UNHCR 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, presented by the Commission)

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[1] 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.

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[1] OJ L 281, 23.11.1995, p.31

(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". UNHCR therefore suggests that "refugee status" be defined as the condition of being a refugee.

(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.

2) 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) 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.

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.