



**UNHCR**  
The UN Refugee Agency

Communication from the European Commission  
on  
A Common Policy on Illegal Immigration  
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**UNHCR's Observations**

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## Executive Summary

The European Union and its Member States generally acknowledge the positive value of international migration when it takes place in a regulated and predictable manner. They are alarmed, however, by irregular migratory movements. Indeed, in the face of the perceived threat posed by this phenomenon, States have introduced a series of measures to deter or prevent migrants from gaining unauthorised entry into their territories. The blanket enforcement of such measures makes it increasingly difficult for refugees and asylum-seekers to secure access to international protection. With this concern in mind, UNHCR must stress that the Action Plan contained in the Commission *Communication on a Common Policy on Illegal Immigration* and subsequently adopted by the Member States strike a proper balance between migration control priorities and refugee protection imperatives.

(i) In implementing their **visa policies**, Member States should give due humanitarian considerations to the particular situation in which persons who have to flee from persecution in their country of origin find themselves. In certain situations, States could facilitate the legal entry of refugees through embassy procedures for processing asylum claims within countries of origin.

(ii) UNHCR would welcome the development at the EU level of a networked system for **information gathering, analysis, exchange and dissemination**. Such a system could draw usefully on UNHCR's wide-ranging operational experience as lead international organisation in complex situations of population displacement.

(iii) **Immigration and airlines liaison officers** tasked with pre-embarkation controls should have clear instructions and adequate training for dealing with cases which might come within the purview of the international refugee protection regime. UNHCR stands ready to provide its expertise in the design and implementation of such training programmes.

(iv) **Financial and technical assistance programmes** for third countries aimed at stemming irregular immigration into the European Union should be balanced with adequate support for the establishment or strengthening of asylum systems, reception capacities and refugee integration programmes.

(v) Credible, impartial and accurate **awareness-raising campaigns** in countries of origin and transit have an important role to play in reducing irregular migration. Such campaigns should evidently not be used as a means of preventing the flight of refugees.

(vi) Effective **border management in a common area**, while legitimate and necessary, must have built-in mechanisms and procedures for identifying and referring to the competent central authority refugee claimants.

(vii) Interception measures aimed at strengthening **controls at sea borders** must ensure, in addition to general rescue-at-sea obligations, adequate protection safeguards for refugees and asylum-seekers. The fact that asylum-seekers and refugees were smuggled by sea does not in any way deprive them of any rights as regards access to territory and to asylum procedures.

(viii) The **common curriculum and training** envisaged for border guards should include a comprehensive asylum component. UNHCR stands ready to contribute to the development and implementation of such programmes.

(ix) A comprehensive and integrated migration management strategy should necessarily include an effective **return policy** for irregular migrants and unsuccessful refugee applicants. There are a number of ways in which UNHCR could play a supportive role in assisting Member States to deal with the return of persons determined not to be in need of international protection.

(x) **Re-admission agreements** are one of the essential tools for addressing the problem of irregular migration. However, UNHCR considers that such agreements designed for the return of nationals do not effectively meet the situation of asylum-seekers whose claims have not been determined. This is best addressed through the establishment of co-ordinated approaches to the allocation of State responsibility for determining refugee status.

(xi) UNHCR notes the interest of Member States in an enhanced role for **Europol** in the fight against irregular migration. An important guarantee that must be upheld in the work of Europol is the protection of the personal data of asylum-seekers and refugees to ensure that it is not disclosed to or shared with the authorities of the country of origin.

(xii) UNHCR supports the work of the European Union against organised criminal **smuggling** of human beings so long as it is consistent with the Smuggling Protocol supplementing the United Nations Convention against Organised Crime. It must be recognised that many genuine asylum-seekers have no viable option to reach safety, but to resort to the services of smugglers. Therefore, the need for anti-smuggling measures to grant special treatment to refugees and asylum-seekers deserves particular attention.

(xiii) Policies and strategies to combat **trafficking** in human beings and related exploitation must be accompanied by specific protective and assistance measures for victims and witnesses of this criminal activity. Putting in place such measures would also ensure that national asylum procedures are not inappropriately used. At the same time, it should be recognised that there may be certain individual victims whose protection needs can best be addressed through the grant of asylum and to whom access to asylum procedures must not be denied.

(xiv) The problem of **illegal employment** is not of direct concern to UNHCR in relation to its refugee protection mandate. However, the Office has an interest in the issue from the perspective of a comprehensive approach to migration management that implies addressing both “push” and “pull” factors.

(xv) UNHCR’s position on **carrier liability** is that sanctions should not apply where a person lacking the required documentation for admission seeks international protection because of a well-founded fear of persecution or other threats to his or her life or freedom.

## I. Introduction

1. In recent years, irregular migration<sup>1</sup> has become a major concern for the Member States of the European Union, thereby prompting them to pursue wide-ranging preventive, deterrence and punitive measures. Yet, despite such concerted efforts at both national and Community levels, the numbers of irregular migrants arriving in the European Union do not seem to be declining. Indeed, current predictions with respect to economic, demographic and political pressures in many parts of the globe permit the inference of growing migratory movements towards the European Union and the rest of the industrialised world where the projected population decline and ageing are likely to accentuate the demand for foreign labour.

2. The prevention and control of irregular economic immigration into the European Union have long been considered essential elements of the emerging common immigration and asylum policy of the Union. To this end the European Commission issued on 15 November 2001 a *Communication on a common policy on illegal immigration*, setting out a comprehensive Action Plan to prevent and combat irregular immigration and trafficking of human beings in the European Union. On 28 February 2002, the Justice and Home Affairs Council approved the proposed Action Plan with some amendments.

3. The Action Plan expressly provides that “measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection.” This reflects the proclamation made by the Tampere European Council that the common policies in asylum and immigration, while ensuring a consistent control of external borders to prevent irregular migration, must be based on principles which “offer guarantees to those who seek protection in or access to the European Union.”<sup>2</sup>

4. The present Note seeks to bring UNHCR's contribution to the European debate as to how to manage migratory movements in a way that upholds human rights and humanitarian principles, while addressing the legitimate concerns of States regarding irregular migration. The Note's central focus is, therefore, on the need to clearly distinguish – in admission policies and in the public debate – between asylum-seekers fleeing persecution and violent conflict, and people moving for purely economic and social reasons.

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<sup>1</sup> UNHCR prefers the term "irregular" or "undocumented" migrants to describe the situation of those who seek entry to the territory of a State without meeting that State's legal requirements for entry, residence or exercise of an economic or any other activity. The label "illegal migrants" connotes the imagery of persons who, finding themselves outside the immigration law, are without any legal identity or entitlement to just and humane treatment.

<sup>2</sup> Presidency Conclusions, Tampere European Council (15-16 October 1999), Conclusion No 3.

## **II. Irregular Migration and Refugee Protection: An Overview**

5. The starting point for a principled approach to the issue of irregular migration must be that while States have the sovereign right to control the entry and residence of non-nationals, the operation of their immigration policies has to be consistent with obligations of States deriving from international refugee, human rights and humanitarian law. Indeed, fearing “uncontrolled” migration in this era of globalisation, European States have individually and collectively introduced a series of measures to obstruct or dissuade third-country nationals from gaining access to their territories. Generally, however, a one-dimensional view of the phenomenon of irregular migration and its causes has hitherto dominated the policy orientations and public debate, thereby leading to no effective response.

6. From the perspective of UNHCR, a major problem common to virtually all of the immigration control measures introduced by States is that too often they fail to make distinctions between, on the one hand, refugees and asylum-seekers and, on the other hand, economic migrants. In some cases, these measures are also self-defeating in that would-be migrants and asylum-seekers turn to increasingly more sophisticated human smuggling networks that are able to circumvent the immigration controls. A vicious circle then sets in motion, with States continually in search of more and more restrictive measures while the smugglers find new ways to get around them.

7. Irregular migration does not exist in a vacuum. It is a dynamic, multi-faceted problem, having social, political and ethical dimensions. Global economic and demographic imbalances and the resulting poverty, unemployment and environmental degradation, combined with the absence of peace and security, poor governance, a generalised lack of respect for human rights and tides of violence and persecution are all key factors prompting population displacement and irregular movements today as in the past centuries. To these “push” factors and the economic “pull” of the north are now added proximate determinants of movements: readily available information about other places and the opportunities they offer, cheaper and accessible transportation facilities and available services of professional migration agents.

8. Experience shows that control and deterrence measures by themselves will have little lasting impact when the need to move prevails. So long as certain basic necessities of life are not met in one's own country, the imperative of survival will continue to dictate the path elsewhere irrespective of the geographical, legal, political and financial barriers erected along the way. Some will move from choice, some because they are forced to, and others for reasons that include elements both of choice and coercion. In the circumstances, the best that States can do is to bring some order to population movements through a coherent mix of migration management policies.

9. Dealing effectively with irregular migration is not, therefore, just a matter of introducing more rigorous legislative and policy measures aimed at strengthening border controls. As acknowledged by the Tampere Conclusions, Governments will be in a better position to address the problem if they are equipped with a broad range of migration management strategies going beyond measures to prevent unauthorised entry. Such a strategy implies, first and foremost, tackling the economic, security, human rights, environmental and demographic problems that prompt people to leave their own country and to seek admission to other States. Addressing the root causes of refugee movements and emigration from less stable and prosperous countries is by no means a simple task. But the European Union could use the various policy instruments it has at its disposal in the fields of common foreign and security policy, development assistance and humanitarian aid to influence the course of events in those countries.

10. A comprehensive, multi-disciplinary response to migration must also address or touch on all the dimensions of refugee protection. Migration management cannot work efficiently without coherent systems and procedures for the protection of refugees. Similarly, asylum policies will not function properly in the absence of comprehensive and transparent immigration policies. If the asylum channel remains the only avenue of entry for those seeking economic opportunities, unravelling the confusion between asylum-seekers and irregular migrants will continue to be difficult.

11. In the final analysis, refugee protection is first and foremost about meeting the needs of vulnerable and threatened individuals. These needs, of course, have to be accommodated and addressed within a framework of sometimes competing interests and rights. But clearly, the international refugee protection regime was never devised with migration control as its object. It is essential, however, that the 1951 Convention and its 1967 Protocol, as expressions of pre-eminent international law, should provide guidance and direction for the implementation of immigration policies that may impact on refugee protection. Concerns about irregular migration, however legitimate, cannot outweigh the fundamental importance of States honouring their international obligations under the 1951 Convention, particularly the Article 33 prohibition not to return or *refouler* a refugee, in any manner whatsoever, to a country in which his or her life or freedom would be threatened.

12. States may not discharge themselves of their *non-refoulement* obligations by moving border controls away from their own frontiers or by invoking the inadequacies in, or the provisions of, their internal laws.<sup>3</sup> In UNHCR's understanding, the overriding importance of the observance of the principle of *non-refoulement* does not imply any geographical limitation, but

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<sup>3</sup> By virtue of Article 27 of the 1969 Vienna Convention on the Law of Treaties, it is an established principle of international law that a State may not invoke its domestic legislation as a basis or justification for failure to perform its international obligations.

extends to all State agents acting in an official capacity within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition to the *non-refoulement* obligation, States parties to the 1951 Convention are required to effectively implement Article 31 of the Convention, which recognises that there are reasons justifying a refugee's unauthorised entry or presence in an asylum country.<sup>4</sup>

### **III. Community Measures and Actions**

13. On the basis of the Commission's Communication on a common policy on illegal immigration, the Council has recently adopted a number of specific measures and actions to be implemented in the short- and medium-term. In the paragraphs that follow, each of these measures and actions is analysed from the perspective of its potential interference with the ability of persons at risk of persecution or other forms of threat to their life or liberty to seek asylum in the European Union. The analysis generally reflects the UNHCR's Global Consultations on International Protection and their recommendations in the Agenda for Protection.

#### **A. Visa Policy**

14. Visa policy is a traditional and legitimate instrument at the disposal of States to control the entry of non-nationals into their territory. It is both a mechanism for deterrence and exclusion, and a means for dictating the specific conditions under which a non-national can enter the State of destination. States often retain the right to refuse entry into their territory even those granted a visa.

15. A harmonised EU visa policy intended for preventing unauthorised entry into the territory of Member States is provided for by the Council Regulation of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.<sup>5</sup> The present common list of 131 countries whose nationals are subject to EU visa requirements under the Council Regulation includes a number of countries where there is documented evidence of grave human rights violations, widespread persecution or violent political, ethnic or religious conflict.

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<sup>4</sup> As part of its Global Consultations on International Protection and the resulting Agenda for Protection, UNHCR is currently in the process of elaborating comprehensive guidelines on refugee protection safeguards that must be built into States' interception measures.

<sup>5</sup> Council Regulation (EC) No 539/2001, OJ L 81/1, 21.3.2001.

16. In its present form, the EU common visa policy is therefore problematic insofar as it does not differentiate between persons in need of international protection and other third-country nationals. Where strict visa policies, operating in combination with sanctions on transport companies carrying passengers without proper documentation, inhibit escape to safety and access to asylum procedures of persons with a well-founded fear of persecution, they threaten to undermine basic principles of refugee protection.<sup>6</sup> Such measures, which more often than not divert the flow of asylum-seekers into other countries and regions, may also have an adverse effect on international co-operation to resolve refugee problems.

17. UNHCR would recommend that in implementing their visa policies States should give due humanitarian considerations to the particular situation in which persons who have to flee from persecution in their country of origin find themselves. Such persons will very often have serious difficulties in meeting visa prerequisites such as the possession of a valid national passport, monetary sums to cover the costs of their stay abroad and their return travel, or family ties in the country of intended destination. Where, therefore, a person establishes to a reasonable degree that his or her continued stay in the country of origin would expose him or her to a risk of persecution or ill-treatment, this should cause States to be flexible on their visa requirements in a spirit of justice and understanding. It is likewise in the case of a person in an intermediate country where -- in the absence of or with limited resettlement opportunities -- the inability to leave that country would, for relevant refugee protection reasons, endanger his or her life or freedom there, or put him or her at risk of *refoulement* to his or her country of origin.

18. As a complement to the easing of visa requirements for persons in fear of persecution or ill-treatment in their country of origin or in countries of first asylum as suggested above, considerations could be given, in certain situations, to the possibility of processing asylum applications within countries of origin. "In-country processing" of asylum applications of persons in fear of persecution by the State of origin is, beyond dispute, fraught with many difficulties. As noted above, cases in which a refugee can request and obtain a national passport from the same authorities that are the cause of the refugee's fear of persecution are the exception rather than the rule. Even if the refugee is able to obtain a national passport surreptitiously, it could be dangerous for him or her to contact a foreign embassy with an asylum application. The scheme may, however, be feasible where the feared harm

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<sup>6</sup> The right to seek asylum is now generally recognised as forming part of customary international law. It is enshrined, *inter alia*, in Article 14(1) of the Universal Declaration of Human Rights, Article 1(2) of the United Nations Declaration on Territorial Asylum, Article 3 of the Council of Europe Declaration on Territorial Asylum and Article 18 of the Charter of Fundamental Rights of the European Union. The right to seek asylum overlaps with and complements the right to leave any country, including one's own as provided for in Article 13(2) of the Universal Declaration of Human Rights and Article 12(2) of the International Covenant on Civil and Political Rights.



emanates from non-State agents and there is no State complicity, but the State is unable to provide the necessary protection in any part of the country. While promoting and supporting mechanisms that facilitate the legal entry of refugees into the European Union, UNHCR must stress that any such possibility should in no way undermine access to asylum procedures of asylum-seekers arriving at the EU borders without proper documentation.<sup>7</sup>

19. There is another aspect of the above-mentioned Council Regulation on visa requirements and exemptions that UNHCR finds problematic. According to Article 3 of the Regulation, the decision as to the visa requirement or exemption in the case of recognised refugees and stateless persons is based on the third country in which these persons reside and which issued their travel documents. However, the harmonisation in this area takes an “exclusionist” approach, in the sense that the visa requirement imposed on recognised refugees and stateless persons is mandatory if the third country where they reside and which issued their travel document is under visa obligation for its nationals. On the other hand, exemption from visa requirement in the case of recognised refugees and stateless persons who reside in a third country whose nationals are exempt from the Community visa requirement is left to the absolute discretion of the individual Member States.<sup>8</sup> UNHCR believes that full harmonisation of such exemptions would ensure equal treatment of refugees and stateless persons in all Member States.

## **B. Information Exchange and Analysis**

20. UNHCR supports the Council’s plan of action as regards the compilation and analysis of migration and asylum data. Good policy-shaping and decision-making depend on good information and analysis. However, the scale and magnitude of irregular migration is by definition difficult to accurately estimate. Even statistical information relating to the levels and trends of legal migration is often partial and incomplete. Given this concern, the United Nations General Assembly, in its Resolution 56/203, has stressed the need for more migration data, analysis of the causes and patterns of international migration, including irregular migration, as well as its social, economic and demographic impacts.<sup>9</sup>

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<sup>7</sup> For a detailed UNHCR-commissioned study on State practice and a recommended framework for Community action, see “Safe Avenues to Asylum: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests,” A Preliminary Study by Gregor Noll and Jessica Fagerlund, Danish Centre for Human Rights, April 2002.

<sup>8</sup> While Article 3 of the Council Regulation provides that the decision as to the visa requirement or exemption in the case of recognised refugees and stateless persons is without prejudice to obligations under the 1959 Council of Europe Agreement on the Abolition of Visas for Refugees, it should be noted that not all EU Member States are signatories to this Agreement, which in any event is limited in its geographical scope.

<sup>9</sup> United Nations General Assembly, Fifty-sixth Session, A/RES/56/203, 21 February 2002.

21. Collection and dissemination of statistical data and information relating to asylum-seekers and refugees is a key statutory function of UNHCR. Moreover, UNHCR routinely collects, analyses and provides to decision-makers up-to-date information on conditions in countries of origin of asylum-seekers and refugees and in countries of asylum. UNHCR would welcome, and stands ready to contribute to, the development at the EU level of a networked system for sound information gathering, analysis, exchange and dissemination. Such a system could draw usefully on UNHCR's wide-ranging operational experience as lead international organisation in complex situations of population displacement.

### **C. Pre-Frontier Measures**

#### ***Posting abroad of immigration and airline liaison officers***

22. A number of EU Member States have posted immigration and airline liaison officers at major international airports and seaports in countries of origin and transit with the task of preventing the embarkation of undocumented or improperly documented travellers. The stated intention of such measure is to complement, and improve the efficiency of, visa requirements as a means of entry control. The present Action Plan proposes that the EU should continue to build up the network of such immigration and airline liaison officers.

23. Several of the countries to which EU immigration and airport liaison officers are posted are major refugee-producing nations, whose citizens figure high on the list of recognised refugees in the various EU Member States. In these circumstances, the question is how such officers tasked with "externalised" border control would deal with persons desperate to flee their country for a well-founded fear of persecution. Clearly, Article 31 of the 1951 Convention recognises that a person fearing persecution in his or her country of origin may have no other choice but to resort, for example, to forged documents both to leave that country and to obtain admission elsewhere.

24. In view of the above considerations, UNHCR would urge Member States to ensure that their immigration and airlines liaison officers tasked with pre-embarkation controls have clear instructions for dealing with cases which might come within the purview of the 1951 Convention and other relevant international refugee and human rights instruments. UNHCR stands ready to provide its expertise and advisory services in the design and implementation of training programmes for such officers.

#### ***Financial and technical assistance to third countries***

25. Another pre-frontier measure contained in the Action Plan is the provision of EU financial and technical assistance to countries of origin and

transit. UNHCR welcomes the fact that such assistance may not focus exclusively on migration control, but could also include the strengthening of refugee reception and protection capacities of countries of first asylum and transit. Indeed what is required is a truly comprehensive, multi-disciplinary approach to the migration and asylum challenges facing third countries, recognising that the European migration and asylum issues cannot be solved in Europe alone.

26. UNHCR has a strong interest in ensuring that refugees are able to enjoy effective protection in any country in which they find themselves. At the same time, UNHCR considers that responsibilities for refugee protection and the resulting costs should not be a matter of a State's geographic position, but rather a coherent, planned strategy for a collective humanitarian response to the victims of human rights violations, persecution and armed conflict.

27. It remains a fact that the great majority of refugees lives, and in all likelihood will continue to live, in countries of first asylum that have to contend with protracted refugee situations, with no immediate prospect for voluntary repatriation. They are faced with serious financial, political and security costs associated with the presence of large refugee populations. Given, therefore, that meeting international refugee protection responsibilities may place unduly heavy burdens on these countries, UNHCR regards it as its mandate responsibility to ensure that their burdens are ameliorated in order to qualitatively improve the political climate and the asylum possibilities for refugees in those countries.

28. UNHCR's policy in this regard is geared towards supporting the establishment of functioning asylum systems, reception capacities and viable integration programmes with the ultimate aim of achieving a globally recognised and consistently applied regime of refugee responsibilities. These activities are not only in the interest of refugee protection but also in the interest of all States. In this field, as in others, however, UNHCR can only be as effective as the support it receives from the donor community.

### ***Awareness-raising campaigns***

29. Credible information available or disseminated to potential migrants has an important role to play in reducing irregular migration. For there is evidence to suggest that the impetus to migrate is often based on ill-founded perceptions of the conditions and opportunities that exist in other countries, as well as a limited awareness of the dangers associated with irregular migration. Information programmes in countries of origin and transit may help to dispel such misconceptions, discouraging people from moving by irregular and clandestine means and informing potential migrants about any regular immigration opportunities that exist, including in-country job-seeker visa processing schemes.

30. Information campaigns of this kind should evidently not be used as a means of preventing the flight of refugees, and must therefore be scrupulously honest, impartial and accurate in their content. UNHCR would have to insist, therefore, that any information campaign programmes should be strictly limited to those situations where the great majority of people who are leaving a country are demonstrably not in need of international protection.

#### **D. Measures relating to Border Management**

##### ***Border management in a common area***

31. UNHCR is preparing a detailed commentary on the European Commission Communication “Towards integrated management of the external borders of the Member States of the European Union,” issued on 7 May 2002. Suffice here to stress that border management measures must be designed and implemented taking into account the special situation of asylum-seekers arriving at the EU external borders without the required entry documentation. Such measures must not inhibit the entry and access to asylum procedures of persons who seek the protection of EU Member States. This would require more than a policy declaration to respect international obligations. An integrated border management system must have built-in mechanisms and procedures for identifying and referring to the competent central authority persons claiming to be in need of international protection.

##### ***Controls at sea borders***

32. From UNHCR’s perspective, the main concerns at stake when it comes to sea border controls are the following common core understandings emanating from international refugee law, international human rights law and fundamental humanitarian principles: absolute respect for the principle of *non-refoulement*, including non-rejection at the frontier; rescue of people in distress at sea and their disembarkation; admission of asylum-seekers, at least on a temporary basis, and their access to fair and effective asylum procedures.

33. It is, therefore, critically essential that any interception measures aimed at stemming boat arrivals must ensure adequate protection safeguards for refugees and asylum-seekers arriving by sea. The fact that asylum-seekers and refugees were smuggled by sea does not in any way deprive them of any rights as regards access to territory and to asylum procedures.<sup>10</sup> Any

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<sup>10</sup> This is clear from the formulation of Article 19 of the Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime: “nothing in this Protocol shall affect the other rights, obligations, and responsibilities of States and individuals under international law, including international humanitarian law, and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.”

interception and related sea border measures -- whether of legislative or operational nature -- which the European Union is envisaging to adopt should also set out specific guidelines for rescue-at-sea obligations and procedures. It is recalled, in this regard, that the question of rescue-at-sea and specific aspects relating to asylum-seekers and refugees were a subject of the UNHCR's Global Consultations.<sup>11</sup>

### ***Common curriculum and training***

34. Border guards are often the Government officials who first come into contact with asylum-seekers. Unless these officials have clear instructions, knowledge and skills for dealing with persons who might come within the purview of the relevant international refugee instruments, they may, by their actions or inactions, violate the rights of asylum-seekers and refugees. This may involve, for instance, denial of access to territory or referral to the competent refugee status determination authority, which may result in a breach of the *non-refoulement* obligation.

35. The requirement for border officials and immigration officers to have instructions and the necessary training for dealing with applications for asylum is expressly provided for in the Commission proposal for a Council Directive on "minimum standards on procedures in Member States for granting and withdrawing refugee status."<sup>12</sup> Within the Council of Europe, both the Council of Ministers and the Parliamentary Assembly have adopted specific Recommendations on the training of border officials.<sup>13</sup> These Recommendations stress that all officials who first come into contact with asylum-seekers should be fully cognizant not only of rules and principles of refugee protection deriving from international and domestic legal instruments but also of their responsibility for treating asylum-seekers with humanity, sensitivity and discernment.

36. UNHCR therefore strongly recommends that the common curriculum and training programmes envisaged for border guards include a comprehensive asylum component. This should include, at a minimum, learning and on-going skills development in the following key areas: principles of international refugee law under the 1951 Convention/1967 Protocol and the European Convention on Human Rights; asylum rules and procedures in national legislation; the limitations under international and

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<sup>11</sup> See background note and summary of Expert Round-table, Lisbon, 25-26 March 2002.

<sup>12</sup> Commission of the European Communities, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 20.9.2000, COM(2000) 578 final.

<sup>13</sup> Recommendation No. R (96) 15 of the Council of Ministers and Recommendation (1309) 1996 of the Parliamentary Assembly.

national law on the use of detention; developments in the political and human rights situation in countries of origin of asylum-seekers; interviewing techniques, including intercultural and interpersonal communication; management of cases with special needs, such as those of separated children, victims of torture, etc. UNHCR stands ready to contribute to the development and implementation of appropriate and adequate curriculum and training programmes in these important areas.

## **E. Readmission and Return Policy**

### ***Return policy***

37. The recent Green Paper on “a Community return policy on illegal residents” issued by the European commission rightly places the return question in the broader context of asylum, migration and human rights issues. UNHCR welcomes, in this regard, the initiative of the European Commission to organise a broad consultation on the issue, and intends to contribute to the debate in a separate submission.

38. For UNHCR, the primary concern in regard to the return issue is, of course, the situation of unsuccessful asylum-seekers. The Office appreciates that EU Member States have invested considerably in the development of complex asylum procedures. However, the credibility of these procedures risks to be undermined by the non-return of those who, after a fair and objective assessment of their asylum claims, have been found not to be in need of international protection on any valid grounds. This could also erode public confidence in the effectiveness of the international system of refugee protection.

39. The right of everyone to leave his or her country and to return thereto is fully recognised in international law. The General Assembly of the United Nations has, in a series of resolutions, underlined the responsibility of countries of origin in relation to the return of their nationals who are not refugees.<sup>14</sup> The question of return of unsuccessful asylum-seekers has also received the constant attention of UNHCR’s Executive Committee.<sup>15</sup> At the European level, the Committee of Ministers of the Council of Europe adopted Recommendation R(99)12 which provided Member States of the Council of Europe with guidelines on how best to facilitate the return of this group of persons to their country of origin.<sup>16</sup>

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<sup>14</sup> See, for example, Resolution 46/150 of 14 December 1990, 46/106 of December 1991, and 47/105 of 16 December 1992.

<sup>15</sup> See, for example, Executive Committee Conclusion No. 85 (XLIX) of 1998.

<sup>16</sup> Committee of Ministers of the Council of Europe, Recommendation R(99)12, May 1999.

40. While the international legal framework for the return of unsuccessful asylum-seekers is clear, a number of obstacles stand in the way of orderly and humane return. Some countries of origin are not fully co-operative to facilitate the return of their own nationals. In countries of destination, some sectors of the economy may benefit from the presence of people willing to work in physically difficult and menial jobs for less than the minimum wage and without social benefits. There are also logistical problems relating to arrangements for transit through third countries. From the perspective of the potential returnee, a number of elements may hinder or facilitate the implementation of a return measure. These include, for example, the length of the asylum procedure, the resources or skills the individual has acquired while in the country of asylum, the availability of accurate information on conditions in the country of origin.

41. Greater international co-operation is needed to deal with the return of irregular migrants and unsuccessful asylum-seekers to their countries of origin. Formal re-admission agreements offer the best mechanism for a collaborative response to this problem. For its part, UNHCR could play, within its humanitarian mandate, a supportive role in encouraging the return of unsuccessful asylum-seekers in a number of ways: undertaking the systematic dissemination of information on developments in the country of origin as they affect the process of return; promoting voluntary return through collaborative counselling measures; facilitating dialogue and negotiations between countries of asylum and origin; identifying possibilities for post-return initial re-integration assistance where this is needed; and in certain cases monitoring the situation of returnees once in their country of origin. The key criterion for UNHCR's involvement with the return of unsuccessful asylum-seekers must remain the fairness and accuracy of the refugee status determination.

#### ***Re-admission agreements***

42. Re-admission agreements are, indeed, one of the essential tools for addressing the problem of irregular migration. Such formal agreements, whether bilateral or multilateral, have a significant advantage over unilateral return measures in that they spell out the mutual responsibilities and commitments of the contracting parties for the re-admission of their respective nationals.

43. Increasingly, however, re-admission agreements are being concluded to address the situation of third-country nationals who are present on the territory of either contracting party without authorisation. These third-country provisions of re-admission agreements make no differentiation between irregular migrants and persons seeking international protection. This is clear, for example, from the specimen re-admission agreement proposed by the Council of the European Union in November 1994. UNHCR considers that

re-admission agreements designed for the return of nationals do not effectively meet the situation of asylum-seekers whose claims have not been heard and who may risk to be returned to situations where their security cannot be guaranteed.

44. It is true that the irregular movement of asylum-seekers is just as problematic as that of economic migrants. Yet, it remains essential to clearly distinguish – in both admission and return policies – between persons in need of international protection and people moving for purely economic and social reasons. In the case of nationals found in an irregular situation in a given State, their re-admission by the State of nationality is, in effect, an end in itself. When it comes to asylum-seekers, however, neither irregular presence nor nationality is as such the determining factor for return. What is at stake is the determination of the State responsible for receiving and adjudicating the refugee claim of the asylum-seeker on the basis of agreed criteria for apportioning such responsibilities. Whichever State is ultimately found responsible, its commitment goes beyond the re-admission of the asylum-seeker and includes the obligation to observe the cardinal principle of *non-refoulement*, to consider fairly and objectively the person's asylum claim, and to treat him or her in accordance with accepted international standards.

45. UNHCR agrees with States that appropriate measures are necessary to limit the possibilities for refugees to seek asylum in one country after another where there are no valid reasons for doing so. This is best achieved through the establishment of co-ordinated approaches to the allocation of State responsibility for determining refugee status, preferably in the form of binding agreements similar to the Dublin Convention. Such agreements must contain, alongside criteria for apportioning responsibility, agreed mechanisms for the transfer of the asylum applicant without undue delays. In defining the allocation criteria, the fact that a person has the possibility to seek and enjoy asylum in a given country should not take precedence over every other consideration. Most importantly, the connections which an asylum-seeker may have with a particular country, whether through the presence of family members or linguistic, cultural or historical ties, are key considerations.

## **F. Europol**

46. UNHCR notes the Council's interest in an enhanced role for Europol in the fight against irregular migration. One proposed measure in this regard is for Europol to enter into agreements with transit countries to foster the operational exchange of information. From the perspective of refugee protection, an important guarantee that must be upheld in the work of Europol is the protection of the personal data of asylum-seekers and refugees to ensure that it is not disclosed to or shared with the authorities of the country of origin.



## G. Penalties

### *Smuggling of human beings*

47. UNHCR shares the concern of EU Member States that the organised smuggling of migrants, including persons with a valid claim to refugee status, is increasingly in the hands of transnational criminal organisations that have scant regard for the lives of their customers. Precisely because UNHCR recognises that many genuine asylum-seekers have no viable option to reach safety but to resort to the services of smugglers, it cannot allow immigration control concerns to overshadow the need to protect the victims, or the commitment to uphold the right to seek asylum from persecution.<sup>17</sup>

48. Through the adoption of two Protocols on Trafficking in Persons and Smuggling of Migrants, supplementing the United Nations Convention Against Transnational Organised Crime, the international community has made a significant contribution towards preserving this delicate balance between the repression of crime and the protection of humanitarian interests. Of particular significance to the current European debate is the definition, in the United Nations Protocol, of “smuggling of migrants” as:

*“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.”*

49. It is clear from the terms of the United Nations Protocol on Smuggling that the criminal character of the facilitation of unauthorised entry or residence results from the combination of two elements, namely, the violation of immigration provisions and the pursuit of a financial or other material benefit. These elements are indissociable. Should it be otherwise, those individuals who facilitate the unlawful entry or residence of migrants or refugees out of compassion, with no other purpose than to help people in need, would be treated on the same footing as “professional” smugglers exploiting the distress of their fellow human beings. Regrettably, these two key elements are not made an integral part of the definition of smuggling in the Council Directive defining the facilitation of unauthorised entry, movement and residence and the accompanying Framework Decision on the

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<sup>17</sup> The link between restrictive immigration control measures and the rise in smuggling and trafficking has been made by many observers, including the European Parliament and the Council of Europe. In its resolution "on illegal immigration and the discovery of the bodies of 58 illegal immigrants in Dover," the European Parliament had cause to observe: "...as a result of these barriers to immigration, refugees often fall victim to organised gangs of smugglers who demand substantial sums for their services." The Parliamentary Assembly of the Council of Europe has echoed similar concerns pointing out that "draconian restrictions on lawful immigration introduced by European countries increase the likelihood of people illegally entering Europe since they encourage recourse to the services of unscrupulous traffickers of human beings, using increasingly sophisticated and inhuman means to make money out of clandestine migration," (Recommendation 1449 and 1467).

strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence.

50. The need for anti-smuggling measures to grant special treatment to refugees and asylum-seekers deserves particular attention. Although some human smugglers may be humanitarian altruists, most are unscrupulous criminal gangs aiming to make profit out of compelling human needs. Many refugees and asylum-seekers who, of necessity, resort to human smugglers are thus doubly victimised: firstly, by the situation of persecution or danger that forced them to leave their country and secondly, by the greed of the criminal smugglers.

51. The international community must find better ways of managing the global movement of people so that they no longer fall prey to those who thrive and profit on the desperation of the weak and the powerless. In developing effective measures to combat smuggling, the underlying causes which force people to resort to irregular and clandestine movement must be addressed. This would necessarily include, aside from determined efforts to provide individuals and communities with greater degrees of security in their countries of origin, the adoption and implementation of a normative framework for legal immigration channels for employment, family reunification and studies.

### ***Trafficking in human beings***

52. UNHCR supports the work of the European Union against trafficking in human beings and related exploitation so long as it is consistent with the Protocol on Trafficking supplementing the United Nations Convention against Transnational Organised Crime. The Trafficking Protocol defines “trafficking in persons” in terms of three constituent elements: (i) it is an action consisting of recruitment, transportation, transfer, harbouring or receipt of persons; (ii) it is carried out by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve consent of a person having control over another; and (iii) the action is for the purpose of exploitation that includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery or servitude.

53. The Trafficking Protocol also sets out the basic obligations of protection and assistance to victims and witnesses of trafficking. These include, for example, adequate legal protection and standing in judicial or administrative proceedings; measures for physical, psychological and social recovery of victims; provisions for the physical safety of victims; and possibilities of temporary or permanent residence in appropriate cases.

54. UNHCR acknowledges that being a victim of human trafficking does not alone suffice to establish a valid claim for refugee status under the 1951 Convention and 1967 Protocol. There will, nevertheless, be individual victims whose protection needs can and should best be addressed through the grant of asylum and to whom access to asylum procedures must not be denied. At the same time, it is essential that anti-trafficking policies and strategies are accompanied by specific protective and assistance measures for victims and witnesses of trafficking. Putting in place such measures would also ensure that national asylum procedures are not inappropriately used.

55. As in the case of smuggling of migrants, measures to combat trafficking must necessarily include tackling the root causes of this abhorrent phenomenon: economic factors such as poverty and massive unemployment; social and cultural factors such as violence against women and girls, gender discrimination in the family, the community and by the State; and political and legal factors such as lack of appropriate legislation and public sector corruption. A truly comprehensive action plan against trafficking in persons, by definition, must address all the dimensions of the problem including its preventive aspect.

### *Illegal employment*

56. UNHCR notes that the European Commission issued a Communication on Undeclared Work in 1998, which also touches on the unauthorised employment of irregular third-country residents.<sup>18</sup> As far as UNHCR is aware, however, the suggestions and recommendations contained in that Communication have not been taken any further and translated into concrete plan of action to address this problem.

57. While the problem of illegal employment is not of direct concern to UNHCR in relation to its refugee protection mandate, the Office has an interest in the issue from the perspective of a comprehensive approach to migration management that implies dealing with both “push” and “pull” factors. It is generally recognised that irregular economic migration is often the consequence of the disconnect between, on the one hand, labour demand and availability of supply and, on the other hand, the non-existence or non-accessibility of legal channels of economic migration.

58. There are, at the same time, human rights concerns that the continuing concentration on irregular migration as largely a problem of border control limits awareness of the desperate conditions that irregular migrants have to tolerate in order to earn basic subsistence without authorisation to work. While some of them constitute an underworld, many live and work in the mainstream of the host societies, underpaid and filling the less glamorous jobs

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<sup>18</sup> Communication of the European Commission on Undeclared Work, Brussels COM (98) 219 final.

that nationals have long disdained. Finding themselves outside the protections of criminal and civil law and with no legal avenues by which to claim humane treatment, they are often vulnerable to exploitation, abuse and deception by employers.

### *Carrier liability*

59. The question of sanctions on transport companies for carrying undocumented or inadequately documented persons is a very delicate area, into which interests of various sorts converge. The fundamental concern which UNHCR has consistently voiced on this issue refers to the very real danger that measures, such as carrier sanctions, aimed at curbing irregular migration may inadvertently prevent persons at risk from leaving the place in which they fear persecution or other forms of violence.

60. UNHCR recognises that the lack of proper and adequate documentation on the part of asylum-seekers and refugees complicates the asylum process and the task of determining refugee status. The identity of such applicants may be difficult, if not impossible, to establish; it may be unclear whether some other State has in fact already accorded residence or protection; and removal of those found not to be in need of international protection may be frustrated. Nevertheless, these problems cannot in themselves justify refusal to admit or summary exclusion from asylum proceedings. By requiring a refugee to obtain proper travel documentation before fleeing his or her country to seek asylum in another country, States in fact ignore the very problems which give rise to the need for refugee protection and, in effect, deny the possibility of asylum to some refugees. As noted above, this is inconsistent with Article 31 of the 1951 Convention.<sup>19</sup>

61. It is with this concern in mind that when commenting on the Council Directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement, UNHCR insisted on a "savings clause" to be incorporated into the Directive. In UNHCR's view, the sanctions foreseen by the Directive should not apply where the third-country national lacking the necessary documents for admission seeks international protection under the 1951 Convention and the 1967 Protocol or other international human rights instruments because of a well-founded fear of persecution or other threats to his or her life or freedom. It needs also to be stressed that airlines and other carrier personnel are not authorised by international law to either make asylum determinations on behalf of States or to assume

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<sup>19</sup> The incompatibilities between carriers' liability and the protection of refugees have been consistently pointed out by the Parliamentary Assembly of the Council of Europe, for example, in Recommendation 1163 (1991): "...airlines sanctions...undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from the immigration officers."

immigration control responsibilities. They are neither qualified to identify cases which might come within the purview of international refugee instruments, nor inclined -- in light of penalties on their corporate employer -- to permit transport of those to whom the State might otherwise extend protection.

#### **IV. Conclusion**

62. With the adoption of the Treaty of Amsterdam, Member States of the European Union agreed to communitarise key policy aspects of asylum and immigration matters. The Tampere European Council, held shortly after the entry into force of the Amsterdam Treaty, firmly set the stage for the development of common European asylum and immigration policies based on principles which “offer guarantees to those who seek protection in or access to the European Union.” This implies that the present Action Plan to combat irregular immigration into the European Union strike a proper balance between migration control priorities and refugee protection imperatives.

63. UNHCR recognises, of course, the dilemma of EU Member States faced by the problem of irregular, disorderly migration. The problem cannot be solved in Europe alone by harmonising laws, policies and practices. Likewise, combating irregular migration is not just a matter of introducing more rigorous measures aimed at strengthening border controls; it requires integrated policy responses at various levels, including appropriate orderly channels for the admission of labour migrants.

64. A greater coherence of internal and external policies of the European Union is required to effectively address the problems raised by today’s movements of migrants, refugees, asylum-seekers and displaced persons. UNHCR has wide-ranging experience and expertise in dealing with the multiple facets of population displacement, including building asylum systems and capacities where needed, promoting international refugee law standards world-wide, and leading and co-ordinating the regional and global responses to refugee crises. UNHCR’s Global Consultations and the Agenda for Protection resulting therefrom have also advanced thinking on these issues.

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