UNHCR's observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM(2000) 578 final, 20 September 2000)

Introduction

1. On 20 September 2000, the European Commission issued a proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (Document COM(2000) 578 final). The adoption of this Directive is one of the measures envisaged by the Conclusions of the Presidency at the Tampere European Council and by the Vienna Plan of Action, for the purpose of establishing an area of freedom, security and justice in the Union, as mandated by Article 63 of the Amsterdam Treaty.

2. Consistent with the 1951 Convention and the 1967 Protocol, all asylum-seekers must be granted access to fair and effective procedures for determining their protection needs.[1] In this connection, UNHCR is bound to recall that it has in the past raised serious objections regarding the possibility that access to asylum procedures may be denied on grounds of nationality, as allowed under the Protocol on Asylum for Nationals of Member States of the European Union. UNHCR hopes that Member States will continue to examine any application for asylum that may be submitted to them by any person who is not a national of the Member State concerned.

3. UNHCR has repeatedly emphasized the importance of States adopting appropriate procedures for the determination of refugee status, as the enjoyment by refugees of all the rights to which they are entitled under international law, and specifically under the 1951 Convention and the 1967 Protocol, is dependent upon their status as refugees having been formally recognized. In addition, both UNHCR and States have an interest in the early identification of those not in need of international protection, as this is critical for the credibility of the institution of asylum.

4. UNHCR has further emphasized that refugee status determination and asylum procedures must be both fair and efficient, and has insisted that efficiency should not be achieved at the expense of fairness. UNHCR has also recalled that, while

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[1] Cf. General Assembly resolutions 48/116 of 20 December 1993, paragraph 4; 49/169 of 23 December 1994, paragraph 5; 50/152 of 21 December 1995, paragraph 5; and 51/75 of 12 December 1996, paragraph 4; and EXCOM Conclusions Nos. 6 (XXVIII) of 1977; 15 (XXX) of 1979, paragraph (h) (i); 22 (XXXII) of 1981, section II (A); 65 (XLII) of 1991, paragraph (o); 68 (XLIII) of 1992, paragraph (g); 71 (XLIV) of 1993, paragraph (i); 73 (XLIV) of 1993, paragraph (c); 74 (XLV) of 1994, paragraph (i); and 87 (XLX) of 1999, paragraph (j).

efficiency can be obtained by streamlining procedures, it is also indispensable that adequate resources be allocated to the processing of asylum requests and that those involved in this process be appropriately trained.

5. Member States of the European Union have had in place procedures for determining refugee status for several decades. Though significant differences persist and the level of guarantees is far from uniform, it must be acknowledged that European practice has, over the years, contributed positively towards setting international standards in this area. Recent developments in the law and practice of Member States have, however, not always advanced the international refugee protection regime. UNHCR has noted, with concern, a gradual shift of emphasis away from the identification of persons in need of protection towards the deterrence of real or perceived abuse, if not sheer deterrence of arrivals of asylum-seekers. Concern about growing backlogs and the difficulty of agreeing on burden-sharing formulas have resulted in policies of deflection, with less attention paid to key issues of responsibility and international solidarity. Accelerated procedures, while acceptable in principle, have been expanded to become, in some jurisdictions, the rule rather than the exception. Perhaps most worrying of all is the climate of mistrust and suspicion within which asylum procedures, more often than not, operate. This adversarial environment must be transformed by the restoration of mutual confidence in the system for the determination of asylum claims, if this system is to function fairly and effectively. The Community instrument on procedural standards has the potential to assist in achieving this.

6. Against this backdrop, UNHCR must commend the policy vision embodied in the Communication on a common asylum procedure and a uniform status for persons granted asylum, issued by the European Commission on 22 November 2000. Likewise, UNHCR appreciates the comprehensiveness of the present proposal and supports its central objectives to:

(i) provide for measures designed at ensuring the efficiency and speediness of asylum procedures, including the introduction of time limits for deciding asylum requests;

(ii) establish minimum safeguards to ensure the fairness of the decision-making process;

(iii) lay down specific procedural safeguards for persons with special needs;

(iv) establish a common approach as regards both the definition and the application of the notions of “inadmissible” and of “manifestly unfounded” claims; and

(v) lay down minimum requirements for ensuring a good standard of decision making.

7. The Commission’s proposal constitutes a serious and valuable attempt to strike the right balance between the imperatives of fairness and those of efficiency. As such, it provides a sound basis for discussion. UNHCR welcomes a number of provisions contained in the proposal, particularly those related to the basic principles

and guarantees and the regular procedure, which generally reflect the international standards laid down in, *inter alia*, the resolutions of the General Assembly of the United Nations and the Conclusions of the Executive Committee of UNHCR. The following observations therefore focus on those areas which require clarification or amendment in order to ensure full conformity with those international standards, as well as the realisation of those objectives which the Commission has set for its own work.

8. UNHCR's comments are presented in the order of the proposal's chapters and sections.

Scope and definitions (Chapter I of the proposal)

9. UNHCR notes that the proposal relates only to procedures for determination and withdrawal of refugee status under the 1951 Convention and 1967 Protocol. The text envisages 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 instruments[2], but does not go farther. UNHCR believes that, by thus leaving at the level of a mere possibility a comprehensive treatment of all applications for protection, an important opportunity is being missed.

10. It is in the interest of Member States, as well as of asylum-seekers, that the same minimum guarantees apply to all procedures leading to the grant of any form of international protection. As the Commission intends to table its proposal on minimum standards on the qualification of persons as refugees and on subsidiary forms of protection in the very near future, it would be most useful to consider, in parallel to the definition of protection grounds and criteria, all related procedural aspects.

11. The Commission's Communication on a common asylum procedure and a uniform status explores the adoption of a system whereby all international protection needs arising from all forms of risks would be considered within a single procedure. 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 protection needs cannot, therefore, be made in a compartmentalised fashion. Each case must be examined in its totality, and this can be better achieved if the claim is considered in a single procedure. Furthermore, UNHCR believes that a single asylum procedure will help to increase speed and reduce the costs of decision-making in asylum matters.

12. Following the same logic, UNHCR finds the definition of "asylum" provided in Article 2 (b) of the proposal unnecessarily restrictive. Asylum, which is the protection extended by a State to a foreign national or a stateless person in need of it, is broader than and cannot be equated with the specific protection afforded to refugees under the 1951 Convention and 1967 Protocol. As for "refugee status", defined in Article 2(i), UNHCR wishes to point out that this phrase 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

[2] Article 3.3.

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 phrase "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee.

13. Finally, under this Chapter, Article 2 (l) defines "[w]ithdrawal of refugee status" as the decision by a determining 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. This provision merits two important observations:

(i) Article 1(C) of the 1951 Convention deals with "cessation" of refugee status, a notion which is different from that of "withdrawal", even though, in practice, the latter accompanies the former. As is known, a person ceases to be a refugee as soon as any of the circumstances envisaged in Article 1(C) become applicable. The decision determining the cessation of refugee status is, as well as the decision determining its recognition, declaratory in nature. Given that Article 1 of the Convention cannot be the object of reservations or amendments of any kind, UNHCR would recommend use of the word "cessation" to describe a decision based on Article 1(C) of the said Convention;

(ii) The exception laid down in the second paragraph of Article 33 of the Convention falls outside the scope of this proposal, which relates to procedures for granting and withdrawing refugee status. Article 33(2) of the Convention denies, in very exceptional cases, the benefit of the *non-refoulement* rule to persons who are refugees within the meaning of Article 1(A) of the Convention. Withdrawal of refugee status is not at issue in the operation of this exceptional provision.

Basic principles and guarantees (Chapter II of the proposal)

14. 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 they can have physical access to the territory of the State where they are seeking admission as refugees[3] 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.

15. UNHCR therefore appreciates:

(i) that the proposal stipulates that Member States shall ensure that the applicant for asylum has an effective opportunity to lodge an application as early as possible;[4]

[3] The granting of physical access to the territory does not necessarily imply the granting of legal access to it, which is done by the issuance of a leave or permit to enter or to land.

[4] Article 4.2.

(ii) 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;[5] and

(iii) that applicants for asylum shall be allowed to remain at the border or on the territory of the Member State in which the application for asylum has been made or is being examined, as long as it has not been decided on.[6]

16. On this last point, however, UNHCR is of the view that the proposal can be improved in two ways. Firstly, the text should make it clear that the stay of an asylum-seeker at the border of a Member State must be for the shortest possible time, as it is clear that this is not a conducive environment for the determination of refugee status. Secondly, there should be no ambiguity as to the meaning of "as long as it has not been decided on" in Article 5. An applicant for asylum must be allowed to remain on the territory of the State in which his or her application has been lodged or is being examined until such time as a final decision is reached on this application, and the wording of Article 5 should reflect this principle with full clarity.

17. UNHCR notes with concern that it is proposed to restrict the basic guarantees contained in Articles 8(6) and 9(3) of the proposal to the regular procedure, described in Articles 24 to 26. The opportunity for an asylum-seeker, not only to hear (as per Article 8(2)), but also to consult the transcript of his or her personal interview should be granted in all procedures in which a personal interview is foreseen. Likewise, UNHCR sees no reason to restrict the presence of legal advisers or counsellors during such interviews. Their advice may be equally relevant during the course of admissibility or accelerated procedures as in the regular procedure. It may, as a matter of fact, be more urgently needed where a possible outcome of the interview is swift removal to a third country, or where the interviewer operates under the pressure of tight time constraints and/or other guidelines.

18. Article 11 of the proposal deals with the detention of asylum-seekers. 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. If it is deemed indispensable to address the subject within the context of this Directive, then a clear cross-reference should be made to the future Community instrument laying down minimum standards for the reception of applicants for asylum in Member States, and the latter instrument should deal in detail with the full range of procedural guarantees to which detained asylum-seekers should be entitled, and with the conditions of their detention. In doing so, the Commission will find valuable guidance in the UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers, of February 1999.

19. These UNHCR Guidelines make extensive references to alternatives to detention, including (though not exclusively) for the benefit of minors and other vulnerable persons seeking asylum. This useful notion must find its way into Community law provisions in one instrument or another.

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[5] Article 3.1.
[6] Article 5.

20. Turning to (exceptional) grounds for detention, which are the principal subject matter of Article 11 of the proposal, UNHCR wishes to recall that its Executive Committee has affirmed that detention of asylum-seekers should normally be avoided, and that if necessary, it may be resorted to only on grounds prescribed by law and only for specifically defined purposes. These 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. The Executive Committee has also recommended that detention measures should be subject to judicial or administrative review.[7]

21. Though the wording may differ slightly, the provisions of Article 11(a), (b) and (c) of the Commission's proposal are, in UNHCR's view, compatible with Executive Committee criteria. The proposal is also consistent with UNHCR's recommendations insofar as it makes provision for the review of detention measures.[8]

22. On the other hand, UNHCR would like to seek clarification of the import of the provision, in Article 11(d), that an asylum-seeker may be detained "in the context of a procedure to decide on his right to enter the territory". UNHCR observes that such procedure is neither defined nor explicitly regulated in the proposal, and is, therefore, concerned that the provision in question may allow for the detention of an asylum applicant for the duration of the asylum procedure, in the absence of any ground to believe that s/he is seeking unlawful entry for any other purpose. This would raise serious questions regarding the compatibility of Article 11(d) with the Executive Committee standards referred to above and, importantly, with the provisions of Article 31 of the 1951 Convention.

23. On a different score, the importance placed in the proposal on decision-makers having access to precise and up-to-date information on countries of origin of asylum-seekers is noted with appreciation. It is, however, of concern that, under Article 13 of the proposal, some of the information on which country-of-origin assessments are made may be withheld from public scrutiny, and even from the scrutiny of reviewing bodies. In UNHCR's view, this restriction may seriously prejudice the fairness of the asylum procedure.

24. UNHCR is equally pleased to note that the proposal affirms, among the basic principles and guarantees supporting fair and efficient asylum procedures, the need for determining authorities at all levels to be properly and regularly trained. UNHCR queries, however, why references in Article 14 to qualify training as "basic" may be necessary. In UNHCR's experience, on-going and advanced training may be equally necessary to the successful operation of fair and efficient asylum procedures.

25. Finally regarding this Chapter, UNHCR would like to suggest that Article 15 of the proposal be complemented by a provision to the effect that hearings at all levels should be held *in camera* – unless the applicant requests otherwise – with a view to protecting the confidentiality of information regarding the applicant, his family and/or

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[7] Conclusion No. 44 (XXXVII) of 1986.
[8] Article 11.2.

his predicament. *In camera* hearings also facilitate the provision of full and frank testimony. Incidents of humiliation, torture and shame that often characterise the refugee experience are less likely to be recounted in the absence of a certain level of privacy for the applicant.

Admissibility (Chapter III of the proposal)

26. UNHCR is pleased to note that the proposal introduces a clear distinction between, on the one hand, admissibility procedures – which do not go into the substance of an asylum application – and, on the other hand, procedures that deal with the substantive aspects of the application, whether they are regular or accelerated. This is a fundamental distinction, disregard for which has led to confusion and weakened protection in some domestic legislation in the past. It is the case, in particular, that some States consider as "inadmissible" those asylum claims that appear to be manifestly unfounded. This practice is inconsistent not only with the provisions of the proposal, but indeed with the guidance provided by the Executive Committee of UNHCR, which (...) *recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive*[9].

27. UNHCR notes with satisfaction the recognition inherent in Article 18 of the proposal that the allocation among States of responsibility for examining an asylum application is the essential underlying rationale for decisions on admissibility. This is particularly welcome as it is clear to UNHCR, as set out in earlier comments[10], that State authorities receiving an asylum application must deal with the substance of this claim in all cases, except where another State assumes responsibility for doing so.

28. Since the agreement of another State cannot be presumed, that 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 in addressing refugee problems. As the preamble to the 1951 Convention and a number of Executive Committee Conclusions make clear[11], refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international co-operation. Perhaps most importantly for UNHCR, as for refugees, the overriding consideration with respect to the need for consent is the basic protection concern that, if no State assumes responsibility for an asylum-seeker, s/he faces at best indefinite "orbit" between national jurisdictions, and at worst *refoulement*.

29. In the light of these basic considerations, UNHCR makes a distinction between two types of permissible limitations on access to a substantive refugee status determination procedure.

30. In the first type of case, access to the substantive procedure may be denied to a person who has already found protection in another country – a "first country of

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[9] Conclusion No. 30 (XXXIV) of 1983 on The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, para. (e)

[10] See "Revisiting the Dublin Convention: Some reflections by UNHCR in response to the Commission staff working paper", January 2001.

[11] See fourth preambular paragraph of the Convention and EXCOM Conclusions from No. 11(XXIX) of 1978 up to, and in particular, No. 85(XLIX) of 1998 and No. 87(L) of 1999.

asylum"– provided that such protection continues to be available.[12] This exception is reflected in the Commission's proposal, which provides that Member States may dismiss a particular application for asylum as inadmissible if the applicant has been admitted to that other country as a refugee or for other reasons justifying the granting of protection, and can still avail himself of this protection.[13]

31. The second type of case is commonly referred to as the "safe third country" exception, and addresses the situation of a person whose asylum application has not yet been examined in substance by any State. Commenting on the "safe third country" notion, UNHCR has made it clear that a country where the person could have found protection is not a first country of asylum. Accordingly, the mere circumstance that the applicant has been in a third country where he could have sought asylum does not provide sufficient grounds for refusing to consider the application in substance.[14] 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 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 he wishes to request asylum should, as far as possible, be taken into account;

(iii) That the third country agrees to admit the applicant to its territory and to consider the asylum claim.[15]

32. As regards the notion of "safety", UNHCR has often noted 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 acquired.

33. UNHCR has also repeatedly 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 any circumstances. This is why UNHCR insists 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, and strongly advises against the use of "safe third country" lists. Articles 21 (2) and (3) and the first sentence of Article 22 of the proposal should, in UNHCR's view, be amended accordingly.

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12 EXCOM Conclusions No. 15 (XXX) of 1979; and No. 58 (XL) of 1989.

13 Articles 18(b) and 20.

14 EXCOM Conclusion No. 15 (XXX) of 1979, paragraph (h)(iv).

15 Conclusions No. 15 (XXX) of 1979, paragraph (h)(iv); No. 58 (XL) of 1989, paragraph (f); and No. 85 (XLIX) of 1998, paragraph (aa).

34. 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" on an individualised basis.

35. On the other hand, UNHCR cannot, for the reasons stated above, accept a procedure (as per section II of Annex I) for the purpose of designating a country as "safe" in general. Furthermore, UNHCR is bound to raise a strong objection against the designation of a country as a "safe third country", even with regard to a particular individual, if that country has not ratified the 1951 Convention and the applicant whose admissibility is in question is seeking the protection of that Convention. UNHCR is not only bound by the terms of its own Statute[16] to promote accessions to the Convention, but perhaps more importantly, can only effectively fulfil its mandate of supervising the Convention's application in those States where it has been ratified.[17]

36. As noted above, the country to which an asylum application has been submitted is primarily responsible for considering it. Accordingly, if that country wants to transfer that responsibility to a third country, in addition to securing the agreement of that country to receive and consider the asylum application, it must establish that such third country is "safe" with respect to that particular asylum-seeker. The burden of proof does not lie with the asylum-seeker (to establish that the third country is unsafe), but rather with the country which wishes to remove the asylum-seeker from its territory (to establish that the third country is safe). The provision in Article 22 (c) of the proposal is problematic in this regard, as it unduly places the burden of the proof on the applicant.

37. UNHCR is further concerned that, pursuant to Article 22(a) of the proposal, 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 fact that the applicant has been merely 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. This holds true irrespective of whether the entry of the person in the territory of a State was regular or not. Even a person who was regularly admitted to the territory of a State cannot be assumed to have established a meaningful link with that State if he has only remained there for a short period of time. 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

[16] See Article 8(a) of UNHCR's Statute.
[17] See Article 35 of the 1951 Convention.

provision, which may well be read as allowing the removal of asylum-seekers to countries of mere transit.

38. Finally, UNHCR must express a serious reservation vis-à-vis the provision, in Article 22(b), that Member States may deny an applicant access to the procedure and remove him 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. As explained above, this approach is clearly inappropriate from an international protection point of view, as it may easily lead to the creation of "orbit" cases and may even have more serious consequences in terms of refugee protection – including potential breaches of the principle of *non-refoulement*.

Substantive determination procedures (Chapter IV of the proposal)

Section 1. The regular procedure

39. Prompt decisions on asylum applications are clearly in the interest of both States and asylum-seekers. UNHCR welcomes, therefore, the establishment, in Article 24 of the proposal, of mandatory time limits for examination of applications for asylum by the determining authority. To be fully consistent with the wording of Article 24 (2), and with the general intent of this section, it is recommended that reference be made to "decisions", rather than to "examination", in Article 24 (1).

40. Derogation from the provisions of Articles 7 and 8 made possible by Article 26(3), which deals with procedures for withdrawal, cessation or cancellation of refugee status, have the potential to lead to significant unfairness unless the circumstances in which such derogation can be invoked are fully circumscribed in the proposal. The Explanatory Memorandum makes it clear that this clause is intended to address situations in which the guarantee to be informed and the right to a personal interview are impossible to implement because the person in question has voluntarily re-established himself in his country of origin – which is, indeed, a motive for cessation of refugee status foreseen in Article 1 C (4) of the 1951 Convention. UNHCR would like to recommend that this important clarification be imported into the text of Article 26 itself, so as to avoid any misunderstanding.

Section 2. The accelerated procedure

41. The principal objective of refugee status determination is to ensure the proper and expeditious identification of persons in need of international protection. The existence of accelerated procedures to deal with the so-called "manifestly unfounded" claims should not, therefore, distract the attention of Member States from the overall need to streamline procedures and make them more efficient for all applicants.

42. This said, UNHCR recognises that some applications deserve to be handled with special diligence. Thus, applications from unaccompanied minors and other persons in a particularly vulnerable situation should be examined and decided upon on a priority basis. Prompt decisions should also be made on those applications which, upon a first cursory examination, appear to be manifestly well-founded. It would be

unfair, indeed, to subject a refugee to long waiting periods once the determining authority possesses the necessary elements to make a swift, positive determination on his behalf.

43. An asylum procedure can be accelerated in a number of ways, including in particular: by giving priority to the examination of specific categories of applications; by establishing shorter, but reasonable, delays for appealing a negative decision; by reducing the time required for the completion of the appeals process; and by simplifying and/or prioritising appeals and reviews. UNHCR would generally advise against the creation of special, parallel procedures for dealing with certain applications. A parallel "accelerated procedure" that deals with only one aspect of an application – e.g., the "manifestly unfounded" character thereof – may paradoxically result in deferring a decision on the full substance of this application. This situation, which contradicts the very purpose of an accelerated procedure, may well arise, in UNHCR's view, from the combined application of Articles 34(3) and 36 of the proposal.

44. The Executive Committee of UNHCR has acknowledged that procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure[18]. "Manifestly unfounded" or "clearly abusive" applications are defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum.

45. In conformity with this guidance from the Executive Committee, UNHCR would like to make a few observations regarding some of the grounds on which, according to the Commission's proposal, an application may be treated as manifestly unfounded.

46. One such ground is the circumstance that the applicant has produced no identity or travel document and has not provided sufficient or sufficiently convincing information to determine his identity or nationality, and there are serious reasons for considering that the applicant has in bad faith destroyed or disposed of an identity or travel document that would help determine his identity or nationality.[19] With regard to this provision, UNHCR must stress that the asylum-seeker's lack of documentation or use of forged documents to escape from persecution or other threats to his or her life or freedom does not, by itself, render the application fraudulent nor warrant negative conclusions about the genuineness of the refugee claim. Given the specific circumstances in which refugees find themselves, they are often unable to obtain valid travel documents and are compelled to use forged documents in order to escape persecution or danger. It is, accordingly, recognised in Article 31 of the 1951 Convention that asylum-seekers who enter or remain illegally should not be penalised on that account.

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[18] Conclusion No. 30 (XXXIV) of 1983 on The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum

[19] Article 28.1(b).

47. The proposal also identifies as manifestly unfounded an application that is made at the last stage of a deportation procedure and could have been made earlier.[20] UNHCR wishes to stress, in this respect, that the mere fact that an asylum application has been submitted after an expulsion order was made against the person is not sufficient reason to treat that application as abusive. In fact, the need for the person to apply for asylum may, precisely, arise at the time when he is under threat of being expelled. Although UNHCR realises that the clause contained in the proposal relates to applications "made at the last stage of a deportation procedure", and hence does not necessarily support the above assumption, it would be useful to further clarify this notion to avoid any possible misinterpretation.

48. Where an application does not raise issues that justify protection on the basis of the Geneva Convention or Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, it may also, according to the proposal, be dismissed as manifestly unfounded.[21] UNHCR wishes to recall the language of the above-mentioned Conclusion No. 30 of the Executive Committee, which refers to applications "not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum". Obviously, the fear of treatment prohibited by Article 3 of the European Convention would be such an "other" criterion justifying the granting of asylum. However, this criterion does not exhaust the range of grounds upon which a form of protection, complementary to that offered by the 1951 Convention, may be granted. As the Commission prepares to table a draft Community instrument on precisely these complementary, or subsidiary, forms of protection, UNHCR is concerned that the current wording of Article 28.1(d) may pre-emptively, and unnecessarily, limit the scope of that future instrument.

49. An application may also be deemed manifestly unfounded if the applicant is from a "safe country of origin", as defined by Articles 30 and 31 of the proposal in accordance with the guiding principles set out in Annex II thereto.[22] UNHCR acknowledges that applications for asylum may be made by persons coming from countries in which there is, in general terms, no serious risk of persecution. UNHCR has not objected, in principle, to the use of this notion as a procedural tool to assign these applications to accelerated procedures.

50. Article 31 acknowledges, albeit obliquely, that the "safe" character of the country of origin cannot be established once and for all, but must be assessed with regard to each individual applicant. This Article raises, however, some concern in that it places upon the asylum-seeker an evidentiary burden of almost unbearable weight. In UNHCR's opinion, once an application has been channelled into an accelerated procedure because the applicant originates from a country identified as "safe", the determining authority must still examine every aspect of the claim and determine whether, in the individual case at issue, a well-founded fear of persecution or other valid ground for asylum exists. The "unsafe" character of the country of origin for that applicant will be proved when s/he shows that s/he has a well-founded fear of being persecuted if returned there.

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[20] Article 28.1(c).
[21] Article 28.1(d).
[22] Article 28.1(e).

51. UNHCR finds the criteria for designation of a country of origin as "safe", as set out in Annex II to the proposal, generally sound and fair. UNHCR observes that it is likely that very few countries in the world will be found to meet all these criteria. The procedure for designation, in section II of Annex II, lists information from UNHCR as a valuable source in a general assessment of the observance of human rights standards by countries, which Member States propose to list as "safe". UNHCR wishes to point out, however, that it gathers and disseminates information (notably in the form of eligibility guidelines) primarily about those less than safe countries that do produce refugees.

Appeals procedures (Chapter V of the proposal)

52. UNHCR has consistently stressed that multi-layered procedures allowing for protracted review or appeal proceedings unduly hamper the efficient functioning of asylum systems. It has commented in the recent past [23] that a streamlining of such systems would be desirable, and that, generally, two levels of appeal with the necessary safeguards would be adequate. The first appeal level may involve consideration of fact and law, and the second (possibly on a "with leave" basis) questions of law only. UNHCR notes with satisfaction that the proposal's provisions on appeals recommend a very similar structure.

53. Reducing the number of appeals presupposes, of course, high quality in the first instance decision-making. Furthermore, in the event of a negative decision, the reasons for the decision and information on the possibility and procedures for review and/or appeal and the relevant time limits must be given in a language that the person understands. UNHCR appreciates that these important guarantees are contained in the proposal.[24]

54. UNHCR's main concern regarding this Chapter in the proposal relates to Article 33(2). This Article allows for derogation from the rule that appeal shall have suspensive effect in cases where:

(i) the claim is rejected on "safe third country" grounds[25]

(ii) the claim is dismissed as manifestly unfounded[26]

(iii) there are grounds of national security or public order.[27]

55. These possible derogations are of serious concern to UNHCR. Withholding of deportation until a final decision is reached on an asylum application is a fundamental guarantee, given the potentially devastating consequences of an erroneous determination. This requirement must be seen in the light of the absolute respect that the principle of *non-refoulement* commands. UNHCR strongly insists that the principle of suspensive effect of appeals against negative decisions on asylum must

[23] See, e.g., UNHCR's comments on the Commission's working document "Towards Common Standards on Asylum Procedures", May 1999.
[24] Article 7 paragraphs (d) and (e).
[25] Article 33.2(a).
[26] Article 33.2(b).
[27] Article 33.2(c).

apply regardless of whether such decisions are taken in regular or in accelerated procedures.

Conclusion

56. UNHCR appreciates the resolve of Member States of the European Union, and the initiative of the Commission, to harmonize their asylum procedures within the framework of the Amsterdam Treaty. The adoption of a Community instrument on minimum standards on procedures for granting and withdrawing refugee status will, hopefully, result in fairer and more efficient asylum procedures throughout the Union. The present Commission proposal represents a serious attempt at striking the right balance between the imperatives of fairness and those of efficiency and, as such, it provides a sound framework for the legislative negotiations ahead.

57. At the same time, UNHCR has serious concerns about an approach to harmonization whereby exceptions to fundamental principles of refugee protection may be tailored to accommodate lower standards found in the domestic legislation and practice of individual Member States. The risk of downward harmonization will, inevitably, be higher if the Directive contains significant scope for derogation or wide margins of discretion. It is UNHCR's strong hope that best practice, in full conformity with international standards, will be allowed to prevail.

58. It is with this concern in mind that UNHCR has offered the foregoing observations. On some aspects of the proposal, such as the notions of "safe third country" and "safe country of origin" or accelerated procedures, UNHCR has warned that procedural devices risk to overshadow the basic concepts and principles which refugee status determination is supposed to serve, and it urges Member States to re-focus their attention on the latter. UNHCR looks forward to a continuing dialogue with the Commission and Member States on these and other topical issues, including those – such as detention of asylum-seekers or complementary forms of protection – that are being addressed by other, closely related Community instruments.

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