



**UNHCR Provisional Comments on the Proposal for a
Council Directive on Minimum Standards on Procedures in
Member States for Granting and Withdrawing Refugee
Status
(Council Document 14203/04, Asile 64, of 9 November 2004)**

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The following provisional comments by the Office of the United Nations High Commissioner for Refugees ('UNHCR' or the 'Office') relate to the amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council document 14203/04, 9 November 2004), on which political agreement was reached at the Justice and Home Affairs Council meeting of 19 November 2004. Comments are limited to the substantive provisions, and the preamble has not been commented upon. UNHCR will issue final comments on the Directive, including the preamble, after its formal adoption and publication.

CHAPTER I General provisions

Article 1 Purpose

The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

UNHCR Comment on Article 1: It is in the interest of Member States that all forms of international protection which are available in a national legal system be decided upon by the same competent authority in one single procedure with the same minimum guarantees. Thus, each case should be considered in its entirety with regard to both 1951 Convention¹ grounds and complementary/subsidiary protection needs. The circumstances that force people to flee their country are complex and often of a composite nature. Information obtained during an examination of a claim under the 1951 Convention could also be relevant for the examination of complementary/subsidiary protection needs. Such an approach should increase efficiency and reduce the costs of decision-making in asylum matters. Basic procedural guarantees should apply equally to any request for international protection. Assessment of international protection needs in separate processes may lead to the application of different standards in practice. A single procedure would also be in line with the approach implied in the Qualification Directive² to treat all international protection needs comprehensively (see comments on Article 3 (3) and (4)).

¹ Convention Relating to the Status of Refugees of 28 July 1951 and Protocol relating to the Status of Refugees of 31 January 1967.

² Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004).

Article 2 Definitions

For the purposes of this Directive:

- (a) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;
- (b) "Application for asylum" means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

UNHCR Comment on Article 2(b): In UNHCR's view, the definition of an 'application for asylum' should be expanded to cover all applications for international protection (see comment on Article 1), including complementary/subsidiary protection needs. In addition, it would benefit from language which clarifies that a request for international protection is one for protection against return to a territory where the applicant fears persecution or serious harm.

Furthermore, to ensure full compatibility with the 1951 Convention, UNHCR recommends use of a wider definition which refers to applications by any non-national (see comment on Article 2(f)).

- (c) "Applicant" or "applicant for asylum" means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

UNHCR Comment on Article 2(c): See comment on Article 2(f).

- (d) A final decision is a decision whether the third country national or stateless person be granted refugee status by virtue of Council Directive 2004/83/EC and which is no longer subject to a remedy within the framework of Chapter V irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III;

UNHCR Comment on Article 2(d): The provision may be subject to misunderstanding since the definition of 'final decision' does not include decisions on complementary/subsidiary protection needs. There is a risk that a negative final decision on refugee status may lead to removal before subsidiary protection needs have been examined. It should therefore be made explicit that a final decision includes not only an examination of 1951 Convention refugee status but also of complementary/subsidiary protection needs. See also comment on Article 2 (f).

- (e) "Determining authority" means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I;
- (f) "Refugee" means a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Council Directive 2004/83/EC;

UNHCR Comment on Article 2(f): UNHCR reiterates its concern at this restriction of the refugee definition to third country nationals and stateless persons. To ensure full compatibility with the 1951 Convention, UNHCR recommends that the provision refer not merely to third country nationals but to any non-nationals.

- (g) "Refugee Status" means the recognition by a Member State of a third country national or stateless person as a refugee;

UNHCR Comment on Article 2(g): UNHCR points out that 'refugee status' may, depending on the context, cover two different notions. Paragraph 28 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* reads: '[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined'. In this sense, 'refugee status' means the condition of being a refugee. In contrast, the proposal uses the term 'refugee status' to mean the protection, the set of rights, the benefits and the obligations that flow from the recognition of a person as a refugee, which is often referred to as asylum. A distinction should therefore be made between 'refugee status' in this sense of 'refugeehood' and the status and rights granted to refugees by a State.

- (h) "Unaccompanied minor" means a person below the age of eighteen who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States;

UNHCR Comment on Article 2(h): UNHCR would prefer use of the term 'child' instead of 'minor', in line with the terminology of the Convention on the Rights of the Child. Also, UNHCR would like to draw attention to the difference in terminology used on the international level, where a distinction is made between 'unaccompanied children' and 'separated children'. The term 'unaccompanied children' refers to children who are not accompanied by any adult, having been separated from both parents and other relatives or legal or customary guardians. The term 'separated children' includes children who may be accompanied by a relative or other adult, but where this person may not be able, suitable or willing to assume responsibility for the child's long-term care.³ UNHCR therefore suggests referring to both separated and unaccompanied children.

- (i) "Representative" means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;
- (j) (deleted)
- (k) "Withdrawal of refugee status" means the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person in accordance with Council Directive 2004/83/EC;

³ UNHCR, UNICEF, ICRC, IRC, Save the Children (UK), World Vision: *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, Geneva, 2003.

UNHCR Comment on Article 2(k): The provision seems to confuse the legal concepts of cessation, cancellation and revocation. Cessation refers to the ending of refugee status, pursuant to Article 1C of the 1951 Convention, because international refugee protection is no longer necessary. Revocation refers to the withdrawal of refugee status in situations where a person who has been determined to be a refugee, engages in conduct subsequent to recognition which comes within the scope of Article 1F(a) or (c) of the 1951 Convention. Cancellation means a decision to invalidate an earlier recognition of refugee status, where it is subsequently established that the individual should never have been recognized, including where he or she should have been excluded from international refugee protection in the initial status determination procedure. UNHCR requests that States differentiate among these concepts and their legal requirements.⁴

(l) (deleted)

(m) "Remain in the Member State" means to remain in the territory, including at the border or in transit zones of the Member State in which the application for asylum has been made or is being examined.

Article 3 Scope

1. This Directive shall apply to all applications for asylum made in the territory, including at the border, or in the transit zones of the Member States and to the withdrawal of refugee status.

UNHCR Comment on Article 3 (1): It is essential that asylum-seekers have access to the territory of the State where they are seeking protection and to a procedure in which the validity of their claim can be assessed. Otherwise, persons in need of international protection will not be able to benefit from the standards of treatment provided for by the 1951 Convention, by other relevant international instruments and/or by national law. These essential prerequisites of refugee protection have been repeatedly underlined by the General Assembly of the United Nations⁵ and by the Executive Committee of UNHCR.⁶ The Office therefore appreciates that the Directive will apply to all persons who make a request for asylum, either at the border or in the territory of a Member

⁴ See UNHCR, 'Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)', January 2005, comment on Article 14 of the Qualification Directive; UNHCR, 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)', HCR/GIP/03/03, 10 February 2003, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3e50de6b4>; UNHCR 'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3f5857684>; and attached Background Note on the Application of the Exclusion Clauses, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3f5857d24>; UNHCR 'Note on the Cancellation of Refugee Status', 22 November 2004, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=41a5dfd94>

⁵ See for example, UN GA Resolutions: A/RES/52/132 of 12 December 1997 and A/RES/56/137 of 19 December 2001, GA Resolution A/RES/58/151 of 24 February 2004.

⁶ See for example, Executive Committee Conclusion No. 81 (XLVIII) para. (h) of 17 October 1997; Conclusion No. 82 (XLVIII) para. (d)(iii) of 17 October 1997; Conclusion No.85 (XLIX) para. (q) of 9 October 1998; Conclusion No. 87 (L) para. (j) of 8 October 1999; Conclusion No. 93 (LIII) paras (a), (b)(i) and(ii) of 8 October 2002.

State, without discrimination. It regrets, however, the lesser safeguards Member States are allowed to apply in procedures at the border and the wide variety of claims which may be subject to accelerated procedures (see comments *inter alia* on Articles 3A, 11, 23(4), 24, 35 and 38).

Furthermore, UNHCR would like to underline that non-discrimination is an important principle of international human rights and refugee law. UNHCR strongly recommends that national legislation make explicit that the provisions of the Directive are to be applied without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority or other status.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.
3. Where Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention, and as applications for other kinds of international protection as defined by Article 15 of Council Directive 2004/83/EC, they shall apply this Directive throughout their procedure.
4. Moreover, Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.

UNHCR Comment on Article 3 (3) and (4): As outlined above (see comment on Article 1), it is in the interest of Member States that all international protection needs are examined in a single procedure with the same minimum guarantees, provided that the latter are in line with international law and standards. Article 3 (3), according to which the Directive shall apply to the determination of complementary/subsidiary protection needs for those Member States which rely on a single procedure, is therefore a step in the right direction. UNHCR encourages Member States to make use of this possibility. However, UNHCR has a number of concerns relating to the Directive which, if extended, would apply to the determination of complementary/subsidiary protection needs. In UNHCR's view, it is important that these concerns are addressed before the relevant provisions are also applied to subsidiary/complementary protection needs.⁷

Article 3A **Responsible authorities**

1. Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with the provisions of this Directive, in particular Articles 7(2) and 8.

In accordance with Article 4(4) of Council Regulation (EC) No 343/2003, applications for asylum made in a Member State to the authorities of another Member State carrying out immigration controls there shall be dealt with by the Member State on whose territory the application is made.

2. However, Member States may provide that another authority is responsible in the following cases for the purpose of:

⁷ See also "UNHCR Observations on the European Communication on 'A More Efficient Common European Asylum System: the Single Procedure as the Next Step' (COM(2004)503 final; Annex SEC(2004)937, 15 July 2004)" of 23 August 2004.

- (a) processing cases in which it is considered to transfer the applicant to another State according to the rules establishing criteria and mechanisms for determining which state is responsible for considering an application for asylum, until such time as the transfer takes place or the requested State has refused to take charge or take over the applicant;
- (b) taking a decision on the application in the light of national security provisions, provided a determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of Council Directive 2004/83/EC;
- (c) conducting a preliminary examination pursuant to Article 33, provided this authority has access to the applicant's file regarding the previous application;
- (d) processing cases in the framework of the procedures provided for in Article 35(1);
- (e) refusing permission to enter in the framework of the procedure provided for in Article 35(2) to (5), subject to the conditions and as set out in these paragraphs;
- (f) establishing that an applicant is seeking to enter or has entered in the Member State from a safe third country pursuant to Article 35A, subject to the conditions and as set out in this Article.

UNHCR Comment on Article 3A (2): UNHCR regrets the wide-ranging exceptions to the principle that all asylum applications should be examined by one competent authority (see Executive Committee Conclusion No. 8 (XXXVIII) of 1977). The Office is concerned that decisions by other authorities will be of lesser quality, due to a lack of appropriate expertise and experience or access to relevant country information. In UNHCR's view, the risk of *refoulement* is thereby increased.

UNHCR therefore recommends that authorities other than the determining authority under Article 3A(1), for example the border police, be competent merely to register an asylum application and to forward it together with all relevant information to the determining authority for examination. Appropriate mechanisms could be established at points of entry to ensure speedy decisions by the determining authority on the admissibility of an application and, exceptionally, on its substance.

UNHCR further hopes that Member States will not make use of Article 3A (2)(b) according to which another authority may decide on the case if national security provisions apply. Concerns relating to national security may raise questions of exclusion from refugee status. UNHCR is deeply concerned that this may lead to the denial of international protection in circumstances where this is not in line with the 1951 Convention. In view of the seriousness of the issues and the consequences of an incorrect decision, it is important that such questions be examined in a regular procedure by the determining authority. Specialized units within this institution could be set up to handle exclusion cases and to ensure that they are dealt with in an expeditious manner.⁸

UNHCR is also concerned about the exception provided in Article 3A (2)(f) for cases in which the safe third country concept is applied. The assessment of whether a country is safe may in some cases be difficult and require specialized knowledge about the situation in that country. In view of

⁸ UNHCR 'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003; and attached Background Note on the Application of the Exclusion Clauses, para. 31(f) (see footnote 4 for full references).

the individual examination required by international law (see comments on Article 27 (2)(b) and (c)), UNHCR recommends that the same determining authority be competent in safe third country cases. At a minimum, national legislation should provide for consultations with the determining authority, as required under Article 3A (1) (see also comments on Articles 27 and 35A).

3. Member States shall ensure that where authorities are designated in accordance with paragraph 2, the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.

UNHCR Comment on Article 3A (3): UNHCR welcomes this provision which obliges Member States to ensure that authorities other than the determining authority should have appropriate knowledge and training. Although the competence of such authorities should be restricted, in line with the above comment on Article 3A(2), the designated authorities should have clear instructions and training to enable them to identify and register asylum applications and to forward them to the determining authority, together with all relevant information.

Article 4 More favourable provisions

Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive.

UNHCR Comment on Article 4: UNHCR welcomes this provision, which underlines the Directive's aim to set minimum standards that permit Member States to retain or introduce higher standards of protection. As outlined in this commentary, the Directive itself may not be sufficient to safeguard the principle of *non-refoulement* enshrined in the 1951 Convention and in international human rights law. The same applies *inter alia* to the provisions on detention and the right to an effective remedy. UNHCR therefore urges Member States to assess carefully, in consultation with UNHCR, where more favourable provisions need to be introduced or retained to ensure compliance in practice with international refugee or human rights law. Such favourable national standards which reflect binding international obligations should always be considered compatible with the Directive. UNHCR further encourages Member States to consider the introduction of standards deriving from best practices in national legislation.

CHAPTER II Basic principles and guarantees

Article 5 Access to the procedure

1. Member States may require that applications for asylum be made in person and/or at a designated place.

UNHCR Comment on Article 5 (1): This requirement should not be applied in a manner which hinders access to the asylum procedure, for example, in a situation where the application is made by a legal representative on behalf of a person in detention.

2. Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.
3. Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.

UNHCR Comment on Article 5 (2) and (3): UNHCR understands this provision as a procedural device which enables Member States to deal jointly with all protection claims of one family. However, it is important that consent first be sought of dependent adults, before an application is made on their behalf. Appropriate counselling should be provided to ensure that dependants understand the implications of their consent. Once an application has been lodged on their behalf, regular procedural rules apply. Adult dependants generally should be interviewed separately from the principal applicant so that they can speak freely about sensitive experiences. It should further be kept in mind that possible trauma and sensitivities related to sexual violence or culture may, for example, lead a female asylum-seeker initially to consent to an asylum application on her behalf. She may, however, develop the understanding and confidence to substantiate the claim properly only after some time has passed. It is therefore important that appropriate safeguards ensure that the examination of subsequent asylum applications of dependants takes such constraints into account (see also comments on Article 33 (7)).

4. Member States may determine, in national legislation
 - (a) the cases in which a minor can make an application on his/her own behalf;
 - (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 15(1)(a);
 - (c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

UNHCR Comment on Article 5 (4): UNHCR understands this provision as a procedural device which enables Member States to deal jointly with all protection claims of one family. Once an application has been lodged on behalf of a dependent child, regular procedural rules apply. It is essential, *inter alia*, that the procedure be conducted in an age-sensitive manner (see comment on Article 15(1)).

As with dependent adult asylum-seekers, it should be born in mind that a child asylum-seeker may not be able to substantiate his/her claim initially. He or she may only later develop sufficient maturity and confidence to report on his/her experiences. It is therefore important that appropriate safeguards ensure that the examination of subsequent asylum applications of child dependants take such constraints into account (see also comments on Articles 15 and 33 (7)).

5. Member States shall ensure that authorities likely to be addressed by someone who wishes to make an asylum application are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.

UNHCR Comment on Article 5 (5): UNHCR welcomes this provision, and hopes that appropriate training will be given, as proposed in its comment on Article 3A (3). Any other authority within the scope of this paragraph should have clear instructions to identify asylum applications, to register them and to forward the application, together with all relevant information, to the determining authority. UNHCR would further recommend that specific provisions address the special needs of vulnerable persons, including survivors of violence, in particular sexual violence and torture, and traumatized asylum-seekers⁹ (see comment on Article 15).

Article 6

Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until such time as the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.

UNHCR Comment on Article 6 (1): UNHCR is concerned that the right to remain is limited to the duration of the first instance procedure. To ensure compliance with the principle of *non-refoulement*, appeals should, in principle, have suspensive effect, and the right to stay should be extended until a final decision is reached on the application. The threat to which refugees are exposed is serious and generally relates to fundamental rights such as life and liberty. In line with Executive Committee Conclusions No. 8 (XXVIII) of 1977 and No. 30 (XXXIV) of 1983, the automatic application of suspensive effect could be waived only where it has been established that the request is manifestly unfounded or clearly abusive. In such cases, a court of law or other independent authority should review and confirm the denial of suspensive effect, based on a review of the facts and the likelihood of success on appeal (see also comment on Article 38).

2. Member States can make an exception only where, in accordance with Articles 33 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European Arrest Warrant or otherwise, or to a third country, or to international criminal courts or tribunals.

UNHCR Comment on Article 6 (2): The article mixes procedural standards for asylum applications with issues related to prosecution and extradition. UNHCR is concerned that it does not contain any safeguards to ensure that prosecution or extradition procedures are in line with international refugee and human rights law. In particular, implementing legislation should ensure that extradition or surrender does not directly or indirectly contribute to the *refoulement* of an asylum-seeker, contrary to Article 33 (1) of the 1951 Convention. A person should not be extradited before a final decision has been taken on the asylum application, if he or she claims to be at risk of persecution or serious harm in the requesting state. In particular, the determining authority should consider whether the extradition request is related to the persecution or serious harm claimed by the asylum-seeker.

⁹ Useful guidance could be drawn from: UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/01, 7 May 2002, para. 35; see also further references in footnote 12. UNHCR, 'Guidelines on Policies and procedures in dealing with Unaccompanied Children Seeking Asylum', February 1997; Save the Children/UNHCR: Separated Children in Europe Programme, 'Statement of Good Practice', Third Edition, 2004; and UNHCR, 'Guidelines on Evaluation and Care of Victims of Trauma and Violence', 1998.

If the extradition as such entails no risk, the sending and the receiving States should ensure that the asylum-seeker has access to an asylum procedure. Once the prosecution is concluded, the asylum-seeker should be returned to the State where the asylum application was initially submitted, so that the latter can resume its examination of the suspended application. Alternatively, the State to which the asylum-seeker was extradited could assume responsibility for examining the asylum request. However, this is possible only if the requesting State can be considered a safe third country¹⁰ (see also comments on Articles 33 and 34 respectively).

Article 7

Requirements for the examination of applications

1. Without prejudice to Article 23(4)(i), Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.

UNHCR Comment on Article 7 (1): UNHCR understands this provision as a prohibition on the imposition of mandatory time limits for submitting an asylum application. Formal time limits for submitting an asylum application may result in *refoulement* and are therefore inconsistent with international refugee law. Failure to apply for asylum promptly may be an element in the consideration of the credibility of a claim. However, it should never be the sole reason for rejecting an application. In the Office's experience, valid reasons may delay the filing of a claim. They include, for instance, illness, trauma, lack of access to information about the means to apply, the need to consult with a legal counsellor, or cultural sensitivities.

2. Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that
 - (a) applications are examined and decisions are taken individually, objectively and impartially;
 - (b) precise and up-to-date information is obtained from various sources, such as information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;

UNHCR Comment on Article 7 (2)(b): UNHCR welcomes the importance attached by the Directive to the availability of information on the situation in countries of origin and asylum. It welcomes, furthermore, that country of origin positions and information provided by UNHCR will be taken into consideration. Country of origin information relied upon by the determining authority

¹⁰ See also 'UNHCR's Recommendations on the European Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States' (COM(2001)522 final 2001/0215 (CNS)), October 2001.

as a basis for decisions should, however, be similarly available to the asylum-seeker and his or her legal adviser/counsellor, and should further be subject to the scrutiny of reviewing bodies.

UNHCR further welcomes that a variety of sources, including UNHCR, should be taken into account when identifying safe countries of origin. In this regard, UNHCR would like to draw attention to its country of origin and legal databases known as 'REFWORLD', as well as to other reliable sources available on internet, including Member States, NGOs and specialized sites such as www.ecoi.net. While the Office may not always be in a position to provide specific replies to country of origin information requests, it will, resources permitting, continue to formulate positions and collate information on countries which produce refugee populations of particular significance, or countries where UNHCR is engaged in returnee monitoring operations.

- (c) the personnel examining applications and taking the decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law.

UNHCR Comment on Article 7 (2)(c): UNHCR attaches great importance to appropriate training, including in international refugee and human rights law, for officials likely to deal with applications for asylum, both at the border and on the territory of Member States. The need for such training should, in UNHCR's view, be specifically mentioned in the Directive, and be provided for at national level (see also comments on Article 3A (2) and in particular 3A (2)(d) to (f)).

3. The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 2(b), necessary for the fulfilment of their task.
4. Member States may provide for rules concerning the translation of documents relevant for the examination of applications.

Article 8 **Requirements for a decision by the determining authority**

1. Member States shall ensure that decisions on applications for asylum are given in writing.
2. Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing.

Member States need not state the reasons for not granting the refugee status in the decision where the applicant is granted a status, which offers the same rights and benefits under national and Community law as the refugee status by virtue of Council Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting the refugee status are stated in the applicant's file, and that the applicant has, upon request, access to his/her file.

Moreover, Member States need not provide information on how to challenge a negative decision in writing in conjunction with that decision where the applicant has been informed at an earlier stage either in writing or by electronic means accessible to the applicant of how to challenge such a decision.

UNHCR Comment on Article 8 (2): It is important that information is attached to all negative decisions on how to challenge them. In practice, an applicant, particularly if not represented by a lawyer, may not be aware of the appeal possibilities. In exceptional cases, where reasons for not granting refugee status are not provided, applicants should, furthermore, in line with Article 8 (2), be informed about their right to request the reasons for the rejection, which should be included in their file.

3. For the purposes of Article 5(3), and whenever the application is based on the same grounds, Member States may take one single decision, covering all dependants.

Article 9 **Guarantees for applicants for asylum**

1. With respect to the procedures provided for in Chapter III of this Directive, Member States shall ensure that all applicants for asylum enjoy the following guarantees:
 - (a) they must be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not co-operating with the authorities. They must be informed about the time-frame, as well as the means at their disposal to fulfil the obligation to submit the elements as referred to in Article 4 of Council Directive 2004/83/EC. The information must be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 9A;

UNHCR Comment on Article 9 (1)(a): In the context of an asylum procedure, where so much depends on the testimony of an individual, effective communication with the asylum-seeker is essential. UNHCR considers it necessary to provide information to every asylum-seeker in a language which he or she actually understands. Assumptions that an asylum-seeker speaks or understands the official language of his or her country of origin may be incorrect. As a matter of principle, bearing in mind the need to prevent deliberate obstruction, every effort should be undertaken in this regard by the countries of asylum.

- (b) they must receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed as referred to in Articles 10 and 11 and appropriate communication cannot be ensured without such services. In this case and in other cases where the competent authorities call upon the applicant, the services shall be paid for out of public funds;
 - (c) they must not be denied the opportunity to communicate with the UNHCR or with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State;

UNHCR Comment on Article 9 (1)(c): Asylum-seekers should be provided with an effective opportunity to communicate with UNHCR or with any other organization working on behalf of UNHCR. A more positive formulation would therefore be appreciated. Given that the form of agreement regarding organizations working on behalf of UNHCR may vary, it is further suggested that the words ‘pursuant to an agreement with’ will be replaced with ‘subject to the agreement of’.

- (d) they must be given notice in reasonable time of the decision by the determining authority on their application for asylum. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him/her instead of to the applicant for asylum;
- (e) they must be informed about the result of the decision by the determining authority in a language that they may reasonably be supposed to understand when they are not assisted or represented by a legal adviser or other counsellor and when free legal assistance is not available. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 8(2).

UNHCR Comment on Article 9 (1)(e): Asylum-seekers should be informed in a language which they understand, not in a language with they may reasonably be supposed to understand. See comment on Article 9 (1)(a).

- 2. With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants for asylum enjoy equivalent guarantees to the ones listed in paragraph 1(b), (c) and (d).

Article 9A Obligations of the applicants for asylum

- 1. Member States may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application.
- 2. In particular, Member States may provide that
 - (a) applicants for asylum are required to report to the competent authorities or to appear there in person, either without delay or at a specified time;
 - (b) applicants for asylum have to hand over documents in their possession relevant to the examination of the application, such as their passports; and

UNHCR Comment on Article 9A (2)(b): It is recognized by Article 31 (1) of the 1951 Convention that applicants may not be able to provide documentation on all matters, due to the circumstances of their flight. UNHCR therefore welcomes that the duty to hand over documentation is restricted to documents asylum-seekers actually have in their possession.

- (c) applicants for asylum are required to inform the competent authorities of their current place of residence or address and inform them of change of this place of residence or address as soon as possible. Member States may provide that the applicant shall have to accept any communication at the most recent place of residence or address which he/she indicated accordingly;
- (d) the competent authorities may search the applicant and the items he/she carries with him/her;

UNHCR Comment on Article 9A (2)(d): In UNHCR's view, searches should be provided for by law for a legitimate objective and be carried out in a way which is necessary and proportional to the objective, including in cases where persons refuse to cooperate. This approach is, *inter alia*, in line with Article 8 of the European Human Rights Convention. It recommends further that any search be undertaken in a gender-, age- and culturally-sensitive manner.

- (e) the competent authorities may take a photograph of the applicant; and
- (f) the competent authorities may record the applicant's oral statements, provided he/she has previously been informed thereof.

Article 10 **Persons invited to a personal interview**

1. Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.

Member States may also give the opportunity of a personal interview to each adult among the dependants referred to in Article 5(3).

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

UNHCR Comment on Article 10 (1): UNHCR highlights that for a variety of reasons, including in particular those relating to culture, dependants may not be informed of relevant activities or events relating to the claim of the principal applicant. This may lead to discrepancies in the statements of different family members. Additionally, information may emerge during an interview with dependants indicating that they themselves have a valid fear of persecution or serious harm. In such cases, they should be offered the opportunity to have their claims considered separately. This would increase the efficiency of status determination procedures, as potential claims are identified and examined as early as possible.

With respect to children, due consideration should be given to their maturity and the psychological impact of traumatic events. The child's knowledge of conditions in the country of origin and their significance for the determination of refugee status may also be limited. (See comment on Article 15).

2. The personal interview may be omitted where:
 - (a) the determining authority is able to take a positive decision on the basis of evidence available; or
 - (b) the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with filling his/her application and submitting the essential information regarding the application, in terms of Article 4(2) of Council Directive 2004/83/EC; or
 - (c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application as unfounded in the cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply.

3. The personal interview may also be omitted, where it is not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control. When in doubt, Member States may require a medical or psychological certificate.

Where the Member State does not provide the opportunity for a personal interview pursuant to this paragraph, or where applicable, to the dependant, reasonable efforts must be made to allow the applicant or the dependant to submit further information.

UNHCR Comment on Article 10 (2)(b) and (c) and (3): UNHCR is seriously concerned about the extended possibilities for limiting personal interviews under these provisions, as personal testimony often proves decisive in the decision. Such exceptions significantly undermine the fairness of procedures and the accuracy of decisions. In line with Executive Committee Conclusions No. 8 (XXVIII) of 1977 and 30 (XXXIV) of 1983, all claimants should in principle be granted personal interviews, unless the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control. All reasonable measures should be undertaken to conduct an interview. Where an earlier meeting has taken place for the purpose of filing an application according to Article 10 (2)(b), applicants should in particular be permitted to refute gaps or contradictions.

4. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for asylum.
5. The absence of a personal interview pursuant to paragraph 2(b) and (c) and paragraph 3 shall not adversely affect the decision of the determining authority.
6. Irrespective of Article 20 (1), Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless he or she had good reasons for the failure to appear.

UNHCR Comment on Article 10 (6): The assessment as to whether the applicant had good reasons not to appear for an interview should also take into account the subjective circumstances of the asylum-seeker, including *inter alia* his or her psychological and medical state (see also comment on Articles 19 and 20).

Article 11

Requirements for a personal interview

1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.
2. A personal interview must take place under conditions which ensure appropriate confidentiality.
3. Member States shall take appropriate steps to ensure that personal interviews are conducted in conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall

- (a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so, and

UNHCR Comment on Article 11 (3)(a): In UNHCR's view, the interviewer should be competent to take into account all relevant facts and circumstances without restriction. Given that the term 'sufficiently' appears to indicate a lower degree of competence, it should be deleted.

UNHCR appreciates that the cultural origin and vulnerability of an applicant are to be taken into account. Interpreters should also be trained appropriately. Additional measures should be outlined to address the special needs of female asylum-seekers, children, survivors of violence and torture, and traumatized persons including, *inter alia*, the requirement for female asylum-seekers to have the option of being heard by a female interviewer and interpreter (see comment on Article 15).

- (b) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in.

UNHCR Comment on Article 11 (3)(b): Effective communication with the asylum-seeker is an essential prerequisite for a fair and effective asylum procedure. While such communication need not necessarily take place in the language preferred by the applicant, it should be in a language which is understood by the applicant, and in which he or she is able to communicate, rather than one which he or she 'may reasonably be supposed to understand' (see comment on Article 9 (1)(a)).

4. Member States may provide for rules concerning the presence of third parties at the personal interview.
5. This Article is also applicable to the meeting referred to in Article 10(2)(b).

Article 12

Status of the report of a personal interview in the procedure

1. Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Council Directive 2004/83/EC.
2. Member States shall ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.
3. Member states may request the applicant's approval on the contents of the report of the personal interview.

Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.

The refusal of an applicant to approve the contents of the report of the personal interview shall not prevent the determining authority from taking a decision on his/her application.

UNHCR Comment on Article 12 (3): UNHCR considers that the approval of the asylum applicant should be requested. Verifying the contents of the report of a personal interview is useful not only to avoid misunderstandings but also to facilitate the clarification of contradictions.

4. This Article is also applicable to the meeting referred to in Article 10(2)(b).

Article 13
Right to legal assistance and representation

1. Member States shall allow applicants for asylum at their own cost the opportunity to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.
2. In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request subject to the provisions of paragraph 3.
3. Member States may provide in their national legislation that free legal assistance and/or representation be granted :
 - (a) only for the procedures before a court or tribunal in accordance with Chapter V and not to any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or
 - (b) only to those who lack sufficient resources; and/or
 - (c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or
 - (d) only if the appeal or review is likely to succeed.

Member States shall ensure that legal assistance and/or representation granted under subparagraph (d) is not arbitrarily restricted.

4. Rules concerning the modalities for filing and processing such requests may be provided by Member States.
5. Moreover, Member States may
 - (a) impose monetary and/or time limits on the provision of free legal assistance and /or representation provided that such limits do not arbitrarily restrict access to legal assistance and/or representation.
 - (b) provide that, as regards fees and other costs, the treatment shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.
6. Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

UNHCR Comment on Article 13: In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex European asylum procedures. Asylum-seekers are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified early. The efficiency of first instance procedures is thereby improved. While guaranteeing free legal assistance and representation against negative decisions is a step in the right direction, UNHCR regrets that this is not available in first instance procedures.

Moreover, the granting of legal assistance under Article 13 (2) is seriously eroded by permitting restrictions in paragraphs (3) to (5). Exceptions to the provision of free legal aid should be made only where the applicant has adequate financial means. The amounts of legal assistance provided could, however, be limited to the average costs of legal assistance for each relevant step in the procedure.

Adequate provision should additionally be made for asylum-seekers with special needs (unaccompanied children, victims of torture and other traumatic experiences) who generally require additional legal, as well as other, assistance.

Article 14 **Scope of legal assistance and representation**

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law who assists or represents an applicant for asylum under the terms of national law shall enjoy access to such information in the applicant's file as is liable to be examined by the authorities referred to in Chapter V, insofar as the information is relevant to the examination of the application.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or persons providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question must be available to the authorities referred to in Chapter V, except where such access is precluded in national security cases.

UNHCR Comment on Article 14 (1): This provision allows for limitations on access to information in an applicant's file by the asylum-seeker and his or her legal advisor. UNHCR is concerned that this would leave asylum-seekers and decision-makers in unequal positions and limit the applicants' possibility to challenge factual errors. UNHCR therefore recommends that information and its sources may be withheld only under clearly defined conditions, where disclosure of sources would seriously jeopardize national security or the security of the organizations or persons providing information (see also comment on Article 3A (1)(b)).

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant. Member States may only limit the possibility to visit applicants in closed areas where such limitation is, by virtue of national

legislation, objectively necessary for the security, public order or administrative management of the area or to ensure an efficient examination of the application, provided that access by the legal adviser or other counsellor is not thereby severely limited or rendered impossible.

3. Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure, without prejudice to this Article or to Article 15(1)(b).
4. Member States may provide that the applicant is allowed to bring with him/her to the personal interview the legal adviser or other counsellor, admitted as such under national law.

Member States may require the presence of the applicant at the personal interview even if he/she is represented under the terms of national law by such a legal adviser or counsellor and may require the applicant to respond in person to the questions asked.

The absence of the legal adviser or other counsellor shall not prevent the competent authority from conducting the personal interview with the applicant.

Article 15

Guarantees for unaccompanied minors

UNHCR Comment on Article 15: UNHCR appreciates that special care is taken in the Directive to address the particular situation of separated and unaccompanied children and to provide for special procedural safeguards, including an explicit reference to the principle of the ‘best interest of the child’.¹¹

General Comment on age- and gender-sensitive procedural safeguards: UNHCR regrets that the draft Directive does not include appropriate age- and gender-sensitive procedural safeguards. This includes, *inter alia*, a requirement for women asylum-seekers to have the opportunity to be interviewed by female interviewers and interpreters, as well as other provisions for vulnerable persons. It recommends that States explicitly provide for such safeguards.¹² This should include, as a first step, the extension of the guarantees provided for under Article 15 (4) to all child asylum-seekers. Furthermore, consistent with Article 3 of the Convention of the Rights of the Child (CRC),¹³ the application of the best interest of the child principle throughout the whole asylum procedure should be explicitly required (see also comment on Articles 3A, 5 (5) and 11).

¹¹ Further guidance for the treatment of separated children can be drawn from: ‘UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum’, February 1997; Save the Children and UNHCR: Separated children in Europe Programme ‘Statement of Good Practice’, Third edition, 2004; and ‘2004 Inter-agency Guiding Principles on Unaccompanied and Separated Children’.

¹² In this regard, the following material may provide further guidance: UNHCR Executive Committee Conclusion No. 64 (XLI) on Refugee Women and International Protection, 1990; UNHCR Executive Committee Conclusion No. 73 (XLIV) on Refugee Protection and Sexual Violence 1993; ‘UNHCR Guidelines on the Protection of Refugee Women’, Geneva, 1991; ‘UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’, May 2002; ‘Sexual Violence against Refugees: Guidelines on Prevention and Response’, UNHCR, Geneva, 1995; ‘Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response’, UNHCR, Geneva, 2003; as well as Excom Conclusion No. 84 (XLVIII) on Refugee Children and Adolescents, 1997 and ‘Refugee Children: Guidelines on Protection and Care,’ UNHCR, Geneva, 1994.

¹³ Convention on the Rights of the Child of 20 November 1989.

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 10 and 12, Member States shall:
 - (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers;
 - (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:
 - (a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or
 - (b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or
 - (c) is married or has been married.
3. Member States may, in accordance with laws and regulations in force at the time of the adoption of this Directive, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative.

UNHCR Comment on Article 15 (2)(a) and (c) and (3): UNHCR regrets that these provisions contain a number of exceptions to the obligation to appoint a representative for a separated/unaccompanied child. In accordance with the Convention of the Rights of the Child (CRC), any person under age 18 should be considered as a child, without differentiation in rights for those over 16. Furthermore, UNHCR recommends a generous approach to separated/unaccompanied children who have become adults during the course of the asylum procedure. States should additionally seek to eliminate unnecessary delays that would result in a child becoming adult during the procedure.

As regards the exception under Article 15 (2)(c), the fact that a child applicant is or has been married does not necessarily indicate that he or she is not in need of a representative to assist in submitting an asylum claim. Marriage is lawful at a very young age in some countries, and is not related to the maturity of the child. Moreover, such child applicants may have complex claims for which the assistance of a legal representative is particularly important, including claims related to domestic violence or forced marriage, where the marriage may even itself be linked to the fear of persecution. In UNHCR's view, this provision should therefore not be applied.

4. Member States shall ensure that:
 - (a) if an unaccompanied minor has a personal interview on his/her application for asylum as referred to in Articles 10, 11 and 12, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;
 - (b) an official who has the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.
5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.

In cases where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, about the possibility of age determination by a medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination.
- (b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned, and
- (c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

UNHCR Comment on Article 15 (5): It is widely acknowledged that age assessment is subject to a considerable margin of error. UNHCR recommends that the examination be carried out by an independent paediatrician with appropriate expertise. If an age assessment is not conclusive, a person claiming to be a child should be given the benefit of the doubt. Furthermore, it should be explicitly provided in national legislation that persons claiming to be children should be provisionally treated as such, until an age determination has taken place.

6. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Article.

UNHCR Comment on Article 15 (6): UNHCR is concerned that admissibility, border or accelerated procedures generally do not provide for sufficient flexibility and time to take the situation of separated/unaccompanied children into account. Furthermore, the personnel conducting these procedures will often not be specially qualified to deal with children's asylum claims. This holds true especially for procedures conducted by a different authority from the one normally responsible for asylum requests, such as the border police (see comment on Article 3A). In UNHCR's view, claims of separated/unaccompanied children should therefore be examined in a regular procedure and should be exempt from application of the safe third country concept, or treatment in accelerated or border procedures. Entry should be granted in cases of claims submitted

at the border, although age assessments could be undertaken prior to entry, inasmuch as this does not create unreasonable delays.

Furthermore, UNHCR recommends that, consistent with Article 3 CRC, the application of the best interest of the child principle throughout the whole asylum procedure should be explicitly required.

Article 16

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Article 17 Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.
2. Where an applicant for asylum is held in detention, Member States shall ensure that there is the possibility of speedy judicial review.

UNHCR Comment on Article 17: UNHCR welcomes the reaffirmation of the general principle that asylum-seekers should not be detained. However, this principle needs further elaboration to circumscribe the use of detention by Member States, in line with Article 31 of the 1951 Convention, the relevant Conclusions of UNHCR's Executive Committee, as well as international and regional human rights law.¹⁴ UNHCR further hopes that best practice by States can be taken into consideration.

Consistent with international and regional human rights law, detention of asylum-seekers is exceptional and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose, proportionate to the objectives to be achieved and applied in a non-discriminatory manner, for a minimal period. The necessity of detention should be established in each individual case, following consideration of alternative options, such as reporting requirements.

UNHCR believes that the guidance provided by the Executive Committee in its Conclusion No. 44 (XXXVII) of 1986, which outlines permissible exceptions to the general rule that detention of asylum-seekers should normally be avoided, addresses States' concerns. Detention of asylum-seekers may only be resorted to, if necessary:

- to verify identity;
- to determine the elements on which the claim to refugee status or asylum is based;
- to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security or public order.

UNHCR suggests that States provide for an exhaustive enumeration of the grounds for detention of asylum-seekers in national legislation.

In line with the jurisprudence of the European Court of Human Rights (ECHR), any confinement in a restricted area should be considered to be detention. Furthermore, UNHCR recommends that the requirements developed by the ECHR for the lawfulness of a detention order be incorporated into

¹⁴ These include in particular Article 9 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the Convention on the Rights of the Child (CRC) and Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

national law. Apart from speedy judicial review, which has been stipulated in Article 17 (2) of the Directive, they include unimpeded access to the asylum procedure, legal and social assistance, interpretation facilities and information.¹⁵

Additionally, implementing legislation should explicitly clarify that Article 17 applies also to asylum-seekers whose claims were found to be inadmissible because another State was considered to be responsible for determining the claim, pursuant to arrangements on the transfer of responsibilities, such as the Dublin II Regulation¹⁶, or in application of the ‘safe third country’ concept. The international and regional provisions on detention outlined above would also apply.

UNHCR would further recommend explicit exceptions to detention measures in relation to children, survivors of torture or sexual violence and traumatized persons.¹⁷

Article 18

(deleted)

Article 19

Procedure in case of withdrawal of the application

1. Insofar as the Member States foresee the possibility of explicit withdrawal of the application under national law, when an applicant for asylum explicitly withdraws his/her application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or to reject the application.
2. Member States may also decide that the determining authority can decide to discontinue the examination without taking a decision. In this case, Member States shall ensure that the determining authority shall enter a notice in the applicant's file.

UNHCR Comment on Article 19: See combined comment on Articles 19 and 20 below.

Article 20

Procedure in case of implicit withdrawal or abandonment of the application

1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or to reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Council Directive 2004/83/EC.

Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:

¹⁵ See ECHR, *Amuur v. France*, 00019776/92, 1996-III, no. 11, 25 June 1996.

¹⁶ Council Regulation EC No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining an asylum application lodged in one of the Member States by a third country national, OJ L 50/1 of 25.2.2003.

¹⁷ Valuable guidance on the existing standards and recommendations on detention of asylum seekers can be found in UNHCR, ‘Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers’, February 1999, Geneva; United Nations Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2000/4, Annex II, Deliberation No. 5, 28 December 1999; United Nations Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/L.26, 18 August 2000; Human Rights Committee, General Comment No. 8, HRI/GEN/1/Rev.6, 12 May 2003; Council of Europe, Recommendation Rec(2003)5, 16 April 2003; Council of Europe, Recommendation No. R (94)5, 21 June 1994.

- (a) he/she has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of Council Directive 2004/83/EC or has not appeared for an personal interview as provided for in Articles 10, 11 and 12, unless the applicant demonstrates within a reasonable time that his failure was due to circumstances beyond his control;
- (b) he/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate.

For the purpose of implementing these provisions, Member States may lay down time limits or guidelines.

2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 is taken, is entitled to request that his/her case be re-opened, unless the request is examined in accordance with Articles 33 and 34.

Member States may provide for a time limit after which the applicant's case can no longer be reopened.

Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.

Member States may allow the determining authority to take up the examination at the stage which the application was discontinued.

UNHCR Comment on Articles 19 and 20: According to the provision, explicit (Article 19) or implicit (Article 20) withdrawal of an asylum application may lead either to discontinuation or rejection of the application. Further, even where reopening of a claim is possible, it may be subject to time limitations.

In UNHCR's view, a claim may be explicitly or implicitly withdrawn for a variety of reasons which are not necessarily related to a lack of protection needs. A time limitation on the reopening of a claim, or a rejection of a claim in such circumstances, carries the risk that existing protection needs are not examined and recognized.

Both time limitations and rejections are particularly problematic in cases where applicants are sent to another country, for example, under the Dublin II Regulation, or where the 'safe third country' concept has been applied. Often, the asylum-seeker is not aware of the details and consequences of such arrangements. If an asylum-seeker is sent back to another Member State where he or she had already submitted an application, the deadline for reopening a claim will generally have passed, or the asylum application will meanwhile have been rejected, and the applicant will have missed all deadlines for filing an appeal.

Moreover, the reopening of a claim is often cumbersome and practically very difficult in some countries, for example where rejected asylum-seekers are subject to immediate deportation. Where a claim has been rejected, the submission of a subsequent application may be possible, but is often subject to similar obstacles and may only result in an examination of cases where new facts have arisen since the rejection of the first application (see comments on Articles 30, 30A and 23 (4)(h)).

UNHCR therefore recommends that a withdrawal should result in a discontinuation of the procedure only and the closing of the file. A reopening of the application should be possible without time limits.

Article 21

The role of UNHCR

1. Member States shall allow the UNHCR:
 - (a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;
 - (b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto;

UNHCR Comment on Article 21 (1)(a) and (b): UNHCR welcomes that the Directive guarantees UNHCR access to asylum-seekers and information on asylum applications. The Office fully endorses the principle of confidentiality of person-specific information concerning asylum-seekers and refugees. However, not all information concerning an asylum applicant would necessarily require the consent of the individual before UNHCR could have access. The Office therefore recommends that a distinction be made between information on applications generally, on the one hand, and person-specific information, on the other. Consent of the applicant should be required only with for the latter.

- (c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

UNHCR Comment on Article 21 (1)(c): UNHCR welcomes the Directive's acknowledgment of the Office's supervisory responsibility which is set out both under its Statute and Article 35 of the 1951 Convention. The Office welcomes the possibility to present its views at all stages of the procedure, including before the courts. The provision ensures that States will take UNHCR's position into account when determining refugee status in accordance with Article 1 of the 1951 Convention.

2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State on behalf of the UNHCR pursuant to an agreement with that Member State.

UNHCR Comment on Article 21 (2): UNHCR appreciates the flexibility provided in the draft Directive with regard to the way in which the Office may exercise its mandate function in Member States. In view of the different arrangements which may be used, it is suggested that the wording 'an organization which is working (...) on behalf of the UNHCR, subject to the agreement of that Member State' be used, rather than 'pursuant to an agreement with'.

Article 22

Collection of information on individual cases

For the purpose of examining individual cases, Member States shall not:

- (a) directly disclose the information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum.
- (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

UNHCR Comment on Article 22: UNHCR welcomes this explicit reaffirmation of the confidentiality principle in relation to asylum applicants. In the view of the Office, State responsibility in this regard extends not only to direct but also to indirect disclosure to alleged actors of persecution.

CHAPTER III Procedures at first instance

Section I

Article 23 Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.
2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, when no decision can be taken within six months,

- (a) the applicant concerned shall either be informed of the delay or
 - (b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time frame.
3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II including where the application is likely to be well-founded or where the applicant has special needs.
 4. Moreover, Member States may lay down that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

UNHCR Comment on Article 23 (2) to (4): UNHCR notes the introduction of a desirable duration for decisions on asylum applications, and the possibility of prioritizing or accelerating the assessment of claims in first instance procedures. In this connection, the Office underlines the interest of all parties in ensuring efficient, as well as fair, asylum procedures.

In UNHCR's view, the first step towards this aim is to ensure quality first instance procedures. Improved decisions in the first instance should, over time, reduce the number and duration of appeals. Furthermore, an inquisitorial, rather than adversarial, approach could help to elicit information in a more co-operative manner, based on mutual trust, and thus contribute both to the quality and speed of the decision-making process.

Rather than introducing a variety of procedures for different categories of cases, priority should be given within the regular procedure to the examination of defined categories of applications, such as manifestly well-founded or unfounded claims, and claims by separated children and other vulnerable persons. Such an approach would, in UNHCR's view, be more efficient and cost-effective, while reducing the complexity of asylum systems.

In UNHCR's view, acceleration of manifestly unfounded or clearly abusive cases could most effectively occur at the appeal level, through shorter but reasonable time limits for submitting an appeal. This should be without prejudice to their fair examination.

UNHCR is concerned, however, that the Directive permits prioritization or acceleration of a wide range of cases. In line with UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983, only cases that are 'clearly abusive', (i.e. clearly fraudulent), or 'manifestly unfounded', (i.e. not related to the grounds for granting international protection), should be considered for distinct treatment with simplified reviews. In line with this Conclusion, UNHCR strongly hopes that Member States will take into account the recommendations and comments outlined below in relation to subparagraphs (a) to (o) inclusive of Article 23 (4).

Applicants who do not qualify for refugee status may nevertheless qualify for complementary/subsidiary protection. UNHCR is concerned that the definition of the categories in Article 23 (4)(a) to (o) do not take such protection needs into account, and requests Member States to require explicitly the consideration of complementary/subsidiary needs in assessing whether an application can be prioritized or accelerated. This is especially relevant if such protection needs are considered in a single procedure.

Furthermore, applications by particularly vulnerable persons, including separated children and persons who may have experienced trauma or sexual violence, should be treated in a regular procedure as a matter of principle. UNHCR recommends that Member States provide explicitly to this effect (see comment on Article 15).

While the Directive requires that basic principles and guarantees of Chapter II will apply, the consequences of prioritization or acceleration are left largely to the Member States. UNHCR is deeply concerned about the lower level of guarantees that is permissible for 'prioritized' or 'accelerated' procedures (see comments *inter alia* on Articles 3A, 10, 23, 35 and 38).

- (a) the applicant in submitting his/her application and presenting the fact, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Council Directive 2004/83/EC; or

UNHCR Comment on Article 23 (4)(a): In UNHCR's view, the term 'minimal relevance' is difficult to define and entails the risk of an overly broad application of accelerated procedures. UNHCR therefore suggests that this category be restricted to 'issues that are not relevant'. As already stated above, the assessment as to whether a claim is manifestly unfounded should take complimentary/subsidiary protection needs into account.

- (b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Council Directive 2004/83/EC; or

UNHCR Comment on Article 23 (4)(b): In UNHCR's view, this provision, inasmuch as it relates to claims which are clearly unfounded, is superfluous, as such situations are already covered by Article 23 (4)(a). The assessment should take complementary/subsidiary protection needs into account.

- (c) the application for asylum is considered to be unfounded:
- because the applicant is from a safe country of origin within the meaning of Articles 30, 30A and 30B of this Directive, or
 - because the country which is not a Member State is considered to be a safe third country for the applicant, without prejudice to Article 29(1); or

UNHCR Comment on Article 23 (4)(c): The provision mixes admissibility considerations, which should be of a formal nature (i.e. application of the 'safe third country' concept), with substantive issues. The lack of a clear distinction between questions of admissibility and questions relating to the merits of the claim risks confusion between different stages in the assessment of an asylum claim. Moreover, qualifying such decisions as 'unfounded claims' gives the impression that a substantive examination has taken place, which is not the case. This may have implications for the examination of the claim if an applicant is not readmitted to the supposedly safe third State (see, *inter alia*, comments on Articles 33 and 34). UNHCR therefore strongly recommends that admissibility issues be treated separately and quite distinctly from issues concerning the substance of a claim. Claims denied on the basis of the 'safe third country' concept should be clearly denoted as 'inadmissible', rather than rejected as 'unfounded'.

- (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or
- (e) the applicant has filed another application for asylum stating other personal data; or

UNHCR Comment on Article 23(4)(e): The fact that the applicant has filed another application for asylum stating other personal data can be taken into account when assessing the applicant's credibility. Such behaviour does not, in itself, exclude a possible well-founded fear of persecution.

- (f) the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, or, it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or

UNHCR Comment on Article 23 (4)(d) and (f): The lack of documentation or use of forged documents does not, in itself, render a claim fraudulent, or warrant negative conclusions about the genuineness of the claim. Asylum-seekers are frequently compelled to flee by irregular means. They may, moreover, have destroyed or disposed of an identity or travel document because they have been compelled to do so by smugglers who wish to reduce the risk of detection. This is recognized also by Article 31 (1) of the 1951 Convention, which explicitly exempts refugees from penalties for illegal entry or presence. The provisions under Article 23 (4)(d) and (f) require fraudulent intent on part of the asylum-seeker.

- (g) the applicant has made inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having being the object of persecution under Council Directive 2004/83/EC; or

UNHCR Comment on Article 23 (4)(g): This provision is formulated very broadly. UNHCR is concerned that it could be applied to all claims rejected at first instance, and could thus lead to a curtailment of procedural safeguards. .

UNHCR points out that, in line with the UNHCR Handbook¹⁸ (paragraph 196), the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility of the applicant and the examiner. This also applies generally, including in cases where there are inconsistencies or contradictions, where an applicant's story appears unlikely, or insufficiently substantiated.

An attempt should be made to resolve inconsistencies and contradictions, although minor inconsistencies or contradictions on issues irrelevant to the substance of the claim should not affect the credibility of the applicant.

The fact that an applicant's claim is 'unlikely' does not necessarily mean that it is not true. In UNHCR's experience, claimants with seemingly unlikely histories may, nonetheless, be confirmed as refugees.

As regards insufficiencies in submissions, there may be limits to what the asylum-seeker is able to submit. Persons in need of international protection may arrive with the barest necessities and frequently without any documents.

In such situations, examiners should use all the means at their disposal to search for the necessary evidence in support of the application. Each case should be determined individually, on its merits. In particular, they should take into account that trauma and mental illness, feelings of insecurity, or language problems may result in apparent contradictions or insufficient substantiation of claims. If the applicant has made a genuine effort to substantiate his or her claim and cooperate with the authorities in seeking to obtain available evidence, and if the examiner is consequently satisfied as to the applicant's general credibility, the applicant should be given the benefit of doubt.

Even where such claims are rejected they should not be channelled into an accelerated appeal procedure, unless it is established that the application is clearly abusive (i.e. where there is fraudulent intent) or manifestly unfounded.

UNHCR therefore recommends that States do not make use of Article 23 (4)(g). Where, nonetheless, relied upon, the provision should be limited in scope to ensure that it is applied only to manifestly unfounded or clearly abusive claims, in line with Executive Committee Conclusion 30 (XXXIV) of 1983.

- (h) the applicant has submitted a subsequent application raising no relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or

¹⁸ UNHCR 'Handbook on Procedures and Criteria for Determining Refugees Status', Geneva 1979, reedited January 1992.

UNHCR Comment on Article 23 (4)(h): UNHCR recommends that national legislation provide for a number of exceptions to this provision. It should not be applied if the first application has been ‘rejected’ on formal grounds without an examination on the merits. This includes *inter alia* applications which are considered to have been withdrawn (see comments on Articles 19 and 20) or applications that are inadmissible because another State was considered responsible in accordance with, for example, the Dublin II Regulation or the ‘safe third country’ concept.

Furthermore, the requirement of ‘new elements’ should be applied in a protection oriented manner and take into account, *inter alia*, trauma and culture-, gender- or age-related sensitivities, which may not have been considered sufficiently earlier. If a new element appears to reinforce an earlier claim and could consequently result in a positive revision of the decision, the claim should not be considered in an accelerated procedure on the basis of Article 23 (4)(h). See also comments on Articles 33 and 33A.

- (i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or
- (j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or

UNHCR Comment on Article 23 (4)(i) and (j): UNHCR notes that there may be circumstances where a person, despite ample opportunity to apply for asylum, has not done so for understandable reasons. These include, for example, a lawful stay on a visa for other purposes or circumstances arising *sur place*, where the reasons for a fear of persecution or a risk upon return become apparent only during the stay. Such behaviour does not, in itself, exclude a well-founded fear of persecution and should not be used to designate a claim as manifestly unfounded, or to examine it in an accelerated procedure.

- (k) the applicant failed without good reasons to comply with obligations referred to in Articles 4(1) and (2) of Council Directive 2004/83/EC or in Articles 9A(2)(a) and (b) and 20(1) of this Directive; or

UNHCR Comment on Article 23 (4)(k): In UNHCR’s view, the failure to fulfil formal requirements does not in itself exclude a well-founded fear of persecution and should not be used to designate a claim as manifestly unfounded or to examine it in an accelerated procedure.¹⁹ The Office therefore recommends that States not implement this provision.

- (l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible given the circumstances of his/her entry; or

UNHCR Comment on Article 23 (4)(l): See comments on Article 23 (4)(i) and (j).

¹⁹ See also UNHCR, ‘Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)’, January 2005, comments on Articles 4, 9 and 20.

- (m) the applicant is a danger to the national security or the public order of the Member State; or the applicant has enforceably been expelled for serious reasons of public security and public order under national law; or

UNHCR Comment on Article 23 (4)(m): UNHCR acknowledges that States may wish to prioritize the asylum claims of those applicants who fall within the scope of Article 23 (4)(m). However, prioritization should not result in the curtailment of procedural guarantees. Acceleration procedures, on the other hand, should only be used for cases which are manifestly unfounded or clearly abusive. This provision encompasses claims falling outside these categories, and which may be based on serious grounds requiring detailed examination. This provision should therefore not be applied to accelerate such claims.

- (n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or

UNHCR Comment on Article 23 (4)(n): Non-compliance with the obligation to have fingerprints taken does not necessarily give an indication of the substance of the claim. There may be a variety of reasons, including cultural sensitivities, why asylum-seekers may refuse to have their fingerprints taken. While such a refusal may be taken into account as one element amongst others when assessing the credibility of the claim, it should not serve to channel the application into an accelerated procedure. See also comment on Article 23 (4)(k).

- (o) the application was made by an unmarried minor to whom Article 5(4)(c) applies after the application of the parents or parent responsible for the minor has been rejected by a decision and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

UNHCR Comment on Article 23 (4)(o): UNHCR agrees that a joint assessment of all claims of one family may help to streamline the procedure. It nonetheless suggests that concerns and suggestions raised in comments on Article 5 (4)(c) as well as Article 15 (2) and (3) be taken into account. In relation to ‘new elements’, see also comment on Article 23 (4)(h).

Article 24 Specific procedures

1. Member States may moreover provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:
 - (a) a preliminary examination for the purpose of processing cases considered within the framework of the provisions set out in Section IV;
 - (b) procedures for the purpose of processing cases considered within the framework set out in Section V.
2. Member States may also provide a derogation in respect of Section VI.

UNHCR Comment on Article 24: UNHCR is strongly concerned about the possibilities to derogate from minimum standards, as outlined in Chapter II, for claims considered under Sections IV, V, and VI of the Directive. There is no reason for requirements associated with due process of law in asylum claims submitted at the border to be less than those submitted within the territory, or for different safeguards and guarantees to apply in cases of applicants arriving from a ‘safe third

country' under Article 35A (see comment on this article), or in cases of subsequent claims (see comments on Articles 33, 5 (3), 15 (3), 19 and 20).

UNHCR also seriously regrets that the Directive fails to define clearly the principles and guarantees to which exceptions may or may not be made. Member States may thus derogate from many of the principles and guarantees as outlined in particular in Chapter II. Such an approach is not conducive to the objective of harmonization of procedural standards, and increases the risk of *refoulement*. UNHCR therefore strongly recommends that Member States not make use of these possibilities.

Section II

Article 25

Cases of inadmissible applications

1. In addition to cases in which an application is not examined in accordance with the provisions of Council Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Council Directive 2004/83/EC where an application is considered inadmissible pursuant to the present Article.
2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:
 - (a) another Member State has granted refugee status;
 - (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;
 - (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;
 - (d) the applicant is allowed to remain in the Member State concerned on some other ground and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Council Directive 2004/83/EC;
 - (e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of a status pursuant to (d);

UNHCR Comment on Article 25 (2)(d) and (e): In UNHCR's view, asylum applications should not be considered inadmissible if the application for Convention refugee status has not been examined. It is important that any application first be considered under the criteria of the 1951 Convention, and only if these are not met, under the criteria for complementary/subsidiary protection in accordance with the Qualification Directive, or on the basis of other legal obligations. This is necessary to ensure that the 1951 Convention is not undermined by resorting to other forms of protection for applicants qualifying for 1951 Convention refugee status. UNHCR therefore recommends providing explicitly in national legislation that: 'All applications for international protection will first be assessed on the basis of the refugee definition contained in the 1951 Convention and, only if these criteria are not fulfilled, on the basis of the requirements for subsidiary protection.'

The fact that an applicant has been granted protection on other grounds generally does not preclude refugee status and is therefore, in UNHCR's view, not a valid reason for a denial to examine an application on refugee grounds.²⁰ There are a number of reasons why Convention refugees should be recognized as such, even if they were already granted another status with similar rights. Convention refugee status may *inter alia* ensure additional safeguards as regards cessation and extra-territorial recognition. The Convention is a widely ratified international instrument which offers Convention refugees special protection not only in the State which recognized the refugee, but also in other contracting States. Furthermore, UNHCR notes that the Qualification Directive, to which Article 25 (2)(d) and (e) refers, does not incorporate all Convention rights. Unless Convention refugee status is formally recognized, refugees would not be able to claim all the rights to which they are entitled under the 1951 Convention.

- (f) the applicant has lodged an identical application after a final decision;
- (g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 5 (3), consented to have his/her case be part of an application made on his/her behalf and there are no facts relating to the dependant's situation justifying a separate application.

UNHCR Comment on Article 25 (2)(g): See comment on Article 5 (2) and (3) as well as Article 23 (4)(o).

Article 26

Application of the concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if

- (a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection, or
- (b) he/she enjoys otherwise sufficient protection in that country, including benefiting from the principle of non-refoulement,

provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum, Member States may take into account the content of Article 27(1).

UNHCR Comment on Article 26: UNHCR welcomes the requirement that a country be considered a first country of asylum only if the refugee can still avail him/herself of that protection. The Office notes, however, that the term 'sufficient protection' in Article 26(b) is not defined and may not represent an adequate safeguard or criterion when determining whether an asylum-seeker or refugee can be returned safely to a first country of asylum. In UNHCR's view, the protection should be effective and available in practice. The Office recommends, therefore, using the term 'effective protection' in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on 'effective

²⁰ Refugee status would be excluded only if the 'other' status granted is equal to that of nationals, in line with Article 1E of the 1951 Convention.

protection'.²¹ Furthermore, the capacity of States to provide effective protection in practice should be taken into consideration, particularly if they are already hosting large refugee populations.

Countries where the Office is engaged in refugee status determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the State has neither the capacity to conduct status determination nor to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return to such countries of persons in need of international protection should therefore not be envisaged.

Article 27

The safe third country concept

UNHCR Comment on Article 27: As the preamble to the 1951 Convention and a number of Executive Committee Conclusions highlight, refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international co-operation. The primary responsibility to provide protection remains with the State where the claim is lodged. A transfer of responsibility should be envisaged only between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities. By contrast, the 'safe third country' notion, as defined in this Directive, rests on a unilateral decision by a State to invoke the responsibility of a third State to examine an asylum claim. Application of this concept should therefore be abandoned in favour of such multilateral agreements which ensure access to effective protection for asylum applicants.

Furthermore, the safe third country notion is far less relevant following the accession of ten new Member States, as the Dublin II regulation should supersede the 'safe third country' concept within the EU.²² Other States outside the EU have been (Norway, Iceland) or will be (Switzerland, Liechtenstein) included in the Dublin II regime, so that the 'safe third country' concept will no longer be relevant for these countries. Beyond these borders, none of the remaining countries now at the periphery of the Union could legitimately be considered safe.

If Member States nevertheless wish to rely on the 'safe third country' notion, the following requirements should be met:

- (i) The applicant should be protected against *refoulement* and be treated in accordance with accepted international standards as outlined, *inter alia*, in the 1951 Convention – i.e. the third country should be 'safe' for the applicant. 'Safety' should be ensured under the country's practice and not just under the formal obligations that it may have assumed (see also comment below on Article 27 (2)(b) and (c)).
- (ii) The applicant should have a genuine connection or close links with the third country. This link should be stronger than the link to the State in which asylum is requested, so that it is fair and reasonable that he or she be called upon first to request asylum there. The asylum-seeker should have transited through the State concerned, although mere transit alone would not, in UNHCR's view, constitute a connection or close link. The intentions of the asylum-seeker as regards the country in which he or she wishes to request asylum should, as far as

²¹ 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers'- Lisbon Expert Roundtable, 9-10 December 2002, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?tbl=PROTECTION&id=3e5f323d7>

²² With the exception of Denmark, which opted out of the Dublin II Regulation, but for which the Dublin Convention remains in force and continues to apply between Denmark and other EU Member States until conclusion as an agreement on Denmark's participation in the Regulation. (see preambular paragraph 19 of the Dublin II Regulation).

possible, be taken into account. Such an approach would also be likely to have a positive impact on the integration of persons who are recognized to be in need of international protection (see comment on Article 27 (2)(a)).

- (iii) The third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure. It should also provide access to a durable solution for those recognized to be in need of international protection.
- (iv) The provision should permit for exceptions *inter alia* for separated children and other vulnerable persons.

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

UNHCR Comment on Article 27 (1): UNHCR considers these criteria to be acceptable in principle. However, the country's practice in implementing the 1951 Convention and international as well as regional human rights instruments should be carefully examined. Furthermore, consideration should be given to the capacity of third States to readmit applicants, examine their claims and grant effective protection. UNHCR suggests that national legislation provide for exceptions to the application of the 'safe third country' concept in cases where the country in question is not able or willing to provide effective protection (see also comment on Article 26 on effective protection).

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) the principle of non-refoulement in accordance with the Geneva Convention is respected; and
- (c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and

UNHCR Comment on Article 27 (1)(a) to (c): UNHCR notes that under international human rights law, the protection against *refoulement* extends to irreparable harm and includes threats to life, including the death penalty. Connection to a Convention ground, as outlined in Article 27 (1)(a), is not required.²³ UNHCR further suggests that an explicit requirement be included for both legal obligations assumed by the State and their fulfilment in practice.

- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

²³ International Covenant on Civil and Political Rights (ICCPR), as clarified by the Human Rights Committee, General Comment No. 31 [on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 21/04/2004 (CCPR/C/74/CRP.4/Rev.6)], para. 12, which states that: 'Moreover, the article 2 [ICCPR] obligation requiring that State Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.'

UNHCR Comment on Article 27 (1)(d): In principle, UNHCR understands this provision to require both ratification of the 1951 Convention and/or the 1967 Protocol as well as implementation in practice.

2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:
 - (a) rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country;

UNHCR Comment on Article 27 (2)(a): UNHCR welcomes the requirement of a meaningful link or connection and suggests that examples of meaningful connections be elaborated in the relevant national legislation. Examples of links which might reasonably be considered are family links, including extended family and possibly a broader community, previous stay such as visits or studies, as well as language and/or cultural links. Such links should be required in addition to transit through the country. The ‘safe third country’ concept should not be applied where the links of the applicant to the EU Member State are stronger than those to the third country.

In UNHCR’s view, mere transit alone is not a meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Neither does a simple entitlement to entry without actual presence constitute a meaningful link.

- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case by case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
 - (c) rules, in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

UNHCR Comment on Article 27 (2)(b) and (c): The question of whether a particular third country is ‘safe’ for the purpose of returning an asylum-seeker cannot be answered in a generic fashion, for example by ‘national’ designation of parliament, for all asylum-seekers in all circumstances. In UNHCR’s view, the question of whether asylum-seekers can be sent to a third country for determination of their claim must be answered on an individual basis. If not, the risk of chain *refoulement* arises.

National designation of a ‘safe third country’ could raise a rebuttable presumption. The individual concerned should, however, be given an effective possibility to rebut such a presumption, including in the first instance, even if on an accelerated basis. Otherwise an essential safeguard for asylum-seekers would be removed. Particularly in view of the lack of procedural standards for appeals in the Directive, and the fact that suspensive effect of such appeals is not required (see comment on Article 38), there is a real risk of return to persecution or serious harm, in contravention of the 1951 Convention and other international human rights instruments.

Article 27(c) requires rules in accordance with international law, which will allow an individual examination of the certain aspects of a country's safety for the applicant concerned. UNHCR points out that under international law, risks extending beyond the minima in Article 27(c) must be examined, including specifically the fear of persecution on 1951 Convention grounds.

3. When implementing a decision solely based on this Article, Member States shall:
 - (a) inform the applicant accordingly; and
 - (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

UNHCR Comment on Article 27 (3)(b): UNHCR welcomes this provision which reduces the risk that applicants who are removed to a safe third country will be immediately sent onwards, without an effective possibility to apply for asylum.

4. Where the third country does not permit the applicant for asylum in question to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

UNHCR Comment on Article 27 (4): UNHCR welcomes this clarification which ensures that asylum-seekers have access to an asylum procedure and examination of their claims. The Office recommends that implementing legislation outline the procedure to be followed in such cases, and that border police and others involved in the transfer be explicitly instructed on how to handle such cases to help ensure implementation of this provision in practice.

Persons thus admitted into the asylum procedure should, moreover, have their claims processed in the regular procedure, unless there are other factors which would make it reasonable to consider the application manifestly unfounded or clearly abusive. See in this regard comments on Article 23 (4) and its subparagraphs, as well as comments on Articles 33 and 34.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

Article 28

(deleted)

Section III

Article 29

Cases of unfounded applications

1. Without prejudice to Articles 19 and 20, Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Council Directive 2004/83/EC.
2. In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications for asylum in which any of the circumstances listed in Article 23(4)(a) and (c) to (o) apply, Member States may also consider an application, if it is so defined in the national legislation, as manifestly unfounded.

UNHCR Comment on Article 29: In UNHCR's view, an asylum application should be rejected as unfounded only if the applicant qualifies neither for refugee status nor for complementary/subsidiary forms of protection. The Office is concerned that a rejection of the asylum application on refugee grounds only, as envisaged in Article 29 (1), may create the impression that no international protection needs exist, even if complementary/subsidiary protection needs are subsequently recognized. It should therefore be made clear in the decision that the authorities have considered and dismissed the claim on 1951 Convention grounds only. In this connection, UNHCR would like to reiterate the importance of a single procedure in which all protection needs are examined before a decision is taken on the asylum application (see comments on Articles 1 and 3 (4)).

UNHCR further regrets that the Directive leaves much room for discretion in adopting fair procedural standards, including for manifestly unfounded claims. UNHCR refers in particular to its comments on Article 23 (4) and its subparagraphs, as well as on Article 38. The Office hopes that Member States will maintain or adopt standards in line with UNHCR Executive Conclusion No. 30 (XXXIV) of 1983.

Article 30

Minimum common list of third countries as safe countries of origin

1. The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries that shall be regarded by Member States as safe countries of origin in accordance with Annex II.
2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State that it submit a proposal to amend the minimum common list.
3. When making its proposal under paragraphs 1 or 2, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations.
4. Where the Council requests the Commission to submit a proposal for removing a third country from the minimum common list, the obligation of Member States pursuant to Article 30B(2) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.
5. Where a Member State requests the Commission to submit a proposal to the Council for removing a third country from the minimum common list, that Member State shall notify the Council in writing of the request made to the Commission. The obligation of this Member State pursuant to Article 30B(2) shall be suspended with regard to the third country as of the day following the notification of the request to the Council.
6. The European Parliament shall be informed of the suspensions under paragraphs 4 and 5.
7. The suspensions under paragraphs 4 and 5 shall end after three months, unless the Commission makes a proposal, before the end of this period, to withdraw the third country from the minimum common list. The suspensions shall end in any case where the Council rejects, a proposal by the Commission to withdraw the third country from the list.

8. Upon request by the Council, the Commission shall report to the Council and the European Parliament on whether the situation of a country on the minimum common list is still in conformity with Annex II. When presenting its report to the Council and the European Parliament, the Commission may make such recommendations or proposals as it deems appropriate.

UNHCR Comment on Article 30: UNHCR understands that the intention of the drafters of the Directive was to preserve the integrity of the asylum process, by designing procedural devices for the treatment of manifestly unfounded claims. UNHCR does not oppose the notion of ‘safe country of origin’ where it is used as a procedural tool for prioritized or accelerated treatment, in carefully circumscribed situations. However, it is critical that each case be examined fully and individually on its merits. Each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, in his or her individual circumstances and to access an effective remedy in the form of an independent review.

UNHCR further welcomes that a variety of sources, including UNHCR, should be taken into account when identifying safe countries of origin. In this regard, UNHCR would like to draw attention to its country of origin and legal databases known as 'REFWORLD', as well as to other reliable sources available on internet, including Member States, NGOs and specialized sites such as www.ecoi.net. While the Office may not always be in a position to provide specific replies to country of origin information requests, it will, resources permitting, continue to formulate positions and collate information on countries which produce refugee populations of particular significance, or countries where UNHCR is engaged in returnee monitoring operations. (See comment on Article 7 (2)(b)).

While UNHCR finds acceptable the criteria laid out in Annex II (also referred to as Annex C to Annex I in Council Document 14203/04), it notes that clear benchmarks need to be developed as to when a country could be included in the list. It should not be possible to include a country where the potential for conflict is still considerable. UNHCR recommends that appropriate mechanisms provide for a regular review of such lists. Furthermore, any designation of such countries by law or regulation should be flexible enough to take account of changes, both gradual and sudden, in a given country.

Article 30A

National designation of third countries as safe countries of origin

1. Without prejudice to Article 30, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purpose of examining applications for asylum. This may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part.

UNHCR Comment on Article 30A (1): UNHCR regrets that Member States have permitted the possibility of introducing or maintaining national lists of safe countries of origin and notes that such national lists are not conducive to harmonization. The Office refers to its comments on Article 30, which apply equally to Article 30A. Furthermore, UNHCR recommends that Member States provide for appropriate mechanisms for a regular review of such lists.

As regards the possibility to designate a part of the country as safe, UNHCR notes that, in principle, a country cannot be considered ‘safe’ if it is so only for part of its territory. Furthermore, UNHCR wishes to emphasize that the designation of a safe part of a country does not necessarily represent a

relevant or reasonable internal relocation or flight alternative. The existence of a 'safe' part of a country may be but one element in an examination of whether a particular asylum-seeker has such an alternative. The complex questions which arise in the application of the internal flight alternative require, however, a careful examination of the individual case in the regular procedure and should not be dealt with in an accelerated procedure (see also comment on Article 8 of the Qualification Directive).

2. By derogation to paragraph 1, Member States may retain legislation in force at the time of adoption of this Directive that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum where they are satisfied that persons in the third countries concerned are generally neither subject to:
 - (a) persecution as defined in Article 9 of Council Directive 2004/83/EC; nor
 - (b) torture or inhuman or degrading treatment or punishment.
3. Member States may also retain legislation in force at the time of the adoption of this Directive that allows for the national designation of part of a country as safe or a country or part of a country as safe for a specified group of persons in that country where the conditions in paragraph 2 are fulfilled in relation to that part or group.

UNHCR Comment on Article 30A (2) and (3): UNHCR regrets the possibility to derogate from the standards outlined in paragraph 30A (1) and in Annex II. The Office considers unsatisfactory the criterion 'generally neither subject to' persecution, torture or ill-treatment, as outlined in Article 30 (2), and sees no reason to deviate from regular standards. UNHCR recommends that Member States not apply these provisions (see also comments on Articles 30 and 30A (1)).

4. In assessing whether a country is a safe country of origin in accordance with paragraphs 2 and 3, Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned.
5. The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.

UNHCR Comment on Article 30A (5): See comment on Article 30 in relation to sources for country of origin information.

6. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with the provisions of this Article.

Article 30B

Application of the safe country of origin concept

1. A third country designated as a safe country of origin either in accordance with the provisions of Article 30 or 30A can, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:
 - (a) he/she has the nationality of that country or,

(b) he/she is a stateless person and was formerly habitually resident in that country;

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee in accordance with Council Directive 2004/83/EC.

2. Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 30.

UNHCR Comment on Article 30B (1) and (2): UNHCR is concerned that this provision places the burden of proof entirely on the asylum-seeker, who is made responsible for submitting any evidence that a country is not safe. As noted above in the comment on Article 30, UNHCR considers the notion of ‘safe’ country of origin to be a procedural tool, which creates a rebuttable presumption and may serve to prioritize or accelerate examination of a claim. It remains essential, however, that each individual case is fully assessed on its merits. Each applicant should be given an effective opportunity to rebut such a presumption, without increasing the burden of proof on him or her. Furthermore, in UNHCR’s view, vulnerable applicants, including children, should not be channelled into an accelerated procedure. See comments on Article 23 (4) and the relevant sub-paragraphs.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

Article 31

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Section IV

Article 32

(deleted)

Article 33

Cases of subsequent applications

1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.
2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:
 - (a) after his/her previous application has been withdrawn by virtue of Articles 19 or 20;
 - (b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.

3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Council Directive 2004/83/EC have arisen or have been presented by the applicant.
4. If, following the preliminary examination referred to in paragraph 3, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Council Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.
5. Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons according to which a procedure has to be reopened.
6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 38.
7. This procedure may also be applicable in the case of a dependant who lodges an application, after he/she has in accordance with Article 5 (3), consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination referred to in paragraph 3 will consist of examining whether there are facts relating to the dependant's situation justifying a separate application.

UNHCR Comment on Article 33: UNHCR, in principle, agrees that subsequent applications could be subjected to a preliminary examination (an admissibility procedure) to examine whether new elements have arisen which would warrant examination of the substance of the claim. Such an approach would permit the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR's view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.

Consequently, it would not be appropriate, in UNHCR's view, to treat claims as subsequent applications, if they are submitted following a 'rejection' based on explicit or implicit withdrawal of an earlier claim. Rather, national legislation should provide for the resumption or re-opening of the asylum procedure (see comment on Articles 19 and 20). Similarly, claimants should be permitted to reopen the first asylum procedure in cases where an initial 'rejection' was based on the 'safe third country' concept or arrangements such as the Dublin II Regulation, if it subsequently emerges that the host State is nonetheless responsible for determining the claim on the merits, in line with Article 27 (4).

In UNHCR's view, preliminary examinations should extend both to points of fact and law. The notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object and purpose of the 1951 Convention. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Gross procedural errors should also lead to a reopening of the procedure.

UNHCR suggests use of the possibility which Article 33 (5) provides for Member States to address exceptional circumstances. Discretion to reopen a substantive examination is required in cases where, for example, trauma, language difficulties or age-, gender- or culture-related sensitivities

may have delayed the substantiation of an earlier claim. UNHCR recommends that this provision be reflected appropriately in national legislation and that it be applied with the necessary flexibility.

UNHCR further welcomes that the preliminary examination will, in accordance with Article 33 (7), take into account whether the specific situation of the dependant justifies a separate application. UNHCR reiterates the importance of ensuring that dependants, who may not have been able to submit a reasoned claim earlier, be given the possibility to have their asylum claim examined. Due consideration should be given in particular to trauma-, culture- and age- or gender-related sensitivities.

Article 33A

Member States may retain or adopt the procedure provided for in Article 33 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or to appear before the competent authorities at a specified time.

UNHCR Comment on Article 33A: This provision appears to allow limitations on the substantive consideration of asylum applications, if formal requirements have not been met. An examination of the claim could thus be limited to new elements or grounds for protection which have arisen since the time at which the applicant should have gone to a reception centre or appeared before the competent authority.

UNHCR agrees that States have a legitimate interest in preventing asylum applicants from intentionally failing to appear. However, there are more appropriate dissuasive measures for achieving this objective (such as, for example, restrictions in reception conditions). An applicant's failure to appear could also be an element in the credibility assessment.

However, UNHCR strongly objects to rejection of an application merely on the basis of failure to fulfil formal obligations. The proposal in question is at variance with the 1951 Convention which defines a refugee as a person with a well-founded fear of persecution on Convention grounds – regardless of the point in time when those grounds arose, or whether he or she disregarded formal obligations, such as going to the designated reception centre or appearing at a specific time before the competent authority. In this regard, see also comments on Articles 19 and 20, as well as 33. States should therefore not apply this provision.

Article 34 Procedural rules

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 33 enjoy the guarantees listed in Article 9 (1).
2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 33. Those rules may inter alia:
 - (a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
 - (b) require submission of the new information by the applicant concerned within a time limit after which it has been obtained by him or her;

- (c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

The conditions shall not render the access of applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.

UNHCR Comment on Article 34 (1) and (2): While UNHCR acknowledges that preliminary examinations under Article 33 shall be subject to the guarantees listed in Article 9 (1), it reiterates its view that preliminary examinations should, in principle, be subject to the minimum procedural standards of the Directive, outlined, in particular, in Chapter II (see comment on Article 24). It therefore requests such a clarification in implementing legislation.

The Office further welcomes that the Directive explicitly requires that the conditions outlined in Article 34 (2) should not render access to a new asylum procedure impossible, or severely curtail such access. In this regard, UNHCR notes that the obligation to indicate facts and evidence which would justify a new procedure, as required by Article 34 (2)(a), rests not only on the applicant but also on the examiner (see comments on Articles 9A (2)(b) and 23 (4)(g)).

UNHCR further emphasizes that valid reasons for a delay should be taken into consideration when deciding on whether an applicant submitted new information in time, in accordance with Article 34 (2)(b) (see *inter alia* comments on Articles 7 (1), 10 (6), 19 and 20).

Applicants should further be given the opportunity to clarify any apparent inconsistencies or contradictions which could lead to a refusal to examine a claim on its merits, including in cases where Article 34 (2)(c) would apply.

3. Member States shall ensure that
 - (a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons and of the possibilities of seeking an appeal or review of the decision;
 - (b) if one of the situations referred to in Article 33 (2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

Section V

Article 35

Cases of border procedures

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide, at the border or transit zones of the Member State, on the applications made at such locations.
2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force at the time of the adoption of this Directive, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations.

3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:
- shall be allowed to remain at the border or transit zones of the Member State, without prejudice to Article 6; and
 - must be immediately informed of their rights and obligations, as described in Article 9 (1) (a); and
 - have access, if necessary, to the services of an interpreter, as described in Article 9 (1) (b); and
 - are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 10 to 12; and
 - can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 13 (1); and
 - have a representative appointed in the case of unaccompanied minors, as described in Article 15 (1), unless Article 15(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why his/her application for asylum is considered as unfounded or as inadmissible.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.
5. In the event of particular types of arrivals or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

UNHCR Comment on Article 35: In UNHCR's view, there is no reason for requirements of due process of law in asylum cases submitted at the border to be less than for those submitted within the territory. Rather, the principle of non-discrimination requires that all asylum-seekers, irrespective of whether they apply at the border (including air and sea ports), or inside the country, benefit from the same basic principles and guarantees. Such differences in safeguards may compel asylum-seekers and refugees to enter and stay illegally, in order to be assured of higher standards in the asylum procedure. The Office therefore acknowledges that Article 35 (1) requires Member States to adhere to the basic principles and guarantees in procedures undertaken at the border or in transit zones, as set out, in particular, in Chapter II.

UNHCR regrets, however, that Article 35 (2) permits Member States to maintain border procedures which do not comply with these standards. The Office strongly recommends that the States concerned adjust their procedures, with a view to bringing them, at least, into line with the agreed standards, outlined in particular in Chapter II of the Directive.

UNHCR further notes with concern that, according to Article 35 (4), confinement of asylum-seekers without judicial review is possible for up to four weeks. UNHCR considers confinement at the border to be equivalent to detention, in line with the jurisprudence of the ECHR. While UNHCR welcomes the introduction of a time limit, the Office recalls that asylum-seekers should not, in principle, be detained. This principle is confirmed in Article 17. Where detention is used, it should meet the requirements outlined in the comment on Article 17.

Given that detention is not an environment that is conducive for refugee status determination, the stay of an asylum-seeker at the border should be as short as possible. UNHCR recommends that manifestly unfounded and well-founded claims be prioritized. Additionally, the specific needs, *inter alia*, of women and children should be taken into consideration and the right to family unity fully respected. Particularly vulnerable persons, such as separated children, elderly, the sick and traumatized, should furthermore be exempted from border procedures and admitted to the territory (see comments on Articles 15 and 17).²⁴

Section VI

Article 35A

UNHCR Comment on Article 35A: UNHCR is seriously concerned about the additional exceptions in this article qualifying the safeguards defined in the Directive on application of the ‘safe third country’ concept. No minimum principles and guarantees appear to apply to the procedure under Article 35A, and access to the asylum procedure (and territory) may be denied altogether. Such a denial risks being at variance with international refugee law.

No category of applicant should be denied access to an asylum procedure completely. Some form of assessment, at a minimum by way of an admissibility determination, must be provided for, in order to ensure access for refugees to the rights conferred by the 1951 Convention. As the article stands, the decision to refuse entry or remove the applicant may be taken by border guards who do not necessarily have the qualifications to assess international protection needs. UNHCR refers in this regard to its comments on Articles 3A (2) and 27, which apply equally here.

Mere transit through a presumed ‘safe third country’ could be accepted as a basis for the transfer of responsibility in certain limited circumstances, where an agreement exists between the sending EU Member State and the receiving third country, which clearly determines responsibility for asylum-seekers. The criteria for allocating responsibility for determining an asylum claim should be reasonable and the agreement should, *inter alia*, provide for exceptions in those cases where the links with the EU Member State are stronger than those with the transit state.

²⁴ The following recommendations provide further guidance: Council of Europe, Committee of Ministers, Recommendation No. R (94)5, 21 June 1994 (On guidelines to inspire practices of member states of the Council of Europe concerning the arrival of asylum-seekers at European airports); Council of Europe, Parliamentary Assembly, Recommendation 1475, 26 September 2000 (Arrival of asylum-seekers at European airports); Council of Europe, Parliamentary Assembly, Recommendation 1163, 23 September 1991 (On the arrival of asylum-seekers at European airports).

However, even in such cases, the applicant must have a genuine opportunity to bring forward and have considered any reasons precluding the transfer of responsibility prior to return. There must further be an effective remedy in practice, even if it is without automatic suspensive effect. In this regard, UNHCR recognizes that the latter is guaranteed by Article 38 (1)(a)(iii).

UNHCR therefore strongly recommends the deletion or non-application of Article 35A. If it is used nonetheless, UNHCR strongly urges the European Union and Member States to conclude agreements on responsibility-sharing, as outlined above, before returning asylum-seekers to third countries under this provision.

1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II takes place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.
2. A third country can only be considered as a safe third country for the purpose of paragraph 1 where:
 - (a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations; and
 - (b) it has in place an asylum procedure prescribed by law; and

UNHCR Comment on Article 35A (2)(b): In UNHCR's view, the mere existence of an asylum procedure in law is insufficient to ensure that the country in question will be able to deal fairly and efficiently with asylum applicants. UNHCR draws attention to the considerable number of countries just outside the external borders of the EU that have adopted asylum laws but implement them in a very limited fashion. They have, in reality, neither the structures nor the resources to deal with more than a very small number of asylum-seekers. Excluding persons who have travelled through such countries from any individual determination procedure in the EU could amount to an effective denial of the right to seek asylum under international law.

- (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and it observes its provisions, including the standards relating to effective remedies; and
 - (d) it has been so designated by the Council in accordance with paragraph 3.
3. The Council shall, acting by qualified majority on the proposal of the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.
4. Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement under the Geneva Convention including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.

UNHCR Comment on Article 35A (4): UNHCR notes the possibility to invoke exceptional situations where the ‘safe third country’ concept is not applied, which could be used, *inter alia*, to meet the concerns outlined in the comments on Article 35A.

5. When implementing a decision solely based on this Article, Member States concerned shall:
 - (a) inform the applicant accordingly; and
 - (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.
6. Where the safe third country does not readmit the applicant for asylum in question, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

UNHCR Comment on Article 35A (6): UNHCR welcomes the requirement that asylum-seekers who are not readmitted to the third country will have their claim examined in the EU, and refers to its comment on Article 27 (4).

7. Member States which have designated third countries as safe countries in accordance with national legislation in force at the date of the adoption of this Directive and on the basis of the criteria in paragraph 2(a) to (c), may apply paragraph 1 to these third countries until such time as the Council has adopted the common list pursuant to paragraph 3.

CHAPTER IV

Procedures for the withdrawal of refugee status

Article 36

Withdrawal of refugee status

Member States shall ensure that an examination may be started to withdraw the refugee status of a particular person when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.

Article 37

Procedural rules

1. Member States shall ensure that, where the competent authority is considering to withdraw the refugee status of a third country national or stateless person in accordance with Article 14 of Council Directive 2004/83/EC, the person concerned shall enjoy the following guarantees:

UNHCR Comment on Article 37 (1): See comment on Article 14 of the Qualification Directive.

- (a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and
- (b) to be given the opportunity to submit, in a personal interview in accordance with Article 9 (1) (b) and Articles 10 to 12 or in a written statement, reasons as to why his/her refugee status should not be withdrawn.

In addition, Member States shall ensure that within the framework of such a procedure:

- (c) the competent authority is able to obtain precise and up to date information from various sources, such as, where appropriate, information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of the persons concerned; and

UNHCR Comment on Article 37 (1)(c): UNHCR welcomes this provision and refers to its comment on Article 7 (2)(b).

- (d) where information is collected on the individual case for the purpose of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee, whose status is under reconsideration, nor jeopardise the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

UNHCR Comment on Article 37 (1)(d): UNHCR generally welcomes this provision and refers to its comment on Article 22.

2. Member States shall ensure that the decision of the competent authority to withdraw the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision shall be given in writing.
3. Once the competent authority has taken the decision to withdraw the refugee status, Articles 13, paragraph 2, 14, paragraph 1 and 21 are equally applicable.
4. By derogation to paragraphs 1, 2 and 3, Member States may decide that the refugee status lapses by law in case of cessation in accordance with Article 11(1), sub-paragraphs (a), (b), (c) and (d) of Council Directive 2004/83/EC or if the refugee has unequivocally renounced his/her recognition as a refugee.

UNHCR Comment on Article 37 (4): The question of whether refugee status has ceased should always be determined in a procedure in which the person concerned has an opportunity to bring forward any considerations and reasons to refute the applicability of the cessation clauses. The burden of proof that the criteria of the cessation provisions have been fully met lies with the country of asylum. UNHCR further refers to its comment on Article 11 (1)(a) and (d) of the Qualification Directive.

CHAPTER V **Appeals procedures**

Article 38 **The right to an effective remedy**

UNHCR Comment on Article 38: UNHCR notes with satisfaction that applicants have the right to an effective remedy before an independent and impartial tribunal or body. Such an appeal instance should have the jurisdiction to review questions both of fact and law.

1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:
 - (a) a decision taken on their application for asylum, including a decision:
 - (i) to consider an application inadmissible pursuant to Article 25(2),
 - (ii) at the border or in the transit zones of a Member State as described in Article 35(1);
 - (iii) not to conduct an examination pursuant to Article 35A;
 - (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;
 - (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;
 - (d) a decision refusing entry within the framework of the procedures provided for under Article 35 (2);
 - (e) a decision for the withdrawal of the refugee status pursuant to Article 37.
2. Member States shall provide for time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.
3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:
 - (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome; and
 - (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and
 - (c) the grounds of challenge to a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).

UNHCR Comment on Article 38 (3): Many refugees in Europe are recognized only during the appeal process. Given the potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard. This requirement is essential to ensure respect for the principle of *non-refoulement*. If an applicant is not permitted to await the outcome of an appeal against a negative decision at first instance in the territory of the Member State, the remedy against a decision is ineffective. Exceptions to this fundamental principle should only be permitted in precisely defined cases, where there is clearly abusive behaviour on the part of an applicant, or where the unfoundedness of a claim is manifest. Here, the automatic application of suspensive effect (as defined in Executive Committee Conclusion No. 30 (XXXIV) of 1983) could be lifted.

Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal arrangement between States on responsibility-sharing with respect to the determination of asylum claims (see comments on Article 33 and on Articles 27 and 35A). However, even in these cases, there should be some form of review by a court or other independent body. The review and possible confirmation of denial of suspensive effect should take into account the chances of an appeal. Such a review could be simplified and fast, provided both facts and law are considered. In order to be meaningful, the applicant should always be permitted to stay until that review is completed and a decision taken.

UNHCR considers that review prior to removal should be required explicitly. The principle of suspensive effect should otherwise be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of the 'safe third country' concept or in a substantive procedure.

4. Member States may lay down time limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.
5. Where an applicant has been granted a status, which offers the same rights and benefits under national and Community law as the refugee status by virtue of Council Directive 2004/83/EC, the applicant may be considered to have an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.

UNHCR Comment on Article 38 (5): For the reasons outlined in the comment on Article 25 (2)(d), refugees have a right to and an interest in having their refugee status recognized under the 1951 Convention and should therefore be provided with an effective remedy against a rejection. This applies even if they have been granted a status which offers nearly the same rights as refugee status, in accordance with the Qualification Directive.

6. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.

Article 39

(deleted)

Article 40

(deleted)

CHAPTER VI General and final provisions

Article 40A

This Directive does not affect the possibility for public authorities of challenging the administrative and/or judicial decisions as provided for in national legislation.

Article 41 Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle, as defined in national law, in relation to any information they obtain in the course of their work.

Article 42 Report

No later than two years after the date specified in Article 43, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 43 Transposal

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after the date of its adoption]. Concerning Article 13, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [36 months after the date of its adoption]. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Member States shall communicate to the Commission the text of the provisions of national law, which they adopt in the field covered by this Directive.

Article 43A Transition

Member States shall apply the laws, regulations and administrative provisions set out in Article 43 to applications for asylum lodged after [date mentioned in Article 43] and to procedures for the withdrawal of refugee status started after [date mentioned in Article 43].

Article 44 Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 45
Addressees

This Directive is addressed to the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels,

For the Council
The President

DEFINITION OF "DETERMINING AUTHORITY"

When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17 (1) of the Refugee Act 1996 (as amended) continues to apply, consider that:

- “*determining authority*” provided for in Article 2 (e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and
- “*decisions at first instance*” provided for in Article 2 (e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Ireland will notify the European Commission of any amendments to the provisions of section 17 (1) of the Refugee Act 1996 (as amended).

DESIGNATION OF SAFE COUNTRIES OF ORIGIN FOR THE PURPOSES OF ARTICLES 30 AND 30A(1)

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Council Directive 2004/83/EC; no torture or inhuman or degrading treatment or punishment; and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken inter alia of the extent to which protection is provided against persecution or mistreatment through:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms.

DEFINITION OF “APPLICANT” OR “APPLICANT FOR ASYLUM”

When implementing the provisions of this Directive Spain may, insofar as the provisions of “*Ley 30/1992 de Régimen jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*” of 26 November 1992 and “*Ley 29/1998 reguladora de la Jurisdicción Contencioso-Administrativa*” of 13 July 1998 continues to apply, consider that, for the purposes of Chapter V, the definition of “applicant” or “applicant for asylum” in Article 2(c) of the Directive shall include an “appellant” as established in the above mentioned Acts.

The “appellant” shall be entitled to the same guarantees as an “applicant” or an “applicant for asylum” as set out in the Directive for the purposes of exercising his/her right to an effective remedy in Chapter V.

Spain will notify the European Commission of any relevant amendments to the above mentioned Act.

Draft statements to the Council minutes

1. Re Article 3

"**The Council** is of the view that the Member States which apply the provisions of Article 3(3) of the Directive can, where they suspend an examination of an application for asylum in accordance with Article 17 of Council Directive 2001/55/EC (on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof), also suspend the examination of the application for other kinds of international protection covered by the procedure referred to in Article 3(3) until such time as that suspension no longer applies."

2. Re Article 27

"In adopting this Directive **the Council** recognises, having regard to the differing legal and constitutional traditions, that the rights of individuals are safeguarded in Member States according to their varying administrative, judicial and legal systems."

3. Re Article 30

"**The Council** invites the Commission to submit, as soon as this Directive has entered into force, a proposal allowing the Council to adopt a minimum common list of third countries that shall be regarded by Member States as safe countries of origin."

4. Re Annex II to the Directive

"**The Council** stresses its support for the abolition of the death penalty, as expressed in Protocols No. 6 and 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms. However, the Council recognises that ceasing to impose and execute the death penalty is a significant step towards abolishing the death penalty and encourages countries to continue their progress towards this end."