Towards a Common European asylum System *european conference on asylum*

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SERVIÇO DE ESTRANGEIROS E FRONTEIRAS

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FOREWORD

António de Lencastre Bernardo
DIRECTOR-GENERAL OF SEF

The Portuguese Presidency of the EU Council has decided, with the support of the European Commission, to promote in Lisbon, on 15 and 16 June 2000, a Conference on asylum – «TOWARDS A COMMON EUROPEAN ASYLUM SYSTEM».

The Serviço de Estrangeiros e Fronteiras (SEF) – the Portuguese authority competent to assess and decide the asylum applications – was entrusted with the organization of the conference, in which Commissioner António Vitorino, as well as representatives of the EU Member States – some of them at ministerial level –, of UNHCR, IOM, non-governmental organizations and other bodies and institutions, normally concerned with issues related to asylum and refugees, participated.

The Portuguese Presidency's decision was taken within the framework of the measures set by the Action Plan approved in Vienna, on 3 December 1998, and took into account, above all, the recommendations laid down at the European Council meeting held in Tampere, on 15 and 16 October 1999. It is important to underline that, in the said meeting, the European Council agreed to «work towards establishing a Common European Asylum System, based on a full and inclusive application of the Geneva Convention…».

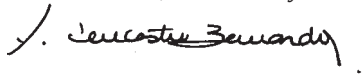
After two days of excellent presentations – both from a technical and political point of view – and very interesting debates, it was possible to withdraw a number of conclusions, of which I should like to highlight the following:

• the need for an integrated approach to migration and asylum issues, – underlining the important role which the work of the High Level Working Group on Asylum and Migration may play in this respect;

• when harmonizing asylum procedures, the absolute need to search for simple and practical solutions based on objective criteria which, without compromising the rights of real refugees, may allow for a more efficient handling of clearly unfounded asylum claims;
• the recognition that the Geneva Convention does not cover all the present situations where international protection is called for, whence other complementary forms of protection will have do be devised, without calling into question the full and inclusive application of the Geneva Convention;
• the recommendation that the special needs of vulnerable groups, namely women and children, must be duly taken into account.

On issuing this report, it is SEF's intention not only to publish the speeches and papers presented at the Conference, but above all to make known the opinions expressed by the participants, thus expanding the universe of those who may accede to such important contributions.
In view of the extensive participation in the Conference, the high quality of the speakers, the spirit of consensus that presided over most speeches and the obvious relevance of the conclusions reached, I am led to consider as an undoubted success this EUROPEAN CONFERENCE ON ASYLUM, an initiative closely associated with the SERVIÇO DE ESTRANGEIROS E FRONTEIRAS, the Institution that had the honour and the privilege of proposing and promoting its organization.

Lisbon, 28 February 2001



PROGRAMME

Towards a Common European Asylum System

Conference organized by
the PORTUGUESE PRESIDENCY OF THE EU COUNCIL
with the support of the EUROPEAN COMMISSION,
Lisbon, 15 and 16 June 2000

OPENING SESSION
Introduction

Fernando Gomes
MINISTER OF INTERNAL AFFAIRS – PORTUGAL

Kari Hãkãmies
MINISTER OF THE INTERIOR – FINLAND

FIRST SESSION [*15 june*]
International Protection, New Challenges

The current geo-political situation is characterized by grave human rights violations in countless regions throughout the world. Thus, today, new challenges related to the concession of international protection are facing States and Humanitarian Organizations. The high number of asylum seekers and displaced persons, the increasingly imperceptible distinction between refugees in the sense of the Geneva Convention and the people who, as a result of armed conflicts, civil wars or grave human rights violations, flee their countries of origin, besides the high number of economic migrants make it ever more difficult to find appropriate and effective solutions for differing situations, where the concession of international protection is required. Can a common European asylum system, based on a total and inclusive application of the Geneva Convention, be a decisive step forward in the sense that it will enable the European Union to provide correct and efficient responses to the challenges posed by such situations?

Chairman:
Luís Silveira, DEPUTY ATTORNEY-GENERAL

Otto Schily
FEDERAL MINISTER OF THE INTERIOR – GERMANY

Erika Feller
DIRECTOR OF THE DEPARTMENT OF INTERNATIONAL PROTECTION – UNHCR GENEVA

Patrick Weil
UNIVERSITY PROFESSOR – PARIS I, SORBONNE

Brunson Mckinley
DIRECTOR-GENERAL OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION

> Debate <

SECOND SESSION [*15 june*]

Towards a Common Refugee Status

The definition and concrete realization of a common refugee status is probably one of the greatest challenges facing the Member States of the European Union with a view to attaining a desired level of harmonization of the asylum and refugee policies. In spite of the important steps that have already been taken in this area, it is essential that we find common and harmonized rules. Apart from enabling an uniform application of the Geneva Convention and other international subsidiary protection mechanisms, the said rules should guarantee equivalent protection levels, irrespective of which Member State assesses and decides the applications for international protection.
Which path and strategy are to be followed with a view to a common refugee status, without the European Union thereby running the risk of calling the Geneva Convention into question?

Chairman:
Anne-Willem Bijleveld, DIRECTOR OF THE EUROPEAN DEPARTMENT – UNHCR GENEVA

Peer Baneke
GENERAL SECRETARY OF ECRE

Maria-Teresa Gil-Bazo
EXECUTIVE OFFICER FOR ASYLUM ISSUES – EU OFFICE / AMNESTY INTERNATIONAL

Kay Hailbronner
UNIVERSITY PROFESSOR – KONSTANZ UNIVERSITY

> Debate <

THIRD SESSION [*16 june*]

Towards a Common Asylum Procedure

The adoption of minimum standards for the concession of the refugee status offers Member States a margin of flexibility to determine the various aspects of the administrative mechanisms necessary for the application of procedural guarantees which may subsequently be enshrined in a binding instrument. Thus, the said adoption of minimum standards will be an important and decisive step towards a common European asylum system. A future legally binding, but quite flexible, community instrument may be the first stage of a future single European asylum procedure. What advantages may the Member States identify and gain from the said single system?

Chairman:
Job Cohen, STATE SECRETARY FOR JUSTICE – NETHERLANDS

Maj-Inger Klingvall
MINISTER FOR DEVELOPMENT, CO-OPERATION, MIGRATION AND ASYLUM POLICY – SWEDEN

Nuno Piçarra
UNIVERSITY PROFESSOR – UNIVERSIDADE NOVA IN LISBON

Jack Straw
HOME SECRETARY – UNITED KINGDOM

> Debate <

CLOSING SESSION

Jean-Marie Delarue
DIRECTOR OF THE PUBLIC FREEDOM AND LEGAL ISSUES DIRECTORATE – FRANCE

Representing **Mr. Jean-Pierre Chevènement**

António Vitorino
EUROPEAN COMMISSIONER FOR JUSTICE AND HOME AFFAIRS

Fernando Gomes
MINISTER OF INTERNAL AFFAIRS – PORTUGAL

OPENING SESSION

Fernando Gomes

MINISTER OF INTERNAL AFFAIRS OF PORTUGAL

Mr. Minister of the Interior of Finland and dear colleague
Mr. Minister of the Interior of the Federal Republic of Germany and dear colleague
Mr. Chairman of the Committee on Constitutional Rights, Freedoms and Guarantees of the Portuguese Parliament
and Mr. President of the Supreme Administrative Court
Ladies and Gentlemen

I am delighted to welcome you all. To all those taking part in this Conference, I wish a very pleasant stay in our country, in Lisbon, a city always hospitable to its visitors. I expect this initiative to be a milestone in the harmonization process of asylum policies in the European Union, and I am certain that the tasks and debates we have set for ourselves during these two days will be successful. So, I wish you all, both speakers and participants, a fruitful work, being certain that the results will be positive.

By organizing this Conference, as Presidency of the EU Council and in close co-operation with the European Commission, we propose to further the implementation of the concept of a common European asylum system, as laid down and adopted by the Tampere European Council, under the Finish Presidency last year, in October. The Conference also aims to give a substantial contribution to future debates within the scope of the work and commitments which were undertaken by the European Union, within a clear integration process, with a view to establishing a common asylum policy, as well as to contribute, directly or indirectly, to the immigration and visa policies. In order to better understand how important and decisive this moment is and, based on what has been achieved so far, to become aware of the immense task still ahead of us, let me briefly highlight the main stages and landmarks that have brought us together today.

The first EU initiative, considered as an attempt to co-ordinate national immigration and asylum policies, was the creation of the Ad Hoc Immigration Group in 1986. It was based on the pure intergovernmental method, totally foreign to the Treaties and the structure of the then European Economic Community. However, as regards the more recent

and future European integration process, it is important to highlight three milestones that indicate the path the European Union intends to take in these areas and which are marked by the Treaty of Amsterdam, the Vienna Action Plan approved in December 1998 and the Conclusions of the Tampere Council held in October 1999.

The Vienna Action Plan established a very precise and ambitious schedule for the adoption of measures in asylum and immigration matters within two and five years from the date the Amsterdam Treaty came into force, with a view to implementing and developing the articles 61 and 63 of that Treaty. So, it was agreed to undertake within two years the commitment to adopt measures relating to the assessment of the countries of origin, as well as of the asylum seekers and immigrants, in order to define a specific country by country approach, and also measures relating to the application of the Dublin Convention, the implementation of the EURODAC system, the adoption of minimum standards for granting and withdrawing the refugee status, the limitation of the asylum seekers' secondary movements between the Member States, the definition of minimum standards for the reception of asylum seekers and, finally, it was decided to carry out during that same term a study to assess what are the advantages in adopting a common European asylum procedure.

On the other hand, under the said Vienna Action Plan, the Council undertook to adopt within five years measures that will enable to identify and implement the actions listed in the European migration strategy; it also undertook to define, within the same period, minimum rules governing the conditions to be fulfilled by third country nationals applying for the recognition of refugee status, and to establish minimum standards of subsidiary protection to be provided to those in need of international protection. The Vienna Action Plan also lays down measures to be adopted as soon as possible to give temporary protection to displaced persons from third countries who cannot return to their country of origin, as well as measures intended to secure an adequate burden sharing between Member States as regards the reception of displaced persons. This is as far as the Vienna Action Plan is concerned.

The Tampere Council reaffirmed in its Conclusions the importance that the Union and its Member States attach to the absolute respect for the right to seek asylum, and agreed to work towards the creation of a common European asylum system based on the full and inclusive application of the Geneva Convention, so as to include a practical and clear definition of the State responsible for examining the asylum applications, define common standards for a fair and efficient asylum procedure, minimum

common standards on the reception of asylum seekers, an approximation of the rules concerning the recognition and content of the refugee status, as well as the establishment of subsidiary forms of protection offering an adequate status to those in need of international protection.

On the other hand, the Tampere Council also reaffirmed the priorities laid down in the Treaty of Amsterdam and in the Vienna Action Plan in the sense that, based on proposals presented by the Commission, the Council should adopt the decisions necessary to achieve the goals set by the Union in accordance with the timetable defined therein. Considering the schedule set in the Vienna Action Plan, we must bear in mind, and this is the right moment to do it, that more than one year has passed since the end of the two-year period within which the Council undertook to adopt certain measures. Therefore, this is a crucial moment to give a new impetus to the work that must be carried out and, based on the principles of democracy and transparency that guide us, to discuss with the civil society the difficulties we face and the solutions that need to be put in place. So it is time to take stock and to look to the future. Imbued with these principles, we decided to promote a public debate between the main politicians concerned with asylum matters in every Member State and other international partners and agencies who will certainly have an important contribution to make in this respect. To that effect, besides the Member States' political representatives, we have invited to take part in this Conference senior officers from other States with which the EU has special institutional relations, as well as representatives from the main international and non-governmental organizations, and also a number of professionals who, owing to their academic prestige and experience in these matters, may contribute with new and constructive ideas to the short and medium-term measures to be adopted at EU level.

As regards the areas we have put forward for discussion, I would say they focus on three key issues currently facing the European Union.

In this morning's panel we intend to analyse the problems and challenges that the complex geopolitical situation of today's world raises in terms of the need of international protection, as well as the common strategic approaches that may enable to deal with them with the necessary quickness, fairness and efficiency. This afternoon we shall discuss what is probably one of the most difficult issues facing the Member States and the European Union as regards the harmonization of asylum and refugee policies, namely, the common definition and content of the refugee status and of other suitable forms of complementary protection. Finally, tomorrow, we shall try to look to and discuss the possible procedural approaches to be

adopted at EU level with a view to achieving better and more harmonized decisions within the framework of the national concession systems and international protection systems. Believing that the work we shall do here will lead to conclusions that may help finding new ideas and solutions with regard to measures necessary for a more just, humanitarian and efficient asylum policy, as well as for a better and more appropriate international protection for those in need of it, believing in all of this, I wish you all a good work. Thank you very much.

FERNANDO GOMES

Kari Hãkãmies
MINISTER OF THE INTERIOR – FINLAND

Ladies and Gentlemen,

Until the Second World War, floods of refugees used to be created by singular events.

In the 1950s, people still thought that refugee problems were only a passing phenomenon. The number of refugees remained steady until the end of the 1970s, being around 2-3 million, but it has grown fast ever since.

The problem related to Palestinian refugees was the first one that proved chronic. After that, there have been many refugee problems to which we have not been able to find a permanent solution. The end of the Cold War as well as the easier exchange of information and movement of people have also had an effect on refugeeism. Today, there are already 20 million refugees in the world.

Since the 1980s, the reasons for people leaving their home country have more and more often been incompatible with the criteria of the Geneva Convention relating to the Status of Refugees. People tend to leave their home country more and more spontaneously. While the number of asylum seekers is increasing, the number of persons to whom the host countries grant asylum is, however, decreasing.

Many countries, including Finland, have examined the following questions:

- How to make sure that help is given to the people who really need it?
- How to prevent illegal immigration and abuse of asylum procedures?

No one can, of course, be blamed for seeking better living conditions for himself and his family. It is, however, clear that in Europe only few asylum seekers can be given a right of residence.

So, what should we do to solve the refugee problem?

• First of all, the number of refugees should, naturally, be reduced by understanding and examining the reasons behind refugeeism. This approach has lately become justifiably more and more important also in the EU.

• Secondly, when crises are over or when people cease to need protection, the return to their home country should be supported as often as possible.

If refugees cannot return to their home country, they should, if possible, be settled permanently in areas close to their home country.

• Finally, refugees may have to be resettled in remote countries, for example within the framework of a refugee quota. Finland is one of the countries that has been taking in quota refugees.

National traditions and features often characterize the immigration policy of each country. This is also evident in asylum matters – the States themselves decide on their asylum procedures. Now that the number of asylum seekers is increasing, however, closer European – and international co-operation – is necessary.

The European integration has created a need for the Member States to harmonize their immigration policies. We have had to explore possibilities of rationalizing such procedures as the examination of asylum applications. This could be done, for example, by using the concept of safe country, as well as by means of simplified procedures based on other reasons.

The following questions relating to asylum policy are important to Europe:

• Who are the foreign asylum seekers to whom may be given a right to stay in an EU country?

• What are the procedures for examining asylum applications that would enable us not only to give a right of residence to those badly in need of it, but also to prevent unjustified asylum applications?

The extraordinary European Council held in Tampere, in October 1999, as part of the Finnish EU Presidency, was organized as a result of a growing need for political guidelines in the field of justice and home affairs. This summit concluded that the creation of an area of freedom, security and justice is one of the Union's political priorities. The Tampere Conclusions can be considered the basis for future EU asylum policy.

According to the Tampere Conclusions, a Common European Asylum System should include:

• a clear and workable determination of the State responsible for the examination of an asylum application;

• common standards for a fair and efficient asylum procedure as well as common minimum conditions of reception of asylum seekers;
• a more efficient management of the migration flows at all their stages, which calls for efficient information campaigns on the actual possibilities of immigrating legally;
• the adoption of legislation providing for severe sanctions against trafficking in human beings;
• closer co-operation between the Member States' border control services and those of the applicant States;
• the signature of readmission agreements aiming at the return of the persons who have entered the country illegally.

These measures are, however, yet to be achieved. In my opinion, we should take concrete measures as soon as possible.

Dear conference participants,

Finland, too, wants to give its contribution to this matter and help people who need protection, that is to grant them asylum in our country. To this effect, Finland is committed to the obligations of international agreements, which means that we have given up some of our sovereignty.

In addition, we aim to reduce refugeeism by means of our foreign and development policy. We also seek to prevent international crime relating to the abuse of refugees, such as illegal immigration, from coming to our country.

I hope that during this two-day conference we will discuss as openly as possible our common European principles of asylum. I believe that this conference is the right occasion for such discussions.

I hope that you'll enjoy this conference! Thank you!

FIRST SESSION

International Protection, New Challenges

Luís Silveira

DEPUTY ATTORNEY-GENERAL

This first session is entitled «International Protection – New Challenges», and I personally think that the choice was a very strategic one. In fact, it is said that, at present, there is a double contradiction in this field. Firstly, a contradiction as to how the right of asylum is managed and as to how the situation of refugees is dealt with on an individual basis: here, the level of protection granted by the international standards in force, namely the 1951 Geneva Convention, is probably stronger, more open, more progressive, more protective than some of today's international players would like. On the other hand, we are confronted with another contradiction when we consider the mass flows, the massive displacements from one country to another or even within the same country, a phenomenon which is not as yet duly covered and regulated by international standards. So that is why we are all very grateful to the group of speakers who will address us today, as they will certainly help us clarify some of these contradictions. Today's speakers, as I'm sure you've seen from the programme, make up a really unique selection, especially as they combine a sound theoretical and cultural background with a long field experience, an experience of dealing with asylum and refugee issues.

They are Mrs. Erika Feller, Head of the International Protection Department of the United Nations High Commission for Refugees, Professor Patrick Weil, who is a Professor at Paris I, the Sorbonne, and Mr. Brunson Mckinley, Director-General of the International Organization for Migration. According to our agenda, we shall first give the floor to Mrs. Erika Feller.

Otto Schily[1]

MINISTER OF THE INTERIOR OF THE FEDERAL REPUBLIC OF GERMANY

Ladies and Gentlemen,

Let me first of all thank my colleague Minister Fernando Gomes and Commissioner Vitorino for convening this conference. As you know, the European Council in Tampere has entrusted us with the creation of a «Common European Asylum System» in order to ensure a fair treatment of third country nationals and an adequate control of the migration flows. These ambitious aims are certainly not going to be achieved by negotiations in Brussels alone with due respect to the work done there. In addition, an open exchange of experiences, free from the restraints of negotiation, is necessary. Bearing this in mind I hope this conference will give an important impetus to the future work within the European Union.

To start with I will ask you to excuse me for not being able to stay throughout the entire conference. To my regret, I have to leave the beautiful city of Lisbon at lunch-time[2] due to the German-Russian consultations that are presently taking place in Berlin. Because of the visit of the Russian delegation headed by President Putin, I am not in a position to stay with you any longer. I would like to especially thank my colleague Fernando Gomes for giving me the opportunity, deviating from the planned agenda, to talk to you this morning.

My main thesis is relatively simple, it is so to speak inherent in the Tampere Conclusions. My main thesis is that the problems of granting asylum, temporary protection and migration in general have to be seen in their respective contexts. If these problems are mixed, the State looses its capability to

[1] Otto Schily was appointed minister of the Interior in October 1998. Before that he was deputy member of the Committee on Internal Affairs as well as of the Committee on Legal Affairs.

[2] Due to a visit to Berlin by a Russian delegation headed by President Putin, Minister Schily had to make his presentation before the beginning of the first session of the Conference and separately from the other speakers chosen for the first panel.

act. My colleague Hãkãmies has already mentioned this difficult situation. If the majority of the asylum procedures is de facto used for enforcing immigration for absolutely comprehensible reasons that cannot be condemned from a moral point of view, a politically precarious situation develops, because the State can no longer act, only react. Where there are problems with the acceptance of granting asylum and other humanitarian decisions, this will end up in the use of polemic and exaggerated language as it is nowadays, sometimes, disseminated in Germany, for example to express that we need more people who are of use to us and less people who misuse our generosity. There is no point in closing our eyes to such facts. The important thing is that the receiving countries are capable of acting in the field of migration policy, or respectively that they regain their ability to act, both in the interest of their own societies, but also in the interest of an effective refugee protection on the basis of the European principles.

I am convinced that the immigration of people from other countries and other cultural spheres enriches the host society from an economic, demographic and cultural point of view. Germany's historical experience has taught us that, as a rule, population exchange and migratory flows have had a positive effect on its development. I was born in the Ruhr area. This region of Germany was flooded with an important influx of Polish migrants in the twenties. The revitalization of German football would not have occurred without the Polish immigration. This becomes obvious if we look at the names of the players in the first German national teams.

Nevertheless it cannot be ignored, ladies and gentlemen, that uncontrolled and unrestricted immigration may also have a negative impact on the social, economic and political stability of the host country. Immigration must be socially compatible. It must be accepted by the host country's society. Such acceptance by the population is highly important, because otherwise considerable focuses of potential conflicts will emerge within the society, which – carefully speaking – may be used for propaganda by politically undesirable forces.

Every now and then it is maintained that the demographic development forces the industrialised nations to pursue an active immigration policy and that time has come for more generous admission rules and an opening of the borders. Certainly this is an important issue that should not be neglected. I do not have time to deal with all the aspects of such a complex issue and, therefore, I will restrict myself to the following remarks. It is a fact that the resident population in Europe is ageing and that the so-called old-age ratio, i. e. the relation between the people in the age-bracket 15-

-64 and the population aged over 65 will probably double or even triple. Demographers estimate that, mathematically speaking, Germany will need until the year 2050 some 500,000 immigrants per year in order to keep the number of salaried persons at the level of 1995.

It is doubtful, though, that such abstract figures can form the basis of a policy. For a start it is a question of whether an immigration of such magnitude would overstrain our labour market, of whether there would be sufficient jobs available. But there is perhaps another question, even more important, namely to know whether such mass immigration, also followed by changes in the ethnical and cultural structures of the population, is possible without a far-reaching political consensus. Without such political consensus, I would say that for Germany, the internal peace would be seriously jeopardised, and I think one has to take such considerations into account. This means that an active immigration policy alone cannot solve the problems caused by a demographic gap. It can at best mitigate its effects on the economy and on the social security system.

We will have to face up to the necessary structural changes in the host countries. Immigration policy is undoubtedly an important instrument, but only one among many others. Moreover, only the immigrants whose integration in the host country is not too costly and who can take up an employment subject to social security payments can contribute to the safeguard of that same system. It is evident that not all migrants meet these requirements. Therefore every State has a fundamental interest in steering migration and being in a position to decide which foreign nationals are admitted for settlement.

The capability to act in the field of migration policy is limited by several factors. At least this holds water in the case of Germany. The host countries are exposed to non-controllable migration by fulfilling legal obligations within the field of refugee protection under the Geneva Convention or within the field of family reunification under the European Convention on Human Rights, for instance. Moreover, the national law also imposes obligations which, in Germany, result basically from the commitment to the fundamental rights embodied in the constitution, as the right to asylum and to the protection of marriage and family. In addition, there are factual reasons for uncontrollable migration. No free State will be able to prevent illegal immigration completely.

Against this background the question arises as to whether the host countries' capability to control migration is restricted to such an extent that they have to look for new approaches. This question, ladies and gentlemen, has been in the centre of the discussion in Germany in the past few weeks

since Federal Chancellor Schröder announced the idea of an immediate programme for recruiting foreign IT experts. In the meantime we have made relevant decisions in this field. Maybe will get forward with our analysis if I give you a brief survey of the German experience in the field of asylum and immigration policy. I am well aware that the European States have very differing experiences in this respect, and in Germany I always promote the idea that we should concentrate not only on our issues, but also concern ourselves with the problems that other countries have to cope with. Some of you, ladies and gentlemen, will rightly maintain that their States have not lost their capability to act. For these States, the question should perhaps be how can they sustain their capability to act in the long term? For a while we had the impression that the UK, for instance, did not have to deal with this kind of problems. In the meantime we have learned the UK too has to cope with such problems and I am very eager to know what my friend Jack Straw will tell you tomorrow. Unfortunately I will not be here to follow his speech, but I will certainly read it afterwards.

Let me now describe the three phases that characterized the evolution of the immigration in Germany. The first phase – the 1950s and 1960s – was marked by a serious lack of workforce; the 1990s comprise the second phase and, finally, the present situation. Please do not see this as a strictly chronological sequence of events; what happened in the earlier phases has still now repercussions.

The first phase, which thanks to Germany's economic recovery after the war was also called the «Wirtschaftswunder» (economic miracle), i. e. the 1950s and 1960s, as regards migration policy, was characterized by the recruitment of foreign labourers – «guest workers» as they were called – above all from Turkey and the former Yugoslavia. During this phase, the German Government had an active immigration policy and determined the conditions and limits of the influx of foreign workers. However, this has not prevented us from making serious mistakes. The term «guest worker» for instance reflected the general expectation that these workers would remain in Germany only for a limited period and then return to their home countries. This expectation did not come true. And because people at that time had this erroneous expectation, no measures were taken to integrate the guest workers, an omission for which we are still paying today. The economic recession in the early 1970s did put an end to the recruitment of foreign workers. At that time, nearly 2,5 million guest workers lived in Germany. The ban on recruitment in 1973 however did not result in a decrease of the foreign resident population, but rather

in an increase. The great majority of the guest workers chose to settle in Germany for good. Their families joined them in the course of time. The subsequent immigration of family members then was thus one of the main reasons why the foreign resident population increased from some 4 million in 1973 to 7,3 million last year, i. e., the figures have virtually doubled. Every year approximately 70,000 foreigners move to Germany to join their families. This is why we express certain reservations about extending the right to subsequent immigration to relatives.

In addition, the recruitment of guest workers proved to be a pull factor in the wars in the former Yugoslavia. This is an important aspect, too. Whoever flees his home country – also not someone migrating in the pursuit of work and here we can observe the interaction of certain developments – will above all seek protection among his countrymen. Already due to the language problem, this acts as draw. This is why many Bosnians and, last year, many Kosovars sought refuge in Germany.

While the first migration phase was initiated by Germany itself, i. e. it resulted from a policy actively pursued by us, the second phase was one of uncontrolled and presumably uncontrollable migration, at least it was not controllable under the circumstances prevailing at that time. It was characterized by a dramatic increase in the number of asylum applicants. In 1988, Germany registered 103,000 asylum applicants. The number rose steadily and reached its peak in 1992 with more than 438,000 asylum applications. In 1992 and 1993, Germany received a total of 760,000 asylum seekers. In addition, more than 350,000 civil war refugees from Bosnia and Herzegovina and 450,000 ethnic German repatriates arrived in Germany who, although having the German nationality, are regarded by the local population as foreigners due to their different biographies and language problems. On the whole, Germany had to cope with an influx of over 1,5 million people during these two years, which naturally entailed integration problems. At that time the acceptance by the population of the right to asylum, in particular by the low-income classes of the society as well as by the foreigners who had been living in Germany for a long time. This means that the problem of the local population vis-à-vis immigration was not purely ethnic, but rather a sort of competition for housing, jobs or places in nursery schools. If we take a glance at the recognition rate of that time and the then main countries of origin, among them Romania and Bulgaria, we see that the great majority of the asylum applicants obviously misused the right to asylum to enter Germany. I do not condemn this behaviour from a moral point of view, only it is not in line with what the right to asylum aims at. Once more to make it very clear: In 1992 more

than 100,000 Romanians came to Germany. The recognition rate was next to zero. And 100,000 persons is more or less the population of a German city. We have to bear this in mind in order to understand how the situation came to a head. Right-wing extremist groups subsequently fomented xenophobia and feelings of hostility towards foreigners. They committed several xenophobic crimes, including arson that caused the death of people lodged in hostels for asylum seekers. The situation got very tense.

The Parliament's response to the percentage of asylum applicants increasing steadily since the 1970s was the enactment of seven new laws, in the end, without significant success, because they did not provide the means to curb the influx of asylum seekers. The basic right to asylum as defined at that time remained unchanged. It guaranteed the unrestricted right to asylum, unrestricted in the sense that any foreigner who either at the German border or within the German territory claimed to be politically persecuted was granted a preliminary right to stay. Whilst at that time our neighbouring countries applied the concept of the safe third country vis-à-vis Germany, Germany itself could not transfer any asylum seekers. Moreover the asylum seeker then was entitled to have his asylum application thoroughly examined even in cases of obviously unfounded claims. A representative of UNHCR depicted the situation at that time very precisely: this constitutional provision made the right to enter our country the most liberal in Europe, i. e. anyone who could say «asylum» without stammering was granted leave to enter with the prospect of a long-term stay funded by Government support. At the same time and in response to this situation, so to speak, as far as the acceptance of the claims is concerned, our practise was the most illiberal.

The intolerable situation in 1992 finally resulted in a comprehensive reform of the asylum law in 1993. The new law did not entitle the foreigners who entered Germany through a safe third country to have resort to the fundamental right to asylum. The reform also made it possible to list the countries of origin for which there is a refutable presumption of freedom from persecution. Within this framework a great number of critics associated this possibility with the idea that in future no one would be granted asylum in Germany because, as you know, it is surrounded by safe third countries only. However, this criticism proved to be wrong. We still have some 100,000 asylum applicants every year. This is due to the fact that nowadays it is impossible to protect the borders in a way so as to prevent a person from entering our country by other means. And then, in any case without prejudice to the basic right to asylum, the

Geneva Convention relating to the Status of Refugees plays a role in the examination of the respective applications.

This takes me to the third phase, the present. In 1998, 605,000 foreigners entered the federal territory of Germany of which about 100,000 were asylum applicants, 100,000 repatriates of German origin and 70,000 foreigners joining their families, while 639,000 foreigners left Germany. Amazingly, there was an excess of departures over arrivals. The difference between them was 35,000 persons. This negative migration balance is mainly due to two factors, we think: first, the departure of EU citizens. The economic situation of countries such as Spain and Portugal, which are also sunnier than Germany, makes the departure for Spain more interesting than the stay in Germany. Thus, nowadays, there are more Germans living in Spain than Spanish citizens in Germany. In this respect, the tendency changed. I am not quite sure whether we really appreciate this turnabout because most of the Germans who go to Spain also spend their pensions there. But I do not wish to go into details now. The second and most important factor is the return of civil war refugees to Bosnia and Herzegovina.

If we look at the migration balance over a longer period, however, the picture is quite different. All in all, more than 10,5 million foreigners have entered Germany since 1983 and about 7,4 million have left the country. In other words, if we look at the last 17 years, we have a migration surplus of 3,1 million persons. In view of the length of this period one might think that the figure is not very significant. However, one should not forget that Government aid, specially integration benefits, were also given to foreigners who left Germany after having lived there for a while. The migration of people or their return to the country of origin at a later stage does not reduce the necessary integration measures. If 10,5 million persons enter our country, we have to fund integration measures for those 10,5 million persons.

Now then, do these figures suggest that an immigration policy orientated towards economic or humanitarian purposes has a new scope of action? In this context, may I remind you that, two weeks ago, the Federal Government defined rules for the entry of up to 20,000 information technology experts, known to the public as the «Green Card», although this is not quite correct because contrary to the United States we do not have any Green Cards. According to it, up to 20,000 foreign IT specialists may enter Germany during the next three years to take employment. They shall initially be admitted for a period of five years, but it may be extended. I only mention this because we are undeniably in a situation

where we have to consider thoroughly in which areas and in which contexts we may want to allow the immigration of foreigners. Some countries call primarily for a quota for a humanitarian admission policy, others for amendments to the asylum law as a prerequisite for an active immigration policy. In view of the very complex questions and unclear trends in the general discussion, I have decided, in agreement with the Federal Chancellor, to set up an independent expert commission on this subject. They will deal with the ideas of all political and social groups including UNHCR – and I am pleased to welcome representatives of UNHCR here today. Their task will be to draft concrete proposals for new regulations adequate to the European needs.

In my opinion, however, it is clear that the chances of an active immigration policy are limited by the different categories of uncontrollable migration, the influx of asylum seekers, repatriates and by the subsequent immigration of dependants. And how to find a balance without giving up our humanitarian principles, this is exactly the difficult issue facing us. We have to consider that we are capable of acting only if those foreigners, who cannot be granted leave to stay either on legal, economic or humanitarian grounds, actually leave the country, i. e. that their stay in Germany can in fact be terminated. Well, we are having problems in this field too. Last year about 30,000 persons whose asylum application was refused returned to their countries of origin, half of them voluntarily. This number is blatantly out of proportion to the number of asylum applicants who entered Germany last year, namely 95,000. Of them too many are rejected asylum seekers who, although being under an obligation to leave, actually remain in the country. We have presently more than 500,000 persons who are compelled by law to leave the country, but this stipulation is not carried out. The inability to enforce the obligation to leave the country is alarming, as it reveals a lack of capability to act. Without prejudice to its legal obligations, any State must be in a position to decide freely which foreigner is to be granted leave to stay in its territory.

In order not to exceed my time-limit, I will not go into details about what causes the law enforcement to be deficient, but I'll say that the lack of co-operation with the countries of origin, the use of all legal remedies and, perhaps, also, too many legal possibilities of preventing the departure certainly play a role in this context.

In this context too the question is also – and I hope no one will be shocked to hear this – to know to what extent, with regard to the obstacles to deportation presented from a legal point of view, once again, I mean the legal obstacles and not flexible solutions to cases of hardship, whose

resolution is left at the discretion of the receiving country, is there a tendency to apply largely the provisions in question making it impossible to control that same application. But when reading the draft directive of the Commission on temporary protection, particularly the grounds on which deportation cannot be carried out, I see that it will be impossible to deport a person if conditions prevailing in the country of origin do not ensure the respect for human rights and rule of law, I wonder whether that wording is not too comprehensive. Naturally one of the fundamental principles common to all of us is that a person shall not be sent back to his home country if he is to suffer torture, death or inhumane treatment there. But we cannot extend this principle so as to prevent the repatriation if the standard of the social and legal conditions in the country of origin is lower than in the other European host States. In other words this means: Will it be impossible to deport a person only because he will not find a job in his home country? I think that this would overburden the legal provisions. We really should deal with these questions in a more critical manner.

Let me now outline some ideas for possible solutions.

The Amsterdam Treaty and its ambitious working programme create the opportunity for having Community regulations that enable fair and short asylum procedures. Europe would make a great progress if the Community law would enable all States concerned to clarify the jungle of their regulations, reduce the bureaucracy and optimise the procedures and their application. Community regulations could result in levelling the duration of the asylum procedures, as well as in applying the same appeal system throughout Europe. The Commission's working paper on common standards for asylum procedures presents a proposal to this effect, i. e. it defends that the authority responsible for assessing an asylum application, in case it decides to refuse it, should also examine whether the person concerned should be granted subsidiary protection on account of the situation prevailing in the State of origin. For us, this would be the standard that we have already reached.

I also welcome the proposal the Commission presents in its document, according to which there should not be multi-phase appeal procedures. Having said this, we should pay particular attention to the appeal procedures. Fast-track asylum procedures do not lead us anywhere if they are followed by slow court procedures. Our colleague Hãkãmies just had to deal with such issues. In Germany, appeals are filed against 80% of all negative decisions made by the Federal Office for the Recognition of Foreign Refugees. Naturally, this is not due to the lack of plausibility of

those decisions, but simply because the persons concerned resort to this procedure in order to be granted a longer stay. The average duration of a court procedure is one year. At the end of last year, about 200,000 asylum procedures were still pending, many of which refer to applications filed in 1992 and 1993. The backlog caused by these asylum applications shows that these procedures encourage people to resort to this method to extend their stay in Germany.

In case of mass flight situations, I advocate granting complementary protection, a concept we have termed «temporary protection». This concept has the following advantages: The authorities and courts are not clogged with a great number of claims. The host States can handle grave refugee crises with more flexibility and they gain room for action, mainly because the temporary protection is return-oriented – in other words, the emphasis here is on its temporary nature. This also encourages host States to grant protection to those seeking protection and who have not yet found refuge. Irrespective of some differences of opinion as far as details are concerned, I am grateful to Commissioner Vitorino for his draft on temporary protection.

Another measure needed is the improvement of the return policies. I do not want to go into details about that. I appreciate the attempt to co--ordinate our return policies at an European scale and, above all, to be very firm with those States that try by different ways and means to dodge fulfilling their international obligations.

Finally, I very much welcome – and Germany too has supported it and we are thankful to the Portuguese Presidency for helping this issue to advance – the idea that a coherent migration policy must take into account all factors, i. e. the pull as well as the push factors. This is why the work of the High Level Working Group on Asylum and Migration certainly is a starting-point that we clearly have to develop further, because the best policy – and this has not changed over the years – to prevent undesirable migration flows is to influence the conditions in the countries of origin so as to prevent such migratory flows.

In conclusion, let me briefly summarize my theses and statements as follows:
We have to create a coherent European set of rules that complies with the following criteria:

It must be a coherent European set of rules that meets the objectives of the Tampere Conclusions to which I referred at the beginning. It must be an overall concept and not be limited to isolated and particular solutions. I expressly warn against having isolated solutions at the end. Besides,

together with other national regulations, they would have a disastrous effect.

It has to be a coherent set of rules which takes into account the different conditions prevalent in the Member States. We cannot ignore that the conditions in Spain, France and Portugal, for instance, are quite different from those in Germany owing to their geographical situation and their historical links. One must always bear this in mind. This is why complete agreement will be impossible. What we need is harmonization and not total uniformity. It has to be a set of rules that meets the conditions inherent in the unshakeable humanitarian principles upon which is based the European Union, i. e. it does not renounce any humanitarian principles.

In this context, I would like to point out that precisely as far as temporary protection is concerned, some States, especially France, attach high importance to the principle of double voluntarism. A principle also frequently referred to by UNHCR. What does it mean? It means that the State receiving refugees has to decide of its own free will whether or not to grant them protection. I agree to this view. Historically speaking too, it's accurate to say that the granting of protection is not attached to the tradition of human rights protection, but reaches further back to a phase where for religious reasons people were prepared to show compassion for and clemency to those being persecuted and, consequently, to protect them by providing a safe haven. I just ask you to give some thought to that fact because, in reality, it also applies to asylum. The gist of the matter is the voluntary decision to grant asylum.

Anyway, I do not want to speak out against any legal procedures – I have already been involved in a dispute over this in Germany – I just want to give the background of that issue so that we can understand what is really in question. I also mention this in the context of the next point. A coherent European set of rules must provide for the necessary flexibility needed when a country receives refugees on humanitarian grounds. If we assert that we have to maintain certain principles, as in Germany, for example, the basic right to asylum, then there has to be a paralel room for action where the State, based on its own authority and at its discretion, is able to say: we allow people to stay in our territory beyond the limits of a set of rules as long as that decision does not entail any new claims and legal procedures. Those who hold a different view, for example those who, in the discussion about non-state persecution, defend that there should not be a limit to the legal elements, will end up getting into a difficult situation no longer controllable by the rules. This would mean that, compared with the present situation, the

procedures would once again be extended with all the resultant repercussions and consequences.

We need an European set of rules that creates administrative and procedural structures leading to the increase of the accuracy and selectivity throughout the decision-making process regarding asylum, temporary protection and immigration in general. In Germany this would mean that we also have a regular procedure pursuant to which those who wish to come to our country for social, economic or other reasons, will have a procedure other than asylum and refugee protection, a simple procedure under which they will be able to say that they have a fair chance to be granted a residence permit without having to resort to the asylum procedure.

Last but not least, it has to be a set of rules that takes into account the interests the States may legitimately have in an active immigration policy. It is important to consider this aspect too. Some may think that this is an attempt to find the squaring of the circle. But I do not think so. If we try to work for a better mutual understanding of the different interests of the European countries, interests which are related to their geographical and historical conditions, I am confident, ladies and gentlemen, that we can agree on a modern, future-oriented asylum, refugee and immigration policy.

Erika Feller[1]

DIRECTOR OF THE DEPARTMENT OF INTERNATIONAL PROTECTION – UNHCR

INTRODUCTION:

My thanks go to the organizers of this Conference, for the invitation extended to UNHCR and for the timely opportunity it presents for serious reflection on the way ahead for refugee protection in Europe. A question is put to us for this session. Will a common European asylum system, based on a total and inclusive application of the Geneva Convention represent a decisive step forward taken by the European Union by providing a correct and efficient response to the challenges of today's world?

UNHCR would venture to say it can. I want to explore this issue by looking at two possible scenarios for the future of the 1951 Convention – the worst case scenario and then a better alternative. Before doing so though, it is important to situate the Convention and the refugee protection regime in its present context. What is the Convention and what is it not, as an instrument of refugee protection today?

WHAT IS THE CONVENTION?

It is often repeated, with justice, that the 1951 Convention is the foundation of refugee protection, the one truly universal instrument setting out the fundamental principles on which the international protection of refugees has to be built. Among them are the principle that refugees should not be repatriated to face persecution or the threat of persecution (principle of *non-refoulement*); the principle that protection must be extended to all refugees without

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discrimination; the principle that the refugee problem is of a social and humanitarian nature, and therefore should not become a cause of tension between States; the principle that since the granting of asylum may put unduly a heavy burden on certain countries, a satisfactory solution of the refugee problem can only be achieved through international co-operation; the principle that persons fleeing from persecution cannot be expected to leave their country and enter another country in a regular manner, and accordingly, should not be penalized for having entered into or for staying illegally in the country where they seek asylum; the principle that given the very serious consequences the expulsion of refugees may have, such measure should only be adopted in exceptional circumstances impacting directly on national security or public order; the principle that the co-operation between States and the High Commissioner for Refugees is essential, if the effective co-ordination of the measures taken to deal with the refugee problem is to be ensured.

The Convention also has a legal, political and ethical significance that goes well beyond its specific terms – legal in that it provides the basic standards on which principled action can be founded; political in that it provides a truly universal framework within which States can co-operate and share the burden resulting from forced displacement; and ethical in that it is a unique declaration made by the 139 States parties stating their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged people. In May of this year at the meeting of the Inter-Parliamentary Union, in Amman, Parliaments from 124 countries, by consensus, «reaffirm[ed] the fundamental importance of the 1951 Convention relating to the Status of Refugees and its Protocol of 1967», and «urg[ed] those countries which have not already done so to accede to [these instruments], as well as to other universal instruments of international humanitarian and human rights law and call[ed] on all States to fulfil their consequent obligations». It is very difficult to reconcile, on the one hand, the fact that the 648 members of Parliaments from all around the world present at the meeting in Amman, the 15 EU Heads of States in Tampere or the 57 Government members of the UNHCR's Executive Committee reiterate that the Convention is central to asylum systems today, and, on the other hand, the fact that new States accede to it and States parties continue to promote that accession, with assertions to the effect that the Convention is no longer relevant.

WHAT THE CONVENTION IS NOT:

If, on the one hand, the Convention principles form the base, on the other hand, in many respects that is all they are. The Convention is no panacea

for all the problems caused by displacement. The root causes are outside its scope. It is true that the notion of burden sharing is inherent in the Convention, but it does not contain any specific provisions underpinning it in practice. It also makes no provision for family reunification or for access to the procedures for obtaining asylum. There are no measures tailored to the specific needs of women and children, just as the issue regarding solutions to the refugee protection is only very little developed. Although the Convention could be applicable to large scale influxes of people, as well as to individual arrivals of refugees, in practice States find it too difficult or onerous to adhere to its provisions when dealing with sudden mass arrivals. There clearly are gaps in the system established by the Convention. To admit this, though, does not mean to take that one unacceptable step further and hold the Convention accountable for what it has not achieved in relation to problems it was never designed to respond to. The criticism levelled directly at the 1951 Convention has lately increased. It has been variously labelled outdated, unworkable, irrelevant or as an unacceptably complication factor in today's migration environment. It is alleged to be excessively rigid when facing important irregular migration challenges. In this context in particular, several States have deemed that it was an instrument unable to meet both the States' interests and the real needs on the field.

It needs adamantly to be stated that the Convention was never conceived as an instrument providing for permanent settlement only, much less for migration control. The Convention, together with its 1967 Protocol, was designed to become a global, multilateral and standard setting agreement providing protection to individuals in need of it. Its terms and the States' sovereign right to regulate the crossing of their borders, collide, it is true, but they do it with a view to introducing an exception needed for a specific category of persons. While UNHCR can sympathize with the States' concerns that frivolous and unjustifiable resort to asylum or its deliberate misuse should be hindered, the fact remains that the Convention contains sufficient safeguards and that States have other means to limit this possibility without having to resort to condemnation and formal modification of the basic provisions of the only global refugee protection framework that exists. The Convention should not be blamed for the States' inability to otherwise control their borders, or to deport aliens unable to present valid reasons for applying for permanent residence in their territories.

THE MIGRATION ENVIRONMENT

This being said, migration trends are very much part of the environment in which refugee protection has to be granted, and they are, from

the standpoint of the protection, a serious complication factor. I will return to this in a moment, but let me just make a brief comment on the evolution of the refugee situation in general terms. The transformations the international political system has undergone since the end of the Cold War have significantly altered the context for refugee protection. The so-called humanitarian space has greatly diminished, UNHCR and other humanitarian organizations having to operate more and more frequently in conflict situations awaiting a political, as well as military resolution. There has been a distinct shift in the nature of armed conflicts, with a growth in internal, inter-ethnic conflicts characterized by mass displacements, which are not their unintended result, but their actual objective. Refugee movements now often result from «destructured conflicts», where humanitarian agencies, including UNHCR, are left to negotiate not with governments or even national liberation groups, but as one journalist put it, «with clans, bandits, militias, and weekend fighters». This environment is, in itself, a challenge to the principles.

The protection principles and the State responsibilities within the asylum system cannot effectively be viewed separately from the broader framework in which they will be applied. Refugee problems are not only closely connected with the spread of inter-ethnic conflicts and the States' capacity to respond to and resolve them, but also with globalization as well as with the management of one of its aspects, namely migration. There is no doubt that States are seriously apprehensive about «uncontrolled» migration in this era of globalization – globalization of communications, economics and, indeed, of migration. The freer capital and goods move around the world, the more rapidly information and people can travel and the harder it becomes to inhibit the movement of people. The expansion of the global access having open one part of the world on to the other clearly encourages the would-be migrant and opens up more possibilities for the forced migrant, thus resulting in the erosion of the distinction between asylum-seekers and other forms of disadvantaged migrants. Globalization has two sides. For governments aiming at minimizing the effects of the globalization of migration, asylum is an exemption that allows too many people to enter their territory.

A number of very telling observations about these and other related issues are to be found in a recent article in The London Review of Books (3 February 2000) with the title «The Uninvited», by Jeremy Harding. After much research, one conclusion he felt to be justified is that asylum seekers are less and less welcome in many countries, unless they come from countries in crisis and are formally invited via resettlement programmes,

visas or temporary admission systems. If they enter by other means, he observed, they face inevitable consequences, among other things, their motives will be considered of economic nature and the illegal entry will prejudice their case.

TRAFFICKING AND SMUGGLING OF PERSONS AS A COMPOUNDING FACTOR:

One problem is that many refugees, driven by necessity, not only come uninvited but more and more with the help of smugglers. Trafficking and smuggling of persons is a compounding feature of the migration environment. Harding aptly notes that there are «few Schindlers among the traffickers».

There are many evils associated with trafficking and smuggling which are criminal activities and which lead to many individual abuses. It is also true, though, that being smuggled to the sanctuary has become an increasingly important option for asylum seekers, even if the price they have to pay for it exceeds its financial cost as such. An asylum seeker who resorts to a human smuggler seriously compromises his claim in the eyes of many States. As Harding also comments, this leads to an imputation of double criminality: not only do refugees not respect national boundaries, but they consort with criminal trafficking gangs to do so, thus their claims must be bogus and measures restricting elementary privileges are justified. «To be an asylum-seeker is to be a stranger on trial», suggests Harding. «He is accused of nothing more palpable than his intentions, but these are assumed to be bad and the burden of proof rests with the defence».

COSTS OF ASYLUM:

If migration is a singular feature of the changed environment of the refugee protection, another is the more and more unfavourable cost-benefit equation of asylum, when seen from the State's point of view. There was a time when the benefits of granting asylum to refugees, arguably at least for many States, outweighed the costs. Whenever refugees had a similar culture, were easily assimilated, helped to meet labour shortages, arrived in manageable numbers and, as an extra plus, reinforced ideological or strategic objectives, the policy was one of generous admission. Today, by the reckoning of the States, the costs are to the fore. States seeking to restrict asylum options frequently claim that these options have to be limited due to the financial burden the granting of asylum entails, set against the national priorities competing for limited resources. Security concerns, interstate tensions, backdoor migration, social and political unrest and environmental damage – are all cited as

«negative» costs in the asylum ledger. The increasing number of asylum seekers and a growing incidence of racism, xenophobia and intolerance directed against refugees, asylum seekers and foreigners in general go hand in hand. For this too there is a political price which, as a result, acts certainly as a disincentive to enlightened arrival policies.

THE RE-SHAPING OF ASYLUM POLICIES

This combination of factors – the evolving refugee situation, the threat of uncontrolled migration, together with the perceived or other asylum costs – has led to a re-shaping of the asylum policies and practices of many States. Broadly speaking, two parallel trends have emerged, which have impacted negatively on the accessibility of asylum and on the quality of treatment received by refugees and asylum seekers. The first has been the growing trend towards an overly restrictive application of the 1951 Refugee Convention and its 1967 Protocol, coupled with a formidable range of obstacles set up by States to prevent legal and physical access to their territory. The second is the bewildering proliferation of alternative protection regimes of more limited duration and guaranteeing lesser rights when compared to those provided for by the 1951 Convention. There has even been, in some States, a gradual movement away from a rights-based approach to refugee protection altogether, with a growing preference by their governments for discretionary forms of protection that provide lesser safeguards and fewer rights to people of refugee concern.

Much ingenuity has been shown at developing new forms of protection. Temporary protection, «B» status, humanitarian status, exceptional leave to remain, stay of deportation and toleration permits are but a few. The present situation is marked by little harmonization of asylum policies, even within regions, with marked differences between countries and within countries as to who gets protection, what kind of support is available, and what are the legal and social consequences of the different kinds of statuses. There is clearly a risk of «unseemly competition in inhumanity to asylum seekers», as Harding put it. To merely tolerate the stay, without any rights, of those entitled to international protection is certainly pushing these devices to their acceptable limits.

Together with these various approaches made by the States and not least in part as a response to them, asylum seekers whose claim was refused, lawyers seeking protection solutions and judges considering protection needs resort even more to human rights instruments as, in effect, another alternative source of protection. The fact that all the advantages offered by this possibility are available also entails the problem (at least at the

present time) that under human rights instruments the *non-refoulement* is not yet accompanied by clearly articulated standards for the treatment and stay to be granted to the beneficiaries.

TWO DIFFERENT CASE-SCENARIOS FOR THE FUTURE OF THE 1951 CONVENTION:

Against this background, it is clear that we are at the crossroads as far as refugee protection and the Convention are concerned. So, where might we be going from here? I want to turn first to the worst case scenario from UNHCR's point of view. It would, in its end result, render the Convention redundant, or make it disappear altogether, to the irrevocable detriment of the refugee protection.

To develop this scenario a little, I'll say that in those parts of the world where protection is legislated for, the resort to complementary forms of protection is growing. As already mentioned, there is now a plethora of alternative forms of protection. There are also variations of these different forms – temporary protection for Bosnians was not the same as temporary protection for Kosovars, and what humanitarian evacuation is a variant of has yet to be determined. Concomitant with it, «notions» or «approaches» which have substituted, in effect, for the application of the Convention, by putting it in a rather subsidiary place in a State's response repertoire, are on the increase. Here I am talking, for example, of the safe country notion, or of the internal flight alternative concept which, rather than functioning as evident proof within a full refugee status determination process, they constitute the rationale for not resorting to the Convention procedures in the first place. It is our opinion that refugee protection can only be seriously jeopardized by it.

Notions such as «effective protection elsewhere» are increasingly becoming part of the asylum systems, in fact, substituting for the internationally agreed refugee definition. Whether or not an individual has found – or even could have found – protection in countries through which he passed is seldom easily or reliably assessed, and the signs of «protection» are too imprecise. If the notion is to enjoy any currency, its applicability should be determined based on the particular cases, not on the countries, and certainly not in the case of persons who have passed through countries of «mere transit». Any decision to return an asylum seeker to a «safe third country» should be accompanied by a guarantee that the person will be readmitted to that country, will enjoy there effective protection against *refoulement*, will have the possibility to seek and enjoy asylum and will be treated in accordance with accepted international standards. Moreover, the adequacy of «protection elsewhere» has to be nurtured through

carefully targeted support policies, albeit always understanding that this should not absolve States from their responsibility to offer protection to refugees on their territories. These are the basic standards UNHCR's Executive Committee has attached to this notion and to which one should adhere, at least formally. Unfortunately this is not always, or even often, the case.

There are similar concerns about the notion of «safe country of origin», which is also becoming an automatic bar to the access to asylum procedures. From a legal standpoint, it is impossible to exclude the possibility that an individual could have a well-founded fear of persecution in any particular country, however great its attachment to human rights and the rule of law is. Although a sophisticated democratic order and an elaborate system of legal safeguards and remedies permit, in general, presuming a situation of safety, history is replete with examples of how no system is neither infallible nor immutable. Where the notion of safe country of origin is used as a procedural tool to assign certain applications to the accelerated procedures, or where its use has an evidential function giving rise, for example, to the presumption that the claims are not va1id, UNHCR has far less concern, as long as the presumption of safety can be rebutted in a fair procedure.

The most «questionable» aspect of these various developments is the resort more and more frequent to the State or ministerial discretion as the final arbiter of a State's responsibilities. Should all this be coupled with an increasingly restrictive approach to the interpretation of the definition, and should countries legalize the exclusion of certain classes or nationalities of persons from any right to have access to the existing asylum procedures, one could predict at best that the Convention will become redundant and the refugee protection ever more precarious, a game of chance.

Much of what I have been describing to this point is, of course, a scenario most relevant to the developed world and to the countries where refugee protection has traditionally a strong legislative base. In countries where protection is not legislated for, accession to the Convention would certainly be an increasingly remote possibility. Telling in this regard is the observation repeatedly made by the Indian Government at UNHCR's Executive Committee meetings, that as the Convention seems to be less and less relevant for its main traditional supporters, any incentive States such as India might have to accede to it is fast receding. In this worst case scenario, therefore, there is the spectre of no more States acceding to it – that is of no more States agreeing to be part of a formalized international co-operation regime for the refugee protection – while simultaneously the new concepts and practices of refugee protection (such as the notion of

safe country, the internal flight alternative and interception) gain ever more global acceptability. Restrictive approaches export well and are indeed, already, being replicated in regions where only now laws and structures are being established. They are also being reproduced in regions where their effect is not cushioned or mitigated in any way by a culture, much less a regime, of human rights protection.

A global recognized and consistently applied regime of refugee responsibilities is clearly advantageous to all concerned – the refugee obviously, but also the host States and the international community in general. Burden-sharing would be enhanced, the so-called «forum shopping» would be reduced and a better predictability of responses would improve the asylum management. The worse case scenario would have none of these elements present.

THE WAY AHEAD:

The better case scenario might well be the following: Looking at the plethora of different forms of protection – coupled with the ever more ingenious trafficking of persons – which confuse rather than improve the system, we can already see signs of frustration. Countries are becoming aware of the need to rationalize and harmonize approaches, at the regional level undoubtedly, but also more and more among regions. Harmonization and a growing acceptance by States that it is no longer feasible, much less demographically sound to coexist without a considered migration policy, may well go hand in hand. Most population projections for the developed world forecast an increasing imbalance between young and old people in these countries. A truly comprehensive and integrated approach must include a normative framework for the management of migratory movements. In a global economy, it will become increasingly difficult to maintain the borders open to the free movement of capital, goods and services, while pursuing a «zero immigration» policy. International migration should be viewed as a positive force of progress, where both the country of origin and the one of destination stand to gain from the orderly movement of people. The current demographic trends in Europe, for example, are quite telling. They suggest that European States may need some 135 million immigrants by the year 2025 in order to compensate for their ageing population. This reality underlies in certain countries the resurgence of the debate about the re-introduction of migration policies.

In UNHCR's view, constructive and visionary immigration policies could result in easing or at least balancing the pressure put on asylum systems

and switch the approach to where it should be – to manage migration with migration tools and the asylum system with asylum tools. Where there are linkages – and trafficking and smuggling of persons are a case in point – special additional approaches are called for. It is worth noting here, for example, the efforts now being made in Vienna to elaborate a comprehensive international convention against the organized crime, including the draft of international instruments addressing the trafficking in persons, especially women and children, and the smuggling in and transport of migrants. In UNHCR's view, the elaboration of such instruments provide a unique opportunity to design an international framework which could provide a solid legal basis for reconciling the measures to combat the smuggling of persons with the existing obligations imposed by international law towards asylum seekers and refugees. It is certainly a far preferable and more principled response to the smuggling of persons and trafficking problem than the dismantling of the basic refugee protections whose object was never trafficking and migration.

In this best case scenario, we should be working, in fact, towards a revitalization of the Convention regime, which would preserve its centrality, but would buttress it by more enlightened migration policies and harmonized additional protections.

To return to the question at issue, to us, our efforts should focus on the development of a common asylum system in Europe. One of the main objectives for us at this point is, certainly, the promotion of a better respect for the 1951 Convention's terms, objects and purposes while, at the same time, we want to encourage the study of additional protections where they are necessary, as well as of the ways to harmonize them. This being said, UNHCR appreciates that the Convention does not cover all displacement situations occurring today. The Office is responsible for working with States to supplement – though not to replace – the Convention principles with new approaches to the granting of protection. Our starting point in this regard is that a less rigid and more principled application of the existing instruments would go far towards bridging the perceived protection gaps. We fully shared the conclusion of the Tampere Summit in October 1999, where all 15 Heads of the EU Governments set a positive political tone for the development of an European asylum system by recognizing the primacy of the 1951 Convention, as well as the need for its full and inclusive application. For UNHCR this means its application to actual or potential victims of persecution in the context of war or conflicts, as well as in situations where persecution emanates not only from the Government, but also from de facto authorities or other groups

of non-state agents against whom the Government is unable or unwilling to protect them.

As regards buttressing the Convention where it is less strong, temporary protection is a case in point. For UNHCR, temporary protection is a flexible and pragmatic tool to be used in mass influx situations with a view to granting protection to people in need of it, without necessarily leading to permanent asylum. It has an important place as an interim protection measure, and is an essential component of a comprehensive approach based on burden-sharing and international solidarity. As Commissioner Vitorino has recently stated, «temporary protection should be an exceptional mechanism safeguarding the integrity of the Geneva Convention and ensuring, in cases of mass influx, an immediate protection of temporary character until the normal asylum system is in a position to operate smoothly again». What we need is better guidelines on how and when a temporary protection situation may be declared, how to terminate it, and when to conclude that return should or should not be triggered. The safety indicators have to be more precise, and the role of voluntariness as an aspect of the return in temporary protection situations needs to be better defined. Such guidelines could well take a binding form at some point through an instrument on temporary protection.

The better case scenario is built on the recognition that the 1951 Convention is far from obsolete, even if in some respects it is incomplete. Might we envisage somewhere down the line protocols on massive influxes of people and temporary protection? Interstate co-operation, or burden-sharing, is another area where the Convention's preambular references could well benefit from being given a specific context. Special protection measures for women and children, procedural requirements for refugee status determination, family reunification and voluntary repatriation are other areas where a progressive development of international refugee law would one way or another be useful. In the process of revitalizing the protection regime, UNHCR also sees a need to foster a greater consistency and combination between human rights instruments, such as the European Convention on Human Rights or the CAT Convention and the 1951 Convention.

CONCLUDING THOUGHTS:

The problem of the migration of people, be it in search of better protection or a better life, is global-natured and beyond the control of any State. As one representative of the Government of a major refugee receiving country had recently cause to observe, «we seem destined to be

continually in search of always new and more effective control measures. No sooner do we solve problems of abuse than new ones appear. We are caught up in a cycle of adding more and more restrictive measures. The advent of well-organized criminal trafficking organizations may make our controls effective for even shorter periods. We devise our measures [...] without knowing what the effect is on the growing number of people in the world who need protection. We measure their effectiveness by the reduction of the number of refugee claimants in [the country concerned]. We do not know how many people genuinely in need are prevented from coming... We do not know what the effect of [our] control measures, in combination with similar controls in other countries, is on people genuinely in need of protection». These are sobering words – and not UNHCR's, although they could have been. In a related, even if questioningly, vein, regarding Europe, Poland's Foreign Minister recently asked, «the question is whether the future of the EU is to be built in an atmosphere of courage and imagination, or whether fear is to be the main emotion keeping the Union together».

In conclusion, refugee law is not a static but a dynamic body of principles. As with all branches of law, it has, and must retain, an inherent capacity for adjustment and development in the face of changed international scenarios. UNHCR's decision to promote this development rests on the understanding that refugee protection is first and foremost about meeting the needs of vulnerable and threatened individuals. These needs, of course, have to be accommodated and addressed within a framework of the sometimes competing interests of other parties directly affected by a refugee problem, which include States, host communities and the international community in general. The refugee protection regime has to balance all these rights, interests and expectations appropriately. UNHCR regards it as its moral, legal and mandatory responsibility to foster this process of developing new approaches, not to lower the international protection paradigm, but to strengthen the available protection forms. With this in mind, and the 50th Anniversary of the 1951 Convention close on the horizon, UNHCR intends to engage in consultations involving senior government representatives and experts in the refugee protection area with a view to clarifying the content and scope of protection within the framework of comprehensive approaches, needed in different refugee situations not fully covered by the 1951 Convention. We would hope that any proposals for change could be channelled into a multilateral process in which, as the Heads of the EU Governments have called for, the Convention and its Protocol would remain the starting-point and the foundation.

Patrick Weil[1]

PROFESSOR OF THE UNIVERSITY PARIS I / SORBONNE

Mr. Chairman
Ministers
Ladies and Gentlemen,

I shall start by thanking you for the invitation to participate in this Conference. It is an honour and a responsibility for a university professor like myself to speak about matters that you, as experts working in the field and politicians, know better than us, academics, since you deal with them on a daily basis. The great difficulty, when we think of the future of European policies on asylum and migration, is to ensure respect for the universal values and the fundamental principles, such as those enshrined in the Geneva Convention and so well defended by Mrs. Erika Feller, and to steer on a daily basis the migration influxes, the pressure of the public opinion, the demographic prospects. These contradictions are not easy to handle, either at the legislative level or at the level of the day-to-day public policy. As it was mentioned, I worked for the French Government three years ago, to try to improve my country's legislation in the fields of immigration, asylum and nationality[2]. Later on, together with some foreign colleagues, European as well as American, we looked into ways of improving immigration and asylum policies at European level and, more globally, at transatlantic level[3]. However, it is on a personal basis that I am addressing you today, to explain, particularly in reply to Minister Schily's presentation –

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[2] Reports presented to the Prime Minister on the nationality and immigration laws.
Paris, La Documentation Française, 1997, 176 pages

[3] Transatlantic Learning Community, Migration in the New Millenium, Bertelsmann Stiftung and the German Marshall Fund of the United States (ed.), Gütersloh, 2000, 52 pages

which I found extremely creative and interesting –, how I see and feel about these issues.

When we look at the history of the Geneva Convention, we can see that at the time it was signed, the Convention wasn't considered to be very liberal by the experts on asylum. In fact, several conventions were signed under the auspices of the League of Nations in the twenties and the thirties, aiming to protect the Russians, the Armenians and later on the Germans and Austrians fleeing the Nazi regime, and some of them went much further as far as protection is concerned – particularly those of 1938 – than what the States ratified, after the war, within the framework of the Geneva Convention. Let me quote, as an example, an extract from the 1938 Convention, the aim of which was to protect, in Germany as well as in Austria, «every person who has not yet left his or her country of origin, but who is forced to emigrate for reasons of political opinion, religion or race». Just imagine if the States had signed that kind of commitment in 1951, in Geneva. What would be our present responsibilities towards the Chinese persecuted in China, the Iraqis in Iraq, to name but a few? It would mean a much wider action in terms of international protection. The Geneva Convention preserves the States' right to grant or refuse asylum seekers admission to their territory. It only obliges the States not to return them – it's the clause of *non-refoulement* – if they risk being persecuted. But this doesn't make the Geneva Convention an individualistic-principled convention which preserves, at international level, the rights of individuals against the State.

Anyway, this Convention has performed well until the moment when, in 1973/74, due to economic reasons, we, Europeans, decided to stop the immigration of workers.

We guaranteed the right to family reunification subject to certain conditions, but from the moment we have put a stop to the labour immigration, there ceased to be any legal way to obtain the status of foreign resident. So, all of a sudden, a certain number of individuals who would previously have come in as workers, were forced to apply for asylum.

Later on, in addition to this situation there were other phenomena, namely those relating to the fall of the Berlin Wall, the democratisation of the Eastern countries and, above all, the civil war in former Yugoslavia, which generated large-scale influxes of persons. So, these influxes were not originated in the Eastern countries in general, for economic reasons, but came mostly from an area – former Yugoslavia – where the life of the civilians was in fact in danger. This type of mass influx of persons was not new to us, in France, for we had received, in 1939, in a matter of weeks,

500 thousand refugees from the Spanish civil war. So, as I was saying, in addition to the procedures that had been organized since 1951 to manage the Geneva Convention, there were now the pressures of the migratory flows of workers, on one hand, and of the phenomena related to the arrival of persons fleeing a civil war on the other hand. Furthermore, and this has to be frankly accepted, from the moment the European States suspended the immigration, they were compelled to grant – as it happened in Germany, the case mentioned by Minister Schily, and also in France – the right to stay to foreign workers whose presence was not always very welcome. In this way, a certain form of racism and xenophobia started gaining ground among the citizens of our countries, as they became increasingly aware of the pressures exerted on the right to asylum. Owing to the combination of these factors, the Geneva Convention became the scapegoat, so to say, of the failure to fight discrimination in our societies and, above all, of the inadequacy of the immigration policies.

I don't mean to say that the Geneva Convention has always been properly managed, but one has to put each issue in its right place. There are problems with its management, but there are also problems with the management of immigration policies, as well as with the management of the discrimination issues in our societies. We must differentiate these problems so as to be able to solve them separately, even though at the same time, otherwise we risk making mistakes. Basically, we have to distinguish asylum and political refuge from immigration, without however losing sight of the connection between the two.

This distinction must be ensured through the reaffirmation of the Geneva Convention, which, as I said before, is not very liberal in its essence, but symbolises European values that have become universal values. The protection of those who are victims of persecution for reasons of political opinion, membership of a particular social group, religion or race lies at the foundation of democratic Europe; lies at the foundation of universal values that we want to spread throughout the entire world. And since these values are sometimes difficult for us to transmit to the rest of the world, just imagine how the message would be received in Asia, in Africa or in Latin America, if one of these days they heard that Europe had laid aside the Geneva Convention. What impact this would have! Not only on the consolidation of democracy in those continents, but also on the migration flows. For if asylum seekers cannot find countries that respect the Geneva Convention in the world region where they come from, they will turn to Europe, because they know that despite our strictness and critical attitude towards this instrument of protection, we end up receiving people.

Therefore, I would say that the defence of the Geneva Convention, its international defence, is important to Europe, from the point of view of both its values and the steering of migration flows at international level. We have to look at the future of immigration into Europe with new eyes. We have already experienced, with the wars in Europe, and the civil wars in Spain and former Yugoslavia, exceptional phenomena of large-scale immigration. But should we, because of that, be led to think that whenever we propose to build something in the next fifty years, we run the risk of facing the same phenomenon coming from our neighbouring countries? I don't think so. I think, rather, that those mass influxes were the price that had to be paid for the democratisation process in Eastern Europe. In my view, the task undertaken by the democracies in Western Europe in order to foster the development of democratic regimes in the East and their integration in Europe is a guarantee that, most likely, we will not be confronted again with the phenomenon we experienced over the last fifteen years.

I have come, at last, to the most difficult point in my presentation: the relation between the Geneva Convention – its preservation – and everything that has to do with the immigration policy we wish to build at European level.

First, one has to try to understand the situation. And here I want to express all my admiration for your capacity to negotiate a common asylum and immigration policy based on a statistical system that you don't have. I myself, when I look at the figures, all I can see is mist. Concerning asylum, if we take two countries like Germany and France, for example, we can see that France does not gather data on minors and territorial asylum seekers in the same statistics where it gathers data on asylum seekers under the Geneva Convention, whereas Germany puts everybody, minors included, under the same category. How is it possible to negotiate under these conditions? On what basis do you make comparisons? We could take other examples of immigration flows to compare the statistical systems, and we would again come to the conclusion that there are huge differences between our countries. Frankly speaking, I don't understand how the harmonization is not seen as a priority. I can't imagine your colleagues specialized in economics and finance working in such conditions to achieve the harmonization of the European monetary and economic policies. And please, don't go on relying on the statisticians or the demographers to carry out this task, for they have been trying it for twenty years and still haven't succeeded. It is the duty of the government bodies responsible for immigration policies to take decisions, often based

on good sense, that will enable to work seriously. Even when one doesn't have a precise idea of the situation, one may in part guess it when one works hard. So, what can be said?

It can be said that it's possible to link what Minister Schily was saying, that is, having an active immigration policy, with a policy that is not passive and is based on the respect for rights. There are three major channels of legal immigration into our countries, two based on rights – the right to asylum under the terms of the Geneva Convention and the right to a normal family life subject to certain conditions –, and a third one based on action, that is, on the access to the labour market. Well, this third alternative has to gain more significance. And here a whole revolution has to be made.

Up until the sixties, Europe attracted mostly unskilled workers, whereas today our businesses prefer skilled workers, who are subject to an increasing competition in the world market. However, France and most European countries continue to close their doors to skilled foreign workers from the Southern countries. This excessively restrictive policy is historically explicable by a racist corporativism which developed in France in the thirties and aimed at preventing foreigners considered as «non-assimilable» from having access to the higher professions of society. This corporativism today hides behind a policy purporting to support the third worldism: in the name of development or of co-development, the legalization of undocumented and unskilled foreigners is given preference over foreign nationals who might be potential competitors. This policy is incoherent and absurd: if a foreign student majored at our universities doesn't want to return to his country; he won't. Whether he is African, Asian or South American, he is worth the same as an European or an American degree-holder in the world labour market. If France or Europe reject him, he will be offered a job in the United States, Japan, Canada or Australia, and the country of origin as well as the country where he was trained will «lose» him. It is possible, however, to review the policy in respect of skilled foreign nationals without necessarily falling into the American scheme of the «brain drain», which attracts without giving in return. After completing university, our foreign students look for a job in the French or the European market, namely because they lack the financial means or the professional experience, before eventually starting on an activity in or for their country of origin. If later they resist going back to their country it is, in most cases, should the return be definitive, for fear of losing the cultural, scientific or business environment necessary for maintaining or updating their know-how. Therefore, we must follow the example of

other large industrialized countries and liberalize the recruitment of highly-skilled foreign degree-holders, and then facilitate – through investment support mechanisms and permanent visas – their voluntary round trips between their country of origin and the country of training, according to such timing as is convenient to them and which the States must try to accompany instead of opposing. In this way, by promoting cultural exchanges and business flows, these skilled foreign workers will become private agents of co-development. Co-development is the framework within which we can reorganize our policies, a concept still rather empty, but that can be filled in.

To act within the framework of co-development is what we can do with skilled as well as with unskilled workers, the latter forming the majority of those who try to enter our territory and apply for asylum. Of course we can always try to remove them, but that is not a very efficient measure in systems like ours, so keen, as they should be, on preserving human rights.

The great obstacle to their return is, in fact, the failure of the countries of origin to co-operate, as they seldom recognize their citizens when these are caught in an irregular situation. But we have the means to negotiate with those countries. These are countries with which we have established important financial flows, namely immigrant savings and retirement pensions, and whose students we receive. They are countries with which we could establish temporary contracts of employment within the framework of bilateral and multiannual agreements, as Spain and Italy have recently done it with Tunisia and Morocco.

This should be the basis of the co-operation with the countries of origin, which we need to reconstruct in a different manner.

Finally, there is the issue of asylum itself and the relation between the Geneva Convention, the policy of immigration control and the temporary protection policy. There are initiatives which can simultaneously improve the protection of the victims of persecution and deter illegal immigration. So, the faster the decision is taken, the sooner a status will be granted and the smaller will be the number of illegal immigrants who want to benefit from the period of stay granted by a lengthy refugee status determination procedure. A fast procedure, conducted by professional judges and administrators, possibly harmonized at European level, proper reception conditions as well as conditions of granting social rights, also harmonized at European level, are priority measures to protect those who deserve our protection and to deter those who try unduly to benefit from it.

And what about temporary protection within this system? First of all, we mustn't confound temporary protection with B status, the latter being a

concept that, in some countries, like France, is still making its first steps. The B status is aimed at protecting those who cannot be protected under the Geneva Convention, but who are probably entitled to more than just a temporary protection, for their return could mean that they would be persecuted and such situation could go on indefinitely. So, I am convinced that besides the B status and the Geneva Convention, there is only scope for a very temporary protection. We saw the effectiveness of such temporary protection in the case of Kosovo. It is often related to the need to act by other means than simply the regulation of immigration, namely by resorting to the diplomatic channels and the use of military intervention. We also saw how it was used by the United States to complement its intervention in Haiti.

However, I believe it's extremely important, whenever we invoke the need to develop temporary protection mechanisms, to remember how this need arose. It arose in the context that I described above, a context of the racism escalation in our societies and of mass influxes of persons as a result of civil wars in Europe. Within this context, the Geneva Convention was sometimes presented as being inadequate, and this was due to two reasons that I will present very frankly.

The Convention may have seemed inadequate because it granted too much protection to individuals whose national or ethnic origin was not the most desirable as far as the countries of origin were concerned, and at the same time it might have seemed necessary because the risk they ran was temporary.

I think that in the name of the values upon which we want to build Europe, we must eliminate the first temptation and ensure the right to protection under the Geneva Convention or the B status to those who, regardless of their origin, look for protection in our territories.

On the other hand, it is necessary to provide for a valid system – of roughly six months or one year – allowing the European States to cope with large-scale influxes of persons and co-manage, so to say, the corresponding financial responsibility or burden, which could weigh more on some countries than on others.

Well then, I hope that these different lines that I pointed to may contribute to a common reflection. I shall end with a personal recollection: the first time I came to Portugal was 26 years ago, in the summer of the Carnations Revolution. I was a student then, and it was celebration time for the Portuguese in their newly-democratic country.

Before 1974, many Portuguese had been granted protection in other European countries under the Geneva Convention, for they were victims

of political persecution. I feel that we're not as proud as we should of the protection system that was built up in Europe. It is very difficult, as once said to me the director of the French Office for the Protection of Refugees and Stateless Persons, to give media coverage to the Geneva refugees, because they need secrecy and the protection of secrecy in order to be really protected. He told me about the case of an Iraqi engineer who worked in a nuclear power plant in Iraq and was threatened by his country's authorities, as well as the case of a journalist who was persecuted by the Colombian Mafia. These are persons who cannot be shown on television as examples of foreign citizens who deserve to be protected, because on disclosing their status and their place of residence we would be putting their lives at risk. But I believe that the Portuguese, the Spanish, the French, the Germans who, at a given time of their history, enjoyed the protection of the international society, may witness today what we should maintain in order to continue to represent the Europe we want to build. Thank you.

Brunson Mckinley[1]
DIRECTOR-GENERAL OF IOM

INTRODUCTION

At Tampere, last year, the European Council decided to move towards a common European asylum policy.

Protection of refugees is a noble as well as an inescapable obligation for the nations signatory to the Convention.

We are meeting here, today, to examine the problems and prospects of such a common asylum policy.

My message, as head of an international body charged with the management of migration rather than as a specialist on asylum, is the following:

• Asylum is just one part of the migration management challenge, an essential part, but one that cannot be addressed separately from the broader agenda of migration management.

• At Tampere, the Council has put asylum in that broader context, calling for measures to enhance migration management, the partnership with countries of origin and the equal treatment of non-Union citizens.

• IOM is already assisting governments with many aspects of the broader migration management agenda and stands ready to do more, much more.

• As regards asylum specifically, we can help governments to work their way out of the current crisis and build mechanisms to protect the new common system of the future.

[1] Brunson Mckinley is currently the Director-General of the International Organization for Migrations. He has served his country – the United States of America – as a career diplomat, namely in offices in Italy, China, Vietnam, the United Kingdom and Germany. He was the first American Ambassador in Haiti after the Duvalier period and he helped overcome the Haitian and Cuban boat people crisis in 1994. Since 1995 he has been committed to the search of humanitarian solutions in the Balkans. He is the main author of the Annexe on refugee issues to the Dayton Agreements and, for three years, he performed the duties of US humanitarian co-ordinator for Bosnia.

ASYLUM SYSTEMS HAVE NOT COPED SUCCESSFULLY…

IOM is entirely sympathetic to the humanitarian impulses that led some European governments to create extremely generous asylum regimes.

These systems, while offering the necessary protection to many deserving refugees, met with unforeseen difficulties that have too often resulted in administrative – and political – nightmares.

The cause of this predicament is well known. In the absence of alternative channels to guarantee their stay, many economic migrants took the road of asylum application, thus swamping the existing systems.

Today, the most generous and humane asylum nations find no more than a minority of real refugees at the end of their asylum procedures. The current approval rates are between 20 and 25 percent.

With hindsight, it is easy to see that generous asylum systems, left alone to cope with much bigger challenges, actually attracted abuse.

That is why Tampere has pointed in the direction of a fuller panoply of migration management tools, a truly «global approach».

…BECAUSE MOST MIGRATION IS ECONOMIC

We all know that most migration is economically motivated.

People leave their countries primarily to better themselves – through education, work and the accumulation of capital in the form of money, experience and contacts.

Many migrants ought to be willing to return to their countries of origin once their migration goals have been achieved. The American model of permanent resettlement is not what many new arrivals in Europe are seeking.

Moreover, in many sectors, the European economy needs more workers at all skill levels than its demography can offer.

If this analysis is correct, it follows that the best antidote to irregular migration – and its companion, asylum abuse – is a well planned and well managed regular migration.

Indeed, the evolution in the European Union today is very much directed towards a tougher policy concerning irregular migration coupled with greater flexibility in regard to regular migration.

REGULAR MIGRATION

The question then is how to design programmes that match Europe's economic needs with the migrant's objective to succeed and go home.

IOM is working closely with ILO to develop innovative labour migration programmes.

The German «green card» proposal has attracted great attention, not all sympathetic in political terms. Nevertheless, I rate it a good example of a regular, fixed-term labour migration programme with well defined goals and parameters.

Other examples are not hard to find. Italy, with the help of IOM, has instituted a recruitment and training scheme with Albania. Tunisia is making preparations to send workers to Italy on short-term contracts with a training component. Spain has agricultural work arrangements with Morocco, the United Kingdom with Central and Eastern Europe.

Under these programmes and others like them, workers and professionals earn, save and make a better life for themselves at home.

To make the round trip feasible, of course, it is necessary that conditions back home are such as to sustain and satisfy the returning migrants.

That's where the Tampere «Partnership with the Countries of Origin» comes in. Full co-operation with countries of origin is best guaranteed by measures that mitigate the need to migrate.

IOM is also working closely with the Council's High Level Working Group on Asylum and Migration on its five Action Plans for both countries of origin and of transit.

MASS INFORMATION AND TRAFFICKING

Tampere Conclusions pointed squarely at the need to combat organized trafficking in migrants.

Mass information and education has proven its worth as a tool against trafficking. I would especially single out the IOM campaigns funded by the European Commission to warn potential Eastern European victims of prostitution rackets.

But mass information has broader uses as well. Where legitimate, regular channels for migration exist, mass information can help condition attitudes in both countries of origin and of destination.

Capacity building, training and networking for officials in countries of origin and of transit are other important tools in counter-trafficking.

IOM AND TAMPERE

I'd like to spend the remaining time in cataloguing some of the services we stand ready to provide the European Union with in the furtherance of Tampere objectives.

We have offices or operations in most countries where migration originates. We are already engaged in migration management activities in most transit countries too.

As you know, we focus on the provision of services and on the work with governments in their interest and on the migrants' behalf.

In the design and management of **regular migration programmes**, IOM can recruit, screen for qualifications, maintain databases, provide advice on management of remittances and handle transportation and medical arrangements for the successful candidates.

Our **public information** activities in countries of origin and destination serve to pass on the facts about regular migration opportunities and the risks of irregular entry and stay.

Capacity-building for migration officials is an IOM speciality. We conduct training all over the world, including the applicant countries for EU membership, close neighbours and others not so close but of great interest, like the former Soviet Union.

With the abolition of internal borders, the **public health** aspects related to migration are of wide concern. Pre-departure examinations are something we have been doing for years.

In the area of **co-development**, we assist returning migrants and former refugees and their home communities with micro-credits, networking and integration programmes.

A particularly useful tool for development is the active **recruitment of highly skilled migrants** in developed countries aiming at their return and priority placement in the governments and industries of their countries of origin.

We hope our former EU-funded programme for the Return of Qualified African Nationals will soon be renewed and directed also to the francophone nations of Africa.

ASSISTED VOLUNTARY RETURN

Finally, and coming back to the asylum system, where we started, a particularly useful and humane way to help put an end to the existing backlog and minimize the impact of future burden is **assisted voluntary return.**

Assisted voluntary return provides a safe, cheap, humane and non-confrontational way to help unsuccessful asylum seekers return home. We have had good results in many European countries with this programme.

We are working hard with the Netherlands, Finland, Belgium and Austria on assisted voluntary return, with a focus on enhancing programmes for early counselling of asylum seekers on realistic options.

Many applicant countries of Central and Eastern Europe have also instituted successful programmes of assisted voluntary return through IOM.

As an alternative to legal removal, the system is beneficial to individual migrants and the governments of both the countries of origin and of destination.

Because the returnee travels voluntarily and with normal travel papers, no lengthy discussions about readmission are required.

Nor is there an incentive to complicate returns by negotiating conditions or requirements.

The migrant for his part avoids the stigmatization and other disadvantages of removal proceedings. He or she has no court record to contend with.

The cost analysis of voluntary returns is also highly favourable.

IOM has recently succeeded in carrying out voluntary returns to 'difficult' countries of origin like Iraq and Afghanistan.

A field of action that needs greater attention is the possibility of funding programmes for the assisted voluntary return of migrants stranded in third countries of transit. Close co-ordination with UNHCR in such programmes is of course essential.

CONCLUSION

In closing, let me point out that Portugal is one of our partners in IOM's Western Mediterranean initiative. Three members of the Maghreb Union – Morocco, Algeria and Tunis – are now IOM member States. They have expressed a strong interest in working with IOM on migration management issues across the waters that separate Europe from Africa, and thus joining in the two continents together. We look forward to working next with the presidency of France, another of our Mediterranean partners.

IOM exists to help all of you in hands-on and ways. Let us work together to put an end to the existing asylum backlog. Then let us set up systems that address migration problems with migration solutions.

QUESTIONS – FIRST SESSION

1. Jorge Portas

HEAD OF THE REFUGEE DIVISION (SEF) / PORTUGAL

It's not really a question, but rather a comment on what Professor Patrick Weil said about the situation in the European Union as far as statistics on asylum are concerned. I think I won't be too far from the truth if I say that this issue is now practically solved. During the last months, the Council, the CIREA Group and the relevant services of the European Commission have worked closely on this matter. To that effect, an informal group was set up in parallel with the CIREA Group to identify the different types of decision and the different elements to be included in the statistics in this field. So, precisely that informal group will present a final report during the next meeting of the CIREA Group. I think this is an issue that might not need to be brought forward again.

Answer **Patrick Weil**

I don't think this position has been mentioned, but I am also president of the Group for Statistics of the Integration Council, which in France publishes one of the official statistics on immigration. I was glad to hear what you said and would like to learn more about the progress in this work. But let me stress that I can't imagine how one can move towards harmonization when, I'll take Germany again as an example, a French student spending one year in Germany – six months in Bonn and six months in Berlin – is counted twice in that year as an immigrant there, whereas a German student spending one year in France under the Erasmus programme is not counted as an immigrant. We are in a situation where it is absolutely impossible, in my opinion, to seriously co-ordinate our approaches unless we have common categories. The sooner we do it the better, regardless of the choices that are made. But we must have common rules in this field.

2. Jean-Daniel Gerber

DIRECTOR OF THE FEDERAL OFFICE FOR REFUGEES / SWITZERLAND

Just one comment on the statistics, and then another on the protection issue. The statistics, you know, will come automatically once we have harmonized our asylum systems. The fact is we differ very much in our asylum systems, and therefore the statistics too differ considerably. So this is a process that calls for a two-fold approach: on one hand, we'll have to harmonize our asylum systems – Tampere actually points in that direction – and, on the other hand, we'll have to harmonize our statistical systems as well.

Regarding the protection system which, in my opinion, is really fundamental, I very much appreciated the comments that were made here on this subject.

We all consider that immigration and asylum should be dealt with as separate matters, but we also know that it is extremely difficult to separate the two.

And this because, basically, it is only after we have examined an asylum application and determined whether the asylum seeker is a refugee or not that we may know whether an asylum application is an immigration case. Mrs. Feller said, quite rightly, that the refugee protection should be based on the 1951 Convention. I agree, the Convention is the basis on which we'll have to start building. But I also think that, as a basis, it is no longer adequate, so something will have to be done to develop it. Mrs. Feller suggested that we ought to have a common regime on temporary protection. I was rather surprised to hear that she would exclude – at least that's what I thought I heard, I would therefore appreciate if she could clarify that remark – the other concepts that could eventually be developed. So she more or less excluded, if I understood well, the possibility of a «safe country» concept or of a deeper legal concept concerning internal flights. It's a pity that these should be excluded from the start, because I believe that based on this type of concept, one could build up and develop the 1951 Convention, so as to adapt it to one's needs today and in the future. So, in my opinion, one should be more open-minded on this issue and try to find solutions convenient both for the protection, but also for the interests of the States which one has to adjust to. We have to be able to cope with what actually happens in the real world.

Answer **Erika Feller**

I am happy to comment on that. I fully share Mr. Gerber's point about the need to find a balance in any refugee protection system between all the competing interests at stake and, in fact, I did mention that in my concluding remarks. UNHCR is very clearly amongst those competing or complementary interests. Depending on how you want to look at it, we have the interests of the States directly affected by refugee arrivals, those of the individuals themselves and, broadly speaking, the interests of the international community, which include the country of origin and others. So, certainly we are very much of that same opinion as Mr. Gerber. As regards the new concepts or the not so new concepts any more, because the notion of safe country has actually been around for a long time, I don't think one should read into what I said a complete rejection of these

notions. What I did say was that they have to find the proper place in any refugee protection system. UNHCR's concern over recent years has been in some way that they are not finding what we would call their proper place, but they are coming to supplant, to have a prominent place in the refugee protection system. Which means what in practice? It means that a person who is deemed to come, lets say, from a safe country of origin, does not even get pass the front door, that is his claim is not determined under procedures based on the refugee or protection status, if that claim is declared inadmissible right from the very beginning. Our concern has always been that the safety notion, being relative and very difficult to define, should not be used to preclude procedures. It can be used, and we have said this on a number of occasions, to create certain presumptions that can be tested through the procedures.

For example, it can be used to presume that a case is manifestly unfounded. It can form the basis guaranteeing that certain types of claims are assigned to fast and expeditious procedures so as not to unduly hold up or clog up the refugee status determination procedure with unfounded claims.

But they have to find their proper place as the prominent place is supplanting even the refugee definition. Where the fact of a person's origin determines whether or not that person has protection concerns rather than a definition which looks at his political views, religious belief, ethnic background and measures that against the threat or likelihood of persecution, there is something wrong with that sort of assessment. So, no, certainly we would not reject these concepts. We just want them to be in the right place and, certainly, they can be build into the sorts of approaches which have to be grafted on, as I said, to buttress the 1951 Convention, but not to supplemented, not to replaced it and render it redounded. UNHCR, as I mentioned, is prepared to go into consultations at this point with a number of interested States to discuss how we can extend better protection to those who need it and who are not covered by the Convention. These sorts of issues that Mr. Gerber raised are very much issues we would want to approach in these consultations.

Comments

Erika Feller

I look forward to hearing and, I think, I would have liked to have heard probably more from those Government representatives present in the audience how they see, for example, the role of the 1951 Convention. It

seems – and a further explanation is to be expected tomorrow – that they are some who would wish to contest its relevance and recommend that it should be radically altered. I do not know, I would be interested to hear whether that was a sort of a widespread opinion or whether it is an aberrant view. I think there is rather a silence on this matter and if nothing confirms our understanding, at least what we need to do is to construct a new protection regime having as its centre the Convention and which may include a protocol to the Convention or some sort of other instrument at the international level. Here, I know you are all looking at it very much from the European point of view which is important and meets the purpose of this meeting. We are constrained to look at it more broadly, because we have to work with refugees all over the world and we have to work with the instruments we have. So we seek to learn and work with the processes that enable the development of new approaches, such as those that are to a large extent being undertaken in the European context, as well as to look at their export value, because, as I said, things export very well, particularly restrictive approaches rather than more enlightened approaches. We would always want to keep in focus the relevance of what you are saying as well as of what we are doing to the broader world. And here I was very taken, I think, by, Patrick, your comment to the effect that we must be very conscious of what we do here and how that may help or hinder us because of the way it is exported, interpreted and applied.

We should be aware of the fact that if we decide, for example, to recreate a protection regime which is particularly relevant to the European situation and if, in the process, we should get rid of the global instrument we have or give it a very subsidiary or irrelevant role, we may be gaining in the short term but losing in the long term; we may be creating a system whereby quite a number of people have nowhere else to turn to but to the European countries for example, and the pull factor would become bigger instead of diminishing.

I think that were very important words or pieces of advice that you had to offer, so I suppose that would be my footnote to everything that I have said. We have to bare in mind not only the relevance of what we are doing to this particular room, but also to the global environment, which in this globalized world, will impact back, here, on this region.

Patrick Weil

I just want to add something to what Mrs. Feller said. Personally, I don't believe that the majority favours a return to the Geneva Convention. Quite on the contrary, I think we could keep the Convention, so to say, in

reserve, or under a kind of a general, sacred shield, to which we would refer to in a document, but which we would no longer apply in the immediate term. What we must indeed take due account of is the exact text of the agreement to be signed between the Member States. Will it be possible to invoke the immediate application of the Geneva Convention, simultaneously with the temporary asylum status, as the Kosovars, for example, were able to do it in France but not in other European countries? That is why the term of the temporary protection is so important, because if certain groups are given temporary protection and during that time they cannot invoke the Geneva Convention, the longer will be the temporary protection and the more will the applicability of the Geneva Convention be called into question. Therefore, all this has to be carefully examined and wisely negotiated by the Member States. It is this relation between temporary protection and the immediate applicability, or not, of the Convention that must be analysed and assessed. Only then can we judge the consequences of the optimistic as well as of the pessimistic case-scenario.

Brunson Mckinley

We and IOM are concerned with migration management issues all around the world and there are important common elements that we find everywhere. Whether it is in South America, Southeast Asia, Southern Africa or in Central Asia, we find interesting dynamics at play, many involving the same principles we have been discussing today. But I have to say that the European dimension of the coming debate on migration management is, I think, really the most interesting and the most significant for the future, because you have elements of change here, in Europe, which are bigger in terms of quantity, but also different in terms of quality from what is happening in other parts of the world. I think. In the context of the expansion of the European Union, things are happening that are of major historical importance. In the context of the North/South migration debate between Europe and Africa, things are or should be happening, will be happening that are of major significance and are also potentially quite new.

From the legal point of view, in terms of international law, things are happening here that are more fundamental and more fundamentally important than what is going on in the debate in any other part of the world. And of course, as I said in my presentation, if I am right that migration is largely economically motivated, well the economic dimension is bigger, more important and more significant and will continue to be so in the European context. So this debate is a very important one for the world history in the next century.

SECOND SESSION

Towards a Common Refugee Status

Anne-Willem Bijleveld
DIRECTOR OF THE EUROPEAN DEPARTMENT – UNHCR GENEVA

The subject we are going to discuss – «Towards a Common Refugee Status» – I hope will keep you all awake and will allow us to have an interesting and good discussion. So, I do hope that after the different presentations, we will have time for an exchange of views on this extremely important issue.

The theme is really central for the harmonization process of the different asylum policies and practices within the EU, as well as for an uniform application of the Geneva Convention. In fact what is here in question is a common drive towards an agreed definition of the term «refugee» and of other persons in need of international protection under the Geneva Convention, as well as towards a common refugee status. In the current state of affairs in Europe the diversity of interpretation of the refugee definition and the diversity of protection statuses is quite remarkable and, I should add, a worry. Regarding the aid that is granted, in some States it has gradually moved away from a right based approach towards a refugee protection altogether with a growing preference for discretionary forms of protection that provide lesser safeguards and fewer rights to persons of concern to UNHCR.

While some States have used the mechanism of a broad definition in a regional instrument to provide for the protection of refugees falling within the wider competence of UNHCR, other States have used provisions to extend the time limit of the leave to enter. In the latter case, the proliferation of standards applicable to the different categories of beneficiaries has tended to obscure the refugee nature of some of them and has led to some confusion about the considerations which should govern their treatment.

However, the complementary forms of protection, adopted by the State to ensure that persons in need of international protection actually receive it, are responding positively to certain international protection needs from a pragmatic point of view. Beneficiaries of complementary protection should be identified according to the international protection needs and treated in conformity with those needs and their human rights. The criteria upon which the refugee status is determined under the 1951 Convention should be interpreted in such a manner that individuals who fulfil the criteria are recognized as refugees and protected under that instrument rather than treated under complementary protection schemes.

The 1951 Convention and its 1967 Protocol form the corner-stone of the international protection of refugees and provide the basic framework for such protection. The standards contained in the Convention, together with developments in the international human rights law, provide an important guidance regarding the treatment that the persons in need of international protection should get. States that have not yet done so should accede to these instruments and to other applicable regional refugee protection instruments in order to ensure the widest possible and most closely harmonized application of the basic principles of refugee protection.

Now, these few lines are in fact the conclusions of a paper UNHCR has very recently issued on complementary forms of protection and which will be submitted to our standing Committee in July. So, the discussion, today, is definitely an extremely timely one.

I must say I am pleased that we have a very interesting group of speakers to start off the discussion on this matter. We have two persons coming basically out of the human rights area – Amnesty International, NGO world – and we have an eminent Law Professor. I will follow the programme.

Peer Baneke[1]

GENERAL SECRETARY OF ECRE

On behalf of the nearly 70 member agencies of the European Council on Refugees and Exiles (ECRE) l would like to thank you for the invitation to this seminar.

The programme notes for this session state that «the definition and concrete realization of a common refugee status is probably one of the greatest challenges facing the Member States of the European Union, with a view to attaining a desired level of harmony regarding asylum and refugee policies». Having to choose between some of the many challenges facing the EU in developing a common European asylum system is not easy, but ECRE would agree that a harmonized interpretation of the Refugee Convention and harmonized forms of complementary protection are certainly *amongst* the most difficult.

Two things caught my eye in the programme notes, revealing something perhaps about assumptions underlying our work. First, there is the assumption that the EU risks calling the Geneva Refugee Convention into question in developing a common asylum system. Second, there is the welcome assumption that this should be avoided. I think we can safely say that we all share the first assumption. I wish we could be confident that we all share the second assumption too, but I cannot. As I said, a common interpretation of the Refugee Convention is one of the greatest challenges. However, there are others, and I shall come back to these later.

ECRE has long argued for a common European approach to refugee protection. But harmonization

[1] Peer Baneke is the General Secretary of ECRE since January 1998. He studied sociology and has been actively engaged in human rights issues, first as a volunteer and then, for almost fourteen years he worked for Amnesty International, in the International Secretary, in London.

must only be achieved at a high standard, set not only on substantive issues of protection and integration of refugees but also in procedure.

I should briefly outline what the dangers are to the Refugee Convention in the process of harmonization. First, clearly, the degree of co-operation required to achieve harmonization within the five-year timetable set out in the Amsterdam Treaty is very high. ECRE is deeply concerned that in the process of developing a common European asylum system, standards will be discarded in order to achieve harmonization. This concern is only heightened by the need, under the voting procedures set out in the Amsterdam Treaty, to achieve unanimity on the measures to be adopted and by the incomplete powers of consultation and oversight of the European Parliament and European Court of Justice.

Second, one of the reasons we have urged a common approach to refugee protection is obvious: there is a protection lottery in Europe, based mainly on the fact that several European States adopt a narrow interpretation of the Refugee Convention which, in our view, is often not legally correct. Refugees are protected or are not protected not according to rational rules governing criteria in Europe but according to where they end up making their asylum claim. A cursory glance at the criteria governing recognition of refugee status shows differences on important concepts – such as persecution by non-state agents of persecution, a concept accepted by most States except Germany and Austria; or gender-based persecution – with some countries accepting this as grounds for recognition as a refugee, such as the United Kingdom, while some countries grant a «category B» status, like Sweden.

The situation regarding the granting of complementary forms of protection is even more complex. The wide differences in treatment of those people who might benefit from complementary protection encompass the type of status granted and its duration. The differences also cover the reasons for the granting of status and also the rights attached to the type of status. One thing which is common to nearly all EU States is that complementary forms of protection are increasingly preferred to recognition of refugee status.

The key danger here in harmonizing asylum policy is that the Refugee Convention may simply be lost. We can see from the practice of adopting a narrow interpretation of the Convention and having greater reliance on complementary protection that the Convention becomes, in practice, redundant by limitation to a small group of refugees.

Third, the EU needs to re-visit its time-table if it is not to risk undermining the Refugee Convention. The Amsterdam Treaty, the Vienna

Action Plan and the «scoreboard» place all decisions on responsibility--sharing, a new Dublin Convention, temporary protection, procedures for deciding who is a refugee, etc., before a harmonized interpretation of the Convention. The irrationality of this approach needs no explanation.

Finally, the greatest risk to the Refugee Convention in the harmonization process is the threat to access to its protection. As European States are all too aware, the Convention only applies when a refugee has crossed an international border. The jurisdiction of States parties extends only when the refugee comes within its authority. This is why there have been repeated and various attempts to prevent refugees from leaving their place of persecution and to prevent them accessing protection, through visa regimes, carriers' sanctions and so-called «safe third country» practices, and «regionalisation» of refugee protection by designation of «safe havens» and promotion of the «right to remain». ECRE can see no point to the creation of a model asylum system in Europe if refugees are simply to be denied the opportunity to access it.

The situation at present can be compared to the Prohibition Era in the USA. By erecting barriers, European States have merely created, or help to create, powerful networks of traffickers. Of course, many of these traffickers engage in the disgusting trade in human beings and in forced prostitution. But I want to highlight the peculiar and worrying fact that traffickers have become the last resort of the asylum seeker.

The point I wish to make is that accessing protection has itself become life-threatening: in the process, a highly undesirable criminal problem has been worsened, and the Convention risks being undermined by a spiral of control and evasion of controls, of which trafficking is a symptom.

Why do ECRE and its member agencies insist on the centrality of the Refugee Convention in international protection of refugees: why not grant all refugees a form of protection and leave it at that? Often, this question is phrased as why do we insist on looking at the reasons why someone is forced to flee? Essentially, these questions repeat the basis of the position advanced by Austria, during its Presidency of the EU, when it announced that the Refugee Convention was no longer relevant in dealing with refugees and called for a new asylum system based on political discretion.

Our answer has four elements: first, that the Refugee Convention is not simply about protection of people according to why they have to flee. Instead, the Convention is essential to the human rights framework agreed by the United Nations. Crucially, it supports and complements other human rights treaties agreed by the international community –

most of which do not have redress or prevention mechanisms. In our view, the Refugee Convention is the redress mechanism for human rights violations and has been successfully invoked in the protection of millions. It remains the only internationally agreed and binding definition guaranteeing protection from serious harm.

Second, as we can see from the forms of complementary protection granted, most States have a very narrow idea of what «protection» means – an idea not based on the universality of human rights but rather on ideas that some people do not deserve the same treatment which we believe we deserve ourselves. The rights which the various forms of status attract depend upon the reasons why the asylum seeker cannot be removed. Some forms of status do attract the same level of rights granted to those recognized as refugees under the Refugee Convention. Others have lower levels of rights or fewer rights and, of particular concern, some forms of status do not attract the right to family reunification. «Tolerated» status, i.e. withholding of deportation, generally attracts no rights at all.

In our view, the concept of «protection» does not mean merely the suspension of deportation; it involves the enjoyment of at least certain basic rights. The Refugee Convention is clear on this point: any refugee in the territory of a Contracting State is entitled not only to protection from *refoulement* but also to rights such as freedom of religion, to property, access to the courts, to elementary education, to identity documents and to freedom from penalization for illegal entry simply by virtue of his presence in the asylum State. Further rights are secured once an asylum application has been made, i.e. once the refugee is lawfully staying. This includes the right to self-employment, to freedom of movement and to protection from expulsion. Most governments now forget that the Refugee Convention text extends beyond Article 1 and believe they owe no obligations to treat refugees as human beings «born free and equal in dignity and rights», even though these were the minimum guarantees which they themselves built into the Convention.

Third, the Refugee Convention provides a framework for co-operation between States and a mechanism to provide for returns of refugees. As European States begin forcibly returning large numbers of Kosovar refugees we can see the policy of not recognizing them as refugees but granting temporary protection come home to roost. Without having recognized the Kosovars as refugees, European governments cannot now rely on the existing mechanism of the Refugee Convention cessation clauses to say, objectively and verifiably, that there are no longer any protection concerns for the majority in Kosovo and refugee status is not

warranted. Nor can they point to the requirement to co-operate with the UNHCR in order to co-ordinate returns. Instead, we have a pattern of different statuses across Europe, with variations on the time allowed for Kosovars to stay. Each country makes its own assessment of the safety of the province and decides on its own when refugees should return. The dangers here are clear for the countries concerned: they risk undermining wider policy objectives, namely the stability of the Balkans: Dr. Kouchner has already warned that large-scale returns of refugees to Kosovo risk undermining the precarious security situation there, a prospect surely no European country wants.

The question posed for this session is «which path and strategy are to be followed with a view to a common refugee status, without calling the Geneva Convention into question».

Well, the rather obvious answer to which path to follow is to start applying the Convention according to its object and purpose, and to the letter of the law. ECRE believes that the starting-point for the EU has to be the Presidency Conclusions of the Tampere European Council, agreed only in October last year. We were encouraged by the positive commitment to the right to seek asylum and by the impetus given to the development of harmonized asylum policies with guarantees to those who seek protection in or access to the European Union.

ECRE welcomed the aim of the Council to ensure an open and secure European Union, fully committed to the obligations of the Refugee Convention. For us, this meant that interdiction measures which deny the opportunity to flee persecution must be changed in order to guarantee access to protection. ECRE also warmly welcomed the fact that a common European asylum system will be based on a full and inclusive application of the Refugee Convention. However, we also said at the time that we believed that the key was in the implementation of the commitments and that we would keep a sharp eye on developments. For this reason, we have produced a dossier on Tampere, setting out the promises made there, as an easy reference point. This is available here and at our office.

To those who say that the refugee regime is beset by unmeritorious applications, we say that a common interpretation of the Refugee Convention and common forms of complementary protection status rely on fair and efficient determination procedures, with resources being invested in making good, quick decisions. Letting applicants know that it will not take years to make a decision will put off those who do not really need protection. Further, establishing a means by which those who wish to immigrate into the EU for economic reasons could do much to

ease the perceived pressure on the asylum back door: the recent UN report on Europe's immigration needs could provide space for a more informed debate about migration generally.

The answer to the problem of unmeritorious applications is not to re-negotiate the Convention. No compelling reason has been shown as to why the Convention is no longer relevant. Instead, we have been given circular reasoning and disingenuous concerns about people being pushed into the hands of traffickers because of the requirement that a refugee be outside the country of persecution. The only reason refugees have been pushed into the hands of traffickers is not because of the Refugee Convention but because of ever stricter immigration controls.

An idea has become prominent that asylum determination could be done in the region of origin and then refugees could be re-settled into Europe. ECRE is not totally opposed to this idea – it could be seen as an additional protection tool, rather than a substitute – but we have serious questions about it. Let's be brutally honest. The only reason most European States are interested in refugees is because they entered their territory. It is almost inconceivable that this interest would be maintained once the «problem» is out of sight. We need only point to decreasing levels of international aid and decreasing interest in existing resettlement regimes to know that Northern countries will not institute and maintain asylum determination regimes in the South, from where most refugees originate and where most remain. We also cannot help but wonder what Southern States will make of such a proposal anyway, when they are already protecting the vast majority of the world's refugees and whether there can be any balanced discussion between the North and South given the unequal bargaining positions of the two sides.

In conclusion, we believe that the strategy which the EU should follow is obvious and it is one we and our members have consistently advocated for years: there has to be access to the protection of the Convention, the Convention has to be applied correctly, according to its object and purpose, there has to be a clear understanding that the Convention applies to refugee situations as much today as it did in 1951 and there has to be a comprehensive, cross-pillar approach to the problem of forced migration.

The idea that the harmonization of asylum policies requires a comprehensive and a co-ordinated approach might seem an obvious thing to say, but it is something which governments do not seem to be able to grasp. The EU is stretching for an international approach to irregular migration, yet at the national level our member agencies see the inability of governments to move beyond the departmental approach, with Foreign,

Home Affairs and Development ministries each pursuing their own, often incompatible agendas. The EU is laudably attempting to overcome this, for example in the work of the High Level Working Group. But, as we see there, the peculiar problem caused by the lead of Home Affairs Ministries is that we may arrive at a more one-sided approach to irregular migration than that intended and not the hoped-for comprehensive response. Perhaps we are being too negative here – there was a good example of a co-ordinated approach of the French, German and British governments joint statement before Tampere – which, incidentally, stressed the importance of the Refugee Convention.

The EU must really listen to the voice of civil society. Declaration 17 to the Amsterdam Treaty is a start, but it is not enough. NGOs represent an enormous resource of knowledge based on experience: we don't always get it right, but we often know what will work. Primarily, this is because we work with refugees themselves and we can understand how the grand objectives set by governments will fare when they meet the reality of people in need.

Organizations like ECRE, or the Immigration Law Practitioner's Association and the Migration Policy Group are able to formulate alternative visions based on pragmatism. ILPA and the MPG have drafted directives on asylum and migration. which are available here. We need to know, by good practice of governments and the EU, that our views are being taken into account. Transparency is vital to this process.

There is a repeatedly expressed opinion across Europe that we are under threat from «floods» of refugees. We think that existing violations of the Convention and of refugees' human rights show that the reality in Europe is that it is refugees who are under threat and not asylum States. This year is the 50th Anniversary of the European Convention on Human Rights, marking half a century of human rights protection on our continent. At Tampere, the European Council stated that human rights belonged to everyone. Yet, as one of our members – Amnesty International – reported in its «Concerns in Europe» for July-December 1999, the reality of human rights in Europe for refugees is their violation. In Belgium there was alleged ill-treatment of detained asylum seekers; the European Committee for the Prevention of Torture expressed concern about the conditions of detention of asylum seekers in Finland; and in Germany there was reported danger of *refoulement*.

Next year is the 50th Anniversary of the Refugee Convention. There is a lot of work for the EU and other States to do before next year to make sure that the Convention will be observed in practice.

Maria-Teresa Gil-Bazo[1]

EXECUTIVE OFFICER FOR ASYLUM ISSUES – EU OFFICE OF AMNESTY INTERNATIONAL

INTRODUCTION

Good afternoon, ladies and gentlemen. Amnesty International would like to thank the Portuguese Presidency and the European Commission for the invitation to participate in this Conference entitled «Towards a Common European Asylum System». This Conference is intended to constitute an additional stage in the process of European integration in the field of asylum by promoting a public debate between the authorities of all Member States competent in asylum matters and other international partners and entities with opinions and comments on this matter, among which non-governmental organizations. Amnesty International is pleased that civil society is invited to present its views on the European integration processes that have an effect on the protection of human rights, and hopes that such contributions will be reflected in the outcome of this Conference as well as in the ongoing and future work of the European Union in the field of asylum.

Amnesty International has followed the activities of the European Union in the field of asylum with great interest and has accepted the invitations received to participate in meetings and to submit comments and information. However, Amnesty International is not an «implementing partner» in any of the activities undertaken by the European Union in this field. As a human rights organization, Amnesty International welcomes initiatives to improve human rights protection throughout the world. Recognizing that all human rights are indivisible and interdependent, the

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organization urges all governments to ratify and implement international human rights standards. It is in this context that the contributions by Amnesty International need to be understood. The organization will continue to monitor the human rights performance of the European Union Member States, when acting both individually as well as collectively within international organizations and their member agencies, in order to ensure that States comply with their obligations under international law.

It often happens that in their will to control migration to their territories, States resort to means that have great impact on refugee protection. However, migration and asylum are separate matters, as stated by the European Council in its meeting in Tampere, in October 1999 (conclusion 10). Therefore, asylum and protection measures for those who flee human rights violations must be given separate consideration; they cannot be subordinated to migration measures.

The European Council in Tampere stated that «Community rules should lead to a common asylum procedure and an uniform status for those who are granted asylum valid throughout the Union», a matter on which the Commission was asked to prepare a communication within one year (conclusion 15). If a harmonization process is to be undertaken at European Union level, under the framework established by Title IV of the Treaty establishing the European Community (as amended by the Amsterdam Treaty), it must comply with international law, so that maximum protection is provided to individuals in need of it. Measures in the field of asylum must fully respect the Member States international obligations under international refugee and human rights law.

Amnesty International is concerned that the harmonization process of asylum regimes in Europe may result in the lowering of the protection level provided to refugees. While Member States declare their commitment to international refugee and human rights law, in practice compliance with international standards is often not achieved, as the decisions of both national and international bodies, as well as of the courts, on this issue show. In the minutes that will follow, we shall present and discuss some of the key elements of the system for refugee protection under international law. We shall focus on three key areas: the right to asylum and to *non-refoulement*; a full and inclusive application of the UN Refugee Convention which ensures that all individuals entitled to protection receive it; access to the territory and to asylum procedures; and the wider human rights policy of the European Union. Amnesty International calls upon the European Union to open and/or continue the debate about

these issues in order to ensure that international standards, as presented below, are respected, in accordance with the Member States' international obligations.

RIGHT TO ASYLUM AND TO NON-REFOULEMENT

Any European Common Refugee Status must ensure effective and durable protection, which must always include, at a minimum, provisions allowing refugees to remain in the asylum country for as long as they continue to be threatened with human rights violations in the country they have fled, therefore including protection against expulsion or return to a country where they are threatened with human rights violations or to any third country where no effective and durable protection against such return (principle of *non-refoulement*) would be granted.

The right to asylum and to *non-refoulement* are therefore essential elements of refugee protection, and as such, Amnesty International calls for their full respect in the European Union.

The European Union is currently drafting a Charter of Fundamental Rights, as decided by the European Council in Cologne, in June 1999. **A**mnesty International has stated its position on the European Charter. It analyses the issues raised by its adoption, as well as the draft articles themselves, and advances recommendations so that it could constitute a real improvement in the human rights protection currently granted by the European Union and its Member States.

The organization asks for the inclusion of a provision dealing with the right to asylum and to *non-refoulement* in accordance with international refugee and human rights law[2].

The right to asylum in the European Union must be recognized without discrimination.

Restricting the right to asylum on the grounds of nationality constitutes a clear violation of the UN Refugee Convention and other international human rights treaties. Amnesty International recalls that under international law discrimination in the enjoyment of fundamental rights on the grounds of national origin is forbidden (article 2 of the Universal Declaration of Human Rights, article 3 of the UN Refugee Convention, article 3 of the International Covenant on Civil and Political Rights, article 14 of the European Convention on Human Rights) and therefore calls for the express recognition that all persons have the right to asylum. Even more, under the 1967 Protocol to the UN Refugee Convention (to which all Member States are

[2] The position of Amnesty Internationa1 on the European Charter of Fundamental Rights can be obtained at the Council's web-site (documents CHARTE 4173/00, CHARTE 4290/00 and CHARTE 4331/00).

parties) the geographical limitations on the application of UN Refugee Convention were abolished. Any European Union policy in the field of asylum must take into account that Member States have an international obligation to refrain from undertaking activities which may result in the discriminatory application of the human rights treaties to which they are parties on any grounds, and particularly on the grounds of nationality.

Amnesty International opposes return in cases where there is a risk that the person would be subjected to an unfair trial, imprisonment as a prisoner of conscience, torture, extra-judicial executions, the death penalty, or «disappearance». For this reason, Amnesty International has asked for the express recognition in the European Charter of the absolute principle of *non-refoulement*, a norm of customary international law, as included in article 33 par. 1 of the UN Refugee Convention and in other international treaties, of universal and regional application, such as article 3 of the UN Convention against torture and article 3 of the European Convention on Human Rights, which prohibit the forced return of individuals (whether directly or indirectly) to the territories where their lives or freedom are at risk or where there is a risk that they would be subjected to torture.

ENSURING THE PROTECTION OF ALL REFUGEES

A Common European Asylum System must ensure that protection will be provided to all individuals entitled to it.

In practice, the States differ significantly in their application of the relevant definition of who is entitled to protection as a refugee. The way they view the flight causes, the causes they recognize as forming a legitimate basis for granting protection and, in some cases, the political interest of host Governments have an influence on this.

Since there is no international judicial body to rule on interpretation issues, the result is that the countries differ widely in their interpretation of the UN Refugee Convention definition. Sometimes States resort to overly restrictive interpretations of the refugee definition which result in the rejection of refugees, such as considering that human rights violations in civil wars do not constitute persecution; persecution other than by the State does not give rise to a valid claim to refugee status; the lack of persecution in the past prevents having a well-founded fear of persecution in the future; or that torture and ill-treatment are illegal acts of violence by individual officials, rather than State persecution.

Amnesty International calls for an interpretation of the UN Refugee Convention such as to cover all forms of persecution, in order to ensure

that all individuals who fall within its scope are granted the protection provided for in this instrument. In this regard, the UNHCR Handbook on procedures and criteria for determining refugee status, as well as the EXCOM conclusions, which reflect international consensus, are binding on States when interpreting the UN Refugee Convention. Other relevant human rights treaties, such as the European Convention of Human Rights, the Convention Against Torture and the International Covenant on Civil and Political Rights which develop and complement the protection accorded to refugees, must also be taken into consideration when adopting measures to determine who should be given protection. The adoption of an EC instrument on the definition of refugee should reflect the broad framework of the existing and evolving international law and standards, including the relevant jurisprudence and interpretation.

Such an interpretation would be in accordance with the decision adopted by the European Council in Tampere, whereby it «agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*» (conclusion 13).

There is a general recognition that an expanded class of «refugees» (people who do not meet the UN Refugee Convention's criteria) has a legitimate claim to some form of protection. UNHCR describes refugees and «people of concern» as those who have been forced to flee their country as a result of persecution, massive human rights violations, generalized violence, armed conflicts, civil strife or other circumstances that have seriously disturbed public order, threatened their lives, safety or freedom.

Having regard to the fact that certain individuals in need of international protection may not fall within the scope of the UN Refugee Convention, Amnesty International requests that any additional, complementary protection arrangements adopted by EU institutions imply granting protection to all individuals who fall within the scope of the provisions of the human rights law. This protection must be effective and durable and it must include legal security.

The determination of who is entitled to international protection under complementary arrangements requires that the claims should be examined on a case by case basis according to fair and satisfactory procedures. The criteria for granting such protection, as well as the rights granted to its beneficiaries must be clearly determined and they must be in compliance with international human rights obligations.

Amnesty International calls for the establishment of complementary protection regimes that in no case prevent individuals who fulfil the criteria set out in the UN Refugee Convention getting the recognition of their refugee status.

In emergency situations of mass influx of persons, several European States have used temporary protection as a tool to provide protection to specific categories of people without immediate recourse to individual refugee status determination procedures. Beneficiaries of a form of temporary protection are generally given fewer rights than those granted refugee status under the UN Refugee Convention.

This raises serious issues regarding the ability of States to deprive individuals of the rights they have under international refugee and human rights law. The most serious issue is that the host State can often put an end to the temporary protection status much more easily than to the refugee status. The lack of an international standard for ending temporary protection is a cause for concern as it may result in the breach of the obligation of *non-refoulement*.

ACCESS TO PROTECTION

Amnesty International recalls that the effective protection of the right to asylum and of the absolute principle of *non-refoulement* requires that access to the territory of asylum countries, as well as to fair and satisfactory asylum procedures is ensured. A Common European Asylum System, respectful of the States' international obligations as far as refugee protection is concerned, would be meaningless if individuals were prevented from getting such protection. Ensuring access to protection would be in line with conclusion 3 of the Tampere Summit, whereby the Heads of State and Government reaffirmed that the common asylum policies «must be based on principles which [...] offer guarantees to those who seek protection in or access to the European Union», and particularly with conclusion 13 where they reaffirm «the importance the Union and Member States attach to absolute respect of the right to seek asylum».

While recognizing that States are entitled to control immigration and entry to their territory, Amnesty International requests that in doing so they ensure and demonstrate adequately that asylum seekers have effective access to their asylum procedures and that any restrictions on entry, such as visa requirements, the fight against forged documents, carriers' sanctions, the growing effectiveness of the airline liaison officers in the countries of origin, the conclusion of readmission agreements or other similar restrictive measures, do not obstruct this access in practice.

The implementation of such measures not only ignores the specific protection needs of refugees and asylum seekers, but may also constitute a breach of international law in certain circumstances. In this respect, the application of measures aimed at preventing migration to EU Member States, such as carriers' sanctions, may constitute a breach of the right of everyone to leave any country, when in practice such measures do have the effect of preventing individuals from leaving their country, and particularly the country in which they are at risk (see UN Human Rights Committee General Comment on article 12 of the 1966 International Covenant on Civil and Political Rights). The implementation of visa regimes and the fight against forged documents must take into account that pursuant to article 31 of the UN Refugee Convention, States may not impose penalties to refugees on account of their unauthorized entry.

The existence of readmission agreements whether between Member States or with third countries, must respect international obligations in the field of the refugee protection. The countries of readmission must provide explicit guarantees in each case, regardless of any existing agreements between the removing country and the destination country.

Amnesty International recalls that international refugee law does not require that a refugee must seek asylum in the country in which he or she arrives.

It is the country where a refugee applies for asylum which is obliged to consider the application substantively to ensure that the refugee is not directly or indirectly returned to persecution. In fact, a person might be at risk in a country of first asylum or in a country of transit. Thus a claim for asylum cannot simply be declared inadmissible on the grounds that there exists a «safe third country» for that person. Therefore, in all situations, also in the case of countries having concluded readmission agreements, States planning to return an asylum seeker to a country of first asylum should ensure that the receiving country is able to provide adequate protection. In this respect attention should be paid not only to the possibilities of the receiving country (existence of a satisfactory asylum procedure) but also to the capacity of UNHCR to provide protection there.

This principle also applicable in the context of the Dublin Convention, or of any other instrument that may be adopted within the framework of Title IV to replace it. In the case of TI v. *the UK* (decision following the admissibility hearing of 7 March 2000) involving the application of the Dublin Convention between the UK and Germany, the European Court of Human Rights found «that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect

the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically, in that context, on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organizations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution».

In March 1999 the Commission issued a working paper entitled «Towards Common Standards on Asylum Procedures[3]» and the adoption of an EC instrument on common minimum standards on asylum procedures is expected by April 2001, according to the Commission's «scoreboard», as adopted by the Justice and Home Affairs Council last March.

Amnesty International believes that the minimum requirements for a fair and satisfactory asylum procedure include the following: an independent and specialized decision-making body, a qualified decision-maker, a qualified interpreter, individual and thorough examination of the claim, legal assistance, reasonable time to prepare the case and seek legal and other advice, presentation of the reasons for rejection, right to appeal, an independent appeal body, and the right to remain during the appeal procedure. The organization also believes that the requirements of proof should take into account the fact that many people who have fled their country arrive with the barest necessities and frequently without personal documents.

Amnesty International believes that the major shortcomings in asylum procedures are related to the use of concepts such as «manifestly unfounded» claims, safe third country, safe country of origin, «international zones» where guarantees are not applied, or accelerated procedures which do not meet the essential requirements of a fair and satisfactory procedure. Amnesty International asks that the practices that may undermine the right to asylum and result in the *refoulement* of refugees be rejected.

[3] Amnesty International commented on the Commission's paper in a document entitled «Towards Common Standards on Asylum Procedures». Comments by Amnesty International on a document from the European Commission. (May 1999).

THE NEED FOR A COMPREHENSIVE HUMAN RIGHTS POLICY OF THE EUROPEAN UNION

It is commonly known that one of the main causes for migration world-wide is the violation of human rights which leads to flight and to the request for

asylum in safe countries. Refugee displacement is therefore the result of human rights violations world-wide. Therefore, an efficient refugee policy would be one that addresses human rights abuses and prevent further human rights violations.

The call for a coherent European Union-wide policy on human rights constitutes an extraordinary challenge requiring perhaps an extraordinary initiative. The European Union activities under the framework of Community Law and of Common Foreign and Security Policy (the so-called «first and second pillars») need to be jointly developed in order to ensure that the internal and external human rights dimensions do not remain disconnected.

The adoption of a European Charter of Fundamental Rights applicable to all three pillars of the Union offers a perspective of real improvement in the human rights protection currently afforded by the European Union, provided that certain conditions are met. Amnesty International calls for a legally binding European Charter provided that it guarantees the fundamental rights of all individuals without discrimination, strengthens rather than weakens the current level of human rights protection in the EU, serves to include fundamental rights that have not necessarily been included in other international instruments, and is fully justifiable by the European Court of Justice and by national courts when applying EC/EU Law.

In this context, the activities of the High Level Working Group on Asylum and Migration (HLWG) are a matter of concern. Amnesty International has followed the activities of the HLWG with great interest and has accepted the invitations made by the Group to participate in meetings and to submit information on the human rights situation in the countries of origin. As a human rights organization, Amnesty International welcomes initiatives to address the human rights violations which force people to flee their countries and seek protection elsewhere.

Amnesty International has already stated that it is concerned that the adoption and further implementation of Action Plans for countries of origin of asylum seekers and their neighbouring regions may undermine the right to seek and enjoy asylum for refugees fleeing those countries[4].

Despite the expressed wish to provide for a comprehensive approach to migration, in our view, the Action Plans have not provided for a strategy to address effectively such human rights abuses. In fact, the proposed measures, as well as their implementation, indicate a clear imbalance, with a strong weight given to measures devoted to prevent migration into EU Member States, whereas a

[4] See «Comments by Amnesty International on the Implementation of the Action Plans adopted by the High Level Working Group on Asylum and Migration» (December 1999).

comprehensive, effective plan to address and prevent human rights violations seem to have been forgotten. Even more, some of the activities of the European Union in relation to third countries raise serious issues in the field of human rights protection. For instance, despite the adoption of the Code of Conduct on Arms Exports in 1998, the European Union has not yet put in place a system that prevents effectively that military and security transfers from Member States to third countries, including those addressed by the HLWG, contribute to human rights violations world-wide.

Amnesty International calls for a comprehensive European Union approach in the field of human rights that places human rights at the heart of the European Union's policies and contributes to the fight for human rights protection world-wide.

Kay Hailbronner[1]

PROFESSOR AT THE UNIVERSITY OF KONSTANZ

Mister Chairman,
Ladies and Gentlemen,

I like to watch the Italian westerns of the sixties because the plot is relatively simple: there are always the goodies and the baddies. On looking at this programme, beside ACNUR, Amnesty International and ECRE, it became clear to me the role that had been assigned to me. But there's also a more factual reason, it's getting late and I don't want to annoy you by going through all that has already been said, so I'll try to give you a somewhat different point of view.

The Portuguese Presidency has laid the emphasis, quite rightly I would say, on the fact that moving towards a common European asylum system is the main challenge facing the Member States of the European Union. Having a common European asylum system is necessary for three reasons.

Firstly, to avoid uncontrolled migration within the European Union, which leads to different recognition standards as well as to different protection mechanisms. In fact, I believe that the current state of affairs, and particularly the legal uncertainty as to the procedures and regimes available, is a major factor in generating uncontrolled immigration. Secondly, to avoid a duplication of asylum and other subsequent procedures, which feeds on the diversity of recognition criteria. The basic idea of the Dublin Convention is that the definition of refugee status should establish standards, if not totally identical at least equivalent. Thirdly, a

[1] Kay Hailbronner has been for the last thirty years an academic on law issues. He taught at several universities, namely Heidelberg, Konstanz, St. Gallen, Berlin and Kiel. More recently, that is since 1990, he is legal adviser for the Federal Government on asylum and immigration cases at the Constitutional Court at the European Court, in Luxembourg. He was judge at the Administrative Appeal Court of Baden-Württemberg. He is Foreign Member of the Academy of Arts and Sciences in Thüringen and, since 1994, chairman of the ILA Committee on Refugee Procedures and Director of the Centre for International and European Law on Immigration and Asylum.

common concept of refugee is necessary in order to provide the foundation of a common European asylum system based on burden-sharing.

So, what should be the components of a common European asylum system? Well, the programme of this Conference mentions, in the first place, a common definition of the term refugee under the Geneva Convention, but at the same time it already points to other mechanisms of international protection. Right there, we are confronted with the problem arising from the fact that the term «refugee status» implies a number of issues, that is, besides the definition of the term «refugee» under the Geneva Convention other ways of granting subsidiary protection are discussed, as well as the issue of drawing a line between the application of the Geneva Convention relating to the Status of Refugees and other regimes.

While the issue of the material rights of the refugees recognized as such under the Geneva Convention may to a large extent be considered as being clarified, that of the status of other refugees who may claim another type of protection still requires a great deal of clarification. There is here a clear connection to the theme of the future of the Geneva Convention, which was discussed this morning. The definition of the refugee concept under the Geneva Convention and the treatment of persons who may claim another type of protection are therefore also closely related. So, now I come to the definition of the term «refugee» according to the Geneva Convention.

The common position adopted in March 1996 already laid down a certain basis for a common European definition of refugee.

It's true that ultimately some of the most controversial issues concerning a common definition of refugee were not clarified. I will mention only two, on one hand, the persecution by private individuals, non-state agents, on the other hand, the definition of the social group, particularly in connection with gender-based persecution.

Firstly, as far as non-state persecution is concerned, my personal interpretation of the Geneva Convention is that it does not commit the signatory States to including private persecution within the scope of application of the Convention. As far as I see it, the Geneva Convention was intentionally and expressly elaborated as a type of umbrella convention in relation to the interpretation of the term «refugee». I also don't consider the arguments that led the British Court of Appeals, in the Adam case, to defend the thesis that the French and German practices go beyond the scope allowed by the Geneva Convention very convincing. The simple fact that the common point of view implies that there ought

to be at least another scope for interpretation should, I believe, have led the Court of Appeals, in the Adam case, to be cautious about concluding that it was an international law case. Ultimately, however, the central issue is not how the Geneva Convention should be interpreted. I don't want to go into that discussion. The arguments are well-known: the interpretation of the Geneva Convention, its history, the text, the teleological interpretation. Most likely, we wouldn't reach, here and now, any understanding on that matter. I don't even want to go over any of that.

The central point seems to me to be the following: is it wise to apply the Geneva Convention regime to that category of persons or would it be more reasonable to devise another system of subsidiary protection? So, this is also an issue that comes under the scope of legal policy. The German legal position, in this case – as clearly stated by the European Court of Human Rights in the case mentioned above – is also based on the principle that the German courts' interpretation of the Geneva Convention is different from that of other Member States' courts, but that there are other protection mechanisms in force that prevent a person whose life is in danger from being expelled to a country where he is exposed to a real and serious risk of being persecuted. I think we all agree that those who are persecuted by non-state agents are entitled to some protection. This type of protection, if I understood clearly, is indeed granted by all systems, at least whenever the refugee has substantial and concrete reasons to fear for his life. The point is how do we handle these issues relating to non-state persecution with a view to reaching a common European approach.

If we consider, for example, that a sentenced drug trafficker too has a legitimate claim to some form of protection should he really be in fear of his life; or even more, if we consider that those who are persecuted on ethnical grounds in a non-operating State deserve to be protected, then, in my opinion, the question as to what it would mean to apply the Geneva Convention to this and possibly also to other categories of persons is put forward. Is it reasonable, in those instances, to implement the procedures and extend the scope of the Geneva Convention?

Let me answer this question with a straight no, for two reasons. First, the Geneva Convention was conceived, essentially, for those fleeing from totalitarian regimes, like the Nazi Germany or the Soviet Union, and who are looking for protection, in other words, it was conceived for political refugees.

The Geneva Convention has, and has always had, a legitimate scope of action. We can go further, and I wouldn't hesitate in doing so, and say

that today, as in the past, the Geneva Convention is the corner-stone of international law on asylum. However, we cannot close our eyes to the fact that the Convention is not particularly suitable to solve the complex situation of today's refugees.

Such situation is characterized by a number of factors. On one hand, the very different interests of the various categories of refugees. We have the category of refugees who are clearly in a situation where they only need temporary protection. There's another category of refugees, the classical one, the political refugees under the Geneva Convention; these refugees are fleeing a totalitarian regime without having much expectation of a change in the situation in the short term.

Between these two categories, there's a series of other categories of persons to whom a mix of different factors apply. One of them is, of course, that of a large number of individuals who migrate, first and foremost, for economic reasons. It's understandable that they do it, but their reasons are purely economic.

The Geneva Convention is characterized by the lack of rules regulating the issue regarding the legal situation of individuals who claim to be persecuted. This is no criticism of the Geneva Convention, I am simply stating a fact. As someone said this morning, and quite rightly, it doesn't grant any immigration status. The truth is that the underlying principle of the Geneva Convention is the refugee integration. The Convention takes into account the situation of the lawfully resident person, for whom it provides a number of rights. It is also true that the status granted by the Geneva Convention may be revoked under the Convention itself. But we cannot ignore that our systems – and here, I think, I'm not just talking about Germany – have complex procedures with legal protection given by the courts, with several instances, which therefore sometimes drag on for several years. In conclusion, the Geneva Convention, in its present form, is necessary but we cannot rely on it alone to solve the problems currently at issue.

There is also another aspect, which I consider to be more important, and that is the excess of asylum claims. Even though the Geneva Convention does not contain any explicit rules of procedure, the Member States normally follow the recommendations of the UNHCR Executive Committee which entail an expensive administrative procedure, with legal protection provided by the courts. All this is by no means problematic and for decades its use did not cause any problem.

However, it becomes a problem when a large number of persons resort to this system without even having enough reasons for declaring that they

are persecuted under the terms of the Geneva Convention. So, the main problem is not caused by the rights of those who have been granted the refugee status. The basic problem regarding the treatment of refugees lies in the legal, procedural and material status of those who are in a situation where their rights are not clearly defined.

Here the question arises as to what type of regime we should be aiming at within an European approach on this matter. Would burdening the asylum systems with, for example, the category of non-state persecution in fact benefit the cause of refugees, in particular as regards the need for fast and fair procedures, or wouldn't it be more advisable to look into other standards of procedure, more directed, for example, to the situation of war and civil war refugees?

I believe that it would be preferable, for the time being, to integrate this category of persons into the category of temporary refugees. On most occasions, these are temporary situations. We need to set up fast and simple procedures. It should be possible to rely on other protection mechanisms.

The second theme of a common refugee status is the scope and content of an European refugee status, including of those refugees who deserve subsidiary protection.

I have already mentioned that, in my opinion, the current concept of refugee protection is not sufficiently flexible to cope with such a diversity of refugee categories. The general picture, by itself, already shows five different categories of refugees. They are, very briefly, first, those who apply for recognition of refugee status under the Geneva Convention; second, those who ask for subsidiary protection; third, those who have been granted the refugee status; fourth, those who have already gone through the stages of an asylum process, but who cannot be expelled on humanitarian grounds; and fifth, a significant number of people, those who without success have already covered the different stages of an asylum process or of any other process of protection, but who due to the absence of factual impediments – namely the lack of the necessary documents – cannot be expelled either. With a view to determining the substantial rights of these persons, as well as their legal and procedural situation, we have to consider having uniform rules for all these categories. One idea, if I may make a suggestion, would be, for example, to take a final and binding decision, within an uniform procedure – that is, no separate procedures, only within one single procedure –, as to whether the right of residence should be granted or not.

We tried that in Germany. We tried to incorporate in the law a certain concentration of competencies in the Federal Institute. As a result, today

we have a situation where a single asylum process, the definition of which is quite broad, can lead to a series of litigious administrative processes due to other impediments to expulsion. In this regard, the German model is not, as far as I'm concerned, the right model for an European refugee status. On the contrary, we should think that, in this case, it's possible to decide within a single procedure, but then also swift and short, whether, on other grounds, it is justifiable to postpone the execution or grant some form of subsidiary protection. I don't need to tell you that there are huge differences of opinion in this regard. This morning, some possibilities were already mentioned here, namely the exceptional leave.

There's no point in mentioning all of them, there's quite a wide range of possibilities. I think in this regard there is a clear need for harmonization at European level.

Finally, I should like to comment on a number of issues. A very delicate one is that of the abuse. The Geneva Convention does not deal with it.

We have to be very careful regarding the term «abuse». It obviously concerns very different categories of persons; persons who resort to it, so to say, for subjective political reasons. However, I want to run the risk of using that term. I think that in all our systems there is a category of persons, I'll tell you which right away, who are «rewarded» in an unacceptable way. I am thinking, on one hand, of those who hide their identity and, on the other hand, of those who refuse to co-operate in any way, for example, in obtaining the necessary documents. Under the present system, at least the German one, they are ultimately rewarded for this sort of behaviour.

I can't see any reason why there shouldn't be some means of opposing such behaviours within an European asylum system or even within the national asylum systems. At least we should look into whether it would be possible to do so within the process of harmonization at European level. Switzerland has apparently developed in this area a number of principles worth considering; at least, it has the motivation for developing an incentive to ensure that that sort of behaviour is not rewarded. However, we could probably go further and look into what kind of legal treatment should be accorded to this category of persons. I know it's a very provocative idea, surely UNHCR will strongly object to it.

However, why should an individual who constantly changes his identity before the different judicial institutions that he goes through be allowed to invoke the prohibition of *refoulement*? I never understood this. In every legal system there is a limitation on certain rights. Why can a person in those circumstances invoke the prohibition of *refoulement*?

I am aware that this is a very complex subject, so I will not discuss it any further. However, I am also of the opinion that this assembly could, maybe, provide a good opportunity for putting forward provocative ideas.

One last and brief comment regarding the concepts of safe third country and safe country of origin, which were already mentioned here.

If we assume that the problem is not the category of persons that can give evidence of persecution, but rather the category that sustains that it has reasons for requiring protection, then a safe third country regime cannot possibly work, if it allows the access to the asylum process, even if evidence and the like are provided. In those cases, we need very swift procedures, allowing the countries to immediately reject such claims such as that of being persecuted, despite the general supposition or the fact that it is commonly known that the person came from a safe third country.

It is widely known that there is a certain controversy in this regard between the German position and that of other Member States of the European Union, but, in my opinion, now as in the past, we must look into how we possibly could, in terms of procedure, tackle the issue of those persons who manage, in our systems as they stand at present, just by claiming that there are some impediments to their expulsion, obtain a long period of residence, sometimes lasting for years.

In conclusion, the main issue must be the reduction of those procedures. As regards the safe country of origin, it's a similar situation, although I don't intend to support the view that, precisely, in the case of the safe country of origin the process should be carried out without any type of control. Here, I think it's a slightly different matter from that of the safe third country. As regards the latter, I think it's easier to assume that there is safety, in other words, we don't run major risks in doing so, our starting--point may in fact be a general supposition.

QUESTIONS – SECOND SESSION

1. Gloria Bodelon

HEAD OF THE REFUGEE OFFICE / SPAIN

Rather than questions, it's comments, reflections that I want to make. I think there's some confusion right now. I understand that UNHCR, as an agency of the United Nations, relates to the entire world and not just to Europe, but UNHCR has somewhat abstained from looking for regional solutions to cope with regional problems, something it has done throughout its history. I don't believe that the wish to have a protocol, an extension of the Geneva Convention, would undermine this Convention. Just as the Declaration of Cartagena, for example, which presented solutions for certain problems at a certain time in Central America, or the Declaration of African Unity, did not undermine the Geneva Convention.

On the other hand, it is not quite clear what we are looking for. Both the High Commissioner and the non-governmental organizations represented herein say with apprehension that in Europe there are less and less statuses and an increasing resort to protection, now called subsidiary or complementary. I think that the problem in Europe is that we do not receive real refugees. The problem in Europe is that the asylum cases of persons who are not refugees lead us nowhere. It is not because we close our frontiers to the real refugees, but because the procedures are crammed with persons who use the asylum procedure simply as a means to try and stay in Europe. Therefore, maybe what we should do is find a way of going round this problem.

We have no problems with refugees. It is also often said that the refugee systems have been hardened, and that the procedures are increasingly restrictive. I have made a comparative study that shows that since the nineties the application of the Geneva Convention is the same in every European Union Member State. The only thing that changed and that probably became more restrictive is the concept of asylum under national law: in some countries, like Germany and France, we have constitutional asylum. But the application of the Geneva Convention has remained unchanged.

The case-law, which interprets third-party persecution by non-state agents, has been the same for many years, not since the day before yesterday. So, who knows, maybe we should focus on the question of what is the real problem in Europe, which obviously is not the same as in Pakistan or in Central America. It is a specific problem of the European region. Thank you.

Answer **Anne-Willem Bijleveld**

Well, I think this was a question clearly addressed to UNHCR. I will try to reply to that and, maybe, Erika can help me, if she feels that she should give some further precision.

First of all, the Convention is a global instrument and we should not forget that.

While we have nothing against regional aspects, we have to be very careful about the export value of the possible outcome of those regional aspects. You mentioned the problem with the procedures and the clogging up of the system.

This was exactly what we were talking about this morning. This is more a problem of migration than of refugees. Refugees are only a small part of it. The question is only where do those who want to migrate turn to? What's at issue here is the absence of a migration regime, which is part but not all the problem. This brings us to the interventions made this morning. I think they made the connection between asylum and migration very clear. That is really the challenge we are going to be confronted with now and in the coming years.

Harmonized procedures would allow us to overhaul our systems that have become much too complex and much too difficult. They have been there for fifty years, there have been amendments after amendments and, today, it is an extremely difficult maze to get through. What we need is to overhaul that system to get it fairer as well as simpler. I think this is the opportunity we have to face this jointly in order to get to that. But at the same time we should address the migration problems, otherwise it will be almost impossible. I don't know, Erika, whether you want to add something.

Erika Feller

Thank you Anne-Willem. Just a couple of additional points. I think that you, very accurately, said what is the position of UNHCR. I don't know where the impression comes from that UNHCR is giving up regional solutions, if that was the correct translation of the comment made by the representative of Spain. Far from it. UNHCR has spoken consistently in favour of harmonization, in favour of solutions tailored to the regions' particularities. What it has said in addition and will continue to say is that these regional solutions should also be compatible with global standards. That is not to say that they should be identical or that they should be the same approaches in each region, but certainly that the global principles should form the overall framework for devising regionally tailored solutions. That is the first point.

The second point is the reference made to the particularities of the problems in Europe. It is true that Europe has a set of problems to deal with which it needs to develop approaches to. These problems are not, however,

exclusive to Europe. The difficulties of regular migration, the problem of irregular migration, the issue concerning the abuse of the system, the problem caused by a great number of different people on the move in a mixed flow context is not just found in Europe. If one looks at the African continent today, leaving quite aside the massive flows and the flights of people caused by conflicts, and go to the Southern part of that continent and look at the situation facing South Africa today, you will see that a very, very comparable situation is being faced by that country which has a backlog of over 17.000 asylum requests, obviously ill-founded, abusive, from asylum seekers all around the world, including from asylum seekers coming from countries represented in this room today. So, South Africa and Southern Africa, Botswana, will speak in very much the same terms when they come to international meetings as European delegates informing about the problems there.

If you look at the situation in Latin America, you will see that a number of countries there are also confronted with an irregular economic migration problem which is confusing the asylum responses and causing a number of countries to adopt similar sorts of responses in their legislation: temporary protection and others that you will find on the European continent today.

I don't need to mention the problems facing the United States and Canada, or those facing Australia, the problems of irregular migration in the south-east Asian region, the problems caused by the large number of people passing through countries such as Malaysia, Indonesia or others. It is also a problem of people on the move, a problem of trafficking, a problem of irregular migration. So, I think, this reinforces, Anne-Willem, your point of view that while there is a need to develop regional approaches typical of the systems, of the common values and cultures of a particular region, we shouldn't forget that these problems actually have a dimension which goes beyond any region and are shared in a number of respects by most parts of the world. Thank you.

2. **Gerold Lehnguth**

DIRECTOR-GENERAL OF THE MINISTRY OF THE INTERIOR / GERMANY

I would like to comment on Mr. Baneke's presentation, more precisely on the very wide refugee concept that he used, namely through the example of the admission of the Albanians coming from Kosovo. I think your concept of refugee is too wide. Let me first of all recall the political situation at that time.

We were in the spring of last year. A large number of Kosovars had fled to the neighbouring countries, to Macedonia and Albania. The political objective was to maintain stability in Macedonia. Approximately 200.000 persons had fled into that country. In April last year, in an extraordinary summit of the European Union, we decided, together with the UNHCR, to evacuate a large number of persons from Macedonia. In my opinion, this is one of those cases where the asylum procedure makes no sense. It is a typical case of temporary protection; a situation where people are admitted for a given period of time. We can say that this was a success story. It was the first act of European solidarity; at least that is how Germany sees it. At that time we held the Presidency of the European Council. We were unwilling to introduce the difficult and lengthy asylum procedures. So, at the end of the military conflict – today there is no longer any Serbian military presence in Kosovo – we should, in principle, have revoked the recognition of the right to asylum. This is why I want, once again, to insist on the need to have other regimes besides the Geneva Convention; in this particular case, the temporary protection regime, which is currently under discussion in the European Union. I would also like to thank the Commission for the proposal it has submitted in this respect. France, which will hold the next Presidency of the European Union, will certainly continue the work on this subject.

Answer **Peer Baneke**

I would like to respond to those points. I was asked in the midst of the Kosovar crisis by an Australian radio network about the positive and negative aspects of the way Europe was governing that crisis. I chose carefully to compliment the German Presidency at the time for its initiative to try and push and encourage other Member States to take in quotas of Kosovar refugees. So there were positive elements.

However, regarding the definition of what a refugee is, the fear that made them flee, all those people who fled at the time the massive flows arrived were, per definition, I think, refugees.

In fact, I have asked UNHCR to consider this element in its own evaluation of the crisis. But my understanding is that it has not really tackled the issue in there and I can see why not: the political expediency and the complications caused by the countries trying to quickly come to help are indeed very complex factors and they show the problems of Europe. If only there had been clearer agreements on burden-sharing, if the EU had been able to conclude them before Kosovo – and many States here have taken initiatives to try and promote a debate about burden-sharing –, then it

might have been better managed. But I maintain and would very much like to discuss the merits of the status of refugees. In those circumstances it would not have been necessary to resort to an individual procedure. It was for me very clear, per definition, all those people were refugees. So a group determination would have been possible. An interesting thing about Kosovo is, of course, that the refugees themselves – many, many, many – went back, even before UNHCR said it was safe; even though to some extent it endangered, I think, the stability of the country.

As regards the other issue, we – as ECRE – certainly do not oppose in general the development of temporary protection. We think it can be an useful instrument, but only in situations of mass flight, when indeed there are mixed flows and it becomes too difficult to use the procedure to determine who merits the refugee status and who doesn't. So that is the reason, because it becomes impossible to apply the procedure. Furthermore, we have in fact a position on complementary forms of protection and we will as NGO in Europe very much participate in the debate about this issue because, even though for us it is clear that the Convention and the proper, full and inclusive interpretation of the definition contained in it cover more refugees, there are certainly also other categories that are not covered by its terms. We should have a good harmonized system. Ideally speaking, a global *Realpolitik* may perhaps say we should first negotiate in Europe. Let's come as close as possible to that objective.

3. Patrick Weil

I would like to make a comment in view of the fact that Kay Hailbronner presented himself as the black sheep of this panel. I would like to say that if all black sheep were like him, our task of establishing the basis of an agreement at European level would be much facilitated, for in my opinion he said some very important things. For example, he said that the Geneva Convention, interpreted as a Convention that protects those persecuted for political reasons, persecuted by the State, ought to be the basis of the European protection. I think that if all the States today were ready to subscribe to this in a common declaration, it would be an important step forward towards a possible European harmonization of the asylum procedures. This morning I told to myself that we were in the middle of some confusion and that we would have difficulty in finding points of agreement, but now I'm leaving this panel much more optimistic, even though this doesn't mean that there are no more differences of opinion. I also think that one should dedicate more time to the dialogue on Kosovo.

One can say that the Kosovars who enter the territory of a Member State of the European Union deserve to be protected under the Geneva Convention, because at the time of entry they were being persecuted by a State, so it's really a matter of applying the very criteria Kay highlighted.

Now, since the Geneva Convention forces no State to admit refugees into its territory, the future offers the European countries a margin for discussion and interpretation, for not everything about every issue will be written in no European statute on asylum. It is not possible to do so; one must leave a margin for the lawmen, the judges and the politicians. But what I really want to underline is that, based on what we heard in this panel, we are led to conclude that, despite the divergences, a common approach is highly probable.

Answer **Kay Hailbronner**

I think that is really the decisive point. The Geneva Convention does not impose the obligation of granting asylum on an individual basis. Mr. Lehngut has already said so and Patrick Weil also underlined the fact that the Convention is not in essence only orientated towards the individual determination of refugee status. This is probably plain evidence, but we should again bear it in mind, for when we speak about recovering the fields of action, we must be aware that precisely within this context we have a major potential for fields of action, in which, contrarily to what we were used to up until now, there is neither an immediate juridification of everything nor the association of every situation which, under the Geneva Convention, is related to the refugee status, with an individual legal status. Instead we make it clear that there are different interests which are only in part regulated by the Geneva Convention, namely after taking the decision to grant the refugee status under the Geneva Convention to someone, the rights that are applicable are those established under the Convention. But that doesn't mean that in situations of temporary protection – such as the Kosovo case – the States cannot adopt more progressive and flexible approaches than those resulting from a, we could say, strict application of the material rights provided under the Geneva Convention.

If I may raise a further issue – an issue also mentioned by my friend Patrick Weil and which cannot be overstated. Indeed Minister Schily also referred to it and I was actually surprised that he should find a slight contradiction in it. I would like to recall that the Geneva Convention was not built on the development of the human rights as we understand

today the European Convention on Human Rights and the other human rights agreements, that is, the individual right of the person meeting certain requirements. The Geneva Convention, on the contrary, has always considered, ever since its inception, that a considerable part of the political assessment ought to be left to the signatory States. I think this is also relevant as far as the issue of how we deal with the new forms of subsidiary protection is concerned. Of course there has to be certain control procedures. I am also of the opinion that we should not replace our current procedures by the simple rule of arbitrariness.

Why is it, though, that we try to extend to an increasingly larger category of persons something that was developed by means of a clear system of administrative and judicial procedures, or partly by means of various judicial procedures that have failed, instead of recognizing that this system has to be a mixed one. Naturally there will be cases where it will be impossible for us to completely abandon the judicial control, but we must take this aspect into consideration, for example at the end of a protection case. Here it seems evident to me, and that is why I oppose the application of the Geneva Convention, for example, in that type of cases. It must be possible to make a general decision. We must be able to decide on political terms: those persons who were given temporary protection are no longer exposed to any risk, they can return. It must be possible to make such a comprehensive political decision, on the basis, of course, of a proper check.

I hope that in future this reality will become politically more acceptable within the European Union, provided that we have common criteria for basic decisions such as this one.

4. Serge Bodart

PRESIDENT OF THE PERMANENT COMMISSION FOR REFUGEE APPEALS / BELGIUM

I am a magistrate, and here I'm not representing my country, which gives me a certain degree of independence that is quite important inasmuch as what I'm going to say is not very diplomatic. To start with, I have the impression that certain notions are being mistaken here since the beginning of the afternoon, namely the definition of refugee according to the Geneva Convention, as well as the consequences in terms of stay.

As regards the definition of refugee under the Geneva Convention, as president of a jurisdictional body of appeal in that domain, I cannot possibly agree with the opinion of either Professor Weil or Professor Hailbronner. There is not a single word or sentence in the Geneva

Convention that would enable us to say that persecution must necessarily emanate from the State. As a matter of fact, the Appeal Commission in France, too, does not deny – even though their interpretation is stricter than ours – that in certain instances the persecution may emanate from a non-state agent. The debate today also focused on Kosovo, and again we saw some confusion here as regards the strict application of the refugee definition according to the Geneva Convention. There is no doubt that the Kosovar asylum seekers at the time of the ethnic cleansing fell under the scope of the Geneva Convention. If that status was not accorded to them, it was simply for reasons of political opportunity – as was mentioned, I think, by one of the German speakers –, which I can perfectly understand, but let us not mix the two things. I have the impression that, at times, the Geneva Convention is called in question and that one tries to impose a definition that is not in agreement with the text, simply in order to justify the consequences of the procedures, statuses or rights related to the refugee status in the different Member States.

Kosovo is a good example. Those persons were obviously refugees, only they ceased to be refugees. But of course there can be exceptions.

If the majority of the countries had granted them refugee status in 1999 – as Belgium did – they would have obtained an indefinite leave to remain. Therefore, I think it would be better to question the right attached to the recognition of refugee status, the right to stay, and not the refugee definition, which, in my opinion, is a very wide-ranging, abstract definition, as it was said here this morning, and to which there is not much to add.

Answer **Kay Hailbronner**

I will make just one brief comment, so as not to extend the discussion much further. As far as the Geneva Convention is concerned, my opinion is different from yours. I believe that as regards both its text and its history, the Convention does not present any clear grounds in favour of one interpretation or the other. The main point is that it is possible to put forward good arguments for the position that you, as the president, as the representative of the court of appeal, apparently supported. This fact, however, does not yet answer the question as to whether the Geneva Convention, in view, namely, of the international practice – article 31 of the Vienna Convention – as well as in view of the form it assumes in the common position, allows for a wide range of interpretations.

In terms of international law, for me this seems to be the decisive issue. But as I said, as far as I'm concerned, the interpretation is a different one.

Still, I hope I have been sufficiently clear when I said that this doesn't mean I have a different view on the issue of protection. I think this ought to be made very clear.

I also have no doubt whatsoever that we could have applied the criteria of the Geneva Convention to the Kosovo refugees, but with a view to achieving harmonization at European level it is important to agree, in principle, that the other categories are considered to be in need of protection. The only point of disagreement lies in the answer to the question: which is the most reasonable way of granting that protection? Which procedures are actually feasible and enable to grant, and, eventually, also to put an end to that protection? This seems to me the crucial point.

5. **Friso Wijnen**

IMMIGRATION POLICY DEPARTMENT – MINISTRY OF JUSTICE / NETHERLANDS

Both speakers, representatives of Amnesty and ECRE, have underlined the importance of a comprehensive approach in the debate. In that context they have mentioned the work of the High Level Working Group on Asylum and Migration.

Both speakers have expressed their worries about this group. The action plans might undermine the access to the procedure as the representative of Amnesty International has said. There is at national level, as Mr. Baneke has stated, an inability to make the High Level Working Group work. Let me say that I don't agree that the action plans undermine the access procedure or that they are mainly repressive. However, it is true that the Member States need all their strength and creativity to carry them out. They need inter alia to co-operate with international organizations such as ECRE and Amnesty International. I hope that these organizations will remain critical, but most of all that their criticism will remain constructive in order to make the comprehensive approach a success.

Answer **Maria-Teresa Gil-Bazo**

I would like to reply to the comment that was just made. I was expecting it, because it is not the first time I hear it. That is why at the very beginning of my intervention I explained the role of Amnesty International in this context. We are not an implementing partner. We have been accused of not being constructive because we are unable to provide any ideas on how to return rejected asylum seekers. That is not the job of Amnesty International. We do monitor the human rights situation world-wide. This is the type of information we can give to Governments so that they

can do their work. It's what we've been trying to do. Since the beginning of the process, we've been participating in the meetings. Our role there is to ensure that when Governments claim to adopt a comprehensive approach, which includes human rights protection, an issue of concern to our organization, that undertaking is properly executed. When it comes to migration control measures, we acknowledge the States' right to control who enters their territory. Our concern is to guarantee that the rights of those entitled to protection are properly recognized. That is the role we can play and that we definitely would like to play in the future as well.

Peer Baneke

When the High Level Working Group was created, I think, we were quite clear about welcoming the principles of the comprehensive approach. We have our doubts about how concerted the approach really is. That is why we really call for a greater involvement, not only across the EU and across the pillars, but at Member State level as well, within the various departments and departments in the departments. It is our understanding though that, with a view to engaging us properly in the debate, it's not enough to invite us, often at a rather late stage, to the meetings. You should also give us the chance to be present right from the beginning and give us the necessary papers, thus enabling us to fully participate in the debate. What I must say is that you are developing a new approach, but for us it's in fact a new approach as well. So we are not always able to comment at the right and proper time. We have to develop a perspective, which possibly leads the agencies concerned with refugee issues to work closer with organizations more rooted in the countries of origin, as the EU and the Member States are doing it between the Ministries of Justice, Interior and of Foreign Affairs. On the whole, though, considering the plans as we have seen them, our judgement is that the emphasis of the bulk of the measures is on the control and regionalization of the protection, rather than on a genuine concept or on the fight against the root causes in order to deal with the human rights issues, either in the countries of origin or in the surrounding countries. So that is where we probably may maintain our criticism.

Anne-Willem Bijleveld

As UNCHR I should also say a word on this. We are very pleased with the fact that the High Level Working Group on Asylum and Migration was formed. We have put a lot of work in it. Really, on behalf of UNCHR, on my behalf as well as on yours, I had to make sure that my colleagues

in other bureaux were willing to play the game and provide the information needed on the countries you had selected.

The task was not always easy, but I must say, we did our part and I hope we can continue to do so, because I think we are talking of a fundamental approach as well as of an extremely important concept. However, we are somewhat disappointed, let's put it like this, not to have yet seen – let me underline yet, because after having seen the plans of action, I am still hopeful that the project will produce results, and I must say those plans of action contain interesting proposals – as I was saying, we have not yet seen the impact, the money available in order to execute the plans of action. So, here lies at the moment the cause of our hesitation: will it be discussion discussion or are we to see real results? The comprehensive approach is, I think, the right approach and therefore we will continue to encourage you to continue to take that path.

6. **Pedro Matos**

INSPECTOR OF THE REFUGEE DIVISION (SEF) / PORTUGAL

I would like to explore the provocative issue raised by Professor Hailbronner concerning the absence in the Geneva Convention of a concept of abuse. In fact, those of us who deal with asylum seekers on a daily basis are well aware that many of them clearly abuse the system by not revealing their real identity.

We also know that, legally speaking, there are no mechanisms efficient enough to prevent such abuses, namely the presentation of multiple asylum applications using different identities. It's the case of the Portuguese law, but I presume that the laws of many other Member States do not provide for the necessary defence mechanisms to deal with the abusive applications submitted by this type of asylum seekers.

I think that at European Union level we will have an unique instrument, at least to screen this type of situations, which is the EURODAC regulation, once it is implemented. However, since Professor Hailbronner has raised this issue and has said that Switzerland has some effective defence mechanisms against the misuse of the right to asylum in the form of the presentation of different applications using different identities, I would like to ask Professor Hailbronner if he could explain in detail the mechanisms used by Switzerland.

Answer **Kay Hailbronner**

Well, I would say that this is a question for Mr. Gerber.

Jean-Daniel Gerber

If we calculate the number of asylum seekers on a per capita basis, Switzerland is by far the country in Western Europe that has more asylum seekers in all Europe. So, unfortunately, I know we haven't been efficient. But considering the number of asylum seekers we have, we are thinking of a new system that won't be repressive but, as Professor Hailbronner has said, will work based on incentives which we will give to the asylum seekers willing to collaborate and reveal their identity. They do not have to give the papers, but they have to give a certain credibility to their identity. How will it work?

The incentives for those who collaborate would be, for example, the chance of entering the labour market; the right to individual instead of collective housing. With this kind of incentives, we hope to know a little bit more about their identity, because about 70-80% of the asylum seekers coming to Switzerland do not give their identity with the result that the paperwork cannot be done and they cannot be returned. That is one of the major problems.

The second means at our disposal and which, of course, we already resort to, because we do not know the identity, are the linguistic and geographical tests that enable us to a certain extent to find out who the person is and from where he comes from. I know there are other countries such as Netherlands, Germany, and Sweden working on the same basis. But the fact is that, despite these measures, we still have a quite large number of asylum seekers. We do not know whether only with these restrictive measures, we will be able to have less illegal migration in Switzerland. We will see in the future, we hope that it is not necessary to take repressive measures and that an incentive system will suffice.

7. Jon Annes van der Klaauw

UNHCR

I would like to come back to two items of the discussion. One is the High Level Working Group, because the truth is that being based in Brussels, I have been deeply involved in the project on behalf of UNHCR. I just would like to add that our organization has been closely involved in developing the plans.

We have welcomed this approach at the time, precisely because, although its elements might not be that new, it was the first time that this approach, that is to say the attempt to tackle the refugee / migration problems from various angles, was pioneered at European level. It is still a worthwhile exercise.

I think that at the moment, as it was already said, the problem is the implementation phase. It is not easy to implement the plans for the reasons stated. But a bit more fundamental question for us, here, is that, although the approach of the High Level Working Group has been presented as a comprehensive approach, at the same time this initiative, as I understand it, is also tested as a contribution to the migration management. In other words to examine the root causes of the flows of migrants and refugees to Europe, as well as to look at the role the regions of origin, the immigration countries here, in Europe, and the asylum countries have to play.

You could also look at the concept of comprehensive approach in another setting and, I think, that has been much more our problem here, because, if you look at the conclusions about comprehensive approaches, it has to do, for example, with capacity building in the regions of origin, resettlement programs and, indeed, with preventive action in the countries of origin. Those elements although somehow present in the High Level Working Group are less highlighted than the others. I would say rightly so, if the High Level Working Group instead of us would lead the migration management. In any case it is a challenge for us, UNCHR, to look at the various elements of the approach, at the concept of providing asylum or of reception in the region, at the regionalization of the refugee entry; and see how we examine all this, how we consider the return. In that sense it is certainly worthwhile to continue the co-operation.

My questions about the work of the Group are much more, I would not say of fundamental, but of conceptual nature.

I would like to go back to the other debate we had – Professor Hailbronner, Professor Weil and Mr. Lehnguth – on certain aspects of the Geneva Convention. Indeed, this morning, Minister Schily mentioned the States' role in applying the Convention and the right to asylum; once again he said, it is much more, I would say, a *freizügiger Akt* – an act on behalf of the State to come into action and maybe it should not go through all the legal construction. I have heard of that approach early on too by nobody else than Mr. Matzke at the time he explained his strategy paper, in which he also defended this view on the granting of asylum, based perhaps not on an approach founded on rights, but as a discretionary State act. I think that is a fundamental debate. It is linked to the argumentation that the Geneva Convention is part of the body of human rights treaties or that, at the time it was conceived, it was an interstate arrangement, but we could also regard it as having been developed and having gained its place in the body of human rights treaties, asylum having become a right in itself. I would also like to

remind us of the present discussions within the European Union on the Charter of Fundamental Rights and of the inclusion of a right to asylum in that Charter. All the existing problems are there. I think that is indeed a fundamental question.

We, UNHCR, have said the right to asylum is not in fact dealt with in the Geneva Convention, but it is provided for in a number of resolutions adopted by the General Assembly of the United Nations which have developed that notion, as well as in the setting of the Council of Europe. It is presently very much on the table, in the European Union, which has drawn up its Charter.

Answer **Kay Hailbronner**

I think that the idea of prohibition of *refoulement* as an individual right is undisputed. I believe we all agree on that. As such, the issue is to a large extent an academic one, because as regards the persons arriving in our countries, in most cases, it's the application of the prohibition of *refoulement* that is at stake. The issue on which there is disagreement, even if it is no longer very significant, is as to whether one has to grant access to the asylum procedure in its strict sense. But here, too, I think that even if there is no obligation under the Geneva Convention, we all agree, in Europe, to have a procedure, of one type or another, for those capable of showing good reason why they are politically persecuted.

We talk about minimum standards of procedure. Maybe, then, we shouldn't also be raising fictitious problems.

When we talk about assessment and the aspect highlighted by Minister Schily – and in that sense I consider the attitude correct –, are we not including in that system, which I don't want to question either, those situations where there is a political determination – an example would be Kosovo and the end of the temporary protection status – and which, therefore, will come to an end without our having to go through thousands of individual procedures to check, for example, whether the situation in Kosovo has changed significantly. I think it is necessary to look into this, but in my opinion it would be totally unrealistic on our part, and it wouldn't get us any further, if we would now question the prohibition of *refoulement* as an individual right. Nor would we feel very well, if it were a purely political decision or a decision taken according to political criteria. If we did so, I think we would be discarding what can be considered an integral part of our *acquis communautaire*. But once again, when we look into this matter and analyse it in a broader context, with regard to issues like subsidiary protection, termination of protection and

other related issues, we must take into account certain elements, like the political decision-making, and not reduce the entire perspective to the individual judicial cases.

Comments

Detlef Wasser

MINISTRY OF JUSTICE / GERMANY

I would like to focus on the issue of juridification and underline the fact that, in future, we will not have just two players at European level – the Commission and the Council – but also the European Court of Justice. In my opinion, the desire to have the Geneva Convention as the basis of the harmonization of the right to asylum in Europe is not just the result of a political decision made in Hamburg.

That wish was already expressed in the European primary law, namely in article 63 of the EC Treaty, where it is stated that the harmonization of the right to asylum shall be carried out in accordance with the Geneva Convention, and, on the other hand, in article 68 where it is said that the decision proceedings shall be primarily decided by the European Court of Justice. In view of all this, I can foresee interesting decisions on the part of the Court of Justice, which will have to study the Geneva Convention, and, perhaps because of that, I wish we could in future define our legal instruments so clearly that we shall not hamper, but rather help, the European Court of Justice; in other words, that we may lay down precise regulations. This is the Council's view, our view as the legislator on this matter.

Geza Tessenyi

COUNCIL OF EUROPE

I would like to thank Erika Feller for having in her speech quoted certain recommendations of the Council of Europe when talking about safe third country, temporary protection and other issues. Here, I would like to say that there is an increasing body of legal texts elaborated by the Committee of Ministers of the Council of Europe, which adopted the said recommendations. 14/15 members of the European Union as members of the Council of Europe have participated in the adoption of those recommendations, so we are doing the same as Governments, only in another city but Brussels.

In this case, as we are talking about temporary protection and the whole body of protection, I think it is worthwhile recalling that – Professor Hailbronner was there last September, in Strasbourg, when the discussion

on temporary protection began, which I am happy to report ended six weeks ago with a recommendation of the Committee of Ministers on temporary protection – we have a text here which reflects the consensus of 41 Member States of the Council of Europe and UNHCR, because UNHCR participated very actively in the elaboration of the text, whenever the subject matter was temporary protection, an exceptional practical measure limited in time and which complements the protection regime of the 1951 Convention and 1967 Protocol. Among the beneficiaries of the temporary protection there may be refugees under the Convention and the Protocol. The granting of the temporary protection must not exclude the recognition of the refugee status under those instruments. It also clearly establishes a link between the refugee determination process and the duration of the temporary protection. It talks about further details about not referring certain time limits for how long the procedure can be suspended, but, as a consensus text, it clearly talks about the need of examining the asylum requests at the latest when temporary protection ends. I think there is a certain consensus on safe third countries, temporary protection, the return of rejected asylum seekers, the effective remedy rejected asylum seekers have against expulsion decisions etc....which are a set of soft low materials that can be very useful in the context of further analysis of a common European asylum system. Indeed, I would like to repeat and emphasize that the 15 Member States of the EU, all the 15 Governments, agreed on this text recently, during the past four years.

Wolf Szymanski

MINISTRY OF THE INTERIOR / AUSTRIA

I would just like to report on our experience as regards the link between the Geneva Convention and temporary protection within the context of the debate on Kosovo. To that effect, it might be convenient to recall two decisions taken by the Austrian Administrative Court, on different occasions, on the same subject. There's one decision of the Court dated late September of last year according to which, as a rule, under the present circumstances the Albanian Kosovars meet the criteria resulting from the refugee definition under the terms of article 1 of the Geneva Convention. There's another relatively recent ruling – dated April of this year – from the Austrian Administrative Court, according to which the conclusion is precisely the opposite. At present, an Albanian Kosovar is not covered by article 1 of the Geneva Convention. Had we handled the Kosovo situation only in the light of the Geneva Convention, we would now have to deal

with thousands of individual files where the determination of refugee status would have to give way to the opposite act of non-recognition of refugee status. For us this can only mean that in future regulations we have to harmonize these two instruments in such a way that any citizen in Austrian territory may naturally, at all times, resort to the Geneva Convention and to the granting of asylum thereunder, but that, at the same time, during the period in which temporary protection is accorded, the decision on whether to grant permanent protection shall be postponed to the end of that period. Only then will the Geneva Convention play an effective role; it shall then be decided, on a case-by-case basis, whether at the end of the temporary protection period the person concerned meets the criteria set out in article 1 of the Geneva Convention.

As a rule, that will not be the case, as shown by the Court´s decision, and therefore the asylum request that had been submitted will be rejected as an unfounded claim. With this arrangement, we would avoid having a situation like the one we have in Austria right now, where approximately 3000 asylum requests presented by Kosovars remain unsolved and will probably have to go through the entire determination process.

António Lencastre Bernardo

DIRECTOR-GENERAL OF THE SERVIÇO DE ESTRANGEIROS E FRONTEIRAS (SEF) / PORTUGAL

My name is António Lencastre Bernardo. I am the Head of Serviço de Estrangeiros e Fronteiras in Portugal, and during the Portuguese Presidency I have chaired the High Level Working Group on Asylum and Migration. It is precisely on the work of this High Level Working Group on Asylum and Migration that I would like to make a few comments, insofar as this subject was raised during the debate. The comments are quite obvious, but I still think they ought to be made.

First of all, as it has already been mentioned and we all know, this is a new approach to asylum and migration issues. As a new approach to these matters, we all understand that it is difficult to create the necessary conditions, namely financial, and even to adapt the structures and the mentalities to this new way of tackling asylum and migration issues. Of course we are all aware that it would be an easier task to continue pursuing a merely repressive approach. This would be much easier, but we are all aware, and as Director of a Border and Immigration Service, I am fully aware, that it doesn't work. So we'll have to look at other approaches and this is one worth trying.

The second comment I would like to make concerns the problems facing

us as regards the implementation of the action plans in the target countries that have been selected.

For us the implementation of the action plans is very difficult, and, what is more, regarding many of the target countries we even have difficulty in contacting them, even through the non-governmental organizations. It's very easy to say let's implement and let's do it quickly, the problem is the practical side of the matter. This has proven to be extremely difficult.

The third comment is that the implementation of the action plans is a patient and time-consuming task. I would recall that in one of the meetings we held with third countries – the Portuguese Presidency held meetings with several third countries and international organizations –, and our Swiss colleagues, who are much more advanced than us in this respect, we were warned that the work in which we now got involved requires pertinacity, patience, time; at times you just want to give it up, and you often have to start all over again. The successful results are not immediate, they are not absolute, they are very relative. A very important aspect underlined by the Swiss is: you have now started a long process for which you must be patiently prepared.

The other comment is that the Portuguese Presidency, like others, has held meetings with the non-governmental organizations and I think that this type of co-operation will obviously go on in the future. I have no doubt about that.

The last comment I would like to make, also in order not to give just a bleak prospect, but disclose some good news as well, is that the General Affairs Council, which met on 12 and 13 June in Luxembourg, has adopted the action plan for Albania and the neighbouring region, and has also approved a set of measures that are likely to be implemented until the end of 2000. These are the so-called deliverables, and I thought this would be a good piece of news to be shared today, at this conference.

Anne-Willem Bijleveld

I think this was a most interesting afternoon. We got a lot of comments and, as it was said before, nobody expects we will come to real conclusions, but what I think is important is that many cards are on the table. This is obviously a process and, with the cards on the table, we should continue this sort of discussion in the various forms in order to move forward and to make sure that the opportunities lying before us become real opportunities and that we all come to grapple with the enormous problems we all basically face. I thank you very much for your very constructive participation.

THIRD SESSION

Towards a Common Asylum Procedure

Job Cohen

STATE SECRETARY FOR JUSTICE OF THE NETHERLANDS

INTRODUCTION

This morning, we will discuss a common asylum procedure for the European Union. I am honoured to be able to chair this debate with valued colleagues and participants, and I look forward to the conclusions to be drawn at the end of the morning. The idea of arriving at a common asylum procedure dates back to several years. At that time, under Austrian Presidency, I presented the idea of a survey of the merits of a common asylum policy to the Council.

This proposal was accepted and included in the Action Plan for an Area of Freedom, Security and Justice, agreed to by the Council in 1998.

The next occasion on which the common asylum procedure was discussed was during the European Council in Tampere, in October last year. The government leaders then agreed that community legislation should lead in the long term to a common asylum procedure and an uniform status for those who are granted asylum. As a first step the Commission was requested to present a communication about the common asylum procedure within one year. The nature of this communication and the issues it should address were, however, not explicitly stated. I realize only too well that we will not be able to create a blueprint for the communication today. Nevertheless, I believe we will be able to discuss a number of key points that could be elaborated later in the communication of the Commission.

I. OBJECTIVES OF THE COMMON ASYLUM PROCEDURE

The first point I would like to raise concerns the objectives of the common asylum procedure. One could assert that a common asylum procedure is a

logical result of working towards an Area of Freedom, Security and Justice. According to the European Council in Tampere, the challenge presented by this area is rooted *inter alia* in the right of the individual to move unhindered within the entire Union. A right that is not the sole preserve of the citizens of the European Union, but should also apply to those whose circumstances lead them justifiably to seek access to our territory. This makes it *inter alia* imperative that the Union elaborates a common asylum policy. A common asylum procedure could be a meaningful step in such process.

Another goal met by a common asylum procedure concerns legal certainty. An asylum seeker requesting asylum in one of the Member States should be able to assume that the decision regarding his application will be identical, regardless of the Member State to which he submits the application. This is even more important because in the Dublin Convention, the Member States stated that only one Member State is responsible for examining an asylum claim. If a Member State rejects the application, the asylum seeker will in principle no longer have access to the procedure of another Member State. A common asylum procedure will reduce the risk of inconsistent decisions in comparable situations with the immediate result of rendering the legal position of asylum seekers clearer and more uniform.

I have mentioned a number of arguments in favour of a common asylum policy without claiming to have covered every angle. So, I hope that the debate will bring forward other objectives, additional information or subtleties regarding the examples I have given.

II. INTERPRETING THE COMMON ASYLUM PROCEDURE

In addition to the goal we wish to achieve with a common asylum procedure, we will also have to ascertain how to interpret the procedure correctly. Naturally, this requires thorough preparation – there was good reason in Tampere for presenting the common asylum procedure as something to be realized in the long term. But that does not mean that we can allow the matter to rest in the meantime. Sound preparation requires that we start defining now the way we aim at realizing a common asylum procedure – for example by firmly shaping in the short term the European asylum policy with a view to working in the long term towards a common asylum procedure.

It seems logical to think that the elaboration of a common asylum procedure will be an extension of the implementation of the series of measures announced in the Treaty of Amsterdam. Here, two scenarios are conceivable: a strict procedural scenario and an integrated one.

1. In the strict procedural scenario, a common asylum procedure will specifically focus on topics that relate *directly* to the procedure. In that case, a common asylum procedure can be considered the logical follow-up to the minimum norms for asylum procedures that will be established later. This should in any case include a harmonized policy on procedural matters such as:

- access to the asylum procedure;
- accelerated procedures;
- the course of proceedings conducted by legal institutions at national and European level, including the terms and conditions of admissibility;
- the right to an interpreter and legal aid during all phases of the asylum procedure;
- the settlement of repeated applications for asylum and requests for reconsideration.

2. In the integrated scenario the common asylum procedure would have wider implications. In addition to agreements on procedural asylum law, the Member States would in that case establish agreements on the equitable execution of voluntary and forced repatriation and on a joint assessment of the information about the countries of origin with a view to taking decisions as regards admission and repatriation. In this wider scenario the Member States should also reach common agreements on similar facilities for asylum seekers and on an uniform reception policy.

The advantage of the integrated scenario is that it presents all aspects of the asylum chain. In this sense, it is in line with the comprehensive approach to asylum policy proposed by Tampere, whereby attention focuses on the partnership with the countries of origin, among other things.

III. TARGET GROUP OF THE COMMON ASYLUM PROCEDURE

In addition to the goal and interpretation of the common asylum procedure, another key factor is the target group to which these procedures will relate. As mentioned earlier, the government leaders in Tampere agreed that «Community legislation should in the longer term lead to a common asylum procedure and an uniform status for those who are granted asylum». Like the «common asylum procedure», the term «uniform status» also allows of some interpretation. Is the intention to reserve the uniform status only for those covered by the Geneva Convention, or to extend this status to those under some form of subsidiary protection too?

In my opinion, answering this question is crucial. Over the last few years, subsidiary protection has gained considerable substance. At present, the

Member States of the European Union provide subsidiary protection more often than protection based on the Geneva Convention. The same question concerning the target group will be dealt with later this year when the Commission presents its proposal for minimum criteria for asylum procedures. This question will have to have been answered by then with an eye to a future common asylum procedure.

Ladies and gentlemen,
I've focused my introduction on three essential points: the goal, interpretation and target group of the common asylum procedure. These three points need to be further elaborated in the time to come. Without a clarification of these points, the common asylum procedure will be nothing more than an abstract concept. I assume that the communication of the Commission will provide us with new insights and will stimulate the debate on this topic. But before the Commission presents its communication, we will kick off the discussion today and we will probably be able to shed some light on the common asylum procedure.
We have the advantage of being able to exchange ideas on the subject freely because, as I said, nothing has been determined yet and there is no pending proposal. What's more, the contours of a common asylum procedure have still to be defined. I hope that this unprecedented scope to present ideas, opinions and suggestions will be maximized today.

Maj-Inger Klingvall[1]

MINISTER FOR DEVELOPMENT
CO-OPERATION, MIGRATION AND ASYLUM POLICY OF SWEDEN

Mr. Chairman, Dear Colleagues,

The Tampere Summit represents an important landmark in the development of a common European asylum system. In its conclusions, it calls for a strong political will to implement the Amsterdam Treaty in the field of asylum policy. The Heads of State and Government sent a clear message to us. It is now time to show that we can live up to their conclusions by taking action and showing that we are willing to compromise in order to reach the goals set out in Tampere.

I see a need for a legally binding instrument on common asylum procedures in the European Union. Generally, the gap between rich and poor, safe and unsafe countries stands out when a large number of people arriving in the European Union seek asylum. The European countries represent human security and opportunities to many people in the world. **H**owever, this should not be looked upon as a major problem to us and an obstacle for harmonization. Such harmonization would rather solve several problems by ensuring that Member States would know that a certain common level regarding asylum procedures is being upheld in all Member States. This would not only lead to a guarantee of legal certainty, both for Member States and asylum seekers themselves, it would also have the long-term result of ensuring a natural sharing of responsibilities since each country would then attract asylum seekers on roughly the same terms. Furthermore, as an effect of the harmonized rules we should be able to fulfil our obligations to offer international protection as well as integration into our society.

[1] She is a member of the Swedish Social Democratic Party. Professionally speaking, she has always worked in the field of social affairs and in others related to it. Before being Minister for Development Co-operation, Migration and Asylum Policy, she held the post of Minister for Social Security, Health and Social Affairs.

The Treaty of Amsterdam requires the Council to adopt measures on minimum standards on a number of issues. The 1995 Council Resolution on Minimum Guarantees for Asylum Procedures constitutes a starting-point for discussions on a future instrument for asylum procedures.

However, minimum standards should not lead to a harmonization based on the lowest common denominator. The objective must be to achieve as high a level as possible and to reaffirm the basic principles of the laws on asylum and human rights. This was also stressed by the Heads of State and Government in Tampere.

We must live up to the European humanitarian values and make sure that we always guarantee each individual asylum seeker the right to present his or her case orally to an asylum officer without delay.

Furthermore, asylum procedures need to be particularly sensitive towards the needs of vulnerable groups, as for instance, in the case of traumatized women, disabled persons and children. In this context, let me mention that, in Sweden, if it is known beforehand that an asylum-seeking woman has experienced difficulties, she is guaranteed the right to a female asylum officer, a female interpreter and a female legal assistant. Moreover, professional help by, for instance, a psychologist is also offered.

The fundamental principles of the Convention on the Rights of the Child should be integrated and respected throughout the asylum procedure.

This was confirmed by the Heads of State and Government in the Vienna Plan of Action. In the light of this, it has been stressed in discussions on asylum policy that the principle of «the best interests of the child» should be included in the national legislation on asylum of each Member State. In this context, it can be mentioned that we have included a provision in the Swedish Aliens Act stating that in cases where a child is involved, special attention shall be given to the child's health and development and the best interests of the child is always to be clearly upheld throughout the asylum procedure.

By and large, this means that in all stages of the asylum procedure – reception, deliberations on family reunion and reasons for granting a residence permit – the best interest of the child is taken into account.

In the case of unaccompanied minors, their applications should preferably be dealt with by asylum officers specialized in children. It is also important that the procedure is fast. In my mind, it is important to uphold the fundamental right for everybody to seek asylum and guarantee refugee children the right to present their case orally and have their cases assessed on an individual basis. This principle is not only in accordance

with international instruments, but also in line with the Tampere Conclusions.

The Swedish asylum procedure is based on the principle of a single procedure. Let us not forget that the right to seek asylum is a fundamental human right, included in article 14 of the Universal Declaration of Human Rights as well as in other international and regional instruments. In line with common European values, Member States are to guarantee protection to people in need, which is why it is crucial that asylum procedures focus on the asylum seeker. In practice, this means that it is vital to make the asylum procedures as clear and simple as possible for the applicant. The question of whether an asylum applicant qualifies for protection under the Geneva Convention or for protection under some other international instrument, or is otherwise in need of protection, should be determined in one single process and, in my view, preferably by one authority.

The Swedish experience of applying a single procedure to assess an asylum application has proven to be both cost – and time – effective since work is focused on one authority. This ensures that an assessment of all the protection possibilities for the asylum seeker is made in a comprehensive manner and guarantees a high level of legal certainty. Furthermore, the possibilities of receiving a residence permit on humanitarian or on other grounds, such as family reunion, are automatically investigated.

The concepts of the Geneva Convention are the corner-stones of the asylum instruments in Sweden. In 1997, the Swedish Aliens Act was revised. The amendment included a wider interpretation of the criteria that an individual must satisfy to be considered a refugee. According to the new wording of the Swedish legal framework, not only does the Geneva Convention apply to individuals being persecuted by the State and its authorities, but it also includes the principle of a non-state agent of persecution as a ground for asylum. The main reason for this wider interpretation is the development of internal conflicts during the last decade with many actors involved.

Ensuring protection to an individual fleeing from persecution is part of our European tradition and this is also why I am especially pleased with the conclusions of the Tampere Summit, which urge us to base our future work in the field of asylum on the full and inclusive application of the Geneva Convention.

Not all European States recognize that persecution by a non-state agent justifies granting the refugee status according to the Geneva Convention.

This matter is important to me and that is why, during the Swedish Presidency, I intend to continue to work pursuant to the conclusions reached at the Tampere Summit, by emphasizing the importance of working towards the harmonization of European rules on asylum procedures and the inclusion of a non-state agent of persecution as a ground for granting refugee status.

There are situations in today's world that might not be covered by the provisions of this Convention. The Tampere Summit stated the need for subsidiary forms of protection so that we can fulfil our international obligations.

Sweden has found it necessary to extend the right to protection and adhere to other international principles. Thus, in our legal framework, protection is also granted to persons who 1) have a well-founded fear of corporal punishment, of being sentenced to death or of being subjected to torture or other inhuman or degrading treatment or punishment, 2) due to an external or internal armed conflict need protection and 3) because of their sex or homosexuality, have a well-founded fear of persecution.

In the light of the Amsterdam Treaty and the Tampere Summit, I think we should strive to include similar provisions for EU standards on subsidiary protection to form part of an European protection regime.

The principle of reaching greater coherence and attaining harmonized policies within the European Union in general is enshrined in the Amsterdam Treaty. The Tampere Conclusions specify the areas in which it is particularly important to reach common agreements. For instance, it was mentioned that the effort towards a common European asylum system should take into account minimum conditions of reception of asylum seekers. This matter will be a priority issue for the Swedish Presidency. A common goal for the Member States should be to enable the asylum seeker to live a dignified life while waiting for the outcome of his or her claim. Emphasis should be laid on enabling asylum seekers to be self-reliant. Meaningful activities should be available to asylum seekers so that they may benefit from them later in life, irrespective of whether they receive residence permits or are resettled in their countries of origin.

The Vienna Plan of Action focus on the importance of children's rights. Sweden has a long tradition of ensuring extensive rights to asylum-seeking children when it comes to the right to health and schooling, for instance. The right to attend school, as enshrined in the Convention on the Rights of the Child, is especially important both from the integration and the resettlement point of view.

Finally, let me conclude by emphasizing that an European instrument on asylum procedures should be harmonized at a high level and be in line with the proposals of the Tampere Conclusions and the Vienna Plan of Action.

Our common asylum procedure should be based on a single procedure. A common understanding of the interpretation of the Geneva Convention as well as the inclusion of a non-state agent of persecution is important in order to fully guarantee refugees the right to international protection. Furthermore, special focus needs to be placed on vulnerable groups in accordance with our common European values and international and regional commitments. Nor must we forget the links between the asylum procedure itself and other important factors such as reception conditions of asylum seekers.

Let me finally mention that, during the Swedish Presidency, we will be giving a seminar in March 2001 on 'Children in Armed Conflicts and Displaced Children'. There are also plans to hold a seminar on measures to attain a common European system on asylum procedures.

Nuno Piçarra[1]

PROFESSOR OF THE FACULTY OF LAW OF UNIVERSIDADE NOVA IN LISBON

1. I would like, of course, to start by thanking the Portuguese Presidency as well as the Commission for the honourable invitation to address such a qualified audience, together with the distinguished personalities sitting around this table, whom I take the opportunity to greet.

I am not exactly an expert in asylum law, contrarily to many of those who are listening to me, although for three years, while performing my former duties as delegate of the K.4 Committee, I have dealt with this subject on a regular basis. Therefore, what I propose to do is to give you my external and critical view as a jurist and an university professor, with no official position to defend – that was before –, on the issue of harmonization or uniformization of the administrative procedure or the contentious process of granting asylum, in the light of the applicable fundamental principles. Among these principles, I would highlight, for its particular relevance in this context, the rule of law, which, as you know, formally binds the European Union and its Member States by virtue of paragraph 1, article 6 of the Treaty on European Union (TEU).

However, I cannot help pointing out, even if briefly, some of the main consequences resulting from the «communitization», even if incomplete, of the subject «asylum», brought about by paragraph 1, article 63 of the Treaty establishing the European Community (TEC), as amended by the Treaty of Amsterdam. It is precisely this last point that I should like to focus on next.

[1] He worked in the Court of First Instance of the European Communities. He was member of the K4 Committee of the Council and is now Professor of Law in some Faculties of Law in Lisbon.

2. The issue of harmonization or uniformization of the administrative procedure and legal proceedings by which the Member States grant or refuse the right to asylum or the refugee status dates from at least one decade before its «communitization» under subparagraph d), paragraph 1, article 63 of the Treaty of Rome, according to which the Council will within five years as from 1 May 1999, adopt «minimum standards on procedures for granting or withdrawing refugee status in Member States». From among the effects this communitization will have on the handling of the issue at stake, I will highlight three.

Firstly – as opposed to what happened before –, any standards to be approved pursuant to subparagraph d), paragraph 1, article 63 will necessarily assume, just as any other Community standards, one of the typical forms provided for under article 249, namely that of a directive or a regulation, with their inherent legal efficiency and the possibility of control by the EU jurisdictions, which shall also be responsible for ensuring their uniform interpretation and implementation. This puts an end to the recourse to soft law, used up until now systematically for this purpose, with the consequent legal and political implications.

Secondly, by virtue of article 69 of the Treaty of Rome, together with the three additional protocols relating to the opt-outs of Denmark, Ireland and the United Kingdom, any standards to be adopted by the Council on asylum, as well as any other listed in the new Title IV of Part III of the Treaty of Rome, may not be applicable to Ireland and the United Kingdom, and will definitely not be applicable to Denmark, as Community legal standards. This raises the interesting legal question of whether to keep in force the various resolutions on asylum procedures adopted within the Union in 1992, 1995 and 1997, for as long as the United Kingdom and Ireland do not opt in as regards Community standards that may be approved on the same matter and Denmark does not adopt national legal standards with an identical content. Professor Hailbronner, a distinguished conference speaker in one of yesterday's sessions, answered this question affirmatively in a recent article.

Thirdly, the Council must carefully weigh the content of Community standards to be approved on asylum procedures in the light of the principles of subsidiarity and proportionality, by virtue of article 5 of the Treaty of Rome, together with the attached protocol relating to the implementation of those principles. Such principles are fundamental to ensure a certain degree of institutional and procedural autonomy which the Members States must maintain vis-à-vis the granting of a right like the right to asylum. As we'll see later on, this is not a right deriving from the Community legal

framework but rather from the legal frameworks of the different Member States, delimited by the applicable international conventions, and, first and foremost, by the Geneva Convention. Seen from this perspective, it's the distribution of responsabilities between the Community and the Member States that is at stake, and here it is worth recalling a case law of constitutional nature of the European Court of Justice, according to which «when the provisions of the Treaty or other community regulations confer powers or impose obligations on the Member States for the purposes of the implementation of Community law, the question of how such powers are to be exercised and whether the States may entrust the implementation of such obligations to specific internal authorities is solely a matter for the constitutional system of each State» (Judgement of 15 December 1971, International Fruit Company).

3. Having said this, I would now like to focus on the *Leitmotiv* of today's session, that is, the question as to whether – and I quote the programme – «the adoption of minimum standards for granting refugee status» should or not be seen as «a first step towards a future single European asylum procedure». In this regard, I would say – with due respect for, and hoping not to shock you – that, if we put it like that, this question is a false one, at least in the light of the applicable basic principles. And this without prejudice to the obscurity of the meaning of the wording «single European asylum procedure», to which I will also refer below. I shall explain why.

To this effect, I think it is important to start by recalling that the central idea of the rule of law is that the public power shall be subject to legal principles and rules that prevent its arbitrary exercise, thus ensuring the rights of individuals with regard to those powers. An essential dimension of the principle of the rule of law is the public authorities' duty to act according to procedures and processes that are equitable and legally adequate to the protection of the fundamental rights, although without questioning the need for their performance to be efficient.

By virtue of the same principle, any legislative, administrative or legal procedure or process must be structured with a view to achieving materially fair decisions. It is not surprising, therefore, that the administrative procedure and the legal proceedings are increasingly structured according to common principles that are corollaries to the principle of the rule of law. I shall mention only the most important ones, such as the principle of the individual to be heard, participate and co-operate in the cases that concern him, the principle of the right to defence, the principle of the right to information, the principle of the right to the protection of

personal data, the principle of conformity with the fundamental rights, the principle of impartiality, the principle of celerity, the principle of presenting the basis of the decision and the principle of guaranteeing access to the courts.

From this standpoint, the question initially raised gains a new shape, particularly on account of the fact that by virtue of paragraph 1, article 6 of the Treaty of Maastricht, already mentioned, the essential contents of the legal principles referred above is not at the disposal of the Community or its Member States, their observance being jurisdictionally guaranteed. Therefore, the adoption, at European Community level, of standards for the asylum procedure does not exactly mean to achieve, in a first stage, minimum common denominators – eventually unsatisfactory vis-à-vis those principles – and later, in a second stage, to aim at maximum common denominators between the Member States. The objective is, rather, and fundamentally, to establish, all at once, «common standards for a fair and efficient asylum procedure», to quote the well-pointed expression contained in the Conclusions of the Tampere European Council.

In light of this, the term «minimum standards» contained in subparagraph d), paragraph 1, article 63 of the Treaty of Rome is certainly inadequate and devoid of legal precision. Such category is not included in any of the known classifications of the theory on legal standards. However, the Tampere Conclusions, at least, point to the sense in which that term is to be correctly interpreted. On the other hand, it must be stated that the Treaty of Rome contains no provisions relating to a «single European asylum procedure», whether we know what it really means or not. Now, taking into account the enumerated powers of the European Community, it is not certain whether it can move towards an objective not provided for in the Treaty without a review of the same. This is the result of the Treaty's rigidity and its higher normative level in relation to the legislation adopted by the Community bodies.

In view of all this, I have serious reservation about point 9 of the document *Asile* 9 of the Commission, where it proposes a two-stage approach with a view to adopting «a first pillar instrument on asylum procedures», apparently guided by a logic of gradualness. But for me it's very important that, in the same document, the Commission itself omitted the term «minimum standards» and, instead, mentioned the establishment of «a certain level of procedural safeguards and guarantees that all Member States must comply with, for the purpose of procedural impartiality».

Let us add to the value of procedural impartiality, considered by the Commission as a criterion for establishing the «level of safeguards and

guarantees», the values of effective protection and equality among asylum seekers as well as of the value of equality of the Member States as regards the obligation to grant international protection.

They all unquestionably underlie the objective of setting up a common European asylum system with a view to reducing as much as possible the probability of having different decisions in similar situations as well as the concomitant secondary movements of asylum seekers. It becomes clear, then, that it is not a matter of establishing maximum or minimum levels of procedural safeguards and guarantees, but rather of establishing, according to the principles of subsidiarity and proportionality and in compliance with the rule of law and the applicable international instruments, the levels of procedural safeguards and guarantees as may be necessary and adequate to the implementation of such values. It should be pointed out that this is the only approach leaving room for the concern expressed by some Member States, and lately by the Swedish Minister, in the sense that the Community should not be satisfied with an instrument that is just the lowest common denominator acceptable to them all.

For the same reasons, I have the most serious doubts as to the feasibility of an approach corresponding to the second stage in the Commission's logic, «more prescriptive» and committing all Member States to «the exact application of the same procedure, so as to achieve a total harmonization», thus depriving them of any «margin for flexibility». I think that, apart from a greater or lesser difficulty in achieving a consensus on a Community legal instrument with such characteristics, it doesn't seem hard to prove that a total harmonization, in this sense, would at least be disproportionate to the desired goals. Furthermore, national procedures and proceedings are closely connected with the general administrative and judicial organization of each Member State. Accordingly, it is illusory to think of setting up an asylum procedure absolutely identical in all Member States, which would not take into account the considerable structural differences that still exist between them.

In reality, there are some similarities between this and the much debated issue as to whether in the Community legal framework the fundamental rights ought to be protected on the basis of a minimalist approach, that is, only in those cases where the legal frameworks of all Member States protect the fundamental right in question, or on the basis of a maximalist approach, according to which each and every right recognized by the constitutional systems of the Member States should be protected under the Community legal system. Here, too, after having given it some serious thought, that it's not a matter of maximum, medium or minimum

protection of the fundamental rights within the legal framework, but rather of the choice of the better law, that is, of the protection principle most suited to the constitutional identity and the particular objectives and values of the Community, which present some distinctive features which make them different from those of each Member State.

4. As stated above, the Tampere Conclusions are an important step towards a correct approach to the issue at stake, when describing it in the right terms: to establish «common standards for a fair and efficient asylum procedure» within the framework of a common European asylum system, as well as «Community rules leading to a common asylum procedure».

Following the Tampere Conclusions, the scoreboard meanwhile presented by the Commission has also abandoned the notion of a single European asylum procedure, replacing it by that contained in those same Conclusions.

The concept of a single European asylum procedure was enshrined for the first time in point 36 b) vi) of the Vienna Action Plan. It refers, in a rather cautious way indeed, to the «elaboration of a study with a view to identifying the benefits of a single European asylum procedure», without giving any definition of the same. We must therefore focus on that definition, starting by eliminating those meanings which, for one reason or another, cannot be contained in it.

The concept of a single European asylum procedure cannot, surely, be understood as a federal procedure, as I would call it, by means of which it would be the European Community and not the Member States who would grant third-country nationals the right to asylum, through a central body set up for the purpose. This could actually be an acceptable solution from both the logical and the pragmatic point of view: if the granting of asylum becomes an European affair, then the assessment of asylum applications, as well as the control of the decisions made in respect of the same, could or should take place at central level. However, within the current legal framework of the Community, this possibility is totally excluded by article 63 of the Treaty of Rome, pursuant to which the formal granting of the right to asylum is solely incumbent on each Member State, even though all Member States undertook, under the same provision, to do it in an harmonized manner in institutional as well as in procedural terms.

It should be remembered, in fact, that ever since the historical creation of the Nation States, it is they and no other political body who are solely responsible for granting and withdrawing the right to asylum. The right to asylum is a right inseparable from the State's territory.

On a purely theoretical level, it is not inconceivable that a group of States should decide to transfer to an international or supranational organization their original power to grant asylum, and that from then on that organization would, through a central body and according to a single procedure, be solely responsible for granting refugee status to third-country nationals or to stateless persons within the territory formed by the group of the Member States of the said organization. This is, after all, what happens in the model of federal State, where the power to grant asylum is solely exercised by a federal authority for the whole territory of the federation. The United States, Germany and Austria are a good example of that reality.

But as we saw, this is not at all the model aimed at by the Treaty of Rome. Besides, the hypothetical and more than unlikely choice of such a model would not just call for a revision of the Treaty, it would also mean having to revise the Geneva Convention and the attached Protocol which only admit States as Contracting Parties, as well as the constitutions of several Member States in which the right to asylum is enshrined as a fundamental right. And it could very well be that unbridgeable barriers would be encountered in such a constitutional revision.

I wouldn't like to continue dwelling on the major improbabilities: the right to asylum, by its own nature, seems to be a barrier to the federalisation of the European Community impossible to surmount.

In view of the underlying political reality, only with a large degree of imagination and no realism at all could we expect the Member States of the European Community to transfer to the latter their competence in asylum matters, and such power to be exercised by a Community institution similar to the present German or Austrian *Bundesamt*.

And this, regardless of the huge additional problem that the territorial distribution of those enjoying the refugee status granted centrally by the European Community would represent, in comparison with what happens in the federal States already known.

However, I can't help making a very brief and timely comment on the progress of the work on the draft of a Charter of Fundamental Rights of the European Union, where, as you know, the right to asylum is to be included. The discussion on the provision for such right reflects, to a large extent, the issue we were just analysing. This debate has focused on the choice between a formulation according to which – and I quote – «third-country nationals are entitled to asylum in the European Union» and a formulation pursuant to which – and I quote – «third-country nationals are entitled to asylum in any Member State of the European Union».

The draft Charter, in its version of 5 May 2000, still included the first formulation, whereas the more recent one, dated 4 June, favours a third compromise solution, according to which – and I quote – «the right to asylum is guaranteed in accordance with the Treaty of Rome and in compliance with the provisions of the Geneva Convention and the New York Protocol, as well as of other relevant treaties».

It is worth noting that this third and more recent formulation came up after a number of proposals were submitted to the Convention charged with the preparation of the Charter, some of them defending the first formulation, others in favour of the second wording. Among these last proposals, it is interesting to mention that of Jean-Luc Dehaene, personal representative of the Belgium Government to the Convention, submitted on 8 May last. I fully support his justification for preferring the second formulation: «in the absence of a true right to asylum in the Union, it is technically more correct to designate that right by the wording right to asylum under the terms of the law of the Member States of the European Union».

Also with regard to the definition of a single European asylum procedure, it should be noted that in point 11 of the Commission working document *Asile 9* the expression «single procedure» is used to refer those cases where the object of an individual process of refugee status determination under the Geneva Convention may be extended to the granting of alternative forms of international protection. This «single procedure» is aimed at preventing an asylum seeker, whose claim has been refused, from having to initiate a new administrative procedure in order to obtain some form of international protection, different from that granted under the Geneva Convention. It is not in this sense, either, that the concept at issue is used in the Vienna Action Plan.

It may be concluded, therefore, that according to point 36 b) vi) of the Vienna Action Plan, the single European asylum procedure is a totally uniform procedure applicable in every Member State, leaving them without any margin for institutional and procedural autonomy. As it was said before, apart from being totally unrealistic, I don't think that such an integrating and centralizing view of things is even compatible with the present constitutional foundations of the European Community and its Member States.

5. From all that has been said, I would draw the following conclusion: if the basic values to be safeguarded in the context under consideration are a fair and equal treatment of asylum seekers in all Member States, as well

as the principle of the latter being equal vis-à-vis the common obligation to grant international protection, the Member States themselves will have to understand that a presumable minimum common denominator in the applicable asylum procedures would not necessarily guarantee the desired equality, just as a presumable maximum common denominator would restrict, in a disproportionate manner in relation to the desired goals, the institutional and procedural autonomy that they should continue to have. Therefore, it is very important that the Member States stop acting as suspicious negotiators, because otherwise the result will inevitably take the form of a directive but have the content of a regulation, capable of turning the national parliaments into mere notary publics in a domain so sensitive as that of the harmonization of the laws. The Member States must look for, together with the Commission, the fundamental features of a thorough, fair and balanced procedural regime, which is neither characterized by the temporariness of presumable «minimum standards» nor throws them into the negotiation of an unfeasible «single European asylum procedure».

On the other hand, one must bear in mind that the harmonization of asylum procedures in the Member States is a necessary but not sufficient requisite for achieving the underlying goals. To do this, it is also necessary to harmonize a number of substantive aspects and, in fact, it is sometimes difficult to separate these from the procedural aspects. I am thinking, in particular, of the reception conditions of asylum seekers in the Member States as well as of the refugee definition under subparagraphs b) and c), paragraph 1, article 63 of the Treaty of Rome.

It is unquestionably a major challenge, but it is one that, in due time, the European Union and its Member States can and should successfully win. I sincerely hope they will.

Jack Straw[1]

HOME SECRETARY OF THE UNITED KINGDOM

1. Let me begin by thanking the Presidency for their very hard work during the past six months to make progress towards the goal we set ourselves at Amsterdam. The Portuguese Presidency has made significant steps forward in the field of asylum and I have no doubt that the forthcoming French Presidency will do likewise.

THE ISSUES FACING MEMBER STATES

2. Like many Member States, the UK has faced a sharp increase in asylum applicants – and rising public concern as a result.

3. We are all still receiving large numbers of genuine refugees. In those cases it is absolutely clear that Member States must continue to meet their obligations under the Geneva Convention to provide protection to those individuals.

4. But we are also seeing an unprecedented increase in the number of economic migrants arriving in our countries who are being facilitated in many cases by a highly organized people-trafficking criminal industry.

5. In some Member States the massive increase in the movement of economic migrants is putting a severe strain on the asylum determination process. So much so that, in the UK for example, an asylum seeker with a well-founded claim might, until our new legislation and processes recently came in, have waited for as much as 5 years before receiving refugee status. Despite the increase in applications, the UK had by the end of last year got the average delay down to 13 months compared with

[1] He was appointed Home Secretary in May 1997, the office he held at the time this conference took place. Before that he was the «Shadow» Home and Environment Secretary. He is member of the Parliament since 1979.

2 months in April 1997. Now we are processing unprecedented numbers of applications – 11,000 a month compared with less than 3,000 a month in the last quarter of last year, and are getting down the backlog.

6. It is unacceptable for genuine refugees to have to wait years for a decision. And it is unacceptable to expect taxpayers to bear for a prolonged period the cost of supporting asylum applicants who do not qualify for refugee status.

7. So it is essential that we take action to deter economic migrants from posing as refugees, in order to restore the integrity of our asylum procedures.

8. It has become increasingly clear that these are problems for the European Union as a whole. A key to their solution is for Member States to work more effectively together.

9. It is on this basis that, in responding to the protocols agreed at Amsterdam on the UK's position on frontier controls and the Free Movement Chapter, I made clear, in March 1999, that the UK would in principle participate actively in asylum policy. This has indeed been the case: we have opted in to the EURODAC Regulation, the European Refugee Fund Decision and the negotiation of a parallel Dublin Convention with Norway and Iceland.

HARMONIZING ASYLUM PROCEDURES

10. One of the key features of the growth in unfounded asylum claims has been the phenomenon of «asylum shopping» – secondary movements of asylum seekers between Member States, sometimes making several applications as they go, to find the most amenable Member State.

11. The Dublin Convention is, of course, partly designed to deal with that. But the Dublin Convention can provide only part of the answer. What we must do above all to curb asylum shopping is to change the behaviour of those seeking asylum. And the best way to do that will be to remove the incentives to shop around.

12. That means removing the differences in the way we receive asylum seekers, in the consideration procedures, and in the way we determine their claims.

13. I am pleased that so much progress has been made on the EURODAC system to share fingerprint information and I look forward to a rapid conclusion of our discussions on the Refugee Fund.

14. I hope that very soon we will see progress on the core elements of harmonization in Article 63 of the Treaty: minimum standards on asylum procedures, the reception of asylum seekers and qualification as a refugee.

Implementation in those areas will be the key to ensure uniform treatment of asylum seekers across the Union.

15. But we have a more ambitious long term goal. We agreed at Tampere to work towards a common European asylum system. Let me mention two issues which I believe will be vital to ensure success.

REFORMING THE ECJ

16. Firstly, many of you will be aware that there is now a wide range of work underway to improve the operation of the European Court of Justice (ECJ).

17. The current IGC process provides the opportunity to deal with any elements which require an amendment to the Treaty. I believe that this reform is vital to the efficient handling of asylum cases, not just in the UK but right across the European Union.

18. The UK is not alone in having a sophisticated – and sometimes over lengthy – judicial overview of the asylum process. Nor are we alone in having by law to halt decision-making while test cases go through the courts.

19. It is, of course, perfectly proper for asylum applicants – or a Member State – to have a right of access to the ECJ where a domestic court identifies an issue subject to Community law which needs clarification.

20. But preliminary references to the Court currently take an average of 21 months to be dealt with.

At a time when we are all working hard to improve the efficiency of our asylum processes, we cannot allow this right of access to cause asylum cases to become bogged down for months if not years on end in addition to the delays which occur in each Member State.

21. It is all too easy to imagine the damage to our asylum systems if delays of this magnitude were multiplied right across the European Union.

22. I have raised this issue on a number of occasions recently and I have been pleased that other Member States have agreed that it needs to be given priority. I am confident that we can work together to ensure that the reform of the Court is consistent with the move towards a common European asylum system.

1951 CONVENTION

23. The second issue I want to raise is even more important as we move towards a common asylum system: our approach to the 1951 Convention. How do we ensure that the processes we employ are true to the spirit of the Convention and, at the same time, are effective in dealing with contemporary circumstances?

24. At Tampere, we collectively reaffirmed our *«absolute respect of the right to seek asylum». And we agreed that the common European asylum system would be based on the «full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution»*. There can be no retreat from that commitment. The protection of those at genuine risk of persecution must be – for all civilized States – a fundamental moral imperative.

25. The right to seek asylum is enshrined in the Universal Declaration of Human Rights.

26. But the context inevitably changes. Even those who drew up the 1951 Convention were exercised by the need to balance the individual right to protection with the management of large flows of people migrating for diverse reasons.

27. They were concerned, too, with what we now have come to call the «balance of effort» among receiving States. It is this, I understand, which motivated the inclusion in the 1951 Convention of the provisions guaranteeing access by refugees to such things as work and social benefits.

28. Since then the world has changed unrecognizably. The Cold War and the spheres of influence for the West and the Soviet bloc led to closed borders across the continent of Europe, and the suppression of instability in many client States in Asia and Africa. For almost 40 years following the Second World War the UK never received more than 4,500 asylum applications a year. We then saw a tenfold increase within the span of 2 years. On the continent, the increase in asylum flows and illegal immigration was even more dramatic for many Member States. Rapid communications and ease of travel have speeded up migratory flows and added to the attractiveness of European States, and others, as targets for migration. At the same time, all developed countries have, since the 1970s, severely restricted primary migration, given the changing balance in their economies and work-forces.

29. For some, the large-scale abuse of asylum processes, and the growing exploitation carried on by the human traffickers, represent one of the few means of securing physical entry to a Member State. At the same time they threaten not only legitimate immigration controls but also the credibility in the public mind of the institution of asylum itself.

30. We have to work together to tackle these problems, both at the level of the European Union and in the wider international community. And we have to look, critically if need be, at the part which the 1951 Convention – and other international agreements – play in the overall management of our response. For the most part I believe the problem is not what the 1951 Convention says, but what it doesn't say.

31. For example, the Convention gives us the obligation to consider any claims made within our territory, however lacking in substance, but no obligation to facilitate the arrival on our territory of those who wish to make a claim, however genuine and well-founded. There is, of course, no right under the Convention for refugees to choose a particular destination on the other side of the world and travel to it. But in practice there may be very few legitimate options open to them. The result is that many genuine refugees, as well as unfounded applicants, are forced to break our immigration rules and our laws in order to have their applications considered.

32. By article 31, the Convention provides immunity from prosecution for breach of those laws for anyone who is able to establish their claim as a refugee. But the Convention does not itself provide the means to deal with abuse of the obligations which it creates and the way in which it is applied is critical to tackling that abuse. Over-elaborate, over-legalistic, costly, delay-prone processes with multiple opportunities for argument and appeal are a godsend to the opportunistic claimant, but should not be necessary to enable us to recognize the genuine refugee.

33. So there is a contradiction at the heart of the operation of the 1951 Convention. An instrument designed to give effect to the principle of the international rule of law in turn operates to undermine other aspects of the rule of law, and in some circumstances, and inadvertently, positively to feed serious criminality. It is not beyond reason for us to find a better way.

34. We could all, at individual Member State level, take steps to simplify the procedures for deciding refugee status as much as possible, without infringing our international obligations. But the Tampere Conclusions give us a golden opportunity to reinforce our national-level action by drawing up common standards on asylum procedures.

35. These should be, in the UK's view, simple procedures which ensure the swift identification of genuine refugees. They must also be robust in dealing with unfounded claims. That means rapid refusal and removal. Likewise, the Convention does not itself provide a framework or even a set of principles for determining where asylum should generally be sought. There was no expectation in 1951 of massive intercontinental migratory movement. The assumption was that most refugees would be protected in neighbouring countries in the same region. That often remains the better solution today. Indeed, developing countries, particularly in Africa, have also faced severe difficulties as a result of localized mass influxes in recent years.

This debate must acknowledge that the burden of refugees and applicants has often been much greater in countries in the Southern hemisphere and

in Asia than it has in Western Europe, and that we should therefore approach the issue from a world and not an exclusively Northern hemisphere perspective.

36. We need to do all that we can, through the United Nations and more directly, to bolster and support States around the world who receive these major influxes – dealing with them, whenever possible, primarily as regional problems. And we need to look more deeply at the underlying causes of migration. This is why I particularly welcome the work of the High Level Working Group which, for the first time at EU level, seeks to address the «horizontal» dimensions of migration – development, foreign policy and immigration – in order to seek practical solutions.

37. Could we not find a more rational approach to the granting of protection? I believe the time has come for an international debate, involving Member States, UNHCR and others, with that aim. We learnt from the Kosovo experience that it is possible to agree on a humanitarian evacuation programme to cope with a particularly acute situation. I suggest we could draw on this. But I also suggest that we be clear what we are and are not debating. In our view, we should not put up for debate the fundamental obligation on signatory States under the 1951 Convention not to send back those who can show a well-founded fear of persecution. But what we should debate is the changing geo-political, economic, social and legal circumstances in which that fundamental obligation should be exercised.

38. If my premise is accepted, then we might envisage a situation where the EU, at the level of the Council of Ministers, advised by the Commission, and with the help of UNHCR, identified countries and ethnic groups within them facing a high level of persecution, and agreed quotas for each EU State to consider applications for asylum made outside the receiving State. At the other end of the scale we would establish a list of safe countries – which would include all EU States, the US, Canada, Australia and many others – from which applications from nationals would not be considered. And there would be a third, intermediate group – including the accession States and others – where there would be a general presumption of safety and so any asylum claims would be considered under an accelerate procedure.

39. This categorization would be very different from that which has operated within certain Member States to draw up lists of countries of manifestly unfounded claims. Those lists have varied and are often lacking in practical effect and can themselves encourage asylum shopping. In contrast, the very process within the EU of determining the categorization

of a country would force the Union to consider other action to redress the cause of instability, the «push factors» in those countries, and methods by which that could be reduced. And the process would certainly help UNHCR adjust its priorities for activity and intervention around the world.

CONCLUSION

40. If we value the principle of asylum we must be prepared to face the serious questions.

41. We need a new debate, one which is prepared to look at all these linked questions together: how do we best promote the protection of those in real need; how do we deal effectively with abuse and exploitation; what is the right international response to flows of people; how do we achieve better, simpler, quicker systems that are fair and work? And how can we in the EU maximize our ability to work together to ensure the delivery of these aims and aspirations?

42. Chairman, in conclusion may I thank you, the Commission and the Presidency – for the opportunity to contribute to this essential debate.

CLOSING SESSION

Jean-Marie Delarue[1]

DIRECTOR OF THE PUBLIC FREEDOMS AND LEGAL AFFAIRS DIRECTORATE

Ministers:

Thank you very much. It's the contingencies of the calendar that make me take the floor, for the French Presidency will begin in a fortnight. As you might have noticed, it starts on a weekend, the prospect of which is good provided it is not a complot. In these few minutes, I would just like to remind you the intentions of the French Presidency as well as the limits of its exercise. I entirely agree with what Professor Piçarra said before. On one hand, we are limited by the legislation in force and, on the other, as we know, the European construction lacks pace. It is not adapted to the problems we are confronted with. We will have to show both ambition and realism, and bear in mind that the States will have to respect asylum procedures for a long time still. That is why it is so important, first and foremost, to work for harmonization.

Let me also remind you that Europe, representing approximately 6% of the world population, admits into its territory about 15% of the total number of refugees in the world. Europe is not starting from scratch, though. Significant efforts have already been made, namely through the Ad Hoc Working Group set up after the London meeting in 1986, the creation of the CIREA Group, the Dublin Convention, as Minister Straw reminded us, and the creation of the EURODAC system, which has still to be implemented. The essential part, however, remains to be done and I think that all the important issues that were sensibly raised in this Conference call for strong and practical measures.

[1] Sociologist, he has always worked in the field of social affairs. He is, since 1991, vice-president of the *Conseil National de l'Information Statistique* and, since 1994, member of the *Conseil Supérieur de l'Emploi, des Revenus et des Coûts*. In 1997 he accepted the post he presently holds, namely the post of Director of the *Direction des Libertés Publiques et des Affaires Juridiques*, Ministry of the Interior.

The French Government fully agrees with the Tampere Conclusions, which were actually preceded, as you might recall, by a joint declaration from the British, French and German Governments. These Conclusions ought to be remembered mostly because of two of their elements.

The first element is that asylum is a corner-stone of a structure consisting of three other elements, which cannot be dissociated from the former and without which asylum would make no sense. Altogether, those four elements are a response to what Minister Straw was just saying. The first element is made up of those ties that link us to the countries of origin, namely the co-development policy. This is no revolutionary idea, but one should not forget that without such requirement for long-term development in the countries of origin, the number of unfounded asylum claims will not decrease. The second element is the integration of third-country nationals whose situation has been legalized, namely by obtaining the citizenship of the host country.

Finally, the third element is the steering of migration flows.

As far as the asylum policy is concerned, let me underline that none of these four elements may subsist separately from the others.

However, in order to be more precise, I should add that the asylum policy itself only makes sense in combination with other policies, namely, external, diplomatic, development policies and policy of support to the general development of governmental and non-governmental organizations. Our work during these two days was focused on the issue of asylum, but we should not neglect all the remaining context.

The second element of the Tampere Conclusions that particularly concerns us is the respect for international law. Point 13 of the Tampere Conclusions specifically states that the common European asylum system will be based on the full and inclusive application of the Geneva Convention. We must not overlook any point in this Convention and, building on what Jack Straw said a moment ago, I would add that this applies to every single point, be it explicit or implicit. Despite the fact that there is much to be said about the Geneva Convention, we cannot turn our back on a convention which, in my view, has perfectly managed to survive the fifty years it has just celebrated, even though its overall context has gone through major and profound changes.

In line with the Tampere Conclusions, the French Presidency will make every effort to work out the necessary compromises with a view to achieving the goals set out in article 63 of the Amsterdam Treaty and its conclusions, namely points 14 and 16.

The French Presidency wishes particularly to bring to a speedy and fruitful

conclusion the debate on the European Refugee Fund. We think it is possible to reach some compromises in this respect. The Presidency intends to actively pursue the work of the High Level Working Group on Asylum and Migration. I heard the criticism that was made yesterday in this regard and my opinion is that this is a truly difficult task. Surely it is preferable to carry out effectively and efficiently those measures that have already been decided before venturing into any new plans of action.

We also intend to foster the work of the existing institutions, such as the CIREA Group and the CIREFI Group.

The French Presidency is also willing to promote debates, with the support of the Commission, on the conditions of reception of asylum seekers. In other words, we are willing to start as soon as possible the reflection on, and possibly the implementation of the harmonization of such reception conditions. I hope that until the end of the year the Council of Ministers will advance some useful conclusions in this respect. If the harmonization of procedures begins with the reception conditions, so much the better. But one has to bear in mind clearly that the task of harmonization is a very complex one, and I would like to point out to some of the speakers, particularly from yesterday's sessions, that we cannot just blame the passivity of one or another State with regard to asylum, but rather the different complexities of each one of our systems.

Harmonizing the asylum application procedures means, for example, having to harmonize the judicial procedures, and we are all too aware of the diversity of our national judicial systems. So, there are a number of problems that we have not yet solved. This issue cannot be viewed in terms of passivity with regard to asylum.

Equally urgent, in my view, is the swift implementation of the EURODAC regulation, a practical, useful and effective tool, particularly as regards fraud prevention.

It seems important to me to reach compromises on all these points, without neglecting others that were pointed out, namely by the British and the German Ministers. I think we have to work on the issue of temporary protection.

The French Presidency, and more specifically the French Government, were reticent about the idea of temporary protection, for we believe that the multiplication of protection levels contribute in fact to weaken the Geneva Convention.

I can publicly testify here that the French Presidency will without doubt assume its responsibilities in this respect, namely by bringing to a successful conclusion the debate on the document presented by the Commission,

which seems to us excellent. However, I have to warn you right away that we shouldn't lay too much hope on temporary protection. I am thinking in particular about the issue raised a few moments ago by Minister Straw. We shall not be able to solve the problem of false asylum claims by means of temporary protection – we might be able to solve other problems but not this one –, but this fact shouldn't stop us from committing ourselves seriously to this issue. I shall end my short presentation, even though there was still much to be said about everything that was discussed in here, by telling you that the French Presidency will modestly follow the footsteps of its predecessors. I would like to highlight the merit of those who preceded us in recent years – the United Kingdom, Austria, Germany, Finland and, of course, Portugal, whose Presidency I want to congratulate not only on the excellent work done but also on its sense of opportunity in gathering us here to discuss the issue of asylum. I believe that the simple fact that this Conference has been held is already an important step forward towards solving the problem of asylum in Europe. Thank you very much, Mister Chairman.

António Vitorino[1]

COMMISSIONER

Minister Fernando Gomes,
Ministers,
Ladies and Gentlemen,

Let me first, on behalf of the Commission, thank the Portuguese Presidency for this initiative.

We all know that the task of presiding over the European Union during six months requires a lot of stamina. By organizing a conference like this at the end of the Presidency, namely in face of the weather we have in Lisbon today competing unfairly with us, the Portuguese Presidency clearly shows a strong commitment and a great strength of will, which I would like to commend in particular.

The Commission praises the Presidency not just for the actual theme of the conference, but also for the chosen methodology. In other words, in a meeting like this one, the possibility of participating in the exchange of opinions and views between the Member States' ministerial officers and the representatives of non-governmental organizations and of the civil society on an issue which I, sincerely, believe to be central to the European political debate and, to a certain extent as well, a mirror of the idea that we Europeans have of ourselves, as human beings, and of our political responsibilities in today's world.

As we all know, the past few years were marked by extremely serious events, which according to some observers led to a crisis of the asylum system. Naturally, I am talking about the tragic human consequences of what happened in Bosnia-Herzegovina and Kosovo, but we shouldn't forget the events in Iraq and Albania as well. To some extent, these events have hastened the need for a debate about asylum, but we shouldn't

[1] He is since 1999 member of the European Commission where he is responsible for Justice and Home Affairs. He has held several political offices along with his academic and professional career. Between 1995 and 1997 he was Deputy Minister and Minister of Defence of Portugal.

forget that there is a close and intimate relation between the said crisis of the asylum system, or, more generally, of the international protection regimes, and what some observers consider as the adverse effect of the lack of a real immigration policy on the part of the European Union and its Member States.

As already mentioned by the representative of the coming French Presidency, we should avoid having an excessively euro-centered view on this issue, for European Union countries only deal with a small part of the many millions of refugees and displaced persons world-wide. But the truth of the matter is that today, even at such a small dimension, the issue of asylum is politically highly sensitive.

It's a sensitive issue from the political point of view for the public opinion of the different Member States, for their representatives, as well as for the future of the European Union, so I think it is only fair to recognize that, in Tampere, the Heads of State and Government were probably clearer and more ambitious when they dealt with asylum issues than when they looked into other matters in that same Council meeting.

I think the Tampere Conclusions make us define a common asylum policy which, on one hand, is loyal to our traditions, that don't let us refuse freedom and protection to those who rightfully seek refuge in our territory, but, on the other hand, is based on clear principles, so that it may count on the active support of our fellow citizens in the Member States.

These generous goals laid down by the Heads of State and Government in Tampere are enshrined in the formulation of an objective, contained in the said Conclusions, referring to the need for a common European asylum system. In order to meet this challenge, the Commission presented to the Council a scoreboard on which the specific initiatives considered fundamental to the realization of this project are listed.

Let me briefly describe those initiatives that have already been presented. In the first place, as Minister Jack Straw reminded us in his presentation, there's the EURODAC regulation, which has been submitted to the Council in June and is now waiting to be submitted a second time to the European Parliament with a view to being adopted under the coming French Presidency, as Mr. Delarue, the French Presidency's representative, has just confirmed. Let me say that the Commission is not sitting back waiting for the conclusion of the legislative process. On the contrary, it has already started the consultations necessary for the development of the infrastructure projects essential for a computerized system for the storage of fingerprint data. So, I'm quite confident that the vicissitudes of the legislative process will not change our working calendar.

The second proposal that the Commission has already put on the table concerns the European Refugee Fund. This is an instrument aimed at supporting, on a multiannual basis, the efforts made by the Member States in matters of reception, integration and voluntary return of refugees, asylum seekers and displaced persons. It is true that this Fund has well-known budget constraints, but I hope that an agreement may be reached on the regulation concerning the Fund so that we may send two important signals. Firstly, that we are defining a policy based on the principle of solidarity between the Member States, and secondly, that this Fund has two specific objectives.

The first objective is to support structural measures with a view to improving the Member States' infrastructures and administrative capacity so that they can cope with refugee flows, by allocating the resources proportionately to the actual number of refugees each Member State receives, but also by taking into account the need for some Member States that do not have a well-developed tradition or experience in receiving refugees to make good some disparities in this area. The second objective of the Fund is to finance emergency measures, that is, a financial aid given by the European Union so that we may be duly prepared to deal more efficiently with mass influx of refugees, a situation which is naturally, by definition, unpredictable, but which has already occurred in the past, namely in Bosnia and Kosovo, and which taught us to be prepared to handle the crises instead of just sitting back while waiting for them.

The third instrument already on the table is a working document whose purpose is to assess the implementation of the Dublin Convention. It is, today, within the European Union the instrument that enables to determine the Member State responsible for examining an asylum application lodged in one of the EU Member States. From our point of view, the objective of this working document is not just the communitization of the Dublin Convention, but also the introduction of substantive amendments to that Convention, in order to improve the implementation of the legal framework for the determination of the State responsible for examining asylum applications. I expect that, if the debate goes well during the French Presidency, as I hope it will, the Commission will be ready to bring forward a legislative proposal on a Community regulation to replace the Dublin Convention at the beginning of next year, under the Swedish Presidency.

The fourth legislative instrument deals with temporary protection, in other words, it is a legal mechanism for responding to mass influxes of

displaced persons. One has to acknowledge that the Union has a negative record in this respect. We have attempted on several occasions to establish common platforms for assessing this issue, but they failed. I hope that our political sensitivity and the lessons drawn from Bosnia and Kosovo will help us overcome the difficulties and find a feasible compromise. I know that the temporary protection regime does not solve structural asylum issues and, I must say, the Commission does not intend to solve those issues with the temporary protection regime. But our intention is to point out that it is politically important that the Member States clearly define what framework would be applicable in case of future mass influxes of refugees owing to crises which, at this moment, we cannot foresee, but which could in fact occur in the future.

There are two other complementary instruments that we have been working on, and that are worth mentioning. The first concerns the High Level Working Group on Asylum and Migration, which reports directly to the Council. This Group promotes a strategy, supported by the Commission, which seeks to deal with asylum and immigration problems primarily from a preventive point of view, in the light of the so-called co-development policy.

There are two points I should like to highlight concerning the High Level Working Group. In the first place, the necessary actions taken to prevent migration flows and, eventually, flows of refugees and displaced persons, should not only depend on actions taken by the European Union but also on the direct involvement of each Member State, through their own bilateral relations with the countries of origin or transit. The second point I should like to draw attention to is that the Commission has already included a comprehensive list of the measures and actions that may be carried out within the framework of the development co-operation policy, the economic policy, even the humanitarian aid policy concerned with the prevention of migration flows and the situation of refugees. But I want particularly to welcome the fact that it was possible already to define the type of actions that Member States too will have to take in the coming months, in this same area. I hope that both the European Parliament and the Council are ready to approve, in the 2001 budget, a first proposal for a specific budget line for the countries, mainly as regards the five action plans already adopted, to improve their own administrative capacity and deal with asylum and migration issues.

As regards family reunion, this is an issue, one must admit it, that still divides very much the Member States. There are many differences between them but, at least, there's an ongoing debate – this is already the sixth

initiative the Commission puts on the table since the Tampere Council – on family reunion. I hope that under the French Presidency a political consensus may be reached which is not just that of the minimum common denominator, for if all the Member States share the idea that family reunion is an important tool for an integration policy of the immigrants in the host countries, one must be able to draw the necessary consequences from this common assessment the Member States make of the instrument concerning family reunion. The minimum common denominator approach would not bring an extra value to the integration policy of the immigrants in the host communities. I am aware of the difficulties. The Commission is ready to look for compromises on this matter, but we do consider this to be a corner-stone of the immigration policy.

Ministers, I have talked about what has already been offered for consideration. It is not my duty to judge whether it is too much, or too little, in the light of what was decided in Tampere. But I think that the ongoing debate, to which this conference, today, has much contributed, gives us a clearer idea of what direction the Union may take in the next four years.

In the first place, Tampere refers to an asylum strategy in two phases or two stages. At a first stage, to formulate minimum common standards on a number of issues. At a second stage, to adopt a common European procedure on asylum. I believe the legislative instruments already on the table are the basic structure of the first stage of the Tampere mandate. And I'm sure that if we complement them with two further instruments, one already mentioned by the representative of the coming French Presidency – minimum common standards on the approximation of the reception conditions for asylum seekers –, and the other, about standards relating to the granting of other forms of international protection, the so-called subsidiary forms of international protection, we shall be equipped with the essential legal framework of the first stage of Tampere.

Let me also tell you clearly what is the Commission's view on this subject. I think article 63 of the Amsterdam Treaty and the Tampere Conclusions are quite clear. They are not at all ambiguous and they stipulate that measures on asylum matters must be based on a full and inclusive application of the Geneva Convention. That is the Commission's commitment. Let me also say that while I understand that many are committed to jointly defending the application of the Geneva Convention, I think it would be wrong if that wish to apply the Geneva Convention should lead us to counter any attempts at responding to new phenomena occurring in the areas of asylum and migration. I don't think it would do any good to the defence of the overall international protection system if

instruments like those of temporary protection and subsidiary protection were excluded.

Aiming at the second stage of the Tampere mandate, the most ambitious one, where a common European asylum procedure is to be presented, it is the Commission's intention to submit, until the end of the year, as expressly requested by the Tampere Council, a communication on a common asylum procedure and an uniform status for persons granted asylum, valid throughout the European Union.

I know there are those who believe that such an approach is stimulating, but unrealistic: to talk about a truly single area as regards asylum, where each person seeking some form of protection would benefit from the same reception conditions, and would be subject to a similar procedure leading, according to common criteria, to the granting of harmonized statuses, whether it be the refugee status under the Geneva Convention or other specific forms of protection, independently of their name. Of course, this approximation would also be made in respect of the reasons given for rejecting asylum claims and also as regards the conditions for return. According to the Tampere Conclusions, the factors likely to influence the so-called secondary movements of asylum seekers between Member States, would certainly be reduced, or even eliminated, if there were a common asylum system. Only the influence of historic or linguistic links with the regions of origin would remain as a determining factor of refugee flows, but to cope with that we'd have to improve the mechanisms of intra-European solidarity. In a common asylum system, the need to determine the Member State responsible for examining asylum applications would, in itself, become less pressing. Lastly, this strategy would be based on an external policy aimed at the stabilization and development of the countries and the areas which are the source of the stronger pressures, real as well as potential.

The Commission is committed to complying with the Tampere mandate, ambitious and difficult as it is, but it is also aware that the said communication on the fundamental of a common European asylum procedure cannot be considered without, at the same time, defining the basis of a common immigration policy. So, concomitant with the communication on a common asylum procedure, the Commission intends to issue a communication on immigration policy, taking into account its economic, social, humanitarian and family dimensions and bringing it fully in line with the challenges deriving from the new economy and the reform of the social and economic model of the European Union, clearly undertaken by the Lisbon European Council held in March of last year.

As I said, some believe this to be an utopian strategy. Still, with such difficult and complex areas as those of asylum and immigration, it doesn't make any sense to move forward tentatively. We must know what are the values that guide us and what profound sense determines our actions. In order to know whether we are ready to face the difficulties, as well as the stimulus of this political debate, the Commission is ready to contribute by presenting the two communications I mentioned before.

I hope it will be possible to hold this debate in the coming months, for it is the actual pressure of the situation we are living in that forces it; it is a debate that European public opinion demands. And I think it is a debate where we must be loyal to our traditions, but above all assume our responsibilities towards the future.

CONCLUSIONS

Fernando Gomes
MINISTER OF INTERNAL AFFAIRS OF PORTUGAL

Now that we have come to the end of this Conference on the theme «Towards a Common European Asylum System», where excellent contributions were made, both technically and politically, resulting in very fruitful debates, I think we may draw some conclusions on this matter, focusing on the different subjects that were discussed in each of the three panels.

If there was one consensus throughout this conference, it was that on the need for an integrated and comprehensive approach to migration and asylum issues.

In fact, it is common knowledge that nowadays asylum systems in Europe are often abused, as we can see by the huge amount of asylum applications that don't meet the criteria of the Geneva Convention.

One reason for this could possibly be the lack of alternatives at migration level, there being no doubt whatsoever that it is for economic reasons that the great majority of asylum seekers wish to stay in the host countries.

Another problem felt at present concerns the need to implement new forms of international protection, notably for persons displaced due to a conflict situation in their home country.

The challenge facing us right now is precisely the fact that we'll have to look for effective solutions to these problems, which will necessarily involve a harmonization, not only of the procedures but also of the approach adopted by the Member States of the European Union, but without ignoring the specific realities of each State.

This challenge also derives directly from the Conclusions of the Tampere Council, which call for the need for a migration management, for

partnerships with the countries of origin – to which the High Level Working Group on Asylum and Migration is already making the first approach – and for equal treatment of third-country nationals.

Indeed, we consider that the horizontal approach to asylum and migration issues that for the first time is being pursued within the High Level Working Group on Asylum and Migration is a vital step for a better management of the migration flows and a better integration of legal immigrants and refugees into our societies.

The definition of refugee status and the harmonization of asylum procedures assume a particular significance as the main foundations of a common European asylum system.

An idea that seems to have come out clearly from this debate is that in the process of harmonizing asylum procedures, we must look for simple and practical solutions as well as explore the objective criteria which, without questioning the rights of real refugees, allow us to deal more efficiently with manifestly unfounded asylum claims.

The common European asylum system may be an opportunity to find regional solutions to cope with specific and particular difficulties that we face as Member States of an area of freedom, security and justice.

On the other hand, while there seems into be a consensus that the Geneva Convention today no longer covers all persons in need of international protection, other complementary forms of international protection should not, however, prevent the full and inclusive application of the Geneva Convention.

This full and inclusive application of the Convention will necessarily have to take into account the specific needs of vulnerable groups, namely women and children.

One issue that remains open and should be discussed in future debates is the application of the Geneva Convention to situations of persecution by non-state agents.

In order to deal with the new challenges that lie ahead, the efforts and co-operation, as well as the constructive contributions of all the actors concerned with asylum and migration issues seem to be fundamental, as we have seen in this conference that we now bring to a close.

Indeed, that could be the way to find the right solutions to today's problems and, in a practical and efficient manner, to move towards a common European asylum system.

The new and innovative ideas, applicable at European level, that have been put forward here have now to be further explored and analysed throughout the work to be pursued on these matters.

We look forward to the strategic document on a common European asylum procedure that the European Commission intends to submit at the end of this year. I am sure that the debates we had the opportunity to hold here may serve as a working basis and as a source of inspiration to the draft of such an important document.

PRESS CONFERENCE

Fernando Gomes

Ladies and gentlemen, we have now come to the end of this European conference on asylum, on the theme «Towards a Common European Asylum System», which under the auspices of the Council and the Commission brought together in Lisbon, for two days, a group of technicians, experts and politicians.

As you all probably know, three fundamental issues have been discussed: *International Protection – New Challenges; Towards a Common Refugee Status and Towards a Common Asylum Procedure*.

In our concluding statement, we assessed the work carried out so far, as presented, namely by Commissioner António Vitorino, and looked into the different steps that we still have to take as well as into the areas that still need to be covered. As was announced here, the European Commission will be presenting a strategic paper on a common European asylum procedure. The debate we held here was also an attempt to find paths and to show the Commission what are the views of the different participants in this conference.

I would now ask Commissioner António Vitorino to say a few more words about the near future. After that, we will be glad to answer your questions.

António Vitorino

First of all, let me say that the Commission welcomes the Portuguese Presidency initiative to approach a highly sensitive issue from the political point of view for the public opinion in the Member States as well as for the establishment of an area of freedom, security and justice. We believe that the Tampere mandate is quite clear in the sense that, at first, minimum common standards on the asylum system should be adopted European-wide, and later, at a second stage, one should be more ambitious and actually aim at setting up an integrated common asylum system at European level. Today's debate, which gathered here representatives of the Member States, the European Commission and Non-Governmental Organizations concerned with asylum and refugee issues, has proved the need for minimum common standards on asylum procedures as well as on the assessment conditions of asylum claims, as well as the need for the adoption of instruments on the guarantee of funding, through the European Refugee Fund, for the necessary infrastructures for the reception of refugees and exiled persons. The debate has also shown that the situation we have recently witnessed, in Bosnia as well as in Kosovo, strongly

recommends that we should adopt a legal instrument on the temporary protection of large-scale refugee flows caused by disruptive situations, such as the ones I mentioned.

The Commission has already put forward a number of proposals on this subject, so the Council will continue the debate. I believe this conference has helped to clarify ideas, promote the attainment of objectives, and also provide the Commission with the opportunity to gather very useful indications, so that before the end of the year it may submit a communication on a comprehensive strategy for a common European asylum system.

So, once again, I should like to welcome the contributions from all the Ministers who participated in this conference, and to congratulate in particular the Portuguese Presidency for this initiative.

Fernando Gomes

We are at your disposal now. Let me just tell you that, on my left, is the British Home Secretary, Mr. Jack Straw, and, on my right, the Swedish Minister responsible for immigration issues, and the State Secretary of the Dutch Government, who is responsible for internal affairs as well as for immigration issues.

1. *Journalist*

What remains to be done? Is there a long way to go before this project can be concluded?

Answer **Fernando Gomes**

I think there is still a lot to do, namely, we have to find asylum procedures that are consistent with simple and easy solutions. We have to develop a harmonized approach at European level, the absence of which leads asylum seekers to choose the Member State that appears to offer the best conditions, thus overburdening that Member State. Above all, we have to develop a system enabling us to deal with the rights of real refugees and not with those of false refugees who often inundate the asylum system in many Member States with unfounded claims. I think that whatever is still missing it will be brought forward in the document announced by Commissioner Vitorino, which might, to a certain extent, gather the views expressed in this debate. This is clearly a medium-term project.

2. *Journalist*
What are the minimum standards?

Answer **António Vitorino**

First of all, Tampere has defined a set of minimum common standards on asylum procedures, that is, on the rules for the assessment of asylum claims. The Commission has already presented a proposal on this issue, which was debated this week in the European Parliament, that will be discussed within the Council, and we believe shall be adopted under the coming French Presidency. Secondly, it is also necessary to update the legal framework for determining the State responsible for examining an asylum application lodged in one of the Member States of the European Union. This matter is currently dealt with by the Dublin Convention, which is an intergovernmental convention. The Tampere Council has asked for a EU regulation.

The Commission has already submitted a working document with a view to revising the Dublin Convention, changing it into a Community regulation and introducing the necessary amendments and improvements so as to better the process of determining the State responsible for examining an asylum application.

Thirdly, as I have already said, we need to establish an European Refugee Fund aimed at giving financial support to the Member States for the development of the reception infrastructures of refugees and displaced persons. This Fund is also a mechanism for strengthening the solidarity between the European States. I am willing to stress this point here, in Portugal. As a Portuguese, I am aware that Portugal, owing to its geographical position, is not, at present, among the countries with the highest number of refugees or displaced persons. However, let me underline that the guarantee of reception of refugees and displaced persons throughout the European continent is a responsibility that must be shared by all Europeans, and which naturally requires that a special attention should be given to those countries which, for geographical reasons, receive more refugees.

The Commission's proposal, at the moment, is that this should mainly express a financial solidarity by means of the European Refugee Fund and of a system for distributing the financial resources, which takes into due account those Member States receiving more refugees. It also proposes the adoption of a criterion for the distribution of people based on the double voluntariness. In other words, the voluntary decision of the Member States to receive refugees, and the voluntary decision of the

refugees concerned to be received by those States. So, it's a double mechanism of solidarity, financial as well as human.

3. *Journalist*
What benefits would a common system bring to your country?

Answer **Jack Straw**
Not only are the acoustics bad, but I am completely deaf in one ear. I think your question was what would the advantages of a common asylum policy be for the United Kingdom.
All Member States within the European Union would benefit from a common asylum policy provided that the contents of the policy is adequate. Among other things, a common policy would stop the «asylum shopping», that is to say, it would stop asylum seekers who have no basis for a claim from moving from one Member State to another to secure the best deal. Well, asylum is not a consumer product. Asylum is a right which we should give to those in well-founded fear of persecution but, based on the same grounds, we should all deny it to those whose claim is unfounded.

4. *Journalist*
Will it solve your country' problems?

Answer **Jack Straw**
Will it solve the problems? Well, this is a relative matter. What we are seeking is a better system that will enable us to fulfil the profound obligations of the 1951 Convention.
I don't think anybody is proposing, certainly I am not, that we should move away from the fundamental obligation of the 1951 Convention, which is that all Member States should grant asylum to those who flee owing to a well-founded fear of persecution. But what we have to ensure is that we have a common set of procedures and interpretations of the Convention so that, as I said, false asylum seekers are prevented from moving from one country to another trying to pick and choose what is, from their point of view, the most advantageous legal system or the one that gives them the best benefits. That is wrong. It is an abuse and it has caused all Member States quite serious internal problems.

5. *Journalist*
What problems have been encountered in the search of that political system?

Answer **António Vitorino**
Of course, all Member States have different traditions and different legal systems. The main question is what extra value can the European Union, as such, offer in order to help solving the problems facing every Member State with regard to asylum matters. I am sure that all Member States understand that these phenomena today, be it the strict application of the 1951 Geneva Convention or the new forms of persecution, call for a broader approach, for a broader area of intervention, such as the one of the European Union. I think that the agreement we have to reach must take into consideration three concerns.
Firstly, this agreement will have to be efficient, that is functional and capable of acting on concrete cases. Secondly, it cannot be the minimum common denominator, for the minimum common denominator would not suffice to respond to the dimension of this phenomenon today. Thirdly, it has to be a clear reference system, as regards both the guarantee of efficiency of the process for assessing asylum claims and the protection of and respect for the basic rights of asylum seekers.
We have an ongoing dialogue on this matter because we're aware of the big differences. That's why it is important to know the views of all Member States, and those of non-governmental organizations. This is the reason why the Commission has the task, sometimes unpleasant, of proposing syntheses – some of which are good, others are not so good. I hope the synthesis we will be submitting this time will be one of the most successful.

6. *Journalist*
Do you believe in its realization?

Answer **António Vitorino**
I do, because the public opinion in Europe as well as all Member States strongly demand that this issue be dealt with at European level. In addition to that Member States are aware that in this particular field, and in compliance with the principle of subsidiarity, Europe can bring an extra value to what each Member State may do individually.

7. *Journalist*

Would you agree that this initiative of the Portuguese Presidency has resulted in an academic conference?

Answer **António Vitorino**

This conference was not at all academic. It brought together political officials and representatives from non-governmental organizations with a common characteristic, i.e., even if they differ in their opinions, they all work on the field. The ministers are responsible for the management of this issue, which is a highly complex one. As for the participants from civil society, they are daily concerned with the often dramatic situation of refugees and displaced persons. Everyone present in this room surely didn't come here to do an academic exercise, but rather to talk about real problems, human problems that need to be solved, and we must find the necessary political will to solve them.

Fernando Gomes

One last piece of information, just to give you an idea of what is at stake here. About the considerable discrepancies as regards the asylum claims and the so-called «asylum shopping» that Minister Jack Straw referred to. In 1999, in Germany and in the United Kingdom approximately 70.000 asylum claims had to be examined. If we include the dependants, in other words, the family members who end up being entitled to the family reunion or who submit further applications, we come to a total of 95.000 claims in Germany and 91.000 in the United Kingdom. In Portugal we had 310. This gives an idea of the discrepancy between the problems within the European Union.

Jack Straw

I am quite sure the 1951 Convention will reach its 50th birthday intact. Fact that is only seven months away. Although under Commissioner Vitorino the European Union is now working very fast, it will have to work faster. As for the changes, what I have suggested today is that we should stick by the fundamental obligations of the 1951 Convention, in particular the central moral obligation to give refugee status to those who flee owing to a well-founded fear of persecution, but that we should also look at the procedures according to which the Convention has come to be applied and, in particular, to look at a lot of questions that are not

in the Convention, including the issue regarding the place where the applications should be lodged and the other matters that I have raised in my speech.

Will it lead to a protocol in due course, it is possible. What I think is the first stage, however, is to reach a broad agreement about changes within the European Union itself. That is of critical importance.

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