AIDE MEMOIRE
Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status

General

UNHCR has been very supportive of the EU harmonization process. As a first step towards a common asylum system, meaningful harmonization will ensure coherence in the management of asylum claims. This is clearly in the interest of refugees. By helping counter irregular movements within the European Union, it is also in the interest of States.

UNHCR is very concerned that, at this critical stage of the EU harmonisation process, some crucial international protection standards are in danger of being seriously eroded. Negotiations appear to be veering towards the "lowest common denominator," with Member States more interested in ensuring their own national asylum systems will not have to change, than in providing a harmonized, fair and efficient asylum procedure throughout the EU as intended (and indeed envisaged by the Commission's original draft).
Likely result: the Directive is reduced to a compilation of optional provisions that accommodate the existing and planned practices of EU Member States, including those most seriously at variance with international protection standards, and provides for minimal harmonization.

Key specific issues which give rise to international refugee protection concerns include:

- "Safe third country" criteria that go below any standards that could ensure effective protection and provisions that lack any possibility of individual review before return to a "safe" country, and extension of the concept to countries where the applicant may have no links and which he or she may not even have transited;
- Need for minimum principles and guarantees during border procedures;
- Lack of "suspensive effect of appeals" (or denial of right to remain in the country while an appeal is heard);
- Provisions that channel up to 15 different categories into accelerated procedures;
- Failure to limit or define permissible grounds for detention of asylum-seekers;
- Restrictions on free legal assistance and representation including at appeal, for asylum-seekers arriving irregularly as well as unaccompanied children;
- Lack of specific provisions to ensure the gender sensitivity of procedures;
- Failure to take advantage of the opportunity to introduce a single procedure.

This aide-mémoire highlights UNHCR's principal concerns of the three key issues amongst the above, currently under discussion. UNHCR urges the Council to accommodate these concerns so as to avoid a major departure from accepted principles and standards of international law.

<u>Application of the concepts of first country of asylum and 'safe third country'</u>
(Articles 26 - 28 and Annex II)
The current draft allows asylum-seekers to be returned to any third country where they stayed before reaching the EU without risk of forcible return to a dangerous situation. The text also allows EU States to return asylum-seekers to specific third countries, determined to be generally "safe", if the asylum-seeker has merely transited these countries. It even allows asylum-seekers to be sent to "safe" countries with which they have no connection whatsoever, the only condition being that the country would agree to admit them.

UNHCR believes that the development of these concepts in the draft Directive has the effect of unilaterally shifting responsibilities to countries outside the EU. UNHCR is strongly opposed to the extension of the 'safe third country' concept to countries where an applicant has no links and where she or he may never even have set foot, but where she or he merely "has" or "would have" an opportunity to seek protection and would be "admitted." **There is no basis in international law for forcing asylum seekers to seek protection in a country where they have never been**. Nor does the mere fact that someone has transited through a country in principle constitute such a meaningful link. *(Article 28)*

Under international law, the primary responsibility for international protection remains with the State where an asylum claim is lodged. Outside the context of multilateral agreements (such as Dublin II) that regulate the allocation of responsibilities for refugee protection between countries with similar asylum systems, a transfer of such responsibility can be envisaged under certain circumstances: where a **meaningful link** or connection exists which would make it reasonable for an applicant to seek asylum in that third State; and where that State is safe or, in other words, capable and willing to determine needs for international protection and to provide **effective protection.** *(Article 28)*

A third country considered to be offering effective protection is in principle a country that has ratified and fully complies with the 1951 Convention and/or its 1967 Protocol or, at least, has developed a practice akin to the 1951 Convention. An international organization, such as UNHCR, cannot be equated with a State and cannot be considered to provide "effective protection". *(Art. 27 and Annex II)*

The mere fact that an individual is recognized as a refugee does not necessarily mean he or she is receiving "effective protection" in the country concerned, and therefore can be automatically returned there. Effective protection can certainly not be equated solely with respect for the principle of "non-refoulement" – the guarantee not to be returned to a situation of danger. *(Article 26)*

The 'safe third country' concept should be applied only after an individual assessment of whether a particular third country can be considered safe for a particular asylum seeker. A third country may be safe for one applicant but not for another with a different profile. The burden of proof that a third country will, in reality, provide effective protection falls on the State seeking to transfer responsibility for an asylum claim. *(Article 28)*

Border procedures

(Articles 35-35A)

The draft Directive foresees a special procedure, involving detention and reduced safeguards, for asylum-seekers who apply for asylum at the border. Asylum-seekers coming from so-called "safe" third countries can be denied access to the border procedure altogether. They can immediately be returned, without any examination of their claim.

In UNHCR's view, it is only logical and fair that all asylum-seekers, irrespective of whether they apply at the border (including air and sea ports), or further inside a country, benefit from the same basic principles and guarantees. UNHCR is concerned that, according to the current draft, all asylum-seekers can be confined for a period of up to 4 weeks in the border procedure, without any possibility of having their detention reviewed – and with no exceptions provided for people with special needs such as separated children, women, victims of torture and other traumatized people. (Article 35)

The current text allows asylum-seekers arriving from designated 'safe' third countries to be denied access to an asylum procedure (and the territory) altogether. **This may be at variance with international refugee law and, as such, unacceptable to UNHCR.** If a person seeks asylum, some form of determination of the claim must be provided for, if the 1951 Refugee Convention is to function properly. As the text currently stands, the decisions to refuse entry and remove the

applicant may be taken without him or her being given an opportunity to bring forward reasons why he or she might not, in reality, be safe in the third country.

Right to remain during review and appeal proceedings
(Article 39 and Article 23, paragraph 4)
The draft Directive defines 15 categories of cases in which EU States may curtail the right of an applicant to remain in the country while an initial rejection of his or her asylum application is being reviewed. By allowing such a broad range of exceptions to the fundamental principle of an effective remedy, the principle itself becomes the exception.

UNHCR is seriously concerned at the extensive possibilities for States to derogate from the principle of giving asylum-seekers the right to remain during review and appeal – the so-called "suspensive effect." Given the potentially serious consequences of an erroneous decision at first instance, the suspensive effect of an appeal is a core protection principle, stemming from the principle of non-refoulement. Many refugees in the EU today were only recognized during the appeal process. In several EU countries, between 30 and 60 percent of refugees are only recognized after their initial rejection is overturned on appeal.

UNHCR is alarmed by the exceptionally wide range of situations (listed earlier in Article 23[4]) in which suspensive effect on appeal may be denied. The number and range of these exceptions (15 in all) are so broad that in effect they become the rule. They go far beyond what could be considered 'manifestly unfounded' or 'clearly abusive' cases – and may equally affect refugees who are confused, traumatized, or simply ill-informed about the asylum process. As Article 39(2)(b) and Article 23(4) currently stand, an application determined to be unfounded at first instance would rarely be open to the scrutiny of an independent review body. **This would mark a serious deterioration of standards in most EU States and greatly increase the probability of miscarriage of justice**.

In UNHCR's view, the automatic application of suspensive effect of an appeal may be lifted in the case of certain 'manifestly unfounded' or 'clearly abusive' claims, as defined in UNHCR's Executive Committee Conclusion No 30. But even in these cases, an independent – albeit simplified – review should be possible.

To ensure that such a review does take place, prior to the implementation of a rejection, UNHCR suggests that an explicit provision is added stating that the decision to allow the applicant to remain pending the outcome of an appeal will be based on a review of the case and an assessment of the likely success of the appeal. In order to be meaningful, the applicant should always be permitted to stay until that decision has been taken.

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