

## **The purpose of this Guide**

This Guide to advocacy is intended to give an insight into the asylum harmonisation process and to highlight where, when and how policy is being developed which will have an incremental impact on the lives of asylum-seeking separated children in the EU. This Guide is intended to enable people, without a firm knowledge of the EU policy-making process or asylum harmonisation, to access the key information quickly and comprehensively.

Each section briefly outlines the history behind the creation and development of an instrument, and then outlines the policy proposals presented by the competent EU institutions. Attention is drawn to the implications of each instrument on the lives of separated children, and where advocacy should be targeted to effectively argue for full realisation of children's rights within the harmonisation process.

Each section is intended to stand-alone, however, the instruments are all inter-dependent so that references have been made to the links between instruments. A final glossary has information about the EU policy-making process and definitions; all glossary terms and cross-references are highlighted in **bold** type.

## **About the Separated Children in Europe Programme (SCEP)**

The Separated Children in Europe Programme is a joint initiative of and partnership between some members of the International Save the Children Alliance in Europe and the United Nations High Commissioner for Refugees (UNHCR). The Programme partnership is based on the complementary mandates and areas of expertise of the two organisations: UNHCR's responsibility is to ensure protection of refugee children and those seeking asylum; Save the Children is concerned to see the full realisation of the rights of all children.

The program seeks to improve the situation of separated children through research, policy analysis and advocacy at the national and regional levels. It has set up a network of non-governmental organisations (NGOs) working with children, asylum-seekers and refugees in twenty-eight Western European countries (the fifteen Member States of the European Union, Norway, Switzerland, three Baltic States, Poland, Hungary, Czech Republic, Slovakia, Bulgaria, Romania, Slovenia and Croatia).

Funding for the Programme has been provided by the Norwegian Government; the Odysseus Programme of the European Union; UNHCR; Save the Children Norway; Save the Children Sweden; and Save the Children UK.

## **About the Authors**

We would like to warmly thank both interns who substantially contributed in drafting and updating the lobbying guide : Judith Kirton-Darling in September 2000 and Mafalda Marinho Leal in September 2001.

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- **Introduction to the Third Pillar - Justice & Home Affairs**  
**From Geneva 1951 to Amsterdam 1999**

When the Geneva Convention on the Status of Refugees was signed in 1951 Europe was reeling from the tragedy of the Second World War, its causes and consequences. A common instrument was created within the United Nations - the Geneva Convention - which would ensure a certain minimum standard of treatment to persons fleeing persecution on the grounds of race, ethnicity, politics or membership of a certain social group. The Convention forms the basis of all European asylum systems to this day. It offers protection from '**refoulement**', i.e., being returned to a situation of persecution, and provides for a definition as to who qualifies as a refugee, and hence is to benefit from its provisions.

#### **From Rome to Amsterdam**

The drafters of the **Treaty of Rome** in 1957, which established the European Economic Community (EEC), envisaged that the Member States (then only six - France, Germany, Italy, Belgium, the Netherlands and Luxembourg) would become an area of free movement. This would mean freedom of movement for goods, capital, services and workers. The Treaty was supposed to foster an area of peace and freedom, in a region that had experienced war and repression. The EEC was primarily economic and had no competence for issues of asylum and immigration, including the social policies of refugee integration and protection.

The **Single European Act** (SEA), negotiated in 1985 and finally ratified in 1987, revitalised the EC and established the Single Market. The SEA prescribed a series of measures necessary to create an area of true freedom of movement for goods, capital, services and, ultimately, people and labour by the end of 1992. This has not been fully realised to date, but can be explained in part by the reluctance of some Member States to relinquish national sovereignty over immigration policy and border controls. As a consequence of the lack of united agreement, nine Member States (the original six of the EEC, Spain, Portugal and Greece) decided to continue integrating regardless of the 'sceptical members' (Britain, Ireland and Denmark). This was done outside the competence of the EC and was a purely intergovernmental venture.

Twelve of the Member States (including new members Austria, Sweden and Finland) signed and ratified the **Schengen (Implementation) Agreement**. This instrument removed border controls between the states and provides for a number of measures to realise a common area of free movement. Britain and Ireland signed an agreement that they could 'opt-in' when co-operation was appropriate. For Denmark the Schengen agreement entered into force only in 2001, although it will not participate in provisions that have become a matter of supra-national cooperation under the First Pillar since the Amsterdam Treaty (see infra). This results from the reservation the Danish introduced to the Maastricht Treaty that allows them to decide, case by case, if they will adopt a certain measure or not. If so, it will always remain an intergovernmental action. At present a series of draft **Directives** and

**Regulations** attempt to remove the restrictions placed upon free movement for third country nationals legally residing within the EU.

The **Maastricht Treaty creating the European Union** (TEU, 1993) created a 'three pillar' system of governance, and this remains the structure of the EU today. The first pillar covers the European Community policies - in general, these are policies previously within the remit of the EEC/EC. They are governed by selection of decision-making systems involving all the EU institutions. The second pillar is entitled 'Common Foreign and Security Policy' - basically this covers intergovernmental co-operation in security and defence policy.

The **Third Pillar** covers intergovernmental co-operation in the field of 'Justice and Home Affairs', including immigration and asylum policies. The purpose of establishing this pillar was to bring all the measures in justice and home affairs within a coherent framework of \_ inter-governmental \_ policy development and decision making, and to develop a number of instruments (Joint positions, Joint Actions, Resolutions) to legislate on relevant measures.

### **The Amsterdam Treaty**

In 1997, Member States signed the Treaty amending the TEU, in Amsterdam. The Treaty changes were fully ratified by May 1999. The Amsterdam Treaty had major implications for the field of asylum and immigration, as under Title IV (Articles 61-69, TEU) the Member States agreed to harmonise their national asylum systems into a common EU policy. This harmonisation would still be handled at an intergovernmental level before the common asylum policy would be moved from the third pillar to the first pillar, and be affected by the **co-decision procedure** and **qualitative majority voting**<sup>1</sup>. The Amsterdam Treaty specifically gave the Member States five years to agree the necessary basic policies in order to integrate their national asylum systems into the common policy. During this transition period the other legislative institutions have the duty to monitor the progress of harmonisation. By the time the common instruments would be in place, the Union would have created an "area of freedom, security and justice"(Title IV of the Amsterdam Treaty).

As a consequence of Amsterdam, there have been a number of important changes in the way policy is formed and decided at EU level. Firstly, the Commission's right to initiate policy has been fully reflected the field of asylum and immigration policies and since been used to fully extent at least in the asylum area. There is still a shared right of the Member States, but they decided that all the harmonisation measures should originate with the Commission. The Commission has been keen to enact this extension; therefore the first of the harmonisation draft directives was delivered to the Council of Ministers in December 1999. This addressed the right to **family reunification** (see Chapter X). Secondly, the ultimate move to the first pillar will mean the Council shares decision-making with the other institutions of the

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<sup>1</sup> However, this will require a separate Council decision based on unanimity due to be taken in 2004.

EU - the European Parliament, Economic and Social Committee and Committee of the Regions.

The Amsterdam Treaty has accelerated policy-making in the field of asylum and immigration because the Member States have been given a clear timetable for agreement. The first step towards gaining EU consensus on a strategy was proposed by the Austrian Presidency (July-December 1998), within the **Vienna Action Plan**. This plan focused upon common approaches towards countries of origin, developing common asylum measures based on international protection standards, and ways to combat illegal immigration. This document started the inter-institutional debate on how the Amsterdam treaty's provisions could be implemented to form a cohesive common system, and set a timetable for decision-making. The necessary foundations for a common system were proposed for a two-year period and the supplementary elements were given a five-year period.

In December 1998, the General Affairs Council established a **High Level Working Group on Asylum and Migration**. The HLWG was given the mandate to develop a common cross-policy/pillar strategy on relationships with the countries of origin. The group focused on six countries<sup>2</sup>, and developed individual strategies for each one.

### **Tampere Summit October 1999**

On the 15-16 October 1999, the European Council met in Tampere, Finland, the Heads of Government focussing on the entire field of Justice and Home Affairs (Third Pillar). Its intention was to reaffirm the goal of creating an "area of justice, freedom and security" (Title IV of the Amsterdam Treaty). The language of the Tampere Conclusions is positive since Member States reaffirmed "the importance the Union and Member States attach to the absolute respect of the right to seek asylum"<sup>3</sup>, the need to develop a common asylum system based on the "full and inclusive application" of the Geneva Convention and the full respect for guarantees to access EU territory by those in need of protection.

UNHCR and many NGOs welcomed the Tampere Summit Conclusions, as the Member States reaffirmed their commitment to the Geneva Convention, the right to asylum and the principle of *non-refoulement*. The Member States also called on the Commission to prepare a policy paper on a **common asylum procedure** and a **uniform 'refugee' status** to be submitted within a year of the Summit. They also stressed the necessity of completing the application of the **EURODAC** system and agreeing to common measures for **Temporary and Subsidiary Forms of Protection** based on solidarity between the Member States in financial and distribution terms. Thus a new pace to the harmonisation process was created.

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<sup>2</sup> Afghanistan, Albania (and Kosovo), Morocco, Somalia, Sri Lanka and Iraq.

<sup>3</sup> Conclusion 13 of the Tampere Summit, October 1999

The Tampere Summit welcomed the HLWG's action plans and the group was given a further period of time to implement its recommendations<sup>4</sup>. This was supported by a reaffirmation of the necessity of building strong partnerships with countries of origin based upon basic European human rights and democracy standards<sup>5</sup>. The intention was to manage international migratory flows in a more coherent manner. The subsequent meeting of the Justice and Home Affairs Council (**JHA Council**) in December 1999 agreed on a basic **readmission** clause that will be integrated into all EU common agreements with third countries. The first agreement this affected was the former-Lomé Convention<sup>6</sup> with the African-Caribbean-Pacific former-colonies (ACP states).

### **The Scoreboard (March 2000)**

As a result of the momentum built by the Tampere Summit, in March 2000 the Commission published its proposed timetable of legislation in the area of Justice and Home Affairs<sup>7</sup>, to be updated twice a year (last update May 2001). This offers NGOs and the general public a means to assess the development of, inter alia, a harmonised Asylum policy.

A number of principles form the basis of the *Scoreboard's* section dedicated to a common asylum system:

- The Geneva Convention will form the basis of the Commission's proposals;
- The principle of *non-refoulement* will be maintained and ensured;
- The Dublin Convention and the principle of limited secondary movements will be included.

This approach will inevitably have consequences for separated children, as they have needs which do not automatically fit comfortably with these principles. For instance, Dublin proceedings could separate children from members of their family who are not recognised within the strict sense of 'family' required for family reunification across the EU. Equally, both UNHCR and Save the Children stress that children experience different forms of human rights violations and threat, which may not be recognised if a narrow definition of 'refugee' is established, albeit based on the Geneva Convention. Violations of child-specific human rights, for instance, child labour, female genital mutilation or child soldiers, may under certain circumstances constitute a 'well-founded fear of persecution'. This should be acknowledged by EU Member States.

### **Nice Treaty**

In view of the completion of the accession process at least for some candidate countries to the EU in a near future, Member States have adopted at the Nice Summit in December 2000, a Treaty which anticipates some of the necessary institutional reforms. Concerning asylum, the Nice Treaty

<sup>4</sup> This will be assessed at the Nice Summit (December 2000).

<sup>5</sup> Conclusion 11, Tampere Summit of the European Council (October 1999).

<sup>6</sup> Now known as the *Cotonu Agreement*, signed in June 2000

<sup>7</sup> European Commission, "*Scoreboard to review progress on the creation of an "area of freedom, security and justice" in the European Union*", March 2000 (COM(2000)167 final)

prescribes that unanimity voting will be required until the whole set of asylum legislative instruments (as defined in Amsterdam) is adopted, lifting thereby the deadline of 2004 for eventually changing the voting system to qualified majority (Amsterdam treaty).

## **Communication from the Commission, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum**

### **Introduction**

Following the new powers given by the Amsterdam Treaty, the Commission could present initiatives on the area of asylum and immigration, which no longer fall under the exclusive legislative competence of the Member States. The European Council held in Tampere in October 1999 established the aim of creating by the end of 2004, an area of “Freedom, Security and Justice” within the European Union.

### **Harmonisation**

According to the Conclusions of the Summit, the long-term objective of an asylum policy in the EU is the creation of a common asylum system, which fully and inclusively respects the Geneva Convention of 1951. Heads of State recommended that the implementation of such a system should be made in two phases. The first phase would be the establishment of minimum standards on procedures, on reception conditions and on the qualification and status of refugees and people in need of international protection. The second phase would be the creation of a common asylum procedure and a uniform status. The Portuguese Presidency started the discussion in June 2000 when launching a governmental conference entitled “Towards a Common Asylum System”.

In order to start the debate the Commission presented a Communication on these issues in November 2000<sup>8</sup>. Rather than pre-establishing a solution, the Communication explores a variety of possibilities for the creation of a common procedure and a common status. Hence, it highlights that a balance must be found between the need for accelerating the current procedures and at the same time, protect the rights of the applicants. The Communication also explores all the aspects related to the creation of a common asylum system, from the re-examination of the Dublin Convention; the implementation of the Eurodac system; the readmission agreements with countries of origin to the need of approaching separately, although interrelated, the immigration policies.

UNHCR welcomed the Communication in general and especially its approach to a single procedure system, which will allow examining both applications for refugee status, and for subsidiary/complementary forms of protection status.

### **Debate within and between the institutions**

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<sup>8</sup> COM (2000) 755 final of 22 November

The European Parliament appointed Mr Robert Evans (UK) as Rapporteur for the Communication. His report was adopted on the 12 of September 2001 and is to be voted in the Strasbourg plenary session of October 2001.

A wide number of recommendations were put forward:

- appeals procedures and timeframes for asylum determinations should be harmonised;
- the use of safe third country and safe country of origin concepts, of accelerated procedures and procedures for manifestly unfounded applications should be limited to where justified and include legally binding guarantees;
- common repatriation policy for asylum seekers whose applications had been rejected;
- establishment by Member States of voluntary return and resettlement programs;
- UNHCR should be granted more support for the protection and assistance of refugees in regions affected by conflict (especially financial contributions from the Member States).

### **Relevance for separated children**

This Communication should in this context be viewed mainly as a policy statement of general nature.

## Council Decision establishing a European Refugee Fund

### Introduction

The funding of projects and activities aiming to introduce and change policies and structures is essential to improve the situation of separated children throughout the EU. Financial support from the Member States and EU institutions show willingness and commitment to assist asylum seekers and refugees.

A common European fund for working with refugees and asylum-seekers means that funds are available to, inter alia, strengthen non-governmental organisations (NGOs) in terms of capacity building, and enable networks to develop between NGOs and governmental structures. This would facilitate joint ventures to be undertaken, such as research, seminars, training programmes and exchanges of good practices.

### Brief History of the Instrument

With increased co-operation between the Member States in asylum matters, it was agreed in 1997 that EU **budget lines** should be established to fund projects and programmes across the EU. Therefore the Council created through a Joint Action three new budget headings, which covered improvement of reception facilities, integration and voluntary returns. The budget lines covered recognised refugees, displaced people granted temporary protection and asylum seekers. The return programmes included ex-asylum seekers whose applications had failed and volunteered to return (without force or coercion).

These budget lines were treated as independent policies although they were covering the same target group in the majority of cases. The budget allocation for 1998 was 13 million Euros for the voluntary return programmes and 3.75 million Euros for improving reception facilities. A separate line was operated for the integration of refugees, covering both project and network activities.

By April 1999, the Member States recognised the need for more coherence and efficiency, the Council combined the budget lines for improving reception facilities (B5-8030) and facilitating voluntary returns (B7-6008), into one (B5-803). In reaction to the pressures on EU asylum systems resulting from the Kosovo crisis, the funds were designed to specifically support the Humanitarian Evacuation Programme. Consequently, in 1999 the funds were used primarily for emergency measures and not the stated aim of creating structural projects. The 1999 budget for B5-803 was 15 million Euros; less than the budget for the same policies in 1998, regardless of the Kosovo crisis.

## Harmonisation

During December 1999, the last Joint Action expired and on 14 December 1999 the Commission published a draft 'Proposal for a Council **Decision** creating a European Refugee Fund'<sup>9</sup>(ERF). The proposal offered the legal basis necessary to establish the ERF as a long-term and coherent approach to EU funding of projects. The projects on reception facilities and voluntary returns were combined with the budget line on integration and are now administrated by the Directorate-General of Justice and Home Affairs.

In September 2000, the Council adopted the **Decision establishing a European Refugee Fund**<sup>10</sup>. The Fund started operating from January 2000 for five years, covering the entire period of Asylum Harmonisation until the common policy is fully adopted under the **First Pillar**. This ensures that regardless of disruption in the policy-making, funding would continue and be secure. UNHCR and NGOs have welcomed this approach.

All the fifteen Member States are applying this decision since the United Kingdom and Ireland have also 'opted-in'.

According to the Decision, the ERF:

- covers refugees, asylum-seekers and displaced persons granted temporary protection;
- finances projects on reception, integration and voluntary return;
- finances emergency measures to help Member States in the case of a mass influx of refugees or displaced persons;
- allows that up to 5% of the Fund's available resources to be used for intra-Community projects to exchange information, practices and studies or for the assessment of the implementation of measures and technical assistance;
- is based on a model of decentralised management, thus the Member States can control the distribution of national allocations from the Fund;
- distribution of resources between Member States is proportional to the number of asylum seekers they receive and the number of refugees they assist on their territory;
- provides a financial commitment of 216 million Euros for 2000-2004 to be divided between the three areas. 26 million Euros were available for 2000. For the subsequent years each Member State shall receive the following fixed amount fund's annual allocation:

In 2001: EUR 400000

In 2002: EUR 300000

In 2003: EUR 200000

In 2004: EUR 100000

The remainder of the available resources will be distributed between the Member States according to specific criteria as set out in the Decision.

European Refugee Fund

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<sup>9</sup> "Proposal for a Council Decision creating a European Refugee Fund", COM (1999) 686 (see **sources of information**)

<sup>10</sup> Council Decision 2000/596/EC of 28 September, *OJEC L 252*, 06/10/2000 p. 0012 200

Member States' reports on the projects of the ERF for 2000 can be found in the JHA website: [www.europa.eu.int/comm/justice\\_home/jai/prog\\_en.htm](http://www.europa.eu.int/comm/justice_home/jai/prog_en.htm). Several projects being funded by ERF in 2001 target separated children.

The ERF also has its own page on the web, available at <http://european-refugee-fund.org>

### **Lobbying Points**

- The fund should support specific projects and services targeting separated children.
- As there is currently a lack of comprehensive return programmes in line with accepted international standards, Member States should be particularly encouraged to finance return programmes for separated children, whether before an asylum application is lodged or as a result of a failed application.

### **Timetable & Targets**

- Lobbying with the Member States is necessary to include a specific focus on separated children in national project priorities.

## **Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention**

The creation of a common database of fingerprint information about asylum seekers is proposed by the EU for identification purposes, as a means of facilitating the decisions about which state is responsible for an asylum claim (see **Dublin Convention**).

### **Brief History of the Instrument**

After the signing of the Dublin Convention in 1990, the Member States had to assess ways that the Convention could be implemented and supported to create an instrument as efficient as possible. One particular concern was how to effectively identify people abusing the system. It was decided that the use of identity cards and papers alone would cause bureaucratic problems, as they could be manipulated or destroyed quite easily. In 1991, a feasibility study was undertaken to assess the possibility of an EC-wide fingerprint database.

In March 1996, the Member States began negotiating a **Convention** on the proposed fingerprinting scheme, known as Eurodac. The intention was that fingerprints of all asylum-seekers would be fed into a central database, where Member States could check new asylum-seekers' identities on request. The European Parliament approved this measure. The Convention was enhanced by a draft Protocol in 1998, which extended the mandate of the Convention to people found illegally on EU territory. The Member States would be able to check if such individuals had applied for asylum before, regardless of whether they lodged an application when found. The European Parliament rejected this measure, but the Member States ignored its report.

The Member States never formally signed either agreement, as it was decided at the end of December 1998 (for the Convention) and March 1999 (for the Protocol) that these measures should be 'frozen' in consideration of the ratification of the **Amsterdam Treaty TEU II**. Upon ratification of the TEU II, the Commission was asked to prepare a common instrument under Title IV (JHA), incorporating the substance of the former intergovernmental agreements.

### **Harmonisation**

At the end of May 1999, less than a month after the ratification of TEU II, the Commission produced a draft *Council **Regulation** concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens*<sup>11</sup>. The Commission decided that the appropriate legislative tool would be a regulation to ensure that personal data could be collected and stored within a

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<sup>11</sup> COM (1999) 260 (see **sources of information**)

strict set of rules, which would be applied uniformly and unconditionally by the Member States, otherwise the system would not be universally effective.

After the European Parliament's opinion and subsequent discussions in the JHA Council – where an agreement could not be reached - the Commission had to redraft the proposal. Therefore, the **amended Proposal for a Council Regulation concerning the establishment of “Eurodac”** was completed in March 2000 and adopted by the Council later in December 2000<sup>12</sup>.

The Eurodac system will be applicable to all EU Member States since the United Kingdom and Ireland ‘opted-in’ and Denmark also agreed to this measure. As a result of co-operation agreements between the EU and Norway and Iceland, they are becoming part of the Eurodac system too.

The purpose of Eurodac is to assist in the determination of the Member State responsible for examining an asylum application and thus, data assembly shall only be used for ‘Dublin Procedures’.

The system consists of the collection of the fingerprints of all asylum-seekers and certain categories of illegal migrants over the age of 14. The data collected will then be stored in a central unit under the responsibility of the Commission. Data on asylum-seekers can be stored for 10 years before being ‘erased’ although earlier ‘erasure’ is possible if the individual is granted citizenship of a Member State. For persons found illegally crossing EU borders, their data shall remain in the central unit for a maximum of 2 years and for those found illegally within the EU, data shall be ‘erased’ after the completion of a Eurodac investigation.

Data on persons who are granted refugee status shall be blocked and after five years Eurodac started operations, either be stored or erased from the central unit, under the conditions set out in the Directive. It is expressly prohibited to ‘leak’ data collected to third countries, with the exception of Iceland and Norway, in the light of their co-operation with the Eurodac system. The method of fingerprint collection has been left to national practice. Hence, the Member States have to ensure that the modus operandi respects human rights instruments such as, the **European Convention on Human Rights (ECHR)** and the **United Nations Convention on the Rights of the Child (CRC)**.

### Related Action

- UNHCR does not disagree with a system of fingerprinting for identification purposes, as long as safeguards are established to ensure information is not abused and separated children are not endangered or mistreated. A continuous monitoring must be carried out of the application of the Regulation.
- At the time when the instrument was being developed, Save the Children expressed concern about fingerprinting children as young as 14.

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<sup>12</sup> Council Regulation 2725/2000/EC of 11 December, OJEC L 31615, p.1

## **Minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof**

Temporary Protection is considered a short-term solution to situations of mass influx into the EU. It is intended to alleviate the pressure of numbers of applicants on the Member States' asylum systems, whilst maintaining and supporting individual needs for protection. Strong elements are **solidarity** between the receiving states and the setting of mechanisms of **burden sharing**. By definition, it is an emergency measure of an exceptional nature that lasts for a specific length of time, and must not prejudice recognition of refugee status under the 1951 **Geneva Convention**.

Harmonisation of temporary protection aims to create a common regime as regards establishment, implementation, termination, duration as well as standards of treatment and other State obligations, rules on access to asylum procedures, burden-sharing and return conditions across the EU.

### **Pre-harmonisation history**

Temporary Protection existed as a form of protection in several Member States. In general, the need for a short-term form of protection resulted from the large numbers of ex-Yugoslavian nationals arriving into the EU since the early 1990s, in particular Bosnians between 1992-5 and Kosovars in 1999. These forms of temporary protection were inspired by a need to deliver protection quickly to a clearly identified group of people, whilst maintaining the national asylum systems to assist asylum-seekers from elsewhere.

Some key differences existed between the national temporary protection systems<sup>13</sup>:

- The most significant difference is the rights and provisions of temporary protection systems.
- Member States have set different time limits on the provision of temporary protection. Duration ranged from 6 months to 5 years.
- Some Member States, after having suspended asylum procedures during the period of temporary protection, guarantee individual status determination, while others made asylum application and temporary protection incompatible, thus forcing people to opt for one or the other.

In 1993, the Danish Presidency introduced a **Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia**. The Resolution dealt specifically with persons from former Yugoslavia and covered all aspects of temporary protection, including reception facilities.

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<sup>13</sup> For a country by country analysis, see the Danish Refugee Council (as part of the **Odysseus Programme**) report, "Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries", May 2000.

In September 1995, the **JHA Council** adopted a **Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis**<sup>14</sup>. The Resolution reiterated the categories of people included in the June 1993 Resolution to whom temporary protection would be accorded<sup>15</sup> within the Member States; its new element was how the balance of resources would be managed, in financial and physical terms. The Resolution was complimented by a **Council Decision on alert and emergency procedure for burden sharing with regard to the admission and residence of displaced persons on a temporary basis** (March 1996)<sup>16</sup>. This package of measures was a direct result of the war in Bosnia-Herzegovina; however, it was never implemented.

In 1997, the Commission, under its right to co-initiate with the Member States, presented a proposal for a **Council Joint Action** concerning temporary protection of displaced persons. The proposal outlined a European co-ordination mechanism for the establishment, review and termination of temporary protection, as well as common standards of treatment for beneficiaries of temporary protection, including family reunification and social, economic and cultural rights, and a burden-sharing element. In 1998, the Commission introduced a **revised proposal**, which placed the burden-sharing component in a parallel Joint Action. Both proposals were welcomed by the European Parliament. However, the JHA Council remained divided over a number of issues, including the issue of solidarity and burden sharing. During the German Presidency (January to June 1999), a discussion paper was presented suggesting ways to resolve the issue.

## Harmonisation

As a consequence of the ratification of **Amsterdam (TEU II)** in May 1999, both proposals lapsed and the Commission was called on to draft an instrument on minimum standards for giving temporary protection and promoting a balance of effort between Member States (Article 63 (2b)). The draft proposal was presented in May 2000<sup>17</sup> and a political agreement was finally reached on the Justice and Home Affairs Council on the 28 and 29 May 2001, after a long period of tough discussions. The Directive was adopted and published on 20 July. It entered into force on 7 August 2001.<sup>18</sup> The deadline for Member States to comply with the Directive is the 31 December 2002, with the exception of Denmark and Ireland.

The Directive contains a complete 'package' for temporary protection, including reception and procedural aspects and a burden-sharing mechanism

<sup>14</sup> Official Journal, C 262, 07/10/1995, pp. 0001-0003 (see **sources of information**)

<sup>15</sup> These were: former POWs whose safety could not be ensured in the area; people in need of serious medical assistance; people whose protection could not be ensured; rape victims; people formerly living in combat zones who could not return to their homes due to human rights abuses or conflict.

<sup>16</sup> Official Journal, L 063, 13/03/1996, pp.0010-0011 (see **sources of information**)

<sup>17</sup> COM (2000) 303 final of 24 May

<sup>18</sup> Council Directive 2001/55/EC of 20 July

that can be granted for a maximum period of two years. Council ruling by qualified majority, as a result of a Commission proposal will activate a temporary protection regime.

The same procedure will be applied if the Council agrees in extending the regime for a further one year under the condition that the grounds for its establishment have not changed. Under Art.3.3, UNHCR is to be regularly consulted on “the establishment, implementation and termination of temporary protection”.

Temporary Protection is an exceptional regime and therefore can never affect the recognition of refugee status under the Geneva Convention. This means that an application for asylum can be lodged at any time and the Directive sets time limits to its examination. Furthermore, Member States may decide if the temporary protection status can “be enjoyed concurrently with the status of asylum seeker while applications are under consideration” (Art.19).

As regards standards of treatment, general responsibilities of Member States include:

- provision of housing, welfare or assistance, medical care and education;
- the right to work, under specific conditions to be accorded by each Member State
- family reunification – allowed until two months before the end of the maximum period of two years of the temporary protection regime. Family members considered in the draft Directive are spouses or ‘stable’ unmarried couples and their children or other members dependent on the applicant, for economic or psychological reasons, or otherwise in need of specialised medical treatment.

The emergency provisions set out in the ERF can be allocated to Member States to provide for adequate burden sharing.

### **Relevance for separated children**

As with all population movements it is recognised that in situations of mass displacement, children may become separated from their families or guardians. Even with the most organised system of evacuation separations are likely to occur.

The Directive contains a number of provisions according to international standards and appropriate protection of separated children. It provides for the temporary appointment of a guardian (Art.16.1). During the period of temporary protection separated children should live with either adult relatives, foster families or in reception centres with specific provisions for separated children (Art.16.2) and the views of the child shall be taken into consideration when deciding on appropriate placement (Art.16). Family reunion must be in the best interests of the child; if family members, or other primary caregivers, cannot be traced, the Directive calls on Member States to allow the minor to

be placed with the person(s) who looked after the child whilst fleeing (Art.16.3).

It is also the responsibility of the host Member State to ensure that the separated child's medical needs are met, including the right to access medical or other assistance for those who have undergone torture, rape or serious forms of psychological, physical or sexual violence (Art.13.4).

Moreover, all children shall have access to education, including separated children, under the same conditions as nationals of the host state (Art. 14.1).

### **Lobbying Points**

- Member States will have the possibility to set higher standards than those fixed in the Directive. Therefore, advocacy should be conducted at national level in order to ensure that higher standards that may be provided for by national law are not lowered.

In order to strengthen the provisions for separated children:

- Member States should ensure that separated children are informed fully about their situation and the rights and opportunities available to them. For example, the right to seek asylum, the right to education, healthcare and appropriate and adequate psychosocial support.
- The 'phasing out' of a separated child's protection should be addressed: before a child is returned provisions and safeguards should be established to ensure the child's safety and that the child will have a caregiver upon return. The 'best interests of the child' should be paramount.

### **Timetable & Targets**

- Until the end of 2004, the Commission may propose amendments to the Directive (Article 31). Any action carried out to improve its contents would be most useful.

## Minimum standards on procedures in Member States for granting and withdrawing refugee status

A common instrument on asylum procedures is essential to ensure that regardless of where an asylum claim is lodged the applicant will have a fair, humane and uniform chance of recognition as a 'refugee'.

### Pre-harmonisation Instruments<sup>19</sup>

The first intergovernmental agreements on procedural matters were the so-called **London Resolutions** of 1992. These laid out criteria for the screening-out of asylum-seekers whose claims were considered 'abusive' or 'unfounded' or if they were coming from a 'safe third-country' or a 'safe country of origin'.

In general, between the **Maastricht** and **Amsterdam** treaties (TEU I and II), intergovernmental co-operation under the **Third pillar** focused on co-operation in the removal of border controls and creating infrastructures capable of supporting that end. Asylum procedures were considered a strictly national competence. Therefore, in 1994, a **Communication on Immigration and Asylum** policies (see section on Communication on Asylum), issued by the Commission suggested that common procedures should be codified in a legally binding instrument<sup>20</sup>.

In 1995, as a result of Third pillar co-operation and the Communication, the Member States drafted a 'soft-law' **Resolution on minimum guarantees for asylum procedures**<sup>21</sup>, which outlined the core individual rights and state obligations common to all Member States. In accordance with its 'soft-law' status, the Member States were only obliged to take the principles laid out into account in the event of legislative changes.

In relation to separated children, the Member States adopted a clause stating: "Provisions must be made for unaccompanied minors seeking asylum to be represented by a specifically appointed adult or institution if they do not have capacity under national law. During the interview, adults or representatives of that institution may accompany unaccompanied minors. Those persons are to protect the child's interests."

The **1997 Council Resolution on Unaccompanied Minors who are Nationals of Third Countries**<sup>22</sup>, was the only attempt by the Member States to specify the appropriate procedures for minors seeking asylum. The Member States laid out minimum standards of procedures once an unaccompanied minor had applied for asylum and assured access to the territory for asylum-seeking unaccompanied

<sup>19</sup> For a country by country analysis of asylum procedures, see the Danish Refugee Council (as part of the **Odysseus Programme**) report, "Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries", May 2000.

<sup>20</sup> Available as COM (94)23 final, 23 February 1994 (see **sources of information**)

<sup>21</sup> Available from Official Journal C274 on 19.09.1996, pp.13 (see **sources of information**)

<sup>22</sup> Available from Official Journal C221 on 19.07.1997, pp.23 (see **sources of information**)

minor (in line with the provisions for adults in the 1995 Resolution). Furthermore, the Resolution laid out that unaccompanied minors should be 'represented' adequately; the manner in which this was to be achieved was left to national discretion. Although, it also prescribed that in Member States where appointments of guardians to unaccompanied minors were standard procedure, those guardians should be responsible for the child's legal, social, medical, psychological and other needs (Article 3(5)). Importantly, Member States were allowed to go beyond the limits of the Resolution.

As far as officials dealing with unaccompanied minors are concerned, the Resolution stated that interviews should be conducted by officials with an adequate level of experience of interviewing unaccompanied minors; therefore Member States were encouraged to develop further training in this area.

The 1997 Resolution was another piece of 'soft law' inadequately implemented by the Member States<sup>23</sup>. SCEP research in 2000 highlights the disparities in treatment and procedure between the Member States, and the general inadequacies of policy towards separated children<sup>24</sup>.

During the drafting of the **Amsterdam Treaty (TEU II)**, the Member States acknowledged that common asylum criteria and procedures must form the basis of a harmonised system.

The **Vienna Action Plan**, of December 1998, gave the Commission two years to draft an instrument on common procedures. The **Tampere Summit** amended this timetable and called on the Commission to present their draft instrument by the end of the year 2000.

## Harmonisation

In March 1999, the Commission produced a **working document** entitled "Towards Common Standards on Asylum Procedures"<sup>25</sup> aiming to open the debate within the institutions and national legislatures. Its substance was focused on creating a quicker, simpler and more efficient asylum system, while maintaining safeguards to ensure that individual applicants are identified correctly.

Finally, in September 2000 the Commission published a draft Directive on minimum standards on procedures for granting and withdrawing refugee status<sup>26</sup>

The proposal does not create a common procedure but merely sets the rules to align Member States' legislation by the same standards.

<sup>23</sup> See Review of the application of Council resolution of 26 June 1997 on Unaccompanied Minors who are nationals of third countries, OJ C221, 19.07.97, p. 23

<sup>24</sup> *ibid.*

<sup>25</sup> SEC (1999)271 final (see sources of information)

<sup>26</sup> COM(2000)578 final of 20 September

## Debate within and between the Institutions

### *Council of Ministers*

The proposal is currently being discussed.

### *European Parliament*

Mr Ingo Schmitt (Germany) was appointed Rapporteur by the Committee for Citizens' Rights and Justice and Home Affairs. The report was adopted on the 28 of August but, contrary to what happened with his previous report on the Commission Working paper of 1999, which was adopted in plenary session on the 15 June 2000<sup>27</sup>, most of the amendments he proposed were rejected. As a consequence, Mr Schmitt withdrew his name as Rapporteur and the report was submitted to plenary under the name of the committee chairman, Graham Watson (UK). It was adopted by the European Parliament on 21 September 2001. The European Parliament called for better legal assistance to asylum seekers during the procedures, the suspensive effects of appeals, stricter criteria for the designation of safe countries and the reduction of some time-limits, among other concerns.

## Relevance for Separated Children

The Draft Directive includes some important provisions for separated children, such as the appointment of a guardian; the possibility for guardians to be present in the interviews (Art.10.1); the possibility of legal assistance (Art.9.1); the right to legal assistance at the appeals stage (Art.9.4); that interviews are conducted by specially trained officials (Art.10.2); and humane and safe age assessment methods (Art.10.3).

However, there are several aspects that should be addressed. The principle of **best interests of the child** should be paramount throughout the process. Furthermore, separated children should be exempted from admissibility and accelerated procedures although their applications should be given priority and processed fairly and as expeditiously as possible. Children should never be detained but if so happens, detention shall be used only as a measure of last resort and for the shortest appropriate period of time and never under prison-like conditions.

In cases where it is not clear whether the child wishes to or should apply for asylum, special procedures should be adopted to promptly assess which course of action is in the best interests of the child. This would normally be assessing whether applying for asylum or returning to country of origin is the best solution. In general, separated children should not be returned to a country of origin without proper safeguards, ensuring their personal security and integrity<sup>28</sup>.

Family tracing could so be included in this Directive and be initiated on arrival of a separated child in an EU Member State. Prompt family reunification with responsible family members within EU territory should be arranged as soon

<sup>27</sup> Available on the EP's website, the Schmitt report (A5-0123/2000) (see **sources of information**)

<sup>28</sup> Separated Children in Europe Programme, "Statement of Good Practice", December 1999

as feasible (see section on **family reunification, Dublin II and Temporary Protection**).

Concerning age assessments, the proposal should recognise its limitations since it is not an exact science and thus, benefit of the doubt should be given to asylum-seekers claiming to be under 18 years of age. In such cases, medical examinations should be conducted by paediatricians with knowledge of the ethnic and cultural background of the separated child, and in a sensitive and non-threatening manner.

### **Lobbying Points**

- The principle of the best interest of the child should be integrated into national law.
- Family tracing should be initiated on arrival, and family reunification should occur as quickly as possible.
- Separated children should not be detained
- Separated children should never be denied access to asylum procedures.
- Separated children should never be returned to a country of origin or third country without specific safeguards and provisions in place.
- Separated children's claims should never be placed in admissibility or accelerated procedures, although they should be given priority and conducted in a timely manner.
- Age assessments should rely on both psychological and maturity assessments, rather than simply physiological tests.
- Applications by separated children should be treated on a priority basis.

### **Timetable & Targets**

- The discussion has started within the Council but it is going very slowly, based on an article by article analysis. Furthermore, it is not expected that the proposal be adopted in the next months since there is no political agreement on these issues.
- Provisions for separated children must be compared to and co-ordinated with the draft Directive on **reception conditions** to make sure that they are adequate and uniform.

## Minimum standards on the reception of applicants for asylum in Member States

### Introduction

'Reception conditions' refer to the set of measures adopted by States to assist asylum-seekers from the time an application is submitted until a final decision is made on that claim. UNHCR issued an extensive report on reception conditions across the EU<sup>29</sup>, which shows variations across Member States, but in general provisions include<sup>30</sup>:

- adequate arrival facilities at borders for asylum-seekers
- access to legal counselling, to information and to documentation
- freedom of movement
- accommodation
- adequate means of subsistence
- access to education
- access to medical care
- in some Member States, access to employment

Member States have broad discretionary powers over the reception conditions they offer, and the manner in which they are delivered. Harmonisation aims to develop common minimum standards.

### Brief Background of pre-Harmonisation systems

The first attempts by the EU Member States to co-operate on reception conditions were plagued by disagreement over the scope (who should be covered?) and the duration (for how long?) of proposed facilities. This is certainly true of the 1996 proposal under the Italian and Irish **Presidencies**. However, it has been widely recognised that co-operation over the reception conditions offered in each Member State is necessary to remove an incentive for 'asylum shopping'.

The 1997 *Council Resolution on Unaccompanied Minors who are Nationals of Third Countries* sets out the minimum standards agreed by the Member States for the reception of separated children. This stated that regardless of legal status separated children should be entitled to 'necessary protection and basic care' (Article 3.2). In terms of medical provision, the special needs of children who have experienced neglect, exploitation, abuse, torture or degrading treatment is the responsibility of Member States (Article 3.7). Access to education was only to be available if the asylum procedures took a prolonged period to complete. If a separated child was forced to remain on a national border waiting for an admission decision, that Member State was obliged to supply all necessary support and care.

<sup>29</sup> UNHCR, 'Reception Standards for Asylum-Seekers in the European Union', July 2000. Available on website: [www.unhcr.ch](http://www.unhcr.ch)

<sup>30</sup> For a country by country analysis of reception facilities and conditions, see the Danish Refugee Council (as part of the **Odysseus Programme**) report, "Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries", May 2000.

## Harmonisation

Since the publication of the **Scoreboard**, France had made it clear that reception conditions were a key priority area under their Presidency. Therefore, in July 2000, the French delegation in the **Working Group on Asylum** produced a **discussion paper** on harmonisation of reception conditions opening the debate for the Commission's proposed instrument.

In May 2001 the Commission issued its **Proposal** on minimum standards on the reception of applicants for asylum<sup>31</sup>. The draft Directive guarantees the access to reception conditions of every person and his/her family members – third country nationals or stateless persons – applying for asylum in an EU country. In spite of this, the document limits such access to refugees under the Geneva Convention, even if the Member States can opt for applying the Directive to other status of protection. This would have consequences for separated children granted subsidiary/complementary forms of protection.

UNHCR argues that claims for protection under the extended refugee definition should be included in the scope of the proposal.

The range of reception conditions suggested by the Commission is wide and, once again, Member States may introduce or retain more favourable conditions than those prescribed, as long as they are compatible with the Directive. It is also in line with the 1997 Council Resolution on unaccompanied minors who are nationals of third countries.

Applicants shall in principle have freedom of movement although restriction to a certain geographic area is possible. They cannot be held in detention except in the following cases:

- to ascertain or verify his/her identity or nationality;
- to determine his/her nationality when he/she has destroyed or disposed of his/her travel and/or identity documents or used fraudulent documents upon arrival in the Member State in order to mislead the authorities;
- to determine the elements on which his/her application for asylum is based which in other circumstances could be lost;
- in the context of a procedure, to decide on his/her right to enter the territory (**see section on minimum standards on Procedures**).

Regarding accommodation, the draft Directive determines how to provide housing, which in case of being granted by a financial allowance must be sufficient to avoid applicants and their families from falling in poverty. Minors will have the right to access the educational system (at least the public one), in maximum 65 working days after their application has been lodged. This period is extended utmost to six months concerning access to vocational training or to the labour market. Each Member State determines the conditions of such access.

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<sup>31</sup> COM(2001) 181 final of 3 April

Concerning access to health, the proposal makes a distinction as to the type of procedures. Applicants shall have access to primary health and psychological care during the regular procedure; while only emergency health and psychological care and care that cannot be postponed will be given in admissibility and accelerated procedures.

Reception facilities for recipients of **temporary protection** are considered in the Directive for granting temporary protection in the case of a mass influx of displaced persons (**see section on Temporary Protection**).

There are some positive extensions of the 1997 Resolution's provisions. The right to education for all asylum-seeking children throughout the asylum procedures must be granted under the parameters of the draft Directive. The section on information proposing that any information shall be given in a written form in a language understood by the recipient is also a step forward.

## **Debate within the Institutions**

### *European Parliament*

The European Parliament appointed Mr Hernandez Mollar as Rapporteur for the draft proposal. The report is foreseen to be presented to the Committee for Citizens' Rights and Justice and Home Affairs in October 2001.

### *Council*

This fall 2001 the document is being discussed at the High Level Working Group on Asylum. Spain, the next Presidency after Belgium, has already identified this issue as a priority, which indicates that the proposal might be approved before August of next year.

## **Relevance for separated children**

Many of SCEP's concerns about the treatment of asylum-seeking separated children are included in the draft Directive. The variations between Member States in the provision of emotional, social, physical and mental support to vulnerable groups in general, justifies the need for a set of common standards across the EU based on a high level of protection and care.

The Commission's proposed definition of unaccompanied minors is slightly broader than the one used in the draft directive on minimum standards on procedures, while including minors who were left unaccompanied after they have entered EU territory.

It includes several specific provisions for separated children; such as:

- access to the education system under the same conditions as nationals (Art.12);
- that they are accommodated together with an adult carer/guardian (Art. 16);
- special health and psychological care needs (Art. 20);
- special health and psychological care for minors during other procedures (Art.21);

- attention to special needs of minors (Art.23).

Article 24 and 25 deal exclusively with minors and include the best interest of the child principle; rehabilitation of victims of abuse, neglect, exploitation, torture, etc; family tracing and training of those working with separated children.

However, the proposal does not exclude the possibility of children being held in detention. Moreover, it is UNHCR and Save the Children position that in terms of education, separated children should be offered instruction in their mother tongue, and should be given adequate help to learn the language of the host country. This is essential for separated children's integration into host societies and for them to reach their potential academically.

### **Lobbying Points**

- Separated children should never be treated as adults, in terms of accommodation or detention.
- In general, separated children should not be detained, for immigration reasons.
- The specific health needs of separated children must be fully assessed and addressed, in particular, the psycho-social needs.

### **Timetable & Targets**

- The Spanish Presidency (January-June 2002) has stated that reception facilities are one of their key priorities.
- The EP's report is due to be adopted in the fall 2001.

## **Proposal for a Council regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II)**

### **Brief history of the existing Instrument**

Increased integration of the EU in terms of freedom of movement has raised new issues and complications for the Member States. Within the **Schengen Agreement**, the signatory states recognised that a reduction in border controls would create freedom of movement for asylum-seekers as well as citizens of the Member States. Therefore they included a section (articles 28-38) that determined which Member State was responsible for an asylum application. This clause operated from March 1995 until September 1997, when the 'Dublin Convention' came into force.

The *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States*, or **Dublin Convention** as it is commonly known, was signed in June 1990 by all the 12 EC Member States<sup>32</sup>. For the original 12 signatories it came into force in September 1997, for Austria and Sweden in October 1997 and for Finland in January 1998. On 25 March 2001, Denmark also became part of the Schengen area. At present, the United Kingdom and Ireland are the only Member States which have not adopted the Convention. It is an intergovernmental agreement, but can be considered the first step towards the EU asylum harmonisation since it would help to reduce the number of the so-called "orbit cases", in which no state would consider itself responsible to examine an asylum application.

The Convention established an independent Committee (known as the Article 18 Committee) responsible for questions of application and interpretation. Two distinct elements form the substance of the Dublin Convention: firstly, the criteria Member States use for determining the State responsible, and secondly, the procedure for readmission to the Member State responsible if a person is found in one Member State having already submitted an asylum application in another.

### **Harmonisation**

The **Amsterdam Treaty (TEU II)** called on the Commission to draft a new common instrument for determining the Member State responsible for an asylum application to replace the intergovernmental mechanism.

In December 1998, the **Vienna Action Plan** outlined two specific issues that need to be addressed (from the governmental perspective) by the new instrument:

- Firstly, procedures dealing with situations where responsibility criteria for reunifying families involving a number of Member States should be improved.

<sup>32</sup> Official Journal, C 254, 19/08/1997 (see **sources of information**)

- Secondly, the procedures for recognised refugees to change their country of residence needed to be improved and reassessed.

In general, Member States stated that they wanted to limit 'secondary movements' of asylum-seekers within the EU. The **Tampere Summit** reaffirmed these goals.

In March 2000, the Commission presented a **Working Paper** entitled *Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States*<sup>33</sup>. The Working Paper reassesses the Dublin Convention in terms of positive aspects that can be built on and aspects that have not been effective in practice.

The Commission has evaluated the Dublin Convention on the basis of its founding aims and principles, namely:

- to avoid situations where applicants are left in doubt for too long about their application;
- to guarantee all applicants that a Member State will take responsibility for their application;
- to prevent multiple applications, either concurrently or consecutively;
- to ensure that all Member States operate effective pre-entry and entry controls on persons wishing to enter EU territory;
- to deter misuse and preventing asylum-seekers being able to choose the Member State in which they apply;
- to maintain the unity of families and reunite separated families;
- to create an effective **burden-sharing** mechanism.

The Dublin Convention has not been fully successful in any of these aims and principles due to Member States' different interpretation of the established criteria.

In 2000, Member States were asked to complete a questionnaire on the practical implementation of the Dublin Convention, and on their experiences with the mechanisms. The responses contributed to the Commissions' draft **Proposal** that was presented on the 26 July 2001<sup>34</sup>.

According to the draft Proposal, the residual criteria for determining the state responsible for examining an asylum claim is that the responsibility for its examination belongs to the first Member State where the application was lodged. There are strict criteria that prevail which can determine the transfer of responsibility to another Member State:

- Unaccompanied minors: applications shall be examined by the State where they have a family member who can assume guardianship/ act as a primary caregiver.
- Family links: when the asylum seeker has a family member who's application is being examined or was already granted refugee status in other Member State, this is the one responsible for examining the claim.

<sup>33</sup> SEC (2000) 522, 21 March 2000 (see **sources of information**)

<sup>34</sup> COM(2001) 182

- Humanitarian clause: by request of a Member State and with the consent of the applicant, other states can examine the application for humanitarian reasons, related to family or cultural grounds.
- Possession of a residence permit.
- Possession of a visa.
- Irregular entry into the territory: the EU State which borders with a non Member State and was irregularly crossed or tolerated the unlawful presence of the third-country national for more than two months, is the one responsible for examining the application.
- Regular entry into the territory: the responsibility for examining the application lies with the Member State in which it was lodged.

The proposal lays down the time limits and the conditions that Member States have to respect when taking charge or taking back the applications for asylum.

UNHCR welcomes the wider definition of family members introduced in the draft Regulation as it includes ascendants, descendants and other persons related to the applicant that lived in the same home in the country of origin, provided that one is dependent on the other.

Another improvement is the fact that asylum seekers have the right to ask for information of any data processed that concerns them and the right to be informed, in a language that they understand, of a decision on the transfer of the application to another Member State, from which they can appeal.

### **Debate within and between the institutions**

#### *European Parliament*

The Committee for Citizens' Rights and Justice and Home Affairs appointed Luis Marinho (Portugal) as Rapporteur for the Proposal.

#### *Council*

The Proposal is being discussed in the Asylum Working Group under the Belgian Presidency.

### **Relevance for Separated Children**

SCEP advocates that when determining the Member State responsible for a separated child's asylum application, the '**best interests of the child**' should form the basis of policy and practice.

The Dublin Convention is an important instrument of family reunion of asylum seekers and if implemented would significantly change the present situation where family reunification of separated children seeking asylum very rarely occurs<sup>35</sup>. The draft Regulation specifically refers to the transfer of responsibility to a Member State where one member of the family of the child is and cares for the child (Art.6). Article

<sup>35</sup> Ruxton, "Separated Children Seeking Asylum in Europe: A programme for Action", 2000

15 seeks to prevent separation of families by application of the criteria set out in the Regulation. Member States should co-operate with each other to ensure that separated children can rejoin family members present in other Member States as soon as possible. Decisions about separated children's asylum applications and applications for **family reunification**, should be prioritised and separated children should not be forced to wait long periods of time away from their families where family reunification is possible. This would bring the EU's family reunification policy in line with the UN Convention on the Rights of the Child (Article 10(1)).

It should be recognised that it is more beneficial to the separated child if they are able to live in a familiar situation whilst applying for asylum. Therefore the definition of 'family', as regards family reunification, should be broad enough to include immediate and extended family members.

### **Lobbying Points**

- Family tracing should start as soon as a separated child enters EU territory, and family reunion should occur as quickly as possible based on the best interests of the child.
- As very few cases of family reunification of separated children has taken place so far, Member States should be encouraged to establish systems that will expedite family reunion of separated children.
- UNHCR and NGO's should monitor potential and implemented cases of family reunion.

### **Timetable & Targets**

- In view of the uncertainty of the timetable, the legislative process of this instrument should be closely monitored.

**Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention related to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection.**

The **Maastricht Treaty (TEU I)** launched a number of debates and reports within the EU to discuss the refugee definition and subsidiary/complementary forms of protection. On the 4 March 1996, the Council adopted a **Joint Position**, on the basis of article k3 of the EU Treaty, on the harmonised application of the definition of the term 'refugee' in article 1 of the 1951 Geneva Convention relating to the status of refugees<sup>36</sup>. Still, it was merely a joint position and the difficulty in harmonising in this area was that legal terms and practice are different and not adequately defined in all the Member States<sup>37</sup>, founding little consensus even at national level.

In 1998, the European Parliament published a report on its own initiative, and held an expert hearing on the issue of complementary forms of protection<sup>38</sup>. Under the Tampere European Council Conclusions, the Commission had to present a proposal for the approximation of rules on the recognition and content of refugee status and on complementary forms of protection.

The **draft Directive** was presented on 12 September 2001<sup>39</sup>.

This proposal is aimed at:

- (1) laying down common interpretation criteria for the application of the refugee definition of the 1951 Convention and 1967 Protocol;
- (2) laying down common interpretation criteria for the granting of subsidiary protection status; and,
- (3) establishing minimum standards of treatment applicable to persons falling under the above categories.

UNHCR has often stressed that, since one of the main features of refugee status is its international character, it is essential that States Parties the 1951 Convention and 1967 Protocol interpret the refugee definition in a similar and harmonized manner. UNHCR has also stressed that, as the Convention and Protocol do not cover all categories of persons in need of protection, there is a need for establishing complementary or subsidiary regimes of protection.

The 1951 Geneva Convention / 1967 New York Protocol define a refugee as a person who is outside of his / her country of origin and owing to well founded fear of being persecuted for reasons of race, religion, nationality, political opinion, membership of a particular social group is unable, or owing to such fear, is unwilling

<sup>36</sup> Joint Position of 4 March 1996, OJEC L 63, 13 March 1996

<sup>37</sup> For examples see the EP Working Paper, "Asylum in the EU Member States" EP Research DG (LIBE 108). (See **sources of information**)

<sup>38</sup> The EP Rapporteur was Michèle Lindeperg, "Report on the harmonisation of forms of protection complementing refugee status in the European Union", adopted 26 November 1998 (A4-0450/98) (See **sources of information**)

<sup>39</sup> COM(2001)510 of 12 September

to avail himself of the protection of that country. The category “persons eligible for subsidiary protection” include those who have a well-founded fear of being subjected in their country of origin to torture or inhuman or degrading treatment or punishment; or to a violation of a human right, sufficiently severe to engage Member State’s international obligations; or to a threat to their life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.

The Commission’s proposal has some positive aspects, including the recognition of the fact that persecution by non-State agents may provide basis for a claim under the 1951 Convention and 1967 Protocol.

A person in need of protection but who does not qualify as a refugee, because he/she does not fulfil the requirements of the Geneva Convention, shall be granted with subsidiary protection status. This means that such forms of protection are not in competition with the Geneva Convention but complement the protection offered.

The rights and benefits granted to refugees and to those enjoying other forms of protection are similar although with some differences related to the time within which those rights shall be endorsed. Those laid down in the draft Directive must not affect the rights conferred by the Geneva Convention. The provisions of the proposal include, inter alia, the right to information in a language likely to be understood by the applicant; access to employment and education; the granting of residence permits; freedom of movement within the territory of the Member State where they were granted protection; access to appropriate accommodation and access to health and psychological care. Article 6 ensures that accompanying family members are entitled to the same status as the applicant for international protection except if they don’t fulfil the requirements laid down in the proposal to be granted refugee status or subsidiary protection.

The draft Directive also deals with cessation and exclusion clauses.

### **Debate within and between the institutions**

The debate within and between the institutions is just starting.

### **Relevance to separated children**

The proposal provides that the “best interests of the child” should be a primary consideration of Member States when implementing the Directive and contains special provisions for the protection of unaccompanied minors, including:

- (1) That Member States shall take the necessary measures as soon as possible, to ensure the representation of unaccompanied minors enjoying international protection by legal guardianship, or representation by an organisation which is

- responsible for the care and well-being of minors, or by any other appropriate representation.
- (2) That Member States shall ensure that the minor's needs are duly met in the implementation of the provisions of this Directive by the guardian appointed for each unaccompanied minor. The appropriate authorities shall make regular assessments.
  - (3) That Member States shall ensure that unaccompanied minors are placed with adult family members, or with a foster family, or in centres specialised in accommodation for minors, or in other accommodation with a suitable situation for minors.
  - (4) That Member States shall ensure that siblings shall be kept together, and that changes of unaccompanied minors' residence shall be limited to a minimum.
  - (5) That, if it is in the best interest of the child, Member States shall endeavour to trace the members of the family of unaccompanied minors as soon as possible.
  - (6) That Member States shall ensure that those working with unaccompanied minors receive appropriate training on their needs.

### **Lobbying Points**

- Child-specific criteria<sup>40</sup> should be taken into consideration in the cases of separated children; of particular importance is taking child specific forms of human rights violations into consideration when assessing their need for international protection.
- Member States should be encouraged to develop guidelines on interviewing and assessing claims of separated children.
- Member States should establish policies and systems that ensure that, regardless of the status awarded, the rights of every separated child are respected.

### **Timetable & Targets**

- The Citizens' Rights and Justice and Home Affairs Committee will appoint a Rapporteur and the proposal will follow the subsequent terms of the consultation procedure within the European Parliament;
- The Council will start discussions in January 2002.

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<sup>40</sup> UNHCR, "Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum", paragraphs 8.6, 8.7, 8.8, 8.10; 1997

## Proposal for a Council Directive on the Right to Family Reunification

### Introduction

The unity of families and protection of family rights have been recognised by all the EU Member States through international legal instruments at European and UN levels<sup>41</sup>. Each Member State has developed different procedures and criteria for reuniting the families of refugees, and ensuring their 'right to family life' (Article 8<sup>42</sup>). These different systems and criteria are due to be harmonised as an essential element of the common EU Immigration policy.

### Brief history of national instruments

Since the creation of more restrictive policies in the 1970s family reunification of non-EU nationals has represented one route for non-EU nationals to access the EU's territory. Much intergovernmental co-operation has focused on closing such 'loop-holes' in the system. However, it has been recognised by the EU institutions morally and legally<sup>43</sup> that the right to family life, and consequently family reunification, should be available to non-EU nationals.

All of the Member States differ in their application of family reunification law. Generally, all Member States provide for either a right to or a discretionary possibility of family reunification<sup>44</sup>, and only Austria operates a quota system. As regards separated children, few Member States have followed SCEP's guidelines in offering family reunification to asylum seeking separated children, as well as recognised refugee children and as noted in **Dublin II** (see section on **Dublin II**) few cases exist. However if the instrument replacing the Dublin Convention is adopted and implemented at national levels, this should change.

Family reunification is a classic example of the inter-linkage of immigration and asylum policies within the EU. During the discussions of the Heads of Government at the European Council in Maastricht in 1991, it was recognised that a common approach to family reunion was needed. Thus, in 1993 JHA Ministers adopted a **Resolution**, which created a set of 'soft law' criteria for family reunion policy across the EU<sup>45</sup>. These guidelines were neither binding nor fully implemented by all the Member States. However, they created a basis for further co-ordination and harmonisation.

<sup>41</sup> Articles 9 & 10 of the UN Convention on the Rights of the Child (1989)

<sup>42</sup> **European Convention on Human Rights** 1950

<sup>43</sup> Through the judgements of the European Court of Human Rights (Council of Europe) on Article 8 (The right to family life) of the European Convention on Human Rights and Fundamental Freedoms (1950)

<sup>44</sup> Depending upon legal status and category of the non-EU citizen

<sup>45</sup> Resolution on the harmonisation of national policies on family reunification (SN 282/1/93)

Family reunification of separated children has ramifications for all areas of asylum law and EU harmonisation. SCEP advocates that family tracing should occur immediately on arrival and family reunification should follow as soon as possible, whilst always taking the best interests and opinions of the child fully into account (CRC Articles 3 & 12).

## Harmonisation

The Commission presented its proposal for a Council Directive on the right to Family Reunification<sup>46</sup> to the Council of Ministers and to the European Parliament on 1 December 2000, making it clear that the draft proposal was intended as a central element of a greater immigration system rather than a 'stand-alone' instrument. The consequence of including refugees within the draft directive will be to tie asylum and immigration policy together. This is essential, but it is also necessary that these two areas be seen as different in fundamental ways.

The Commission's draft Directive was welcomed by UNHCR and refugee organisations, as it included the right of recognised refugees to family reunification. Nevertheless, the proposal caused major controversy (concerning its depth and coverage) within the Council of Ministers and the Commission had to present a **modified Proposal**, which was issued in October 2000<sup>47</sup>.

At present, spouses (or unmarried couples) and children are allowed to move from one EU country to another for family reunification purposes. Family members in the ascending line can also be admitted if they are dependent on the applicant and deprived of necessary means of family support in the country of origin. As for adult children, the proposal requires that they are objectively unable to satisfy their needs by reason of their state of health.

The scope of the proposal excludes family members of citizens of the Union who have exercised their right to free movement of persons and people enjoying other forms of international protection than refugee status. In the latter case, the exclusion came by suggestion of the European Parliament, considering that family reunification of those enjoying other forms of international protection should be properly addressed in an autonomous instrument. The Commission took this amendment into consideration and should have treated this subject in a proposal on complementary/subsidiary forms of protection (see section). However, in the draft Directive on refugee definition and complementary/subsidiary forms of protection, there is no special provision on family reunification but only the possibility of giving derivative status to the accompanying family members of the applicant.

The modified proposal has now a separate chapter for family reunion of refugees, including special provisions for separated children. Concerning right to family reunion, it allows the entry and residence of relatives in the direct ascending line or

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<sup>46</sup> on 1 December 1999 (COM (1999) 638 final)

<sup>47</sup> COM(2000)624, OJEC C062 of 27 February 2001

other family members in the case where the minor has no ascendant relatives or they cannot be traced.

The draft Directive also asserts the importance of Article 3 of the Convention on the Rights of the Child (CRC) (“best interests of the child”). The Commission’s explanatory statement states that children should not be separated from their families, in accordance with Article 9 of the CRC.

### **Debate within the Institutions**

All the proposals drafted under articles 61-64 (TEU) must be agreed by unanimity in the Council of Ministers, under the **Consultation procedure** with European Parliament.

#### *Council of Ministers:*

The discussion in the **Council Working Party on Migration, SCIFA**, seems to be far from reaching an agreement. In the JHA Council meetings of 28 May 2001 and of 27 and 28 September 2001, main questions like the definition of family members, the guarantees and obligations of person benefiting from the right to family reunification or the scope of the right to family reunification for children (age, conditions) did not reach consensus.

#### *European Parliament:*

Ewa Klant (Germany) was appointed Rapporteur but as she suggested that recognised refugees should not be included in the Directive, and that it should be far more restrictive in criteria and scope,<sup>48</sup> the Committee as a whole rejected her recommendations. Consequently, Ewa Klant stepped down as Rapporteur, to be replaced by Graham Watson, the Chairman of the Committee. The report was adopted in the September 2001 plenary session.

Other EP suggestions modifying the original proposal were related to the quality and assessment of accommodation; the resources the applicant may be required to provide and the prohibition on access to employment and vocational training by relatives in the ascending line or adult children.

### **Relevance for separated children**

UNHCR argues that family tracing for separated asylum seeking children is a first priority and that it is essential that unaccompanied children are assisted in locating and communicating with their family members. It is fundamental that they are given the opportunity to reunite with family members as early as possible; the tracing process should be started immediately upon arrival of a separated child. However, care must be taken to ensure the safety of family members in the child’s country of nationality or habitual residence.

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<sup>48</sup> Available from the EP website: [www.europarl.eu.int](http://www.europarl.eu.int) originally as the Klant Report (1999/0258 Provisional), the revised report by Graham Watson (A5-0201/2000)

Save the Children also welcomed the draft Directive in general though urging for clarification in certain provisions in order to guarantee that the best interests of the child are a primary consideration.

The UN Convention on the Rights of the Child (1989) specifies that separated children have the right to maintain contact with their families<sup>49</sup>.

The **best interests of the child** should dictate how families are reunited, both within the EU and when third countries are involved. Furthermore, the child should be informed about its rights and the state of their application for family reunification.

### **Lobbying Points**

- Ensuring that the rights of refugees remain in the draft Directive.
- Establish systems of family tracing in co-operation with International Committee of the Red Cross, UN or other agencies, which facilitate early and swift tracing of families.
- Establish systems for rapid family reunion.

### **Targets**

- The Council will continue the discussion and a new compromise proposal might be presented by the Presidency to COREPER with a view to the JHA Council on 6 and 7 December 2001. However, it is unlikely that the proposal is adopted under the Belgian presidency due to significant political disagreement on several aspects of the Draft Directive.

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<sup>49</sup> Articles 9(3) and 10, Convention on the Rights of the Child, 1989.

## Readmission agreements between the EU and third countries

Readmission agreements are arrangements between states by which they agree to readmit their nationals and / or third country nationals who do not satisfy or do not fulfil any longer the conditions for entry or stay in the territory of the contracting party. Readmission agreements were primarily designed for improving border control and burden sharing. Their use has increased rapidly over the last ten years. For instance, between 1950 and 1990 18 readmission agreements were concluded, while between 1990 and 1999 220 agreements were created<sup>50</sup>. The majority of these were bilateral and were between Western European states and the states of Central and Eastern Europe. Few of these agreements were concluded between blocks of states, for instance the Benelux states or the EU.

EU Member States have two parallel systems of readmission; the **Dublin Convention** for internal readmission of asylum seekers, and agreements with third countries (non-EU states) for nationals or third country nationals.

### Pre-harmonisation instruments

Although each Member State has already concluded several readmission agreements with third countries (according to its national foreign policy), it was felt that with the increasing co-operation under the **Schengen Agreement** and the realisation of freedom of movement within the Schengen area, readmission agreements on a bilateral basis were becoming ineffective to return immigrants and deter others to come. As a consequence, Member States in the mid-nineties, decided through the **JHA Council**, to adopt a collective strategy towards the issue.

In November 1994, the JHA Council agreed on a 'specimen bilateral readmission agreement'<sup>51</sup>. This set the mould for national bilateral agreements, referring to third country nationals as well as to nationals of the Contracting States, but held no responsibilities as far as the asylum claims of people returned to a '**safe third country**' should be treated or heard. Furthermore, there is no mention of *non-refoulement* principle in the clause.

This agreement was followed in July 1995 with a Council **Recommendation** on the 'Guiding Principles in Drawing up Protocols on the Implementation of Readmission Agreements'<sup>52</sup>. This recommendation specified some implementing tools, including the use of a 'simplified procedure' for returning people found at national borders and the specific documents which would determine which state was responsible for the person. There was no mention of the specific rights of asylum-seekers.

<sup>50</sup> Statistics of the Inter-governmental Consultations for Asylum, Refugees and Migration Policies in Europe, North America and Australia, 'IGC Report on Readmission Agreements', August 1999, pp.5

<sup>51</sup> Official Journal, C274, 19/09/1996, pp. 0020-0024 (see **sources of information**)

<sup>52</sup> Official Journal, C274, 19/09/1996, pp.0025-0033 (see **sources of information**)

Later, much inter-governmental co-operation has developed outside the EU within other intergovernmental organisations, such as the Budapest Group<sup>53</sup> and the Inter-Governmental Consultation<sup>54</sup>.

## Harmonisation

The **Amsterdam Treaty (TEU II)** has conferred power to the European Community in the field of readmission and one Conclusion of the Tampere European Council has mandated the Council to conclude readmission agreements or to include standard clauses in other agreements between the EU and relevant third countries or group of countries. The implication of this is that EU Member States cannot conclude collective readmission agreements with third countries without the agreement of the Commission and the European Parliament (under the **Consultation procedure**). However, as it is recognised that readmission is a far broader issue than simply the stated Amsterdam goal of returning illegal immigrants, it is likely that bilateral agreements between individual Member States and third countries will continue.

In December 1999, the JHA Council stipulated the language of a standard readmission clause to be inserted in Community co-operation agreements. However, as in the 1994 EU Specimen Bilateral readmission Agreement, there are no references to the obligations of the **Geneva Convention** or to the non-refoulement principle<sup>55</sup>.

Following the JHA Council in December 1999, the Finnish Presidency proposed a 'Council Regulation determining the obligations as between the Member States for the readmission of third-country nationals'<sup>56</sup>. The proposal was the first use of the extended Presidency 'right to initiate' policy; from an institutional perspective this made the proposal somewhat sensitive. However, the proposal was ill timed and not greeted enthusiastically by many Member States, as it did not follow the **Vienna Action Plan's** proposal for a cross-pillar approach.

Furthermore, the Commission was not keen to see progress made on this initiative, as they intended to deal with readmission in the context of the whole post-Amsterdam immigration agenda, rather than in piecemeal, uncoordinated measures. Equally, the European Parliament came to the same conclusion on the proposal<sup>57</sup>, and rejected it calling upon the

<sup>53</sup> The Budapest Group is made up of 34 European states, it was established in 1993 and focuses on readmission, trafficking and illegal migration between the participatory states.

<sup>54</sup> IGC has 12 European members (Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, Netherlands, Norway, Spain, Switzerland and the UK); it was established in 1985. It focuses on trafficking and information exchanges between the states.

<sup>55</sup> The Commission's working document entitled 'Towards common standards on asylum procedures'<sup>55</sup> addressed the issue of 'safe third countries', and the definition used by Member States. The Commission asked whether a provision should be attached to the use of the title, which would ensure that asylum-seekers returned to a third country would have adequate access to asylum procedures and reception facilities.

<sup>56</sup> Official Journal, C353, 07/12/1999, pp. 6-9 (see **sources of information**)

<sup>57</sup> Karamanou report, A5-0110/2000, May 2000

Commission to develop a comprehensive policy towards third countries, in light of the **Tampere Summit** Conclusions.

## **Current Developments**

At present, specific EU readmission agreements are being negotiated within the JHA Council (these differ from the readmission clauses added to other EU external agreements). The focus of the JHA Council are the States assessed by the **High Level Working Group on Asylum and Migration**, namely Albania (including Kosovo), Afghanistan, Morocco, Iraq, Somalia and Sri Lanka.

## **Relevance for separated children**

There are no specific clauses in the readmission agreements prepared thus far relating to separated children; even less on asylum seeking separated children : they are subject to the same treatment as adult asylum-seekers as far as 'safe third country' criteria are concerned.

However, readmission agreements could create valuable frameworks for return programmes of separated children, after thorough analysis of their best interests. Some separated children correctly claim that their countries will not accept them back, and for this reason it is important to create durable frameworks which would allow children to return home, if this is deemed the appropriate solution. These framework agreements should be subject to internationally accepted standards and safeguards to ensure that the child's safety and rights are respected.

SCEP advocates that separated children should not be returned to their country of nationality before proper and secure safeguards are established<sup>58</sup>. As far as separated children whose asylum claims have failed are concerned; UNHCR has specific guidelines for their protection and ensuring safe return<sup>59</sup>.

## **Lobbying Points**

- Readmission agreements should contain specific provisions for separated children, in accordance with UNHCR and SCEP guidelines and other international protection instruments.
- Readmission agreements should include the establishment of return programs for separated children.

## **Timetable & Targets**

- The big part of the negotiation and drafting of the Community readmission agreements is done within the JHA Council and its **High Level Working**

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<sup>58</sup> Recommendation 25, Ruxton, "Separated Children Seeking Asylum in Europe: A Programme for Action", 2000 and Statement of Good Practice, SCEP 2000

<sup>59</sup> Paragraphs 9.2-9.7 in: UNHCR, "Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum", February 1997

**Group on Migration.** Consequently, their activities should be followed closely, through contacts with the national delegations and governments.

- In addition, the Commission and the European Parliament are interested that these agreements should be created and adopted with the full knowledge and involvement of all the institutions, to ensure transparency and accountability. Therefore it is important to encourage the institutions to persuade the Council that readmission should constitute an element of a far greater migration policy, with a truly cross-pillar basis and inter-institutional agreement.

## Glossary of Terms

*Amsterdam Treaty (TEU II)* – signed in 1997 and entered into force 1 May 1999, the amended Treaty on European Union. The Treaty's main goals were alignment of employment policies and strengthening of Economic and Monetary Union, however a new section was dedicated to the harmonisation of Asylum and Immigration policy, as part of a new Chapter IV entitled "Towards an area of freedom, security and justice". Basically, the 'soft law' agreements between states were to be developed into a common asylum policy, under Community competence (**First Pillar**). The treaty allocated this process a transitory period of 5 years, after ratification, and a list of the necessary common instruments was adopted.

*Best Interests of the Child* – Article 3(paragraph 1) of the UN Convention on the Rights of the Child (1989) states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

All the EU Member States are signatories to this article.

*Budget Lines* – are the geographical or thematic divisions placed on the entire EU budget, to ensure that adequate funds are available to EU priorities. They are decided by the **Council of Ministers** and **European Parliament**, and allocated by the **European Commission** to fund the implementation of EU policies.

*Burden or responsibility sharing* – this has become a familiar 'buzz-word' in EU Asylum policy, meaning sharing of the financial and physical cost of asylum systems for Member States. The concept has been used to support the capacity of States to host and protect refugees, particularly in situations of mass-influx.

Throughout the 1990s different approaches have been tested, without success, to compensate Member States that handle the majority of EU asylum claims. The most recent example is the distribution system for allocating money from the **European Refugee Fund**.

*Centre for Information, Reflection and Exchange on Asylum (CIREA)* – established in 1992 by a Council Joint Decision, CIREA is a Working Group that facilitates the confidential exchange of information about asylum matters between the Member States. Focus is placed on specific countries of origin, statistics, legislative developments and case-law. UNHCR is able to contribute to the meetings in an expert capacity, as an observer. CIREA has no decision-taking powers.

*Centre for Information, Reflection and Exchange on Frontiers and Immigration (CIREFI)* - similar to **CIREA** but the focus is on trafficking, illegal entry of migrants and border controls. There is no access to the data or participation by outside experts.

*Committee of Permanent Representatives II (COREPER II)* – deals with JHA matters. Made up of the Permanent Representatives of the Member States to the EU. The majority of these Representatives are high-ranking national civil servants from the Foreign Affairs Ministries, based in Brussels. They are assisted by the Council's legal service. They are responsible for preparing the work of the Council of Ministers, including JHA meetings, and arranging the ministerial meetings' agendas.

*Committee of Permanent Representatives I (COREPER I)* – made up of the Deputy Permanent Representatives of each Member State. In an effort to share the workload with COREPER II, they discuss certain policy sectors and set the agenda for specific ministerial meetings.

*Council of Europe* – established in 1949, the Council of Europe has 43 Member States and is based in Strasbourg. The Council of Europe has its expertise in the field of European human rights instruments and law. The European Court of Human Rights is a Council of Europe body.

*Council of Ministers* – the Council of Ministers is the primary legislative body in the EU. There are 25 different Councils working on specific policy sectors, such as Justice and Home Affairs. They are made up of the relevant national government Ministers and the relevant Commissioner. The majority of legislation is prepared in advance of ministerial meetings by **COREPER I** or **COREPER II** and other national civil servants, so during ministerial meetings the majority of national positions and concerns are known. There are a number of Working Groups and Steering Committees, made up of national civil servants, which work below COREPER.

*Justice and Home Affairs Council (JHA Council)*- *As far as Justice and Home Affairs is concerned all legislation must be adopted on the basis of unanimity. This is different from the traditional decision-taking procedures within the First Pillar where the vast majority of legislation is adopted according to **Qualified Majority Voting**.*

*Council Working Party on Asylum* – a Working Party of the **Council of Ministers**, made up of national civil servants and experts. They meet monthly to discuss draft legislative instruments as well as the development of policy in the area of asylum. These meetings are closed to outside organisations.

*Council Working Party on Migration* – a Working Party of the **Council of Ministers**, made up of national civil servants and experts. They meet monthly to discuss draft legislative instruments and the development of migration policy in the EU. These meetings are closed to outside organisations.

#### *Decision-making in the EU*

**Consultative procedure** – on the basis of a proposal, the Council decides by unanimity after consulting the EP. The results of the consultation can be disregarded if the Council wishes. However, the Commission can integrate EP suggestions into modified proposals on a discretionary basis. This procedure is applicable to JHA matters (including asylum).

**Co-operation procedure** – the final decision rests with the Council of Ministers but the EP is given two readings of the draft legislation and allowed to submit amendments. These can be ignored by the Council of Ministers if desired, but often the Commission integrates EP suggestions into modified

proposals on an informal basis. This procedure is not applicable to JHA affairs.

**Co-decision procedure** – shares the decision-making equally between the Council of Ministers and the EP, with **Qualified Majority Voting** in the Council. Both institutions prepare their positions and they have to negotiate their amendments with each other. If agreement cannot be reached then a Conciliation Committee is created made up equally of Council representatives and MEPs, and overseen by the Commission. The Conciliation Committee is given the mandate of creating an agreeable text, but if this fails the EP has the right to veto the piece of legislation outright.

This procedure is applied to the majority of decision-making in the **First Pillar**, but not applicable to JHA matters.

*Dublin Convention* – signed in 1990, but not ratified and implemented until 1997. The Dublin Convention, or Convention Determining the State Responsible for Applications for Asylum, established intergovernmental rules for determining who was responsible for an asylum-seeker, and a system of information exchange. The Dublin Convention can be considered the first solid attempt to co-ordinate EU asylum systems. However, it is dependent on an accompanying fair system of **burden-sharing** and common procedural and material law standards and definitions. (see **EURODAC** and **safe third country**)

*EURODAC* – the EURODAC system is based on the collection of fingerprints and data of all asylum-seekers in the EU above 14 years of age aiming to support the **Dublin Convention**, or the future EU instrument replacing it. The regulation creating Eurodac was adopted by the Council in December 2000.

*European Commission* – the Commission is the legislative initiator within the EU, and also has the responsibility to implement EU policy through the management of budget lines. In the area of asylum, the Commission shares the right to initiate policy with the Council/Presidency.

Made up of 20 Commissioners (2 from the 5 largest states and 1 from the others), the College of the Commission is a nominated, and, therefore, an intentionally impartial body. It must be approved by the EP. The Commissioners are headed by the 'President of the European Commission', at the moment Romano Prodi, and supported by a personal "Cabinet". Most decisions are created by consensus, but majority voting is the rule.

The competence of the EU is divided into 26 different Directorate-Generals (DGs), along similar policy lines to national governments. For instance, DG Justice and Home Affairs deals with Asylum and Immigration, police co-operation and judicial co-operation (criminal and civil) in the EU, or DG Employment and Social Affairs. Each DG develops legislative and policy initiatives (Directives, Regulations, Communications) according to the demands of the revised treaties or other institutions' requests.

*European Council* – started as an informal meeting of the Heads of State and Government in the EEC, in 1961. The European Council was given a formal identity in the **Single European Act**, and fully consolidated in the **Maastricht** and **Amsterdam treaties**. The President of the Commission was also

included as a participant. Basically, the role of this institution is that of an Executive. According to the principle of subsidiarity the European Council has the role of resolving conflicts which cannot be resolved at Minister level in the Council of Ministers. It also gives policy orientation.

*European Parliament* – the EP has 626 Members of the European Parliament (MEPs) elected by the same voting procedure in each member state, and divided into ‘political groups’ (usually along ideological lines). The decision-making powers have grown dramatically since the establishment of the EEC, when the EP was an appointed assembly without power. The first direct elections were in 1979, and gradually powers have been extended to the EP, under the **Co-operation** and **Co-decision** procedures. The Amsterdam Treaty extended the Co-decision procedure to most asylum matters with a transition period of 5 years (after 2004).

*European Refugee Fund* – is an amalgamation of EU **budget lines**, previously operated independently, on the reception, integration and voluntary repatriation of refugees and displaced people (former budget line B5-803). The intention is to simplify the allocation of funds to projects through decentralised management at national level, whilst also sharing the cost of projects proportionally amongst the Member States. The fund was created for a five-year period in September 2000 by a Council Decision.

*Geneva Convention* – was signed in July 1951, the United Nations Convention relating to the Status of Refugees. It was amended by an additional Protocol in 1967 (New York Protocol), which removed both the limitation of persecution before 1 January 1951 to allow people persecuted after that date to be granted refugee status, and the geographical limitation of Europe so that Convention has worldwide application. It forms the basis of all European national asylum systems.

*High Level Working Group on Asylum and Migration (HLWG)* – the HLWG was established in December 1998 during the Austrian Presidency, and was given the mandate of developing an integrated cross-Pillar approach to migration policy:

“The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development.” (Paragraph 11, Tampere Conclusions, October 1999)

The working group is comprised of high-level national civil servants and Commission officials. The HLWG has selected a number of countries to focus on and produced an ‘Action Plan’ for each one, which outlines specific issues relating to that state, and priority areas for future development and relations. The initial Action Plans focused on Afghanistan, Albania (and Kosovo), Morocco, Somalia, Sri Lanka and Iraq. The Tampere Summit extended the

group's mandate, which was reconducted at the Nice Summit (December 2000)

*Intergovernmental Conferences (IGC)* – these are intergovernmental forum for agreeing changes to the Treaties. They occur before every constitutional change.

*Legislation in the EU*

**Communications** - the Commission publishes information papers on a range of subjects; their prime objective is to start an informed debate within the Institutions before an appropriate form of legislation is drafted.

**Regulations** – these are binding immediately – therefore no act of legislature is necessary as they move directly into EC law - applicable to all Member States and ensure the uniformity of EC law.

**Directives** – these are binding legal requirements on the Member States. They can be addressed to all Member States or individuals. However, it is the responsibility of the Member State to integrate the details into national law. There are penalties if it can be proved that Member States are stalling or delaying implementation.

**Decisions** – these are binding agreements made by the Council or the Commission. They refer to the implementation of policy already agreed.

**Resolutions** – these are not binding but serve to highlight areas of concern and co-operation. It is becoming more common that inter-institutional 'joint resolutions' are adopted, between the EP and the Council of Ministers.

*Lomé/Cotonu Convention* – the new agreement between the African, Caribbean and Pacific States (ACP) and the EU was signed in Cotonu, Benin in May 2000. As a result of agreement on a standard **readmission** clause at the **JHA Council** in December 1999, the Cotonu Agreement includes a clause concerning co-operation to repatriate illegal ACP-nationals from the EU.

Whilst other readmission agreements being discussed. These will have major implications for ACP-nationals regardless of age. For instance, the Readmission Agreement that is proposed with Morocco would have implications for separated children from sub-Saharan Africa.

*London Resolutions* – a number of Resolutions concerning asylum policy were adopted at the end of 1992 (British Presidency). They are collectively known as the London Resolutions and include:

- Resolution on Manifestly Unfounded Applications for Asylum;
- Resolution on a Harmonised Approach to Questions concerning Host Third Countries;
- Conclusions on Countries in Which There is generally no Serious Risk of Persecution.

Although agreed outside the competence of the EC/EU these resolutions indicate the growing willingness to co-ordinate procedures and policies.

Maastricht Treaty (TEU I) – signed in 1992 and entered into force 1 November 1993, the Treaty on European Union was designed to strengthen the integration process. The treaty created a three **Pillar approach**. It increased the scope of Community competence and included policy areas that had previously been totally intergovernmental, such as Justice and Home Affairs Co-operation, although decision-making in these areas remained with the national governments.

**N.B.** the EU does not have a legal personality to date, unlike the EEC or European Community as it became. Therefore all European Law is referred to as EC law.

*Pillar structure – First Pillar; Second Pillar; Third Pillar:*

The Maastricht Treaty created a three-pillar structure for the EU, which incorporated areas of policy that had developed as intergovernmental co-operation. The **First Pillar** was 'European Community'; generally, this included all former-EC competence – including, economic, social, environmental, industrial, trade and agricultural policies. The **Second Pillar** was 'Common Foreign and Security Policy' (CFSP), this integrated intergovernmental co-operation in foreign policy and security policy.

The **Third Pillar** was 'Justice and Home Affairs'; this included all the intergovernmental co-operation on cross-border crime, asylum and immigration, visa, border control, justice through the EU, police co-operation, fraud and trafficking.

The allocation of competencies to the three pillars was deemed inappropriate in practice; therefore the **Amsterdam Treaty (TEU II)** shifted some policy sectors – including Asylum policy, which after a 5-year transitory period will stand in the First pillar.

*Presidency* – the Presidency of the European Union rotates through the Member States every 6 months. A member state is expected to hold at least two Summits of the **European Council** during this time (normally, one at the beginning of their period and one at the end), and to facilitate the adoption of legislation, policy instruments, action plans and generally, conduct the ongoing work of various Council groups. Often the agendas of Presidencies are known far in advance, and for important policy goals, such as Economic and Monetary Union, or Asylum harmonisation, the 'troika' (the previous, present and future Presidencies) will discuss the agenda and timetable. There is certainly competition between the states to have successful Presidencies with durable and concrete results.

*Qualified Majority Voting (QMV)* – QMV is a voting system based on weighted votes. Each Member State has a number of votes set in proportion to population size of the country:

Germany, France, Italy, and the UK:	10 votes
Spain:	8 votes
Belgium, Greece, the Netherlands & Portugal:	5 votes
Austria & Sweden:	4 votes
Ireland, Denmark & Finland:	3 votes
Luxembourg:	2 votes

When a vote is taken, in order to pass a piece of legislation there must be 62 votes in favour of the potential 87. This means that the 5 large countries cannot 'steam-roll' legislation through, there must be some agreement from the smaller countries. It also means that a North-South divide is unfeasible.

It is hoped that QMV will be extended to Asylum and Immigration policy after the 5 years transitory period.

This was reviewed within the **Nice Intergovernmental Conference (IGC)**, in consideration of the Enlargement process and the need for reform of the EU's institutions.

*Readmission agreements* – one element of the **Tampere Conclusions** was co-operation with third countries over readmission (repatriation) of their nationals on EU territory, and non-nationals who travelled through their countries to reach the EU. Already back, in 1994 a model for bilateral agreements between individual states was agreed. At the December 1999 **JHA Council** meeting, the Member States agreed upon a standard clause to be integrated into all EU bilateral co-operation and partnership agreements. Co-operation includes provision of new identity papers and travel documents. There are also proposals being discussed on EC readmission agreements with third countries; these would constitute agreements dedicated solely to the return of migrants to ‘safe’ countries of origin or transit (see **safe third countries**). The first agreements are proposed with Russia, Morocco (mainly immigrants from sub-Saharan Africa), Sri Lanka and Pakistan (mainly for Afghans).

*Refoulement* – “No contracting State shall expel or return (‘refouler’[in French]) a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion” (Article 33 of **Geneva Convention**). This is the cornerstone principle of IRC.

*Safe Third Country* – ‘Safe countries’ are those where there is generally no threat of persecution or refoulement to an individual. The concept is often used to determine whether an asylum-seeker can be returned to a “third” country of transit (inside or outside the EU) where **refoulement** will not occur. However, there is a danger that states can be declared ‘safe countries’ and yet they may not be so for certain ‘social groups or individuals’.

*Safe Country of Origin* – refers to states where it is assumed that there is no threat of persecution, torture, inhumane or degrading treatment to its nationals or permanent residents.

*Schengen Agreement* – signed in 1985 by Germany, France, the Netherlands, Belgium and Luxembourg. This was followed by the Schengen Implementation Agreement in 1990. These agreements were signed later by other Member States (All except United Kingdom and Ireland who have the opportunity to ‘opt in’ and Denmark has entered the agreement). The Agreement concerns the removal of border controls that hinder free movement between the signatory states. It was originally a non-EU instrument but it is gradually being integrated into the Treaties. Non-EU states, Norway and Iceland, have expressed interests in being signatories, the EU is deciding their membership presently. The Schengen system is likely to remain within the **Third Pillar** for the foreseeable future; there is no public access to the database of information.

*Scoreboard* – after a request at the **Tampere Summit**, Commissioner Antonio Vitorino (JHA) published the Commission’s programme of work in the field of JHA over the next 5 years, in March 2000, last updated in May 2001. This document was entitled the “Scoreboard to assess progress on the creation of an area of “freedom, security and justice” in the European Union”. It includes timetables for Commission proposals in asylum harmonisation, and the state of play between the institutions in general terms. The Scoreboard shall be reviewed twice a year.

*Separated Children* – Separated children are children under 18 years of age outside their country of origin and without their parents or guardians to care for and protect them (SCEP definition).

*Single European Act (SEA)* – signed in 1986, this treaty continued the ethos of the Treaty of Rome and bridged the gap between a common European market and a single European market with real freedom of movement for goods, capital, services and people. 12 Member States signed the SEA (the original 6 plus the United Kingdom, Ireland, Spain, Greece, Denmark and Portugal). The SEA proposed that a single market, and all associated measures, should be realised by 1992.

“The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” (Article 14 (2), TEU II, formerly Article 8a of SEA)

*Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)* – a special Committee of the Council of Ministers, SCIFA is the step below **COREPER II** in the Council’s decision-making process. All harmonisation measures concerning asylum, migration and border controls are debated in this forum. Similar committees exist for judicial co-operation, and JHA matters remaining within the Third pillar, such as police co-operation (Article 36, TEU II)

*Subsidiarity* – a principle enshrined in the **Maastricht Treaty (TEU I)**, which allows decisions to be made at the most appropriate level, either the local, regional, national or EU level. This principle is observed in all EU policy, and it is often used as a reason to keep greater sovereignty at the national level.

*Subsidiary/Complementary forms of Protection* – these are alternative forms of protection which are granted to people who do not meet the criteria of the **Geneva Convention** but are however deemed to be in need of international protection.

*Tampere Summit* – Held in October 1999, the Extraordinary European Council in Tampere, Finland, was dedicated to the creation of an “area of freedom, security and justice” in the EU. The Conclusions of the Summit were widely welcomed by UNHCR and NGOs. The Member States reaffirmed their absolute respect of the right to asylum, and the development of a common asylum system based on a full and inclusive application of the Geneva Convention (1951). They also called for guarantees on maintaining access to EU territory for those in need of international protection. The Member States asked Commissioner Vitorino to draft a ‘**Scoreboard**’ to assess the progress of the ‘area of freedom, security and justice’.

*Temporary Protection* - Temporary Protection has been proposed to meet emergency refugee mass influxes in many countries. It is an exceptional interim form of protection, which must give way to a durable solution. Through its use governments can initially suspend individual screening (which is both impractical and costly) of people displaced by civil wars and other forms of generalised violence. (see **burden sharing**). The Directive on Temporary Protection was adopted in 20 July 2001.

*Treaty of Rome (EEC)*– signed in 1957, the treaty creating a European Economic Community was signed by 6 European Countries (Germany, France, Italy, the Netherlands, Belgium and Luxembourg). The treaty was primarily an economic agreement designed to interlock the economies of the Member States to avoid future war. The treaty established the principle of freedom of movement for labour and persons. This was later extended and deepened through the **Single European Act**.

*Vienna Action Plan* – published in December 1998, by the Austrian Presidency, the Vienna Action Plan was an agenda and timetable on how the Amsterdam Treaty should be implemented in the field of JHA. It has been partially superseded by the Commission's **Scoreboard** as regards the development and adoption of legislative instruments.

**Appendix 1:**

**Extract of the Commission's Scoreboard to review progress on the creation of an area of "Freedom, security and Justice" in the European union (Com (2001) 278 final, 23 May – pp.5-12**

**2. A COMMON EU ASYLUM AND MIGRATION POLICY**

The separate but closely related issues of asylum and migration call for the development of a common EU policy to include the following elements:

**2.1. Partnership with countries of origin**

A comprehensive approach to migration will be developed, addressing political, human rights and development issues in countries and regions of origin and transit, on the basis of a partnership with those countries and regions and with a view to promoting co-development.

**2.2. A common European asylum system**

The aim is to ensure full and inclusive application of the Geneva Convention, ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*. In the long term, a common asylum procedure and a uniform status for refugees must be established, to be valid throughout the Union. Secondary movements by asylum seekers between Member States should be limited. Agreement will be actively sought on a temporary protection regime for displaced persons, on the basis of solidarity among Member States.

European Commission, "*Scoreboard to review progress on the creation of an "area of freedom, security and justice" in the European Union*", March 2000 (COM(2000)167 final), A PDF version can be found on the Europa website. [http://www.europa.eu.int/comm/dgs/justice\\_home/pdf/com2001-278-en.pdf](http://www.europa.eu.int/comm/dgs/justice_home/pdf/com2001-278-en.pdf)

**Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries (97/C 221/03)**

397Y0719(02), Official Journal C 221 , 19/07/1997 p. 0023 - 0027

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.1 thereof,

Whereas, pursuant to Article K.1 (3) (a), (b) and (c) of the Treaty, the conditions of entry of, and residence by, nationals of third countries on the territory of Member States and measures to combat unauthorized immigration and residence by nationals of third countries on the territory of Member States constitute matters of common interest;

Whereas Article K.1 (1) of the treaty provides that asylum policy is to be regarded as a matter of common interest for the Member States;

Whereas third-country minors sometimes enter and stay in the territory of Member States without being accompanied by a responsible person and without obtaining the necessary authorization;

Whereas unaccompanied minors who are nationals of third countries can be the victims of facilitators, and it is important for Member States to cooperate in combating such form of facilitating;

Whereas unaccompanied minors who are nationals of third countries generally are in a vulnerable situation requiring special safeguards and care;

Whereas recognition of the vulnerable situation of unaccompanied minors in the territory of Member States justifies the laying down of common principles for dealing with such situations;

Whereas, in accordance with Article K.2 (1) of the Treaty, this Resolution is without prejudice to the international commitments entered into by the Member States pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;

Whereas this Resolution is without prejudice to the international commitments entered into by the Member States pursuant to the United Nations Convention on the Rights of the Child, 1989;

Whereas, pursuant to Article 2 of that Convention, States Parties shall respect the rights set forth in the Convention without discrimination;

Whereas, pursuant to Article 3 of that Convention, in all actions concerning children, the best interests of the child shall be a primary consideration;

Whereas Article 22 of that Convention aims to protect and assist minors who seek refugee status or who are regarded as refugees;

Whereas it is of great importance for the Member States, true to their common humanitarian tradition and in accordance with the provisions of the

Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, to grant refugees appropriate protection;

Whereas on 20 June 1995 the Council adopted a Resolution on minimum guarantees for asylum procedures (1);

Whereas this Resolution is without prejudice to the Strasbourg Convention of 28 January 1981 of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data;

Whereas the unauthorized presence in the territory of Member States of unaccompanied minors who are not regarded as refugees must be temporary, with Member States endeavouring to cooperate among themselves and with the third countries of origin to return the minor to his country of origin or to a third country prepared to accept him, without jeopardizing his safety, in order to find, whenever possible, the persons responsible for the minor, and to reunite him with such persons;

Whereas the application of such principles should not interfere with the application of national laws on public policy, public health or public security,

HEREBY ADOPTS THIS RESOLUTION:

#### **Article 1 Scope and purpose**

1. This Resolution concerns third-country nationals below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively in the care of such a person. This Resolution can also be applied to minors who are nationals of third countries and who are left unaccompanied after they have entered the territory of the Member States. The persons covered by the previous two sentences shall be referred to herein as 'unaccompanied minors`.

2. This Resolution shall not apply to third-country nationals who are members of the family of nationals of a Member State of the European Union, nor to nationals of a Member State of the European Free Trade Association party to the Agreement on the European Economic Area and the members of their family, whatever the latter's nationality may be, where, pursuant to the treaty establishing the European community or the Agreement on the European Economic Area respectively, rights to freedom of movement are being exercised.

3. The purpose of this Resolution is to establish guidelines for the treatment for unaccompanied minors, with regard to matters such as the conditions for their reception, stay and return and, in the case of asylum seekers, the handling of applicable procedures.

4. This Resolution shall be without prejudice to more favourable provisions of national law.

5. The following guidelines are to be notified to the competent authorities responsible for matters covered by this Resolution, and such authorities shall

take them into consideration in their action. Implementation of these guidelines is not to be subject to any form of discrimination.

### **Article 2 Admission**

1. Member States may, in accordance with their national legislation and practice, refuse admission at the frontier to unaccompanied minors in particular if they are without the required documentation and authorizations. However, in case of unaccompanied minors who apply for asylum, the Resolution on Minimum Guarantees for Asylum Procedures is applicable, in particular the principles set out in paragraphs 23 to 25 thereof.

2. In this connection, Member States should take appropriate measures, in accordance with their national legislation, to prevent the unauthorized entry of unaccompanied minors and should cooperate to prevent illegal entry and illegal residence of unaccompanied minors on their territory.

3. Unaccompanied minors who, pursuant to national provisions, must remain at the border until a decision has been taken on their admission to the territory or on their return, should receive all necessary material support and care to satisfy their basic needs, such as food, accommodation suitable for their age, sanitary facilities and medical care.

### **Article 3 Minimum guarantees for all unaccompanied minors**

1. Member States should endeavour to establish a minor's identity as soon as possible after arrival, and also the fact that he or she is unaccompanied. Information on the minor's identity and situation can be obtained by various means, in particular by means of an appropriate interview, which should be conducted as soon as possible and in a manner in keeping with his age. The information obtained should be effectively documented. In requesting, receiving, forwarding and storing information obtained, particular care and confidentiality should be exercised, in particular in the case of asylum seekers in order to protect both the minor and the members of his family. This early information may in particular enhance the prospects of reunification of the minor with his family in the country of origin or a third country.

2. Irrespective of their legal status, unaccompanied minors should be entitled to the necessary protection and basic care in accordance with the provisions of national law.

3. Member States should, with a view to reunification, endeavour to trace the members of the family of an unaccompanied minor as soon as possible, or to identify the place of residence of the members of the family, regardless of their legal status and without prejudging the merits of any application for residence. Unaccompanied minors may also be encouraged and assisted in contacting the International Committee of the Red Cross, national Red Cross organizations, or other organizations for the purpose of tracing their family members. Particularly, in the case of asylum seekers, whenever contracts are made in the context of tracing family members, confidentiality should be duly respected in order to protect both the minor and the members of his family.

4. For the purposes of applying this Resolution, Member States should provide as soon as possible for the necessary representation of the minor by:

(a) legal guardianship, or (b) representation by a (national) organization which is responsible for the care and well-being of the minor, or (c) other appropriate representation.

5. Where a guardian is appointed for an unaccompanied minor, the guardian should ensure, in accordance with national law, that the minor's needs (for example, legal, social, medical or psychological) are duly met.

6. When it can be assumed that an unaccompanied minor of school age will be staying in a Member State for a prolonged period, the minor should have access to general education facilities on the same basis as nationals of the host Member State or alternatively, appropriate special facilities should be offered to him.

7. Unaccompanied minors should receive appropriate medical treatment to meet immediate needs. Special medical or other assistance should be provided for minors who have suffered any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts.

#### **Article 4 Asylum procedure**

1. Every unaccompanied minor should have the right to apply for asylum. However, Member States may reserve the right to require that a minor under a certain age, to be determined by the Member State concerned, cannot apply for asylum until he has the assistance of a legal guardian, a specifically appointed adult representative or institution.

2. Having regard to the particular needs of minors and their vulnerable situation, Member States should treat the processing of asylum applications by unaccompanied minors as a matter of urgency.

3. (a) In principle, an unaccompanied asylum-seeker claiming to be a minor must produce evidence of his age. (b) If such evidence is not available or serious doubt persists, Member States may carry out an assessment of the age of an asylum-seeker. Age assessment should be carried out objectively. For such purposes, Member States may have a medical age-test carried out by qualified medical personnel, with the consent of the minor, a specially appointed adult representative or institution.

4. Member States should normally place unaccompanied minors during the asylum procedure: (a) with adult relatives, (b) with a foster-family, (c) in reception centres with special provisions for minors, or (d) in other accommodation with suitable provisions for minors, for example such as to enable them to live independently but with appropriate support. Member States may place unaccompanied minors aged 16 or above in reception centres for adult asylum seekers.

5. (a) During any interview on their asylum application, unaccompanied minor asylum-seekers may be accompanied by a legal guardian, specially appointed adult representative or institution, adult relative or legal assistant. (b) The interview should be conducted by officers who have the necessary experience or training. The importance of appropriate training for officers interviewing unaccompanied minor asylum-seekers should be duly recognized.

6. When an application for asylum from an unaccompanied minor is examined, allowance should be made, in addition to objective facts and circumstances, for a minor's age, maturity and mental development, and for the fact that he may have limited knowledge of conditions in the country of origin.

7. As soon as an unaccompanied minor is granted refugee status or any other permanent right of residence, he should be provided with long-term arrangements for accommodation.

#### **Article 5 Return of unaccompanied minors**

1. Where a minor is not allowed to prolong his stay in a Member State, the Member State concerned may only return the minor to his country of origin or a third country prepared to accept him, if on arrival therein - depending on his needs in the light of age and degree of independence – adequate reception and care are available. This can be provided by parents or other adults who take care of the child, or by governmental or non-governmental bodies.

2. As long as return under these conditions is not possible, Member States should in principle make it possible for the minor to remain in their territory.

3. The competent authorities of the Member States should, with a view to a minor's return, cooperate: (a) in re-uniting unaccompanied minors with other members of their family, either in the minor's country of origin or in the country where those family members are staying; (b) with the authorities of the minor's country of origin or with those of another country, with a view to finding an appropriate durable solution; (c) with international organizations such as UNHCR or UNICEF, which already take an active part in advising governments on guidelines for dealing with unaccompanied minors, in particular asylum-seekers; (d) where appropriate, with non-governmental organizations in order to ascertain the availability of reception and care facilities in the country to which the minor will be returned.

4. In any case, a minor may not be returned to a third country where this return would be contrary to the Convention relating to the status of refugees, the European Convention on Human Rights and Fundamental Freedoms or the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment or the Convention on the Rights of the Child, without prejudice to any reservations which Member States may have tabled when ratifying it, or the Protocols to these Conventions.

#### **Article 6 Final provisions**

1. Member States should take account of these guidelines in the case of all proposals for changes to their national legislations. In addition, Member States should strive to bring their national legislations into line with these guidelines before 1 January 1999.

2. Member States shall remain free to allow for more favourable conditions for unaccompanied minors.

3. The Council, in conjunction with the Commission and in consultation with UNHCR in the framework of its competences, shall review the application of the above guidelines once a year, commencing on 1 January 1999, and if appropriate adapt them to developments in asylum and migration policy.

(1) OJ No C 274, 18. 9. 1996, p. 13.

## **ANNEX**

### **MEASURES TO COMBAT TRAFFICKING IN MINORS**

Member States, mindful of the particular vulnerability of minors, should take all measures to prevent and combat the trafficking and exploitation of minors, and cooperate in this regard.

### **MEASURES TO PREVENT ILLEGAL ENTRY**

Measures which Member States may take to prevent the unauthorized arrival in the territory of the Member States of unaccompanied minors who are nationals of third countries may include:

- (i) collaboration with competent authorities and bodies including airline companies in the countries of departure, in particular through the use of liaison officers;
- (ii) observation at airports of arrival of flights from sensitive countries;
- (iii) consequent application of international obligations including carriers' liability legislation where unaccompanied minors who are nationals of third countries arrive without the appropriate documentation.

***Recommendations from Sandy Ruxton “Separated Children Seeking Asylum in Europe : A Programme of Action”, 2000.***

*The definition of a “separated child”*

**Recommendation 1:** When developing legislation and administrative regulations, the EU and European states must recognise the needs and protect the rights of all separated children. The inclusive definition of ‘separated children’ as defined by SCEP should therefore be central to legislation dealing with asylum-seekers and refugees, and should also be acknowledged within child law.

*Access to the territory*

**Recommendation 2:** In order to ensure effective protection for separated children seeking asylum, greater political will should be focused on meeting the standards set out in international law and guidance (especially the 1951 Refugee Convention, the CRC, and the UNHCR Guidelines), and endorsed in the SCEP Statement of Good Practice. Any subsequent EU and national level legislation in relation to access to the territory should reflect these instruments and the European Council conclusions from the Tampere summit.

*Identification*

**Recommendation 3:** In order to ensure that children are given appropriate protection, the EU and European states should build on the EU 1997 Resolution on Unaccompanied Minors based on paragraphs 5.1 – 5.3 of the UNHCR Guidelines regarding identification.

*The appointment of guardian or adviser*

**Recommendation 4:** For children’s “best interests” to be adequately protected, there is a clear need for all children under 18 years old to be assisted by a guardian or adviser at all stages of the asylum process and in relation to durable solutions. Such assistance should be in line with the provisions set out in international law and guidance (principally the CRC and the UNHCR Guidelines) and the SCEP Statement of Good Practice. In developing common standards on asylum procedure, the EU should ensure that the safeguards identified in the EU 1997 Resolution on Unaccompanied Minors are strengthened and incorporated in subsequent EU legislation.

*Registration and documentation*

**Recommendation 5:** To protect the interests of separated children, such children should be registered and documented as soon as possible following entry to the territory. Article 3.1 of the EU 1997 Resolution on Unaccompanied Minors should be elaborated upon and strengthened, in line with the SCEP Statement of Good Practice and the UNHCR Guidelines.

*Age assessment*

**Recommendation 6:** In any legislation developed by the EU and European states, minimum guarantees in relation to the age assessment of separated children should be integral, based on paragraphs 5.11 of the UNHCR Guidelines and the SCEP Statement of Good Practice.

### *Detention*

**Recommendation 7:** SCEP believes that the detention of separated children for reasons relating to their immigration status violates the CRC and also contravenes the UNHCR Guidelines. In any legislation which is subsequently developed at European and national level, a clear statement preventing the use of detention for all separated children should be included.

### *The right to participate*

**Recommendation 8:** In order to meet the standards set out in Article 12 of the CRC, states should ensure that separated children are provided with appropriate opportunities to be heard at all stages of the asylum process. It is also essential that states should fulfil their positive duty to assist children to express their views. The EU and European states should integrate the standards set out in the CRC and the UNHCR Guidelines into any relevant asylum legislation.

### *Family tracing and contact*

**Recommendation 9:** Despite the real obstacles which exist, the emotional and psychological importance to the child of maintaining and developing contact with family and relatives, and of preserving cultural links with the country of origin, is undeniable. It is therefore vital that the EU should develop legislation which upholds the key principles established in the CRC, and reinforced in the ECHR, the EU 1997 Resolution on Unaccompanied Minors, and the UNHCR Guidelines.

### *Family reunification in a European country*

**Recommendation 10:** In order that the “best interests” of the child are met, states should ensure that separated children seeking asylum within one EU country who have family relatives in another EU country should receive appropriate assistance so that family reunification can take place as soon as possible. Separated children’s access to reunification procedures should be premised upon the fact that they are children rather than upon their status in the asylum procedure. The existing Dublin Convention provisions fail to meet the needs of separated children and their families adequately. Future EU legislation (e.g. Directives on Temporary Protection and Asylum Procedure) should provide for the right of separated children to be reunited with their families.

### *The asylum or refugee determination process*

#### *Access to normal procedures*

**Recommendation 11:** Separated children are to have access to normal asylum procedures containing appropriate provisions and safeguards, in line with the UNHCR Guidelines, ECRE’s Position on Refugee Children, and the SCEP Statement of Good Practice.

### *Legal representation*

**Recommendation 12:** The provision of appropriate legal representation is essential if separated children are to receive a fair hearing in asylum procedures. This principle is reiterated in the UNHCR Guidelines and expanded upon in the SCEP Statement of Good Practice, and should be integral to any EU and national legislation on asylum procedure which is developed.

### *Minimum procedural guarantees*

**Recommendation 13:** The evidence suggests that there are minimum guarantees for separated children in European states. There is, however, considerable variation in practice, both between and within countries even in those where official policy exists. If asylum claims by separated children are to be processed efficiently and fairly, it is essential that any legislation on asylum procedures should ensure that the minimum guarantees within it are sufficiently rigorous and that they are met in practice, in line with the UNHCR Guidelines.

### *Independent assessment*

**Recommendation 14:** In any legislation on asylum procedures which is developed by the EU or European states, reference should be made to the possibility of undertaking expert assessments on the child's ability to articulate fear of persecution.

**Recommendation 15:** The evidence suggests that in many states conformity with the principles set out in the UNHCR Guidelines (and the SCEP Statement of Good Practice) is not ensured. Official guidance is generally lacking, and many children can be subject to hostile questioning in an alien environment. Several governments admit that currently the training for those interviewing children is either not available or not extensive enough. And it is also relatively common for a child to attend an interview alone, without adult support. Measures should be taken by governments to ensure that officials who interview separated children are adequately trained; and that interviews are undertaken in a child-friendly manner.

### *Criteria for making a decision on a child's asylum application*

**Recommendation 16:** The evidence suggests that, in general, there is a lack of clear policies on the factors which should be taken into account in determining separated children's cases despite the existence of developed UNHCR Guidelines.

In practice, this gap means that officials may make decisions in a policy vacuum, leading to wide variations in treatment based on criteria which can be subjective and unfair. When determining refugee status, governments should make sure that child-specific forms of human rights violations are taken into consideration as well as the fact that children might have different ways of communicating fear of persecution and different knowledge regarding their claims than adults.

### *Young people who become adults during the asylum process*

**Recommendation 17:** There is wide variation in approaches between states to separated children who become adults during the asylum process. Significant unfairness can result, especially when "ageing out" occurs as a result of delays which have not been caused by the children themselves. In this context, it is important that the EU and European states should seek to establish fair procedures in this regard.

### *Durable or long-term solutions*

#### *Grounds for a child remaining in a host country*

**Recommendation 18:** Generally speaking, European states do allow separated children to remain in the "host country" in line with the criteria set out in the SCEP Statement of Good Practice. However, to meet fully the

needs and rights of separated children, key safeguards such as providing a status which gives them access to assistance and family reunification, must be implemented in all states, in line with the CRC principle of the “best interests of the child” and the UNHCR Guidelines.

**Recommendation 19:** The evidence presented by the assessments indicates that practice is far from meeting the standards set out in the CRC in relation to family reunification in the “host country”. Efforts should be made to change policy and practice to allow for family reunification in the “host country” for all categories of separated children.

#### *Integration*

**Recommendation 20:** Although a number of good practices are in place, existing evidence suggests that significant improvements are required if the standards of the CRC, the EU 1997 Resolution on Unaccompanied Minors, and other relevant international instruments, are to be met. All separated children should gain access to appropriate services on a non-discriminatory basis and facilities and programmes should be designed to meet their special needs.

#### *Adoption*

**Recommendation 21:** Adoption is rarely a suitable option for a separated child. It is essential that prior to adoption being considered as a viable option for a separated child, there is a rigorous assessment of the family circumstances in the country of origin. The separated child’s parents often still live in the country of origin, or sometimes they are missing but not officially reported dead.

#### *Family reunification and return to the country of origin*

**Recommendation 22:** There is a need for formal schemes or programmes of return to be developed in European states. Guidelines and procedures should be in place in order to assess if return would be in the best interest of the child. Such guidelines and procedures should be drawn up in collaboration with agencies with specific child and country knowledge, and according to the UNHCR Guidelines.

#### *Conditions that must be fulfilled prior to return*

**Recommendation 23:** Experience in European states suggests that greater attention and effort must be devoted to ensuring that the conditions and safeguards set out in the UNHCR Guidelines and the SCEP Statement of Good Practice are implemented. Guidelines should be developed at national level specifying which steps to be taken before a separated child is returned including verification that care will be provided for and basic needs will be met.

#### *Programmes and aid to facilitate return*

**Recommendation 24:** Programmes to assist the reintegration of returned children should be initiated and supported.

#### *Settlement in a third country*

**Recommendation 25:** In general it appears that guidelines and procedures are not in place in European states to assess if settlement in a third country

would be in the best interest of the child and to ensure that the decision is reached in accordance with appropriate safeguards. Procedures should be put in place in all European states in order to allow for the transfer of a separated child to a third country if the child has a family member in that country who is willing and able to care for him or her.

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Statistics of the Inter-governmental Consultations for Asylum, Refugees and Migration Policies in Europe, North America and Australia, 'IGC Report on Readmission Agreements', August 1999, pp.5

### **Treaties and Agreements**

Maastricht Treaty, <http://europa.eu.int/en/record/mt/top.html>

Amsterdam Treaty, <http://europa.eu.int/abc/obj/amst/en/>

Tampere Summit of the European Council, <http://europa.eu.int/council/off/conclu/oct99/>

Nice Treaty, [http://europa.eu.int/comm/nice\\_treaty/index\\_en.htm](http://europa.eu.int/comm/nice_treaty/index_en.htm)

Cotonu Agreement, [http://europa.eu.int/comm/development/cotonou/agreement\\_en.htm](http://europa.eu.int/comm/development/cotonou/agreement_en.htm)

### **European Commission**

All harmonisation instruments can be found on [www.europa.eu.int](http://www.europa.eu.int)

European Commission switchboard: +32 2 299 11 11

### **Web sites:**

Separated Children in Europe Programme: [www.sce.gla.ac.uk](http://www.sce.gla.ac.uk)

European Union: [http://europa.eu.int/index\\_en.htm](http://europa.eu.int/index_en.htm)

European Parliament: <http://www.europarl.eu.int/>

Council of Europe, Legal Affairs: <http://conventions.coe.int/>

Official Journal of the European Communities: <http://europa.eu.int/eurlex/en/oj/index.html>

Odysseus

programme: [http://europa.eu.int/comm/justice\\_home/project/odysseus/index\\_en.htm](http://europa.eu.int/comm/justice_home/project/odysseus/index_en.htm)

UNHCR: [www.unhcr.ch](http://www.unhcr.ch)