

Discussion Paper



Reconciling Migration Control And Refugee Protection In The European Union: A UNHCR Perspective

I. Introduction

1. At the Tampere special meeting in October 1999 devoted to the creation of an area of freedom, security and justice in the European Union, the European Council called for the development of common European Union policies on the separate but closely inter-related issues of asylum and immigration. The European Council considered it essential that such policies must be based on principles which “offer guarantees to those who seek protection in or access to the European Union.”

2. UNHCR welcomes the European Union's harmonisation initiative as an important test case of regional concerted actions to address refugee and migration problems, and the willingness and ability of States to define their interests and objectives in these areas collectively. The Office hopes to be able to contribute to the successful development of harmonised asylum and immigration policies which could result in a clear distinction between refugee protection and immigration control, as well as in the enhanced protection of refugees and other persons in need of international protection. For UNHCR, the starting point for a principled approach to these issues must be that while States have the right, as a matter of well-established principles of international law, to control the entry, residence and expulsion of aliens, the operation of their immigration policy has to be consistent with obligations of States deriving from binding international human rights and refugee treaties.

3. The present discussion paper addresses considerations only as regards the issue of access to territory that a future European Union policy on immigration would need to guarantee as declared by the Tampere Summit. Detailed analysis of questions relating to access to asylum procedures, the operation of the asylum system in general and the standards of treatment of asylum-seekers are beyond the scope of the paper.

4. The approach taken in this Note rests on the following basic assumptions:

- (i) While there are obvious inter-linkages between refugee and migratory movements, they nevertheless each raise fundamentally different concerns and require distinct policy responses and legislative measures.
- (ii) People will continue to move across international borders in the coming many years, as they have done in the past. Some will

move from choice, some because they are forced to, and others for reasons that include elements both of choice and coercion.

- (iii) The experience and lessons to date suggest that control and deterrence measures will have little lasting impact when the need to move prevails. If one door narrows or closes, the pressure is directed at another one.
- (iv) Given the tyranny of distance and the absence of opportunities, only a few of those on the move for refugee-related reasons are likely to make it beyond the borders of countries neighbouring their own country. Preserving the institution of asylum in those States that find themselves geographically proximate to major refugee-producing countries necessarily requires a sustained commitment to asylum on a global level.
- (v) Irregular migrants do not enter the European Union only by means of misusing States' asylum systems. Many studies suggest that in fact the majority of those who enter the European Union in an irregular manner, including people with legitimate refugee claims, do not file asylum applications for fear of being apprehended, detained and deported.
- (vi) Governments will be in a better position to address the problem of irregular migration if they are equipped with a broad range of migration management policies going beyond measures to curb the perceived or real misuse of their asylum systems.
- (vii) In designing comprehensive migration policies, European Union States may have to begin to embark on a serious consideration of their own demographic future. How large a population is the European Union aiming for in the long-term? At what rate of growth? With what proportion of immigrants? At what cost?
- (viii) Legal admission policies for labour migration will not completely prevent irregular migration or misuse of asylum systems. They should go in tandem with both appropriate anti-smuggling measures and effective asylum adjudication systems that are capable of identifying refugees expeditiously and accurately thereby balancing refugee protection with immigration control.
- (ix) Both refugee protection and migration control impose a formidable financial burden on States. Yet, this is inevitable where narrowness of vision, perspective and mandate isolate refugee crises and migration problems from other areas of international relations and co-operation, including in the areas of human rights, democracy, good governance, sustainable development, trade, etc. The best way to minimise this burden is to invest imaginatively and resourcefully in tackling the causes of flight at their source.

II. Migration Pressure: Present Concerns, Future Challenges

5. In recent decades, international migration has been growing considerably. Although exact figures are not readily available, it is estimated that the number of migrants world-wide grew from around 75 million in 1965 to some 135-140 million at the end of the 1990s. Countries receiving migrants have also become more diverse. In fact, virtually all countries of the world have been the destination of some international migration. However, migrants tended to be unevenly concentrated in certain countries and regions. Overall, international migrants accounted for some 4.5 per cent of the population of developed countries in the 1990s, as compared with about 1.6 per cent for developing countries.

6. The causes of migration may not be new, but the challenges and the opportunities are. 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 international migration today as in the past centuries. To these “push factors” were now added proximate determinants of movements: readily available information about other places and available opportunities, cheaper and accessible transportation facilities and available services of professional migration agents assisting with travel arrangements and documentation.

Migration Typology

7. Demographers studying migration typology identify the following major categories of international migrants:

- (i) Permanent settlers -- People who immigrate to a country to live there permanently, often with some family members already there. During 1965-1989, the three major official immigration countries (Australia, Canada and the United States) received a total of 18.4 million permanent immigrants.
- (ii) Guest workers -- Short-term, including seasonal, contract workers whose main motivation for seeking employment abroad is the wage differential. They are often unskilled or semi-skilled.
- (iii) Cross-border commuters -- Sometimes referred to in migration literature as “labour tourists” or “incomplete migrants,” these are people who commute back and forth across international borders in search of employment, whether legally or otherwise. They work usually for just a few weeks at a time, but regularly.
- (iv) Skilled transients -- Professionals who move from country to country, often within organised transfers of multi-national companies. This category also includes employees of

international organisations, military personnel on peace-keeping missions, the clergy, academic researchers and students.

- (v) Migrants for family reunification -- Foreigners admitted to a country for reasons of close family ties with other migrants having legal residence in that country or with nationals of the host country. Migration for family formation also comes within this category.
- (vi) Irregular migrants -- A group also commonly referred to as illegal, clandestine, undocumented and unauthorised migrants interchangeably.¹ They are present in the territory of a State without meeting that State's legal requirements for entry, residence or exercise of an economic or any other activity. According to some estimates, about 30 million migrants are believed to stay illegally in a foreign country. The International Centre for Migration Policy Development (ICMPD) estimates that between 400,000 and 500,000 irregular migrants are smuggled into the European Union each year.

8. In contradistinction to the above categories, which may be broadly defined as "economic migrants" leaving their country voluntarily, there is a separate category of forced migrants. There are two types of forced migrants:

- (i) Refugees as defined in international and regional instruments and other persons in need of international protection.
- (ii) Victims of natural or technological disasters (drought, famine, floods, cyclone, earthquake, nuclear accidents, etc.).

9. There is often an interaction between the different migration categories, whether voluntary or involuntary. For example, persons who could normally seek employment as "guest workers" would use the family reunification channel when restrictions are placed on labour migration. Whereas in the past many refugees have used the various economic migration channels for escaping from persecution in their countries, refugees today can only rely on the asylum channel. On the other hand, when the legal avenue for migration is closed or restrictions placed on asylum, some people turn to irregular immigration. The irregular immigration stream thus often involves "composite flows" of people leaving their countries voluntarily and those who abandon their homes with greater or lesser degrees of coercion.

¹ The term "illegal migration" has been particularly criticised for its generality and normative connotation, with the imagery of this categorisation being of persons with no legal status, no legal identity, no existence. The right to leave one's country remains a fundamental human right, no matter the obstacles erected by home and would-be destination countries alike to frustrate the effective exercise of this right. Many commentators have also remarked on the irony of the very governments now seeking to actively obstruct the right of individuals to leave and to criminalise "illegal" departure being those which championed it for many years during the Cold War era.

10. Today, more than ever, refugees are part of a complex migratory phenomenon in which people are prompted to leave their own country by a combination of fears, hopes and aspirations that are difficult to unravel. In many developing countries, the misery, hardship and other degradations of all sorts are so awful and unbearable that their citizens may have no choice but to vote with their feet. Although labelled "economic migrants," such individuals might have suffered even greater hardship and threats to their life or human dignity than refugees in the sense of the 1951 Convention. It should also be kept in mind that behind economic conditions affecting a person's livelihood, there are often in play the forces of nationalism, ethnic intolerance, widespread violations of human rights and undemocratic government. According to some studies, no fewer than 250 million people live in a dozen countries where the whole population is subject to the most severe repression by the regime, the armed opposition or both. These are by and large the same countries that also produce "economic migrants."

11. In the circumstances described above, the distinction between voluntary and involuntary population movements, between the refugee and the so-called "economic migrant," is not always as clear and definite as may appear to be. The immediate causes of refugee flows are, of course, readily identifiable: serious human rights violations, persecution, violent political, ethnic or religious conflict, or international armed conflict. However, these causes often overlap with, or may themselves be provoked or aggravated by, such factors as economic marginalisation and poverty, massive unemployment, environmental degradation, population pressure and poor governance. Thus, what seems at first sight to be primarily an economic motive for a person's departure from his or her country may in reality also involve a refugee-related element. In other words, a person may be an "economic migrant" and a refugee at the same time so long as the criteria of the 1951 Convention or other refugee protection instruments are met.

The Challenges and Opportunities

12. The international community is yet to approach the migration problem in any comprehensive, forward-looking manner. Ideally, it is preferable to construct a global migration regime that can meet the interests of migrants, host countries and countries of origin. However, the lack of consensus between the developed and developing world was clearly evidenced during the 1994 International Conference on Population and Development held in Cairo under the auspices of the United Nations. One of the follow-up actions proposed by the Cairo Conference was convening of a special global summit on international migration, but six years later the North-South division over the issue remains so strong that such a summit seems unlikely to come to pass in the near future.

13. In Europe, particularly in the European Union, there is now increased recognition that the issue of migration needs to be addressed at a regional level. Yet, the emphasis has been largely on developing and strengthening common policy measures against irregular immigration into Europe through combined action aimed at preventing the arrival or entry of irregular migrants

and the expulsion of those "unwanted" third country nationals. However, experience to date shows that although such measures may have slowed to some extent the inflow of irregular migrants, they have failed to stop it.

14. Experience also shows that so long as certain basic needs are not or cannot be met in one's own country, the necessity for survival will continue to dictate the path elsewhere no matter how deterrent the force of geographical, political, legal and financial barriers erected along way. Indeed, recent tendencies and current predictions with respect to economic, demographic and political pressures in the developing world permit the inference of growing migratory movements towards the developed countries. According to some estimates, the migration pressure on Western Europe and North America alone currently stand at around 80 to 100 million people.

15. Even putting aside concern over the growing migration pressure, States' self-interest alone requires a comprehensive reassessment of their existing immigration policies. United Nations current projections indicate that over the next 50 years, the societies of virtually all countries of Europe will face population decline and population ageing. According to this recent UN report, the European Union would lose 62 million people (17 per cent) between 2000 and 2050, and Europe as a whole would lose 123 million people. With a much older population age-structure, the potential support ratio – i.e. the number of persons of working age (15-64 years) per older persons -- is projected to decline to about two from the current four. The report suggests "replacement migration" as one of the possible means to offset declines in the size of the population, declines in the population of working age as well to offset the overall ageing of the population.²

16. Whether or not "replacement migration" is one of the ways forward for Europe,³ the lesson on all counts is clear: bringing immigration to a complete halt is neither feasible nor desirable. How can one pursue a "zero immigration" policy within a global economy where borders are kept open for the free movement of capital, goods and services? Obviously, unrestricted migration with total freedom of movement across international borders is not an option either within the modern nation-state system. The challenge is, therefore, to find a middle ground between these two extremes and establish a controlled migration regime that takes into account both the growing migration pressures in the countries of origin and the needs and carrying capacity of receiving States. In UNHCR's view, an orderly migration programme that meets the interests of receiving States and the migrants could ease the current pressure placed on asylum systems by persons not in need of international protection.

III. Impact of Migration Control on Refugee Protection

² United Nations Population Division, "Replacement Migration: Is it a Solution to Declining and Ageing Populations?" (New York, 21 March 2000).

³ Many European Governments have expressed reservations about the desirability of "replacement migration."

17. Migration and refugee flows were for many years regarded as discrete phenomena and the task of distinguishing refugees from ordinary migrants did not present any serious difficulties. It was to facilitate this task that many European States developed an elaborate system of refugee status determination whose principal objective was, and remains, to provide a fair and expeditious decision-making process that best ensures the identification of those entitled to international protection.

18. However, the asylum structures and procedures of Western European countries were since the early 1980's failing to cope with the demands made upon them. With migration pressures mounting and opportunities for legal immigration to Western Europe increasingly restricted, more and more potential migrants were turning to alternative means of entry: irregular migration and the asylum channel. States' response to this new challenge has been more restrictive policies and practices that have considerably changed the balance between immigration control and refugee protection.

19. The wide-ranging migration control measures hitherto introduced by European States are blunt instruments, which, failing as they frequently do to distinguish between refugees and ordinary migrants, have served to seriously undermine the foundations of the refugee protection regime. Various other restrictive measures have also been introduced with the aim of reducing the number of asylum-seekers entering Europe's territory and limiting the granting of refugee status. The totality of these measures, policies and practices could be grouped under four categories:

- (i) "Non-arrival" policies aimed at preventing, interrupting or stopping improperly documented aliens, including potential asylum-seekers, from ever reaching Europe (e.g. mandatory visa requirements, carrier sanctions, posting of Immigration Liaison Officers abroad to carry out "externalised" immigration control and physical interception or interdiction of vessels);
- (ii) "Diversion" policies designed to shift to other States the responsibility for those asylum-seekers who manage to arrive at the borders of the European Union (e.g. "safe third country," re-admission agreements);
- (iii) Restrictive application of the 1951 Convention, in particular "defining away" from the scope of the refugee definition certain categories of refugee claimants (e.g. victims of non-State agents of persecution, gender-related persecution, or localised persecution);
- (iv) "Deterrence policies" such as detention, denial of or inadequate means of subsistence, and restrictions on family reunification even after granting refugee status.

20. As mentioned at the outset, this discussion paper only focuses on the European Union immigration policy and practice having important implications for asylum. The paper will therefore address below the migration control

measures mentioned under (i) above, which are designed to prevent, interrupt or stop outside a State's national territory the movement of persons without the required documentation for entry into that State. While such interception policies and practices are aimed principally at combating irregular immigration, they nonetheless also pose formidable barriers for asylum-seekers to access a jurisdiction where they could seek protection. The other three categories of restrictive measures are more issues of asylum policy than immigration policy, and are therefore beyond the scope of this paper.

Non-arrival Policies and Practices

21. Interception of undocumented or improperly documented persons is neither something new nor merely a European phenomenon. For many years now States in many parts of the world have been engaged in interception practices of various forms, often in the context of large-scale smuggling or trafficking of persons. Gunboats frequently intercept or interdict within territorial waters or on the high seas vessels suspected of carrying undocumented travellers. Armed guards patrolling frontiers, at times with the aid of infrared surveillance and electric fences, ensure that national borders are not infringed by "uninvited visitors."

22. Likewise, visa policy is a traditional and legitimate instrument long used by States to control the entry of aliens to their territory. Legislative provisions for sanctions against carriers transporting improperly documented passengers are currently in force in virtually all Member States of the European Union. In addition, many States have also posted their own Airline Liaison Officers at major international airports both in countries of departure and in transit countries with the task of preventing the embarkation of improperly documented passengers. This has been complemented with financial and technical assistance to countries of departure and transit to enable them to detect fraudulent documentation.

23. Legislation providing for carrier sanctions has often been justified by States by reference to their obligations under the 1944 Chicago Convention on International Aviation. It should, however, be noted that the Chicago Convention requires an airline passenger to comply with the entry formalities of the country of destination, but does not impose a legal duty on the airline (operator) to enforce such compliance by the passenger.⁴ The international standards and recommended practices that have been developed by the International Civil Aviation Organisation (ICAO) as regards facilitation of air transport require Contracting States and operators to co-operate, where practicable, in establishing the validity and authenticity of passports and visas. It is however explicitly provided that an operator found carrying

⁴ Article 13 of the Chicago Convention expressly states: "The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State." According to air law experts, the words "on behalf of such passengers" relate to the public authorities of the States parties to the Convention.

undocumented or inadequately documented passengers would not be fined unless there is evidence of negligence on the part of the operator.⁵

24. Carrier sanctions, like the other interception measures, must be viewed, from one perspective, as States' response to the criminal and organised smuggling and trafficking of persons across international borders. Migrant smuggling and trafficking in persons is posing growing threats to the very societies that restrictive immigration policies were intended to protect. There are daily incidents of countless would-be immigrants and asylum-seekers losing their lives while desperately attempting to enter the European Union with the help of smugglers, or those being held by the traffickers as indentured servants or slaves once in the country of destination. According to the International Organisation for Migration, in the past few years over 300,000 young women from Eastern and Central Europe were trafficked and forced into the sex trade in Western Europe in what amounts to a heinous underground of modern-day enslavement. The vulnerability of smuggled migrants and trafficked persons as a result of their precarious situation often leads to many other different forms of violations of their basic human rights.

25. For the trafficking and smuggling gangs it makes little or no difference whether those forced to resort to their services are refugees fleeing persecution or migrants in search of economic betterment. Regrettably, as a result of increasingly restrictive immigration policies, being smuggled to a sanctuary has become a critically important option for many asylum-seekers.⁶ Refugees and asylum-seekers are thus doubly victimised: firstly, by the situation of persecution or danger that forced them to leave their country and secondly, by the greediness of the unscrupulous people willing to make profit out of compelling human needs. Once in their putative asylum country, they are often met with double criminalisation in the political discourse, public perception and even asylum adjudication process: not only are they accused of flouting national boundaries, but they are also turned into criminals themselves for being willing accomplices to the trafficking or smuggling crime.

26. The international community must find better ways of managing the global movement of people so they no longer fall prey to those who thrive and profit on exploitation of the weak and the powerless. In developing effective anti-trafficking/smuggling legislation and programmes, the underlying causes which force people to resort to irregular movement must be addressed. In UNHCR's view, efforts currently under way in Vienna to elaborate

⁵ Standard 3.40.1 of Annex 9 to the Convention.

⁶ 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 recent 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).

international instruments in relation to the smuggling of migrants and the trafficking in persons offer a useful opportunity to establish a universal legal framework for reconciling measures to combat trafficking and smuggling with existing international legal obligations towards refugees and asylum-seekers.

27. A major problem common to all of the "non-arrival" policies and practices of States is that they make no distinction between refugees and asylum-seekers, on the one hand, and other migrants, on the other hand. Blanket enforcement of visa policies, contracting out immigration control to transport carriers and other indiscriminate policy responses to irregular migration inhibit the entry and access to asylum procedures of persons who would otherwise seek and enjoy asylum from persecution in their country. These measures may also have an adverse effect on international co-operation to resolve refugee problems

28. The indiscriminate application by States of interception and other "non-arrival" measures to refugees and asylum-seekers without documents or with inadequate or false documents appears to derive from the assumption that "genuine" refugees, like any other migrants, would be able to obtain the necessary documentation before departure from their country of origin. In support of their visa policies and carrier sanctions legislation, States also assume that "genuine" refugees are unlikely to be affected by these measures, given that they rarely depart by aeroplane. The facts speak against both these assumptions. 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 be seen queuing up at a foreign embassy for a visa. As for the argument that refugees rarely depart by aeroplane, the fact is that refugees will use, within their means, whatever mode of escape from danger is available to them. For a refugee faced with the consequences of life or death proportions, the concern is more immediate departure than finding the most economical route for his or her journey of escape.

29. UNHCR recognises that the lack of proper and adequate documentation on the part of asylum-seekers 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. When it comes to the question of protection from persecution, there is no rational basis for distinguishing between a person fleeing the feared persecution "documented" and one who does so "undocumented." Moreover, 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. This is inconsistent with Article 31 of the 1951

Convention which accepts that there is a valid justification for a refugee's illegal entry or presence in an asylum country.⁷

30. It is essential that the 1951 Convention and the 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 Article 33 of the 1951 Convention not to return or *refoule* a refugee, in any manner whatsoever, to a country in which his or her life or freedom would be threatened. States may not discharge themselves of these responsibilities by moving border control away from their own frontiers or by invoking the inadequacies in, or the provisions of, their internal laws.⁸ In UNHCR's understanding, the overriding importance of the observance of the principle of *non-refoulement* does not imply any geographical limitation, but 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 human rights law.

31. 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, rights and expectations of States. There is consensus among Governments, academics, international organisations and non-governmental advocacy groups that this is best accomplished by mobilising joint efforts towards a comprehensive approach to international migration. Section IV below delineates the framework for such an approach. At this juncture, UNHCR wishes to offer the following reasoned policy recommendations for addressing the possible incompatibilities between visa policies and carrier sanctions, on the one hand, and basic principles of refugee protection and asylum, on the other hand:

- In so far as States' imposition of strict visa requirements and carrier sanctions which do not effectively distinguish asylum-seekers from other non-nationals hinder the access of asylum-seekers both to refugee status determination procedures and to asylum from persecution, basic principles of asylum and refugee protection are seriously undermined. UNHCR believes that the potential flow of large numbers of asylum-seekers which States attempt to stem by

⁷ 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."

⁸ 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.

means of visa policies and carrier sanctions can be properly addressed through expeditious consideration of asylum claims by trained and qualified State authorities, along with co-ordinated and effective measures of return of those determined not to be in need of international protection.

- 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 a person establishes to a reasonable degree that his or her continued stay in the country of origin has become intolerable for the reasons set out in the refugee definition of the 1951 Convention, this should cause States to be flexible on their visa requirements in a spirit of justice and understanding.
- As a complement to the easing of visa requirements for persons in fear of persecution in their country of origin as suggested above, consideration 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. It may, however, be feasible where the feared harm 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.
- Airlines and other carrier personnel are not authorised by international law to either make asylum determinations on behalf of States or to assume 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. UNHCR therefore urges States not to enforce carrier sanctions in relation to the transport of undocumented or inadequately documented passengers who, upon arrival in the country of destination, submit an asylum claim which is subsequently accepted for consideration.

IV. Towards A Comprehensive European Approach

32. A comprehensive approach, by definition, must address or touch on all the essential aspects of population movements within an inter-disciplinary and multi-disciplinary response mechanism, but maintaining the particularities of asylum and refugee protection in contradistinction to the legislative and policy framework applicable to ordinary aliens. This is quite a challenge in the face of differing national priorities, socio-economic situations and cultural

sensitivities, as well as immigration traditions. It is equally a challenge since it is, from one perspective, a response to human needs and problems

33. Regional policies and solutions with respect to migration necessarily affect other regions. Given the inherently international dimension to the movements of persons across borders, a comprehensive approach must be based on the general principle of international co-operation and solidarity. Members of the United Nations have committed themselves, under Article 1.3 of the Charter, "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

34. At issue when it comes to population movement are the basic principles of international human rights law, international humanitarian law, refugee law and migration law. These principles should therefore provide the backdrop against which States can appropriately determine the scope and content of a comprehensive approach to what are essentially human problems. Basing a comprehensive approach on generally accepted principles and rules of international law governing the movement of persons across international borders can enhance co-operation and partnership not just at the regional level, but also at the global level. At least 18 of such rules have been identified:⁹

➤ *Rights and Duties of States in Respect to Movement of Persons Across Borders*

i. **Control and Regulation of Movement of Persons Across Borders**

A State has the competence to control and to regulate the movement of persons across its borders. This competence is not absolute. It is limited by the right of individuals to move across borders and by the obligations of the State that arise from generally accepted principles of international law and applicable international agreements.

ii. **Regulation of Different Movements Across Borders**

A State may apply to persons moving across its borders different laws and regulations, depending upon the reason or purpose for crossing the border.

iii. **Principle of Non-Discrimination**

In applying its laws or regulations to persons moving across its borders, a State shall act in accordance with the principle of non-discrimination.

⁹ Louis B. Sohn and Thomas Buergenthal (eds.), "The Movement of Persons Across Borders," (The American Society of International Law, Washington, D.C., 1992). These "Governing Rules" were compiled by 38 eminent international law professors, judges and practitioners coming from 22 countries all over the world.

iv. Limits on Restrictions

A person crossing a national border shall be subject only to restrictions expressly established under applicable law. That law shall not be applied arbitrarily.

v. Judicial and Administrative Remedies

Each state shall provide fair and effective judicial or administrative remedies to enable persons who claim that they were denied the right to move across its borders to challenge such denial.

➤ *Admission and Exclusion of Persons Moving Across Borders*

vi. Admission of Nationals of a State

All nationals of a State have the right to enter the territory of that State and that State may not impose arbitrary restrictions on the exercise of that right.

vii. Admission of Aliens

Aliens may enter the territory of a State in accordance with the laws and regulations of that State. The conditions and procedures for entry shall conform to generally accepted principles of international law and applicable international agreements.

viii. Respect for Family Values

In the formulation and administration of its immigration laws, and of its laws and regulations relating to admission of aliens into its territory, a State shall respect the unity of the family.

ix. Excludable Aliens

A State may refuse admission to any alien who falls within an internationally recognised excludable category, such as, for example, persons reasonably suspected of terrorism or drug trafficking or those suffering from a contagious disease.

x. Right to Leave

All persons have the right to leave the territory of any State, including their own, and no State may impose arbitrary restrictions on the exercise of that right.

xi. Expulsion or Deportation of Nationals

No State shall expel or deport its nationals.

xii. Expulsion or Deportation of Aliens

A State may expel or deport an alien only in accordance with its laws and regulations and in conformity with generally accepted principles of international law and applicable international agreements.

➤ *Refugees and Displaced Persons*

xiii. Applicability of Internationally Recognised Human Rights
Refugees and displaced persons are entitled to the enjoyment of their internationally recognised human rights. They are also subject to a special international regime under which they are accorded protection by the competent international organisations and by the States through which they transit or in which they seek temporary refuge or permanent settlement.

xiv. Rule of *Non-Refoulement*
A State shall not return (*refouler*) any persons to a country where they are likely to be subject to execution or torture, or to persecution on account of their race, religion, nationality, membership of a particular group, or political opinion. Persons invoking the rule of *non-refoulement* are entitled to temporary refuge and humane treatment pending a determination of their claim.

xv. Exceptions to the Rule of *Non-Refoulement*
A State may deny the benefit of the rule of *non-refoulement* to a refugee who is reasonably regarded as a danger to its security or who, having been convicted of a serious crime, constitutes a danger to society.

xvi. Limits to Expulsion of Refugees
No State shall expel or deport a refugee lawfully in its territory, save on grounds of national security or public order (*l'ordre public*).

➤ *International Co-operation in Protecting and Assisting Persons Moving Across Borders*

xvii. United Nations and Other Organisations as Protectors of Persons Moving Across Borders
The United Nations and other international organisations shall, within their competence, provide international protection and assistance to persons moving across borders.

xviii. State Co-operation in Protection of, and Assistance to, Persons Moving across Borders
States shall co-operate with one another and with the United Nations and other competent international organisations in discharging their obligations to promote and protect the internationally recognised human rights of persons moving across borders.

35. Premised on the above sets of basic, across-the-board principles and rules governing the international movement of persons, a comprehensive approach to migration should address the following six closely inter-connected policy areas:

- (i) *effective protection of refugees;*
- (ii) *effective prevention policy;*
- (iii) *effective management of migration;*
- (iv) *effective integration policy;*
- (v) *effective return policy and programmes; and*
- (vi) *effective public information and education policy.*

(i) Effective Protection of Refugees

36. The motive to any endeavour and any action by UNHCR with regard to the broader migration question is the need to ensure effective international protection of refugees -- the *raison d'être* of the Office. UNHCR's promotion of a comprehensive approach to migration and asylum rests therefore on the understanding that in any such approach asylum is preserved as a distinct legal concept and not sub-ordinated to the political, security and socio-economic dimensions of migration policy. Where a person must, out of necessity, exercise his or her human right to seek asylum, that person's treatment and fate at the hands of a State are a matter of international law and obligations, not a matter of the State's discretionary immigration policy.

37. Effective protection of refugees involves determining who is in need of protection, how beneficiaries of protection are to be identified, what protection should be provided and where it should be provided. At the centre of effective refugee protection is full respect of the right to seek and to enjoy asylum from persecution as set out in Article 14 of the Universal Declaration of Human Rights. Asylum, when granted, serves the dual purpose of providing a predictable and structured framework for the international protection of persons whose life or liberty is at risk in their country of origin, while at the same time ensuring that lasting solutions to the problems of refugees are achieved by way of voluntary repatriation, local integration or resettlement.

The Beneficiaries of Protection

38. The internationally agreed legal definition of who is a refugee is set out in Article 1 of the 1951 Convention as amended by Article I of the 1967 Protocol. The definition was formulated and negotiated primarily by European States and, in UNHCR's view, it is as valid and relevant today as it was when it was first adopted almost 50 years ago. Its provisions should be interpreted in European States, as in other States the world over, in the humanitarian spirit in which it was adopted and in good faith, with protection rather than fear of migratory flows as the underlying purpose. However, even among the European Union Member States with similar sophisticated asylum systems

there is a considerable disparity in the interpretation of the refugee definition of the 1951 Convention.¹⁰

39. It is ironic that some States create a "protection gap" through an unjustifiable narrow interpretation of the refugee definition and then they hasten to point to the "inadequacies" of the Convention. In UNHCR's understanding, the refugee definition contained in the 1951 Convention and the 1967 Protocol does not exclude persons in fear of persecution from non-State agents, as indeed recognised by State practice and jurisprudence in the great majority of States in Europe and the world over. The Convention does not exclude either those whose life or liberty is at risk in a country where governmental authority has collapsed. Likewise, the Convention does not exclude persons claiming to have a well-founded fear of gender-related persecution. Last, but not least, the Convention does not require that asylum-seekers make a frantic, area by area search inside their own country for protection before they may seek asylum in another country -- the so-called "internal flight alternative."

40. Of course, the Convention definition of a refugee does not cover the protection needs of all persons. Those who may not necessarily come within the ambit of the Convention refugee definition as formulated in 1951 but who nevertheless need international protection are commonly referred to as refugees falling under UNHCR's wider competence. States have long supported protection and assistance activities undertaken for these categories of refugees by UNHCR, which include, for example, persons fleeing the indiscriminate effects of armed conflict or serious public disorder, albeit with no specific element of persecution or link to one of the five grounds enumerated in the Convention. Unlike Africa and Latin America, where complementary regional refugee instruments were developed to provide for this broader definition of a "refugee," Europe does not yet have a similar regional complement to the 1951 Convention. Nonetheless, the European Union will soon develop a system of complementary forms of protection as part of the various legislative measures foreseen in the Treaty of Amsterdam that came into force in May 1999.

Identifying Persons in Need of Protection

41. A formal procedure for the determination of refugee status will go far towards ensuring the proper identification of those in need of, and entitled to, international protection. The principal objective of refugee status determination is to provide a fair and expeditious decision-making process that will best ensure the observance of international obligations deriving from refugee and human rights instruments. At the same time as facilitating the task of States in fulfilling their international obligations to refugees, a procedure for refugee status determination also serves to address the legitimate interests of States in controlling immigration by screening out those who do not need protection or who are otherwise excludable.

¹⁰ In 1999, the refugee status recognition rate under the 1951 Convention for applicants from Iraq, for example, varied from 0.8 per cent in Norway and 1 per cent in the Netherlands to 40.2 per cent in Belgium and 59.3 per cent in France. In the case of Afghanistan, the rate was 1.7 per cent in Germany, 10.9 per cent in Sweden and 83.3 per cent in Belgium.

42. To meet the standards of international protection, a procedure for determining refugee status should satisfy certain basic procedural requirements, which, as set out by the UNHCR Executive Committee, include the following: a careful and impartial examination of each claim by a trained and informed decision-maker; adequate opportunities to present one's case, including all necessary guidance as to the procedure to be followed and the assistance of appropriately qualified interpreters if required; the opportunity for review or appeal of negative decisions before removal; the right to contact UNHCR or non-governmental organisations acting on behalf of UNHCR. For its part, UNHCR assists refugee status determination authorities by, *inter alia*, providing training and technical assistance and disseminating accurate and objective information about the human rights situation in countries of origin and precedent-setting asylum decisions by national and international courts.

43. The case-by-case approach to refugee status determination is helpful where the overall numbers of asylum-seekers are manageable. However, the normal procedures for determining individually who needs protection have proven inadequate to respond to situations of sudden mass influx. In such situations, where objective factors attest to the risk of serious harm to life or liberty as the cause of the mass influx, recourse has been had to group determination of refugee status, whereby each member of the group is regarded *prima facie* as a refugee. In Europe, situations of mass influx of refugees have been addressed through exceptional measures of providing "temporary protection" to all members of the group.

44. UNHCR recognises the usefulness of providing temporary protection to people fleeing *en masse* from a conflict situation, especially when it is effectively linked to the political resolution of the causes of the flight. For all its advantages, however, temporary protection poses a number of problems which remain to be resolved satisfactorily. Most importantly in this respect, temporary protection should be modelled on sound principles and well-established criteria that ensure it does not become a second-best alternative to asylum. When it leaves people in limbo, or when it denies generally accepted standards of treatment, or when its termination results in the forcible return of people to situations where their safety is not guaranteed, temporary protection does not conform with States' human rights obligations.

The Content of Protection

45. There are a number of core measures and means of giving effect to the principles and standards of international protection of refugees contained in the 1951 Convention and the 1967 Protocol. They include in particular: (a) ensuring admission to safety; (b) respect for the principle of *non-refoulement*, including non-rejection of asylum-seekers at the frontier; (c) access to fair and efficient procedures for the determination of refugee status; (d) ensuring basic standards of treatment that accords to the full with human dignity and integrity, particularly in respect to physical and material security, freedom from arbitrary arrest and detention, non-discrimination and family unity; (e) appropriate protection and assistance for refugee women and children; (f)

UNHCR's unhindered access to asylum-seekers and refugees to monitor their situation and treatment.

46. Effective protection, as an essential component of a comprehensive approach to forced displacement, also necessitates appropriate lasting solutions for refugees. The three durable solutions UNHCR and States have successfully resorted to -- i.e. voluntary repatriation, local integration and resettlement -- have benefited more than 80 million refugees over the past fifty years. Most exiled populations naturally desire to go back to their homeland as soon as they can. Voluntary repatriation is not, however, always feasible and hence the protection objective may call for the local integration of refugees in their country of asylum or, in other circumstances, resettlement in third countries. However, there is no rigid hierarchy of solutions. There are situations where, for example, resettlement becomes not the solution of last resort, but the principal protection objective.

Responsibilities for Protection

47. Refugee protection is the collective responsibility of the international community, as acknowledged in the preamble to the 1951 Convention: "the grant of asylum may place unduly heavy burdens on countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation." The principles of international solidarity and co-operation to guarantee effective protection to all who need it and ensure fair distributions of the responsibilities which asylum entails have been consistently endorsed by the UNHCR Executive Committee.

48. The principle of global responsibility sharing for the effective functioning of the international refugee protection system places the primary onus on the more affluent States to demonstrate a much greater degree of solidarity with those low-income States where the overwhelming majority of the world's refugees are to be found. UNHCR, as the organisation at the centre of the international protection system, therefore legitimately expects the industrialised democratic States to share the global responsibility for refugee protection in three ways: firstly, by pursuing liberal policies towards those people who wish to seek asylum on their territories; secondly, by establishing and strengthening resettlement programmes for those refugees who are unable or, for valid reasons, are unwilling to remain in their country of first asylum; and thirdly, by providing adequate humanitarian and development assistance which enables the poorer States to cope with the presence of large refugee populations.

49. Sadly, many of the measures introduced by Western European and other industrialised States since the beginning of the 1980s have had the effect of diverting the refugee problem elsewhere, often to those States that are least able to guarantee effective protection. Notions such as "safe third country" and "safe first country of asylum" have become, in the views of many observers, evasive strategies by States seeking to avoid their international

responsibilities towards refugees without actually committing direct breaches of treaty obligations.

50. There is an evident value in instituting formal arrangements which limit the possibilities for asylum-seekers to apply for refugee status in one country after another. UNHCR agrees with States that asylum-seekers should in principle submit their claim to refugee status in only one country. This, of course, is providing the country where the person should apply for asylum has fair and effective procedures for determining refugee status that conform to established international standards and has the means to guarantee asylum-seekers basic human treatment and safe asylum as long as needed. However, the fact that a person has the possibility to seek and to enjoy asylum in a given country should not take precedence over every other consideration as asylum is not just about numbers and legal definitions. For example, the connections which an asylum-seeker may have with a particular country, whether through the presence of family members or through linguistic, cultural or historical ties, are important considerations.

51. Once it is accepted that measures should be taken to limit the so-called "asylum-shopping" phenomenon, the corollary to this is that there must be at least one country in the world willing and able to provide protection and quality asylum to each and every refugee. This may be best achieved by defining universal rules on the proper apportionment of responsibilities for receiving asylum-seekers. Unilateral measures by European States, such as the "safe third country" policy or the pursuit of "regionalised asylum" are not a satisfactory solution. Indeed they raise the worrying prospect that asylum will no longer be a global regime and will, instead, be confined to the world of poor nations and regions neighbouring refugee-producing countries.

52. Throughout the history of refugee protection, the vast majority of those forced to flee their country for reasons of persecution or other serious threat to life or liberty have sought refuge in a neighbouring country or somewhere within that region. It is a natural phenomenon that a refugee, believing his or her flight to be only a temporary necessity, wishes to find sanctuary in a country geographically close to his or her own and where, if possible, cultural and linguistic affinities that facilitate a positive and welcome reception exist. Time and again, however, it has been seen how millions of refugees in the developing world have had to endure for several years the difficulties of squalid camps or settlements where even elementary survival needs are hardly met despite the combined efforts of the frontline asylum countries and donor Governments. No matter how attractive the idea of "regionalised asylum" may appear to some States, there is evidently a straightforward question of human dignity and integrity that needs to be taken into account, as well as the need for an equitable global system of refugee protection.

53. UNHCR has supported in principle the initiative of the European Union to examine the possibilities and limitations of "reception in the region" within the framework of the High Level Working Group on Asylum and Migration (HLWG). Although the HLWG has developed comprehensive plans of action in relation to a number of countries and regions from which significant

numbers of asylum-seekers and migrants originate, those plans are yet to be fully implemented. Insofar as asylum is concerned, the focus of the HLWG action plans is on "regionalising", for example, Afghan refugees in Pakistan and Iran or "localising" Sri Lankan would-be refugees within presumed safe areas in Sri Lanka. In UNHCR's view, this approach to "regionalisation" of protection should be redirected towards a more outward-looking response that is based on the principle of universal responsibilities for refugees world-wide. Such a response must take into account the already uneven spread and disproportionate impact of refugee movements on developing countries, as well as the growing problem of internally displaced persons.

54. One would be hard pressed to find a principled justification for the attempts of the affluent States of the European Union to direct the "burden" of receiving and caring for refugees to those least able to afford it. If the policy priority of the European Union were to reconcile an effective system of control over refugee movements with the requirements of justice towards refugees, there ought to be other positive alternatives capable of preserving humanitarian principles and a fair allocation of responsibilities among all States. For example, consideration could be given to mutually beneficial arrangements between the European Union and selected countries in certain regions to establish "regional asylum processing centres" to serve as an initial locus for identifying protection needs of asylum-seekers originating from those regions.¹¹ The central focus of such a scheme is that, by bringing eligibility procedures closer to countries of origin, refugees could file asylum claims in States other than those that may subsequently grant them asylum if their claims are recognised. As a result, the impetus to move extra-regionally in an irregular manner or to resort to the services of unscrupulous people smugglers may be eliminated, or at least reduced considerably.

55. This approach may succeed if it is situated within a truly comprehensive action plan that takes into account the legitimate interests of all involved -- the countries of primary reception, European and other asylum States and, of course, the asylum-seekers themselves. This may require that firstly, sufficient financial and technical assistance be made available to those countries that undertake to provide the initial reception and process the asylum applications. Such assistance could be provided by redirecting a portion of the enormous sums that European Union countries currently spend to adjudicate the refugee claims of the relatively small numbers of asylum-seekers who manage to reach their borders. Secondly, there should be concerted international efforts to address the root causes of flight and achieve the voluntary repatriation of the refugees. Thirdly, if these efforts do not succeed within a reasonably short period of time, the refugees concerned should be offered durable asylum in the European Union and other States so

¹¹ This approach should build on the experiences gained and lessons learnt from the Comprehensive Plan of Action for Indo-Chinese Refugees (CPA) set up in 1989. The CPA comprised four basic elements: (1) admission to "first asylum" countries with strict observance of the *non-refoulement* principle; (2) large-scale extra-regional resettlement of those determined to be refugees; (3) return and re-integration programme for those who did not qualify as refugees; and (4) mass information campaign in Vietnam in the context of the Orderly Departure Programme (ODP).

that the countries of first reception are relieved of their responsibility.¹² Finally, assistance should be provided, both financial and political, to help the first reception countries effect the return of those found not to be in need of international protection.

(ii) Effective Prevention Policy

56. European Union States have, as does UNHCR, a particular concern to prevent coerced population movements by tackling their root causes, be they violent conflict, persecution, denial of basic human rights or abject poverty. Effective prevention, as seen by UNHCR, refers to strategies and action aimed at safeguarding the security and well-being of people within their homeland thereby removing or mitigating the necessity for flight or irregular migration.

57. It is generally accepted that migration, if managed properly, has an important role to play in furthering human development to the benefit of both the countries of origin and destination. The preventive action required is not, therefore, to obstruct people from moving from one country to another, but to render them more secure in their own society so that they migrate out of choice rather than compulsion or necessity. Such actions are essentially the same as those identified for many of the most pressing global issues confronting world diplomacy today: respect for human rights and fundamental freedoms; resolution of conflicts; promotion of democracy and the rule of law; eradication of poverty through increased economic co-operation, liberal trade, investment, development aid and debt relief; environmental conservation.

58. The European Union has at its disposal a wide range of policy instruments to ensure the reduction of migration pressures by taking, in concert with the United Nations and other organisations, at least some of the above key measures. States with long traditions of democracy and the rule of law could influence the course of events in many refugee-producing countries, for example, by placing respect for human rights in their trade and investment relations. One need only speculate what might have happened in Rwanda if the approximately two billion US dollars spent on refugee relief in the first two weeks of the emergency had been devoted to protecting human rights, peace-making and peace-keeping. Efforts currently under way to institute a global ban on illicit trading in "conflict diamonds" are a clear demonstration of what the international community can do to reduce internal armed conflicts. In the same vein, stopping arms exports to regimes that persecute their citizens and to countries engulfed in violent internal conflicts or wars of aggression against other countries could be the biggest single step towards reducing the number of asylum-seekers.

¹² Not all the refugees would necessarily want to be transferred to the European Union or other countries outside of their own region. Some might prefer to remain and integrate in the country of first reception; others could, if given the opportunity, re-establish their lives in some other countries within the region. Whatever the actual number of those to be transferred to the European Union, it should be under a new programme of "invited refugees" distinct from and additional to the traditional resettlement programme.

(iii) Effective Management of Migration

59. Effective management of migration requires integrated policy responses at various levels. Basically it involves, on the one hand, designing positive admission policies once having defined the objectives migration can serve from the perspective of both receiving and source countries as well as the migrants and, on the other hand, dealing effectively with irregular migration. It is generally believed that where migration policies offer legal avenues, the clandestine alternatives for entry lose attraction.

Admission Policy

60. The range of possible measures to control migration should include positive admission policies concerning family reunification, studies and employment, including self-employment. Admission policies for labour-related immigration or for skills acquisition could be of a temporary nature planned appropriately in conjunction with a return programme. Opening legal channels of immigration for third country nationals to meet justified economic, social and other needs is consistent with the European Union's own positive approach to the freedom of movement between the Member States.

61. There is evidence that many European countries are currently experiencing serious shortages of both skilled labour in a variety of high-tech industries and public services and unskilled workers to perform the less glamorous tasks which nationals are not inclined to take up. International migration should therefore still be viewed today as in the past as a positive force of economic development and progress, where both countries of origin and of destination stand to gain from orderly movement of people, supplying human resources where these are needed. It can also facilitate the acquisition and transfer of skills, know-how and remittances to less developed communities, whilst contributing to the cultural, ethnic and social enrichment and economic development of host societies. One essential consideration is that admission policies for high-skilled immigrants should not contribute to a "brain drain."

62. European Governments may consider the feasibility of the "immigration lottery" system that has been in practice in the United States and other immigration selection models that have been successfully operating in Canada and Australia. Whatever immigration schemes may be considered, UNHCR would advocate that they should also encompass a special "refugee labour migration quota" as part of a proactive approach to managing migration. In many first countries of asylum in the less developed regions of the world, there are highly skilled, educated and talented refugees who simply do not have the opportunity to make use of those skills. Some of these refugees may arrive in Europe in an irregular manner not necessarily in search of better asylum, but with the hope to practice a liberal profession or engage in wage-earning employment. It needs to be stressed that any refugee labour migration quota must be as a complement, and not a substitute, to existing resettlement programmes.

Addressing Irregular Migration

63. Irregular migration is of concern to both countries of origin and receiving countries. Dealing effectively with irregular migration should therefore involve appropriate action at both ends, with relevant international organisations, such as UNHCR, the International Labour Organisation and the International Organisation for Migration having a role to play. The challenge for UNHCR is, together with States, to provide effective protection for refugees within the category of irregular migrants. The International Organisation for Migration has the mandate to provide migration services to individuals as appropriate, either as regards return to their country of origin or admission to another country.

64. Migrant smuggling and trafficking in persons has become a compounding feature of the migration landscape. This phenomenon is posing a growing problem to States and endangering the lives of those individuals on whose fate these criminal organisations thrive and profit. Efforts aimed at preventing trafficking in persons and migrant smuggling must, therefore, be fully supported. However, these efforts stand better chances for success if the international community pays closer attention to a comprehensive response to the various types of contemporary migration.

65. UNHCR supports the efforts under way in Vienna, under the auspices of the United Nations, to elaborate an international Convention against organised crime, including the drafting of two Protocols in relation to the smuggling of migrants and the trafficking in persons. One of the important elements of the two draft Protocols is the distinction in legal terms between “trafficking in persons” and “smuggling of migrants.” The draft Trafficking Protocol defines “trafficking in Persons” to mean *“the recruitment, transportation, transfer, harbouring of persons, either by the threat or use of abductions, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, with the aim of submitting them to any form of exploitation, as specified in article... of this protocol”*. In the draft Smuggling Protocol, “smuggling of migrants” is defined as *“the procurement of the illegal entry into or illegal residence of a person in a State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit”*.

66. UNHCR considers that the above distinction between trafficking in persons and smuggling of migrants is evidently a useful starting point for designing the appropriate legislative or policy framework in the context of the European Union to deal effectively with the criminal trafficking and smuggling organisations. Such legislative and policy measures should not only address the penalties against smugglers and traffickers, but also set out adequate provisions for ensuring the protection of victims of criminal exploitation by these gangs. Whatever measures are taken to combat human smuggling and trafficking, their success depends on concerted action in a wide range of related matters, including the factors that make migration a necessity.

(iv) Effective Integration Policy

67. The European Union has long emphasised the close link between integration and immigration policies. The integration of legally resident immigrants and refugees is therefore an important concern not only for the individuals concerned, but also to the States and the proper functioning of their immigration and asylum policies. It has an impact on both immigration and asylum policies in so far as it may influence the receiving societies' attitude towards immigrants, asylum-seekers and refugees. Successful integration will improve the image of the refugee and the immigrant in the public eye, thus opening doors to greater understanding and tolerance.

68. Some host communities regard the arrival of refugees and immigrants from distant lands as an unwelcome disruption to their normal lives, or as a threat to their national identity or culture. Yet others regard them as competitors for jobs or social welfare support systems, and the fact that nation after nation owes its development and present wealth to the contributions of migrant workers and refugees is often forgotten. This environment can be a fertile ground for racism, xenophobia and related intolerance to develop. It can be easily aggravated by irresponsible media, or public debates that "politicise" asylum and "criminalise" migration. As noted by the European Monitoring Centre on Racism and Xenophobia, "every day, racism and xenophobia rear their heads in the fifteen Member States of the Union. Every day, racism causes the death of many people...Hate-driven groups inflict wounds and confusion. Discrimination even penetrates the wheels of governments. Expressions of racism permeate our daily life."¹³

69. Effective integration policies necessarily require sustained efforts to eliminate racial discrimination and to combat xenophobia and intolerance against people perceived as "aliens." This would only be possible through the determination and political will of all States acting on an individual and collective basis to address with sufficient vigour not only the symptoms of xenophobia and intolerance, but equally the economic, political and social causes that give rise to this phenomenon. Public authorities should be made more responsible and accountable for stereotyping certain non-nationals or for their negative characterisation of refugees as "bogus asylum-seekers" or "scroungers." Racists and xenophobes must not be let to set the immigration and asylum agenda. The media should not be allowed to be used as an instrument to propagate hatred and intolerance. The judicial system must ensure that perpetrators of racist and xenophobic violence are subjected to the full weight of criminal justice.

70. Given that racism and xenophobia are often symptoms of intolerance of difference, rather than a reaction to the presence of foreigners, restricting immigration will not necessarily solve the problem. What led to the holocaust was not the size of the Jewish population in Europe, but racist ideology and aggressive nationalistic prejudice. Likewise, measures to combat racism and xenophobia should not be used as a justification for restricting the access of

¹³ European Monitoring Centre on Racism and Xenophobia, "Giving Europe a Soul," Annual report on the Activities 1998.

lawfully-residing immigrants and refugees to full membership in the social, political, economic and cultural life of the host country.

71. Experience has shown the deficiencies and long-term negative consequences of the previous general policy of so-called "differential exclusion" that characterised the guest-worker recruitment strategy of many Western European countries. It was a policy largely based on fear of threat by the migrant workers to the economic, social, cultural and political structures of the host societies. Even after a protracted period of stay, they were still regarded as "guest" workers and excluded from establishing a solid relationship with their host societies by way of citizenship, political participation and other features of integration. Overt assimilation policies of forcing immigrants to abandon their distinctive cultural, linguistic and social characteristics have not proven desirable either. Between these two extremes lies the integration model which enables immigrants to enjoy equality of rights and opportunities in all spheres of society while preserving their cultural identity. Integration emphasises the value of cultural, national, ethnic and linguistic diversity. Particularly in this era of globalisation in economies, cultures and communication, diversity and pluralism are essential requisites for societal and personal development.¹⁴

72. Following the entry into force of the Treaty of Amsterdam, the importance of integration of third country nationals lawfully residing in the European Union has gained momentum. The Tampere European Council stressed that "the European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States" and that "a more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens." To attain this objective, the European Commission has prepared a proposal for a Directive establishing a right to family reunification that can be exercised by third-country nationals in accordance with common criteria in all Member States of the European Union. However, the facilitation of family reunion is only one important aspect of a holistic integration policy that needs to comprise all spheres, ranging from equal opportunity in the enjoyment of basic civil, political and economic rights, to security of residence and acquisition of (dual) citizenship.

(v) Effective Return Policy and Programmes

73. As noted above, opening up legal opportunities for migration into the European Union will not completely stop irregular migration or the misuse of the asylum system. Therefore, effective management of migration should necessarily include a return component, including the return of unsuccessful asylum-seekers. There is an inter-dependence between admission policies and return policies. Society's readiness to support the legal admission of non-nationals, whether on economic or humanitarian grounds, depends to a large extent on how governments deal with irregular forms of migration. A comprehensive and integrated immigration policy should therefore contain

¹⁴ For a detailed analysis, see, for example, Council of Europe, "Diversity and cohesion: new challenges for the integration of immigrants and minorities," (Strasbourg, 2000).

measures to deal humanely and effectively with the return of unauthorised migrants and unsuccessful asylum-seekers in accordance with relevant immigration regulations and applicable international standards. A primary consideration of a return policy should be to ensure, to the extent possible, the individual's voluntary compliance with the obligation to repatriate.

74. For UNHCR, the primary concern in regard to return migration is the problem of unsuccessful asylum-seekers. European States have invested considerably in the development of complex asylum procedures. However, the credibility of the asylum procedures risks to be undermined by the non-return of those who, after a fair and objective assessment of their claims, have been found not to be in need of international protection. This could also erode public confidence in the effectiveness of the international system of refugee protection. UNHCR is, therefore, prepared to assist States with resolution of the difficult and complex problem posed by rejected cases, provided that the Office's participation would be consistent with its humanitarian and non-political character.

75. Any measures for effecting the return of unsuccessful asylum-seekers should be consistent with human rights requirements and without prejudice to the protection currently offered by many States to persons who do not fully meet the refugee definition of the 1951 Convention, but who might nevertheless be exposed to serious negative consequences if they are forced to return to their countries of origin. Special procedural safeguards should also be laid down for especially vulnerable groups such as torture victims, persons who have been sexually assaulted, unaccompanied children, pregnant women, people who are ill and people with disabilities.¹⁵

76. In the context of a comprehensive approach to migration management, the issue of return of unsuccessful asylum-seekers could not be viewed separately from the return of other aliens found in an irregular situation. Also, return policies should take account of the migration pressures which originally prompted them to leave their country of origin. Therefore, effective implementation of return policies depends to a large extent on closer co-operation with countries of origin through bilateral and multilateral fora. Although countries of origin have international legal obligations to take back their own nationals, compliance with such an obligation is in some cases difficult to secure. Bilateral and multilateral co-operation with countries of origin on economic, trade and development aid issues can provide the framework for mutually beneficial co-operation in return migration.

(vi) Effective Public Information and Education Policy

77. A sound public information policy is an essential component of a proper migration management strategy. It is also central to UNHCR's protection objective in Europe. The dissemination of accurate and up-to-date information on the numbers of those in need of protection, where that protection is being provided and in what form will generate better

¹⁵ See European parliament Resolution on the Commission working document: "Towards common standards on asylum procedures," 15 June 2000.

understanding of the distinction between refugees and ordinary migrants. This will also enhance community understanding of, and support to, refugees and asylum-seekers, and may help reduce the incidence of racism and xenophobia. Furthermore, public information is an important tool in facilitating the integration of refugees and lawfully resident immigrants.

78. The above should be complemented with mass information programme in countries of origin of migrants. This would involve compilation and dissemination of objective and reliable information to potential economic migrants with an accurate impression of the likely consequences of their departure and the availability of managed migration opportunities (e.g. employment contracts, family reunification, studies, etc). Such information could facilitate informed decisions by the persons concerned and empower them against exploitation by traffickers and smugglers. It can also contribute to measures of controlling irregular movement and reducing exploitation of asylum procedures by persons without refugee claims.

V. Conclusion

79. The problems raised by today's movements of migrants, refugees, asylum-seekers and displaced persons are international issues requiring international responses through a combination of national, regional and global responsibilities and capacities. What makes such responses challenging is the multidimensional nature of migration. It intersects with issues of demography and labour market, trade and development, human rights and democratic values, environment and foreign policy. It requires a balancing act in reconciling the interests of States with their obligations to implement international standards, whether applicable to refugees, stateless persons, migrants or migrant workers and their family members.

80. Border controls, visa regimes, carrier sanctions and interception on the high seas may help in the management of migration flows, but only as short-term defensive measures and with adverse consequences for the international refugee protection regime. There can be no objection to deterrence measures against persons who are likely to misuse a State's asylum system from arriving on the territory of that State. The problem is when States also try to deter people with legitimate claims to refugee status.

81. The argument has been made that imposition of visa requirements, carrier sanctions and other "non-arrival" policies of the European Union do not prevent asylum-seekers and refugees from leaving their country of origin, but rather merely deter them from entering the Union. Such policies seem to be relying on the good will of those States neighbouring refugee-producing countries to keep their borders open. It is hard to imagine what persuasive moral justification could be offered for imposing measures that divert refugee movements into countries least able to receive and care for them. After all, the whole point of concluding an international treaty on refugees is that a contracting State is committing itself, not other States, to accept refugees arriving on its territory. If the contracting State then erects all sorts of barriers to prevent refugees from arriving so that it does not have to accept them, this

clearly goes against the good faith requirement for implementing treaty obligations.

82. Unilateral policies and practices with respect to population movement or displacement necessarily affect other States. Problems will only be resolved, rather than shifted, if a more holistic, coherent and multi-disciplinary approach to migration is found to take up a triple challenge: to manage population movements in a way which upholds basic human rights and the institution of asylum; to safeguard the legitimate interests of the States and communities affected by these movements; and to invest the necessary political will and resources in preventing and reversing the causes of involuntary migration.

Office of the United Nations
High Commissioner for Refugees
Geneva, October 2000