

On the basis of Article 63(2)(b) of EC Treaty, the European Refugee Fund (budget line B5-810) was set up by Council Decision of 28 September 2000 to cover the period 2000-04 and given an indicative budget of €216 million over five years (of which €50 million was held in reserve for possible emergency measures).[31] The Fund translates into operational and financial terms the principle of solidarity between Member States in implementing a common policy on asylum. It operates on the basis of shared management with the Member States, with the latter directly responsible for administering 95% of its resources.

The Fund covers measures relating to the reception, integration and return (including reintegration into their home country) of refugees, asylum applicants and beneficiaries of subsidiary or temporary protection arrangements in a Member State.[32]

The Fund's activities are supplemented by some of the measures contained in the Community Initiative Programme EQUAL (thematic field 9), which are designed to facilitate access to the employment market for asylum applicants, with due regard for national rules governing the working environment and laying down the rights of access of asylum applicants to employment. A total of 46 projects have already been approved for 2001 and 2002.

3.2.2.2. Evaluation of the Fund's implementation 2000-02

The Commission is planning an independent evaluation of measures taken under the Fund during 2000, 2001 and 2002, which will be available in the course of 2003. Given that the Council Decision was adopted in September 2000, the financing programmes for 2000 and 2001 were adopted simultaneously at the end of 2000 and run on to the end of 2002. To obtain relevant information on the results of these two years, the Commission has therefore decided to have an independent evaluation carried out on a complete cycle of activities, which cannot be done until early 2003. However, the present report may provide an initial review of the first two years of Decision setting up the programme (mid-term implementation review).

Accordingly, a number of points can be identified at this stage, although they must not be allowed to prejudice the results of the independent evaluation to be carried out in 2003:

– With regard to the detailed arrangements for burden-sharing between Member States, the calculation mechanisms provided for in Article 10 of the Council Decision have allowed the resources available under the Refugee Fund to be shared out according to the burden faced by the Member States. Moreover, among the parameters laid down in the Council Decision for calculating the annual allocations to Member States, the fixed amounts provided for in Article 10(1) have served to restore the balance in the relative burdens borne by each Member State. Finally, the budgetary authority has increased the financial allocation for this line compared with the detailed estimates in the Commission's initial proposal, so that more resources are available for each of the Member States participating in the Fund.

– However, certain limits are placed on the principle of solidarity and the detailed arrangements for sharing resources among Member States in that the annual calculations are based on changes in the number of persons enjoying or applying for the status of refugee or a subsidiary or temporary form of protection. This means that no

account is taken of structural differences between the Member States, and in particular the need for investment relating to reception, integration or voluntary repatriation. So, in practice a number of Member States have failed to use up in projects the full allocations assigned to them in accordance with the criteria laid down in Article 10 of the Council Decision.

– When the calculations provided for in Article 10 are carried out, on the basis of data supplied by Eurostat and updated by the Member States, considerable discrepancies in statistical methods sometimes emerge. To solve this practical problem and to implement the common policies on asylum and migration and assess the needs and impact of those policies, there is a case for greater harmonisation of methodology. The Commission therefore plans to step up cooperation in this field.

– There has been relatively little variation in the respective share of funds allocated by Member States to the various measures between 2000 and 2002: most national allocations under the Refugee Fund go towards investment in the conditions for receiving asylum applicants (49.4%), with integration projects receiving 28.3% of funds and voluntary repatriation 22.23%. However, between 2000 and 2002 there was a substantial increase in the resources allocated to repatriation (from 15% of the Fund's resources in 2000 to 24% in 2002).

– Although the "shared management" method is essentially a way of expressing the principle of solidarity, it nevertheless has the drawback of "isolating" to some extent the various programmes and measures implemented at national level. Transnational measures to pool experience and build networks may be encouraged under the umbrella of Community action, but the first three years of the programme suggest that this facility is rarely used by the Member States.

– Compared with the preparatory action in the period 1997-99, the first years of the Fund's implementation have been marked by a certain rigidity in the management system, due among other things to the annual timeframe for allocating funds, which restricts the scope for financing structural initiatives or those requiring a relatively long implementation period to be fully effective. In addition, the transfer to Member States of administrative responsibility for project selection and management has caused problems for some national government departments in introducing the systems and human resources required for this new task.

3.3 Developments planned for the short and medium term

The development of policy guidelines has opened up fresh possibilities for action within the existing financial framework, in agreement with the budgetary authority. This includes improving our information on and knowledge of migratory phenomena and the launch of preparatory measures to facilitate the integration of third-country nationals legally resident in the territory of a Member State.

3.3.1. A better insight into migratory phenomena

To implement a common policy on asylum and immigration and evaluate the results of that policy, we need to have better information on migratory phenomena and to develop reliable tools and indicators on asylum and immigration.

With this in mind, one of our top priorities is to improve both the quality of information on asylum and migration, in particular statistics, and the methods for exchanging it. In May 2001 the Council (JHA) adopted conclusions on common analysis and better exchange of statistics on asylum and immigration. The Commission is pressing ahead with implementation of the preparatory action on a "European Migration Observatory", which began in 2002 and provides for inter alia the networking of national focal points for exchanging and following up information relating to the political, economic, demographic and social dimensions of migratory phenomena. The network will cooperate with the European Monitoring Centre on Racism and Xenophobia.

The Commission will shortly be presenting the Council with an action plan comprising various types of measures, including a proposal for new statistical methods and a widening of the field in which data is collected. These measures were allocated a budget of 1.4 million in 2002, while the relevant appropriations in 2003 should come to 2.6 million.

3.3.2. Introduction of effective information systems

The Eurodac system for the comparison of fingerprints, created to support the efficient implementation of the Dublin Convention, was the first important information system developed at Community level in the field of Justice and Home Affairs. An amount of 9.6 million was allocated to the development of this system, which will be operational on 1 January 2003.

Important resources of the Community budget will be also need to be allocated to the development of the 2nd generation of the Schengen Information System (SIS II) and the Visa Information System (VIS).

For SIS II the Council already decided in 2001 (cf. Council Regulation (EC) 2424/2001 and Council Decision 2001/886/JHA) to charge the necessary financial resources to the Community budget. These resources have been estimated by the Commission at 23 million.33 In its guidelines for the VIS the Council also asked the Commission to quantify the necessary financial resources in order to allocate the funds within the EU budgetary framework.

In any case the resources for the implementation of these two projects will depend largely on the options retained by the Council and that will be set out in the legal basis. This also includes the definition of respective responsibilities of the Community and the Member States, as well as choices regarding the management of such systems once operational.

3.3.3 Preparatory measures relating to the integration of third-country nationals

Although not specifically singled out in the relevant paragraph of the Seville conclusions, mention should also be made of the fact that the satisfactory integration of migrants, however defined, into our societies must remain a central plank in the EU's overall strategy regarding immigration. This was explicitly recognised by the inclusion by the European Council in Tampere of the heading "Fair Treatment of Third Country nationals" as one of the main headings in its conclusions. Furthermore, interaction between Member States, local authorities and the non-governmental sector is essential to spread best practice in a field which requires both expertise and sensitivity in dealing with other cultures.

There have been strenuous efforts in the past to pursue such aims. Programmes such as EQUAL in the field of employment combined with other Structural Fund instruments, the Community Action Programme to Combat Discrimination, the activities of the European Monitoring Centre against Racism and Xenophobia, the Leonardo da Vinci vocational training programme have all contributed to this field.

The new budget line's pilot projects as proposed in the APB 2003 (B5-815) for the integration of third country nationals, that is economic migrants, aims at enhancing dialogue between all the actors involved, creating European networks and promoting awareness of these issues, with a budget of 3 million for its first year of implementation.

Preparatory actions under this new initiative will include:

– Exchange of information and best practice with a view to identifying transferable models;

– Transnational cooperation at national, regional and local levels involving government, representatives of civil society, including migrant groups;

– Supporting reception programmes for third country migrants with special reference to vulnerable groups;

– Information and awareness raising.

Strong support for this new initiative has been expressed by the Budgetary Authority, who proposes an increase of the budget allocation to a total of 4 million in 2003.

3.3.4. The future of the European Refugee Fund

The current phase of the ERF will come to an end on 31 December 2004. The results of the mid-term review and the priorities identified in the course of managing other instruments or preparatory measures will determine the Commission's approach in its proposal on the activities to be pursued after 2004 at Community level for refugees and asylum seekers. Two basic aspects should already be taken into account in deliberations on the Fund's future after 2004:

– The ERF is an instrument of the common asylum policy. Its second phase will therefore have to reflect the progress and achievements of this policy since 1999 and meet more precise objectives and priorities for action resulting, inter alia, from the entry into force of Community directives and regulations; the second phase might also be the lever for developing new initiatives whereby, for example, its activities might include resettlement programmes, as referred to by the Commission in its communication of 22 November 2000 entitled "Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum";[34]

– The possible development of new initiatives for the integration of immigrants and return policies will also give rise to the question of how these instruments will fit in with ERF measures in these areas.

Moreover, the emphasis placed on repatriation, in particular of illegal residents, might be taken into account in this context. The Fund already allows Member States to cofinance measures to repatriate asylum seekers and refugees. These measures currently account for

22% of the amounts spent. As we will see below, the creation of a financial instruments designed to provide back-up to a return policy would necessarily have to involve a reallocation of some of the ERF's appropriations given the reduced margin of manoeuvre in the financial perspective for internal policies.

This matter therefore has to be considered taking account of the specific characteristics of the people targeted, the need for measures to be effective, and a rational management of Community financial instruments. In this respect, one radical option might be to limit the Fund's portion to the reception of refugees and displaced persons on the assumption that separate integration programmes will be created (covering all immigrant profiles, whether for the purposes of international protection or not) and return aid. While this would probably be more logical than a redefinition of political priorities, this option would, given the reallocation of resources it would require, nevertheless result in a corresponding reduction of the amount of finance available for the genuine solidarity effort which shaped the establishment of the Fund.

4. EXTERNAL-POLICY INSTRUMENTS

4.1. Contributions to preparations for the future enlarged Europe

There have been strenuous efforts in the past years to strengthen migration policy and border management in candidate countries. In the context of enlargement, migration, asylum, border control and customs issues have always enjoyed a particular attention. Between 1997 and 2001 a total amount of 356 million was spent on various tailor made projects under the National Phare Programmes for 10 candidate countries. Many of these projects consisted of a twinning component whereby migration experts from member states were seconded for a period of minimum one year to the administration of a candidate country.

In addition to that and in a complementary way a Phare Multi-Country programme on "Migration, Visa, External Border Control Management" started in January 2001 covering the 10 CEECs. Denmark was in charge of the migration module. The programme includes interactive training of trainers; seminars in the context of each of the modules were being implemented as from Autumn 2001. The project produced jointly agreed Member States - candidate countries recommendations with a time-table in each module for candidate countries to implement.

4.2. Partnerships with third countries of origin and transit

At its meeting in Tampere in October 1999, the European Council established the foundations for incorporating asylum and immigration concerns into the external dimension of Community action by stressing that an integrated, comprehensive and balanced approach targeting the deep-rooted causes of illegal immigration must remain the Union's constant objective in the long term, and that partnership with the third countries concerned would be a key element for the success of such a policy.

To this end, the Commission, on the basis of the financial instruments at its disposal for external activities, has planned a number of measures intended to respond directly or indirectly to the strategy defined at Tampere.

In view of the new powers transferred to the Community by the Treaty of Amsterdam, the

issue of immigration, and in particular the fight against illegal immigration, has also been incorporated into all of the association and operation agreements signed since 1999, including with third countries in the Mediterranean basin, and into the partnership and cooperation agreements with the new independent states of central Europe, central Asia, the Balkans and the ACP countries. Initiatives have been taken with some countries and regions in the context of the programming of external aid which have contributed directly to ensuring that these new priorities in the management of migratory flows are put into practice. These are concerned with the development of regions which have traditionally seen large-scale emigration, the establishment of policies and infrastructures for welcoming asylum seekers, institution building (in particular with regard to police and judicial systems and the improvement of external-border checks), measures to combat illegal immigration and trafficking in human beings, and the return and reintegration of refugees and displaced persons. One example has been the programme to combat illegal immigration by supporting improvements to the management of border checks adopted in cooperation with Morocco for the period 2002-04, with a budget of 40 million. Likewise, more than 37 million is earmarked under the CARDS programme to support measures to combat illegal immigration and trafficking in human beings and to promote institution building in the management of asylum and migration policies in the western Balkan countries. In all, disregarding assistance for rehabilitation or development measures designed to tackle the fundamental causes of migration, a total of some 440 million has been earmarked, essentially over the period 2002-04, for measures to improve the management of borders and immigration and to promote the fight against illegal immigration.

Still under the heading of the Community's external action, the strategies and measures designed to link up emergency aid, rehabilitation and development, such as the Community programme of aid for the return, reintegration and rehabilitation of uprooted people in Asia and Latin America, might also play a positive role in areas in which there has been a massive displacement of people. Alongside a policy of encouraging peace, reconciliation and conflict prevention, these programmes also promote lasting solutions for refugees following natural disasters or armed conflict while limiting secondary-displacement phenomena. For example. 48.7 million was granted in 2002 to assist in the reintegration of refugees and displaced persons in Afghanistan.

All of these initiatives were conceived in accordance with the principles underlying the reform of the management of external aid which has been in progress since 2000 on the basis of a process of multi-annual programming of external-aid instruments. This process is essentially based on national or regional strategy papers defining the priorities for Community action over five to seven years in agreement with the countries and regions concerned. These strategy papers are used to draw up national indicative programmes, which cover a period of two to three years and determine how funds are to be allocated in order to achieve the objectives of the strategy so defined.

Another specific initiative has been in place since 2001 as a means of responding directly to the approach defined by the European Council. This involves financing from budget heading B7-667 innovative projects relating to cooperation with third countries in the area of migration. The aim is to promote a comprehensive approach to the phenomenon of migration and to create the conditions for an efficient management of migratory flows in the context of partnerships with third countries of origin and transit. With a budget of 10 million in 2001 and 12.5 million in 2002, which the budgetary authority intends to increase to 20 million in 2003, this initiative enabled fifteen projects to be assisted in 2001, of which seven related to the establishment of migration-management policies, five involved aid for voluntary return and reintegration policies, and three set out to prevent and combat illegal immigration.

It should be stressed, however, that the management of this budget heading and the implementation of these projects are currently not covered by the programming of external aid.

5. NEW NEEDS WHICH HAVE BEEN IDENTIFIED

The Seville European Council asked the Commission to evaluate the financial resources available in three specific areas: repatriation of illegal residents (immigrants and rejected asylum seekers), the management of external borders and cooperation projects with third countries in the area of immigration.

5.1. A financial instrument to back up return policy ?

The Commission's Green Paper and Communication on a Community return policy on illegal residents35 raises the possibility of creating a specific financial instrument alongside the development of common minimum standards and provision for greater cooperation between Member States.

The Commission draws conclusions from the voluntary return projects implemented in the context of ERF preparatory measures, in particular concerning the need for such operations to have an integrated approach covering not only advice and preparation but also back-up measures involving mechanisms for receiving and reintegrating the people concerned in their country of origin, which is vital if their return is to be permanent. Since it would also apply in the case of forced return, such an approach could not be achieved without a reallocation of resources currently available under the heading of Community internal and external policies.

The creation of an instrument of this nature would require an identification and quantification of the EU's needs and the value added which Community finance might contribute in responding to those needs. The results of the EU return programme for Afghanistan, currently being drawn up at the initiative of the Danish Presidency, might help in determining what is actually required to implement such measures and what complementarity should be sought between the Member States' action and any contribution which the Community budget might make. Over and above the question of complementarity in terms of financial resources, it is also vitalto ensure, using the existing appropriate mechanisms, that there is a more harmonious link between these specific measures concentrating on migration and return and the specific short, medium and long-term mechanisms, objectives and programmes developed as part of the Community's external action.

The question of the means which might be available for a European return programme must take account of the budgetary perspective up to 2006. As indicated above, a reallocation might be possible after 2004 of some of the ERF's appropriations, bearing in mind that 22% of the funds available between 2000 and 2002 (14 million) have been used by the Member States for the voluntary return of refugees and asylum seekers.

5.2. Sharing the burden of managing external borders between the Member States and the Union

Point 32 of the conclusions of the European Council meeting in Seville calls on the Commission to carry out, before June 2003, "a study … concerning burden-sharing between

Member States and the Union for the management of external borders".

This request follows on from the adoption on 13 June 2002 by the Council (Justice, home affairs and civil protection) of a plan for the management of the EU's external borders. The plan provides for a common policy to be developed for the integrated management of external borders and aims to establish a coherent framework for joint action over the short and medium term.

Five components of such a common policy, one of which is burden-sharing, are identified in the plan. The different options for sharing the financial burden are to be evaluated on the basis of many of the points made on the subject in the Commission communication entitled "Towards integrated management of the external borders of the Member States of the European Union".[36]

The plan sets out the necessary conditions for drawing on the Community budget, in particular that national budgets must remain the main source of investments and planned spending, which will be mainly on equipment and human resources, but also that the bases for sharing should be established at Union level and within the limits of the Community's financial perspective.

According to the plan, a contribution from the Community budget can be envisaged in two basic areas:

– financing purchases of joint equipment, in particular with a view to supporting joint operations;

– setting in place a mechanism for redistributing funds between Member States.

In line with the roadmap drawn up by the Council Presidency, the Commission is to draft the final evaluation report identifying the financial options for burden-sharing by June 2003. An interim report was also to be presented in mid-November 2002 and is replaced by this communication. The aim of the interim report was to evaluate the financial resources allocated at national level to the management of external borders on the basis of the Member States' answers to a questionnaire approved by them and distributed in early August 2002. By the deadline of 30 September, set in agreement with the Member States, very few replies had been received.

The questionnaire aims to ascertain the state of play as regards national spending on investments and operations for the management of external borders (controls and surveillance of persons). It also requests the Member States to provide data on real migratory pressures at their national frontiers which constitute external borders. The full range of replies should enable the Commission to make a viable comparative assessment of national spending in order to work out an approximate figure for the financial burden incurred by each Member State in ensuring that the quality and effectiveness of controls and the surveillance of persons are in accordance with the European rules. It is proving difficult to compare contributions, among other things because of differences between the methods used for evaluating investments and needs, as well as the difficulties en countered by national administrations in identifying precisely enough the financial resources allocated to the activities of border guards and equipment used solely for controls and the surveillance of persons.

Apart from national data on spending for the management of external borders, evaluation of

the burden incurred by each Member State through managing external borders clearly has to take into account the following objective factors:

– The geographical situation of each Member State and the nature of the borders;

– The migratory pressure at the different types of border (land, sea and airport);

– The number of checks carried out on persons entering and leaving the Schengen area;
– The quality standard of controls and surveillance at external borders, as measured by the common risk analysis method applied to each type of border.

In the light of these factors, it has to be recognised that the mechanism for financial solidarity between Member States will have to be on a substantial scale if it is to tackle structural problems. Its dimension again raises the question of the compatibility of this exercise with the current financial perspective, also bearing in mind the additional implications associated with the consequences of enlargement.[37]

The Commission is aware that this constitutes a fundamental challenge for the solidarity which should underpin the common policy for managing migratory flows, and indeed any common policy. It will therefore continue looking into the budgetary issues with a view to proposing options that are viable in the medium and long term. It will be for the Council and Parliament to examine the question of compatibility with the financial perspective in order to arrive at the most appropriate solution.

It is therefore in terms of feasible, practical steps that targeted financial measures will have to be sought that can be taken in the short and medium term to meet the most pressing needs resulting from implementation of the action plan adopted by the Council in June, while giving an initial demonstration of solidarity between Member States in pursuing the aim of better policing the external borders.

Within the limits of the funds available, the Commission could, together with the Member States, systematically use the external borders part of the Argo programme in order to support projects on the basis of priorities set jointly within the Council and having due regard to the risk analysis methods currently developed, evaluation of the coordination centres set up by way of pilot projects and the training needs identified through the establishment of common curricula.

Managing the Argo programme, or at least the external borders part thereof, in this way would enable support for closer administrative cooperation, for which it was originally devised, to be reconciled with an initial expression of solidarity by redirecting the available funds towards strengthening the weakest links in the system of controls at the Union's external borders. Albeit modest, this approach should nevertheless be able to count on additional funding, towards which the budget authority appears to be moving by earmarking an extra 3 million for the purpose in 2003.

6. TO SUM UP

The first appropriations allocated to cooperation in the fields of justice and home affairs, and asylum and immigration in particular, were entered in the Community budget before the Treaty of Amsterdam came into force. Since then, they have been steadily and significantly increased: in 2002 a total of 51 310 000 has been earmarked for the policies on asylum

, immigration and external borders. This effort has been supported both by the Commission, which has where necessary endeavoured to make the indispensable trade-offs enabling increased appropriations to be entered in its preliminary draft budget, and by the budget authority, which has even on occasion seen fit to go further. But this increase has always remained strictly within the limits of the financial perspective.

The structure of the different instruments set in place has usually reflected the new priorities that have been emerging under these evolving policies.

The creation of the European Refugee Fund was, for example, prompted by the need for stronger solidarity highlighted in the Amsterdam Treaty itself and in the conclusions of the European Council meeting in Tampere. The transition from Odysseus to Argo has reflected the coming of age of a common administrative culture, enabling a fully-fledged programme of administrative cooperation to be launched. Lastly, the setting in place of a specific instrument designed to support cooperation on migration with third countries has illustrated the determination to integrate migration-related concerns more appropriately into the external dimension of the Community's action. Clearly, new needs are emerging. The conclusions of the European Council meeting in Seville stressed the importance the European Union now attaches to strengthening cooperation with third countries in the management of migration flows. They have also put the spotlight on a new area in which Community solidarity should be brought to bear, namely controls at external borders. Other priorities are coming to the fore, to do with the gradual introduction of a common policy on return and promoting integration. The Community budget, which already finances the investment and operating expenditure on Eurodac, has furthermore to prepare to shoulder the burden of developing large systems that will underpin these common policies: the VIS system for visas and the second-generation SIS.

As with earlier ones, these developments will have to comply with the principles of sound financial management and, above all, remain within the limits of the current financial perspective. But this clearly leaves very little room for manoeuvre. Excessively ambitious expectations could be accommodated only at the cost of significant reallocations, to the detriment of other policies or other priorities in the JHA field: these are difficult choices which ultimately have to be made by the budget authority, on a proposal from the Commission.

The forthcoming revision of the financial perspective, which is to take place after enlargement, could provide an opportunity for carrying out structural readjustments that would make it possible to respond in a more practical manner to the needs generated by the fully-fledged policies on immigration and asylum which should by then be in place. In the meantime, this communication indicates a number of practical approaches that can be taken for giving greater consideration to migration-related issues. The Commission will ensure that the topic ranks high among the priorities set by its annual policy strategy for 2004 and is reflected in concrete terms in the preliminary draft budget. It will then be for the budget authority to confirm the proposed approach.

It will also be for the Member States, and particularly those least called upon to protect the external borders of an enlarged Union, to indicate the way in which they would be prepared to draw on their own national budgets in order to support their
partners bearing the brunt of the common burden.

CONCLUSIONS

Taking greater account of asylum and migration policies in the Community's external relations

The Commission considers migration to be an important political priority. It fully shares the views of the Council that the European Union's various external policies and instruments, including development policy, have a significant contribution to make in addressing underlying causes of migration flows.

At its meeting in Seville in June 2002 the European Council called for the migration issue – and in particular the problem of illegal immigration – to be assigned higher priority in the European Community's external policy. Stressing the "importance of ensuring the cooperation of countries of origin and transit in joint management and in border control as well as on readmission", the European Council reiterated that the Union is prepared to provide technical and financial assistance to ensure that such cooperation brings results in the short and medium term, "in which case the European Community will have to be allocated the appropriate resources, within the limits of the financial perspective". The Community and the Commission are urged to use the political and economic instruments at their disposal to reduce the underlying causes of migration flows and support cooperation with third countries that have a key role to play in the management of migration.

Furthermore, in its conclusions of 19 November 2002 on intensified cooperation on the management of migration flows with third countries, the Council again stressed the political importance of the efforts fully to integrate the external dimension of JHA issues into the EU's existing and future relations with third countries. The Commission intends to respond in practical terms to that commitment, along the lines of its previous action.

The objective of stepping up cooperation with third countries in the area of migration calls for a three-pronged strategy:

– first, a balanced overall approach which addresses the root causes of migratory movements. The Community's action in this area is substantial. Its external cooperation and development programmes and policies aimed at promoting human rights, bolstering democracy, combating poverty, preventing conflicts and improving the economic and social situation in general tackle the main factors contributing to migratory pressures in third countries and therefore exert an indirect effect on those pressures. Although that effect is difficult to quantify, it should not be underestimated;

– second, a partnership on migration stemming from a definition of common interests with third countries. The objective of more effectively managing migration flows requires the Community to continue integrating migration issues into its political dialogue with third countries and regions; that dialogue should focus not only on illegal immigration but also on the channels for legal immigration;

– third, specific and concrete initiatives to assist third countries in increasing their capacity in the area of migration management. Since the European Council meeting in Tampere, the Commission has endeavoured to integrate specifically the topic of migration into its cooperation programmes with third countries. A large amount of aid (some 934 meuro; see annex 2 and 2bis) has been programmed, mainly for the period 2002-04, for directly supporting third countries in their efforts to deal with the problems associated with both legal and illegal migration. This programming must now be put into effect.

The Commission will also take advantage of the mid-term review of most of the country strategy papers due to take place in 2003-04 in order to make the amendments necessary in each individual case to take account of the priorities deriving from this new approach to migration issues, while bearing in mind that there is limited room for manoeuvre with regard to the resources available and that trade-offs will have to be made between competing priorities. The Commission will thereby contribute to the establishment of a financial framework capable of meeting, in the medium and long term, the needs deriving from the first two objectives identified above.

Lastly, progress in the third area could be enhanced by significantly increasing the appropriations allocated to budget heading B7-667. Drawing the necessary conclusions from preparatory work financed in 2001, 2002 and 2003, the Commission intends to propose setting up and implementing from 2004 onwards a multiannual programme designed both to provide a specific, additional response to the needs encountered by third countries of origin and transit in their efforts more effectively to manage all aspects of migration flows, and in particular to stimulate third countries' preparations for, or assist them in, implementing readmission agreements. This specific programme will be a tangible sign of the Union's solidarity with those countries which have resolutely committed to these efforts. It will be implemented in line with the key principles of the reform of external aid, respecting the overall consistency of the Community's external action and alongside the other Community instruments for cooperation and development.

Moreover, the Commission will ensure that issues in the field of migration are taken into account in the preparation of its Annual Policy Strategy for 2004.

These elements put together constitute, in the opinion of the Commission, a credible response of the Community's external and development policies and programmes to the concerns now expressed regarding the issue of migration.

Finally, it shall be recalled that Community resources and hence its margins of manoeuvre are not unlimited. Also, implementing the "integrated, comprehensive and balanced approach" referred to in the Seville Conclusions requires coherence in action and shared responsibility between all actors concerned, Community and Member States alike.

ANNEXES

Annex 1:

Financial resources available for policies on asylum, immigration and management of external frontiers 1998-2003 (Heading 3 of the financial perspective)

Annex 2:

Financial resources programmed for external aid 2000-2006 and linked to the migration issue (Heading 4 of the financial perspective)

Annex 2bis:

Actions programmed and directly linked to migration question (Heading 4 of the financial perspective)

UNHCR Preliminary Positions: Protection and Durable Solutions for Refugees in the Context of Migration and Development

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) fully recognises the linkage between migration and development. The distinction between voluntary and forced population movements, however, is not always clear. Therefore it remains essential to distinguish between people fleeing persecution, human rights abuses and violent conflict, and people moving for economic and social reasons and to make clear that refugees are only part of migratory flows. Given UNHCR's mandate the below will concentrate on the links between refugee needs and development and how development assistance can promote durable solutions for refugees, , such as voluntary return and local integration of refugees. Matters related to migration management and its nexus with development are outside the scope of this note.

UNHCR believes it is time to rethink the relationship of refugees to development. Traditionally refugee needs have been considered to be of a humanitarian nature. Humanitarian assistance, though, is neither sufficient nor adequate in assisting refugees in developing greater self-reliance and allowing refugees to contribute positively to the development process. Humanitarian assistance can address the immediate needs, but transitional assistance and long-term development aid are crucial in addressing the structural problems in society and in providing the changes in e.g. the human rights situation that may prevent new refugee outflows. Reconstruction assistance and development aid are also needed to to render return and reintegration of refugees in their home areas sustainable, and support the local integration of refugees in host communities in developing countries.

Experience shows that the political, financial and humanitarian costs of not incorporating refugee needs into development assistance are high: refugees will be degraded having to endure camp life for many years or they will be impelled to resort to human smugglers in order to find adequate protection and assistance in Europe. Experience also shows that sufficient assistance and protection in the regions of origin result in less pressure on asylum systems in e.g. Europe. Afghanistan today is a clear case in point. A lack of assistance to the large contingents of refugees in neighbouring countries resulted in secondary movements, propelling refugees into onward movements to European countries, where they hoped protection and better living conditions would be secured. Today, when assistance to Afghanistan has considerably improved following fundamental changes in the country, people are returning and Europe has seen a 30 per cent decrease of Afghan asylum seekers in the first six months of 2002.

Making development and refugee needs work for each other requires that root causes as well as immediate protection needs caused by refugee flows are dealt with simultaneously and in an integrated manner. This calls for solutions in the short term as well as in the medium and long term. This is fully recognised by the Linking Relief, Reconstruction and Development concept already developed by the European Union. When instrumentalised this concept would be a tool allowing development and durable solutions for refugees to work for each other.

II. Protection and Assistance in the Region - Short Term Needs

Adequate humanitarian assistance at the outset of an emergency is a precondition for managing emergency situations. Refugee outflows put pressure on neighbouring countries and regions and eventually also on asylum systems in countries further away. Without adequate assistance and protection people will be pushed on the move. If failing to provide sufficient assistance, secondary movement will be a recurrent phenomenon with refugees seeking asylum and better integration opportunities elsewhere and host countries in the region increasingly reluctant to provide access and protection.

Therefore additional funds should be made available for the European Union's humanitarian budget to address immediate needs in emergency situations and to support repatriation and the initial stages of reintegration in return situations.

III Durable Solutions - Medium Term Needs

In the medium term there is a need for more investment in durable solutions in countries of origin - typically in post-conflict situations - and in countries of first asylum - typically in protracted refugee situations. In these situations there is a need to bridge the gap between humanitarian and development assistance.

In post-conflict situations refugees return home to their country of origin. The challenge in these situations is to ensure that the returnees are sufficiently assisted and protected in order to avoid renewed conflict and new refugee outflows. This can best be done by allowing returnees to participate in rehabilitation and reconstruction and thus contribute to the development of their country. This requires investments from humanitarian sources, but especially from transition and development funds. Such assistance will diminish outflows of refugees and make voluntary repatriation more sustainable. UNHCR's co-operation with and secondment of staff to the Ministry for Rural Development in Afghanistan (as part of its capacity-building efforts and its progamme for return and reconstruction) is a good example of how the transition period between emergency relief and long-term development can be addressed.

In protracted refugee situations refugees are often living in camps being dependent on humanitarian assistance. By providing developing countries hosting refugees with development assistance benefiting both refugees and the local population tensions and conflicts will diminish and allow refugees to be self-sustained and locally integrated. The support from the local community, however, requires political dialogue coupled with assistance, geared to self-reliance of the refugee population.

In situations where there are no options for return or local integration EU Member States should allow resettlement of protection cases. Such policies should be aimed at alleviating the pressure on poor first asylum countries whose coping mechanisms risk to become overwhelmed by sheer numbers of refugees. When refugees have access to orderly movements through predictable resettlement offers the incentives for embarking on often dangerous irregular movement may be diminished, thus undercutting the criminal networks that are fuelled by them.

Developing countries hosting considerable caseloads of refugees for longer periods should be supported in their capacity-building efforts to ensure physical security, legal safety and

socio-economic well-being of refugees. In order to avoid tensions with the hosting local populace, such assistance should also target the latter's needs and priorities.

The EU should make full use of existing instruments like the Cotonou Agreement, the budget line for Uprooted People in Asia and Latin America and the CARDS programmes adressing the transition from relief to development. A dedicated global budget line addressing refugee needs as a horizontal issue would be the ideal instrument to ensure a smooth transition from emergency relief to reconstruction and development.

Co-funding and participation by the EU in 4Rs (Repatriation, Reintegration, Rehabiliation and Reconstruction) and DLI (Development through Local Integration) programmes initiated by UNHCR in co-operation with UNDP and the World Bank in post-conflict and protracted refugee situations would realise durable solutions for refugees in the region of origin.

IV Root Causes - Long Term Needs

In the long term there is a need for development assistance addressing the underlying causes of many refugee situations: poverty, conflicts, environmental destruction and human rights violations. Long-term development assistance is a prerequisite for producing the structural, economic and political changes needed in order to prevent future refugee situations.

Development aid targeting projects improving living conditions, creating job opportunities, rehabilitating the environment, providing for better and more equal use of resources, good governance, the promotion of human rights and democratisation can have a stabilising influence on populations and help to avoid the occurrence or recurrence of causes resulting in forced migration. At the same time adequate and flexible development aid will allow humanitarian agencies like UNHCR to pull out in a timely and sustainable manner.

Adding the issue of refugee needs as a cross-cutting concern in EU development policy would acknowdledge the potential of refugees and returnees and allow them to become self-sufficient citizens and at the same time diminish pressure on European asylum systems.

V. The High Level Working Group

The High Level Working Group should preserve its integrated, comprehensive approach to migration and refugee challenges by mobilising political and financial support from foreign, development, humanitarian and social affairs departments. The HLWG should maintain a distinct focus on the search for durable solutions for refugees in specific regional and country situations. This includes support for sustainable reintegration of returnees, local integration of refugees in the region, including through the enhancement of capacities of asylum systems. UNHCR reiterates its call for a balance in refugee protection and migration management and control measures and for the allocation of sufficient resources for the implementation of its activities. Sound partnership with countries of origin and first asylum, based on timely and substantive dialogue, is a prerequisite for successful implementation of the HLWG measures. UNHCR is part of the solution in ensuring durable solutions for refugees - primarily in the regions of origin.

UNHCR
Geneva, September 2002