



**UNHCR observations on the Draft Council Directive defining the facilitation of unauthorised entry, movement and residence and the Draft Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence**

1. In a note dated 22 September 2000, UNHCR shared with the Council, the Commission and the Parliament its views on the original proposal of the French Presidency concerning the above two instruments. In a follow-up letter addressed to the French Presidency on 14 November 2000, UNHCR reiterated its serious concern that the provisions of the draft Directive and draft Framework Decision did not attempt to reconcile the proposed measures to prevent the facilitation of unauthorised entry, movement and residence with States' existing international legal obligations towards refugees and asylum-seekers.

2. To ensure that the proposed Council instruments do not inadvertently jeopardise refugee protection, UNHCR has made two specific proposals: (i) that a general "saving clause" providing for respect for international refugee law and international human rights law be incorporated into the two instruments; and (ii) that the definition of the general offence with which the proposed Directive is concerned be narrowed down to acts of facilitating unauthorised entry and residence committed for the purpose of unlawfully acquiring financial or other material benefits.

3. In making the above proposals, UNHCR was guided, *inter alia*, by the principles on refugee protection embodied in the 1951 Convention, in particular in Article 31, as well as by the international legal framework set out by the United Nations Convention against Transnational Organised Crime and its two Protocols (the Protocol against Smuggling and the Protocol against Trafficking). The Protocol against Smuggling, which is of direct relevance to the proposed Council instruments, contains a number of provisions designed to ensure the rights of refugees and asylum-seekers are adequately protected. For example,

- the acquisition of financial or other material benefits is a key definitional element of smuggling as a criminal offence;
- there is a provision expressly exempting from criminal liability migrants who have been the object of any of the smuggling offences set out in the Protocol;
- there is a "saving clause" designed to safeguard the rights of asylum-seekers and refugees under the 1951 Convention and the 1967 Protocol;

4. UNHCR has been informed that its proposals have, in some measure, been favourably received by members of the Council, and that a “saving clause” has been reflected in the latest version of the draft Framework Decision under consideration. On the understanding that the debate on these instruments is still ongoing, UNHCR wishes to strongly reiterate its position that:

- The Directive include mandatory wording reflecting the principle that penalties should not be imposed to persons who, for exclusively humanitarian reasons, have facilitated the unauthorised entry of an asylum-seeker into the territory of a Member State. UNHCR urges that this be done through the incorporation of the “financial gain” element in the definitional criteria of the offence. UNHCR recalls that this formula has been included in the Protocol on Smuggling of Migrants, to the United Nations Convention against Transnational Organised Crime, and it also figures in Article 27(1) of the Schengen Implementing Agreement.
- The Directive include a provision expressly exempting from criminal liability asylum-seekers and refugees who may be the object of the criminal offence defined in that instrument.
- A general “saving clause”, recalling the international obligations of Member States towards refugees under refugee and human rights instruments, be incorporated not only in the draft Framework Decision, but also in the draft Directive.

5. UNHCR’s essential conclusion is that unless the provisions of these otherwise legitimate immigration control instruments are accompanied by appropriate safeguards, the protection of asylum-seekers, some of whom must resort out of necessity to the services of smugglers, may be prejudiced.

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