



UNHCR comments on the French Presidency proposals for a Council Directive and Council Framework Decision on preventing the facilitation of unauthorised entry and residence

1. The United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the French Presidency initiatives to combat unauthorised entry and residence.¹ UNHCR shares the concern of the Member States of the European Union, and other States, that both criminal and organised trafficking in persons and migrant smuggling is posing a growing problem to States and endangering the lives of those individuals on whose fate these criminal organisations thrive and profit. Whereas the draft Directive defines the offence of intentionally facilitating illegal entry, through trafficking or smuggling, the draft Framework Decision is aimed at harmonising and strengthening among EU Member States the penal framework to prevent this phenomenon.
2. One issue that UNHCR would like to raise at the outset is the question of the relationship between the EU's draft Directive and draft Framework Decision and the ongoing efforts in Vienna under the auspices of the United Nations to elaborate two Draft Protocols in relation to the smuggling of migrants and the trafficking in persons. In UNHCR's view, the two draft Protocols provide a useful opportunity to establish a universal legal framework for addressing effectively a problem that is recognised to be global in scope and nature.
3. One of the important elements of the two draft Protocols is the distinction in legal terms between "trafficking in persons" and "smuggling of migrants". The draft Trafficking Protocol defines "trafficking in Persons" to mean "*the recruitment, transportation, transfer, harbouring of persons, either by the threat or use of abductions, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation, as specified in article ... of this protocol*". In the draft Smuggling Protocol, "smuggling of migrants" is defined as "*the procurement of the illegal entry into or illegal residence of a person in a State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit*".

¹ Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence, EC Official Journal C 253/1; Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence, EC Official Journal C 253/6.

4. UNHCR considers that the distinction that has been made between trafficking in persons and smuggling of migrants is evidently a useful starting point for designing the appropriate legislative or policy framework to deal effectively with the criminal trafficking and smuggling organisations. While UNHCR recognises that the primary objective of the Presidency draft Framework Decision is to prevent “the facilitation of unauthorised entry and residence”, there is a clear need to also set out provisions for ensuring the protection of victims of criminal exploitation by the facilitators – i.e. the trafficking gangs. In this context, it is regrettable that, as a result of States’ increasingly restrictive immigration policies, resorting to the services of smugglers has often become the only viable option for many genuine asylum-seekers who seek sanctuary in the European Union.
5. UNHCR is further concerned that the provisions of the draft Directive and draft Framework Decision do not attempt to reconcile the proposed measures to prevent “the facilitation of unauthorised entry and residence” with States’ existing international legal obligations towards refugees and asylum-seekers. Therefore, whilst supporting the efforts of the European Union and the international community as a whole in combating trafficking in persons and migrant smuggling, UNHCR is seriously concerned that these efforts do not impinge upon the basic human right of individuals to seek and enjoy in other countries asylum from persecution.
6. The lack of proper or adequate documentation on the part of asylum-seekers cannot in itself justify refusal to admit to a State’s territory or summary exclusion from asylum proceedings. The 1951 Convention also provides in Article 31 (1) that States shall not impose penalties, on account of their illegal entry or presence, on refugees who present themselves without delay to the authorities and who show good reasons for their illegal entry and presence. Keeping in mind that there may be a valid justification for a refugee’s unauthorised entry or presence in an asylum country, the European Council stressed in its Tampere Conclusions that the Union’s common policies on asylum and immigration “... must be based on principles which ... offer guarantees to those who seek protection in or access to the European Union”.
7. In the light of the above considerations, UNHCR would urge the Presidency to ensure that anti-smuggling/trafficking measures do not jeopardise refugee protection by incorporating into the Directive and the Framework Decision the following general “savings clause”:

“Nothing in this Directive/Framework Decision shall affect the protection afforded to refugees and asylum-seekers under international refugee law and international human rights law, in particular the compliance of Member States with their obligations under Articles 31 and 33 of the 1951 Convention relating to the Status of Refugees.”

A similar savings clause has been effectively incorporated in both Vienna draft Protocols. UNHCR urges that any future EU legislative instruments related to

combating and penalising the facilitation of illegal immigration, organised crime, trafficking and smuggling, ensure that these instruments do not conflict with, or otherwise undermine, accepted international legal standards for the protection of refugees.

8. UNHCR would further suggest that the scope of draft Article 1 (General Offence) of the proposed Directive should be narrowed down to acts of “facilitating unauthorised entry and residence” committed for the purpose of unlawfully acquiring financial or other material benefits. The element of unlawful payment or benefit is absolutely essential in order to avoid that those assisting asylum-seekers and refugees purely out of humanitarian motives would risk criminal prosecution. Asylum-seekers generally rely on individuals and non-governmental organisations for information, advice and guidance as to the procedures to be followed in applying for asylum. They are often dependent on the care and assistance of their own community or non-profit organisations during the initial period of their arrival in the asylum country. To ensure that Article 1 of the draft Directive preserves humanitarian principles, UNHCR would suggest, at a minimum, the following alternative wording:

“Each Member State shall take measures necessary to ensure that the act of facilitating intentionally, by providing direct or indirect assistance in order to receive unlawful payment or material benefit, the illegal entry or residence in its territory of an alien who is not a national of a Member State of the European Union is regarded as an offence.”

9. UNHCR would also suggest that Article 4 of the draft Directive includes, among persons to be exempted from criminal prosecution, in addition to spouses or relatives, individuals who purely out of humanitarian reasons assist asylum-seekers arriving in an irregular, unauthorised manner in their efforts to seek access to territory and access to the asylum procedure.

(UNHCR Geneva)
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