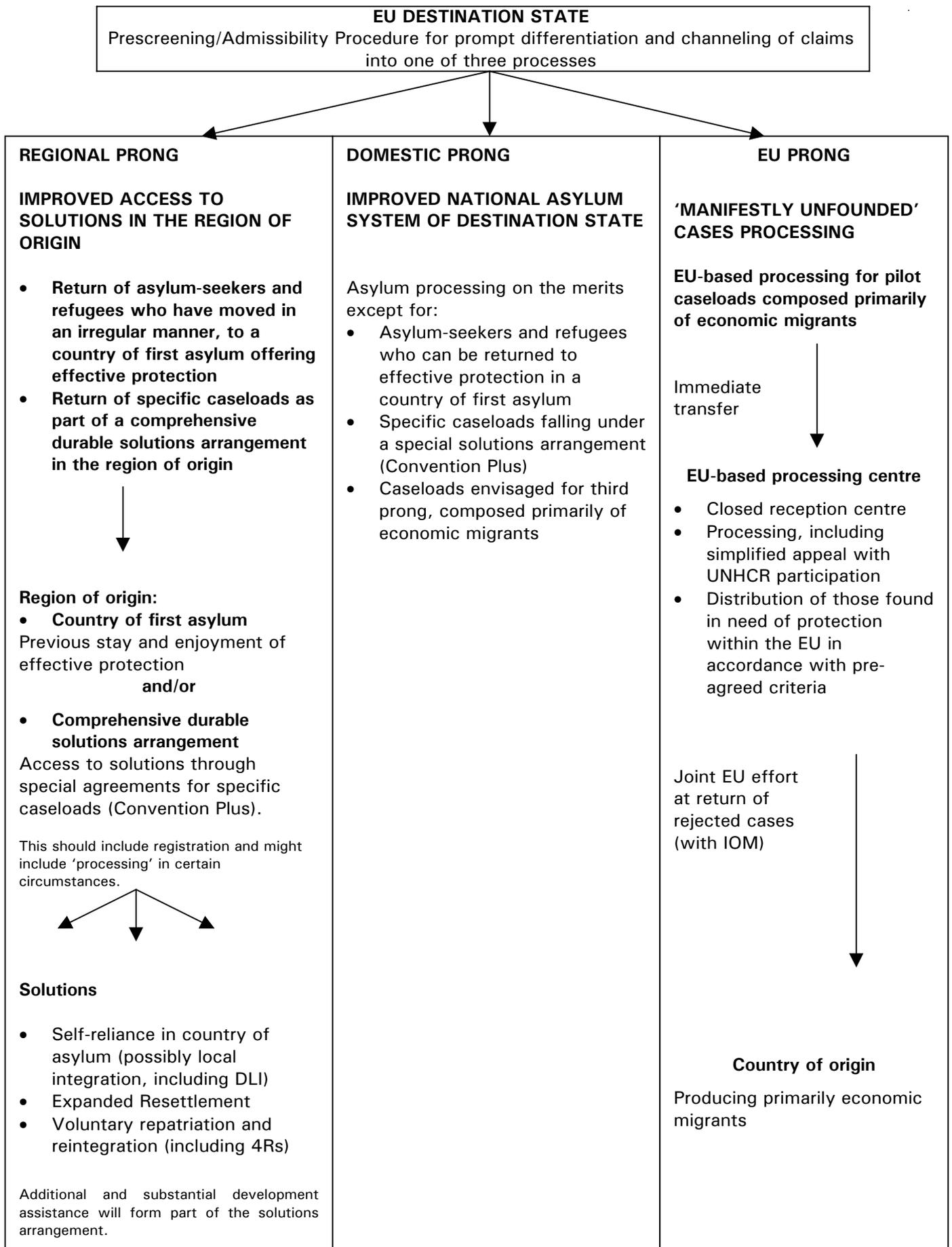


UNHCR Working Paper

“UNHCR’S THREE-PRONGED PROPOSAL”



I. EXPLANATION OF THE REGIONAL PRONG

A. Introduction

This note offers a narrative explanation of the first prong of a three-pronged working proposal by UNHCR to improve the availability of protection and solutions for refugees in the region of origin while addressing certain asylum dilemmas confronting host States.¹ It is part of a more comprehensive approach, which includes also work on improving national asylum systems and a better handling of manifestly unfounded cases, the latter of which is elaborated upon as the EU prong in a separate narrative note.

B. Starting premises

For UNHCR, the starting premises for strengthened regional approaches are the following:

- (i) A better managed global system centred on multilateral co-operation and the equitable sharing of responsibilities and burdens (rather than unilateral responses which may well just shift burdens) is a positive ambition;
- (ii) Improved management of asylum does not require formal amendment of the current international legal framework, in particular the 1951 Convention and its 1967 Protocol, whose continued viability - and indeed need for strengthened implementation - is repeatedly and authoritatively asserted;
- (iii) What is required, though, are co-operative arrangements buttressing the international legal regime so as to facilitate the delivery of protection in complex scenarios whilst meeting State concerns about the effective management of borders;
- (iv) A genuine and concerted effort, in partnership with States and international and non-governmental organisations, to improve the quality and effectiveness of protection available within the countries in regions close to the source of refugee movements has to have an integral place in systems which might be developed;
- (v) Readmission arrangements to facilitate return are crucial to underpin international co-operative efforts;
- (vi) Effective protection for refugees and viable solutions which respect the dictates of equitable responsibility and burden sharing, must be as much the goals of better international co-operation as border control;
- (vii) State responsibility is a key concept, which must be maintained at all stages but can be fulfilled through international co-operation and the sharing of commitments;

¹ While this note is specifically a contribution to the current dialogue within the EU, it contains elements common across regions which are not EU-specific. It draws heavily on analyses that have been undertaken during the Global Consultations process and experience derived from other regional contexts, which have been informing and guiding UNHCR's policies for some time.

- (viii) Practically speaking no action plan has a real chance of success unless it is reliably resourced for as long as is necessary;
- (ix) Interception en route is an increasingly prominent feature of State practice. As it can impede access of refugees to international protection, the matter will be considered by UNHCR's Executive Committee this year and should generate a conclusion setting out parameters that could then be built into any co-operative responses;
- (x) Detention of all asylum-seekers as a matter of course is inherently undesirable and costly. As outlined in Executive Committee Conclusion No. 44, and further elaborated in UNHCR's Guidelines on Detention, the limited restrictions permissible are those necessary, (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; and (iv) to protect national security and public order.
- (xi) A transfer of responsibility to another country should be consistent with the dictates of international law and practice. These normally require transfers to take place on the basis of links, such as, for example, previous stay on the territory of the third country, previous issuance of an entry visa or close ties on the basis of family. Subject to basic standards applying in relation to transfers, admission can be negotiated based on the first country of asylum or the "safe third country" concepts. In this connection, UNHCR's Executive Committee has stipulated that no asylum-seeker should be sent to a third country for determination of the claim without sufficient guarantees in each individual cases that: i) the person will be admitted to that country; ii) will enjoy there effective protection, in particular against *non-refoulement*; iii) will have the possibility to seek and enjoy asylum; and iv) will be treated in accordance with accepted international standards.

C. Protection and solutions arrangements in the region of origin

A number of different measures will need to be taken to move ahead on improving protection and access to durable solutions in the region of origin. These are the following:

1. Strengthened protection capacity in host countries

The Agenda for Protection foresees more effective co-operation to strengthen protection capacities in refugee-receiving countries in regions of origin.² During the Global Consultations process a number of strategies as well as some best practice examples were identified.³ UNHCR is already working in a number of countries to this end. In order to ensure that available protection is indeed effective protection, analyses of gaps in the treatment of specific groups of refugees in selected countries is being undertaken. This work should lead to the identification of inadequacies and encourage a willingness on the part of the host country to address them, as well as substantial financial and material investment to enable host countries, UNHCR and others to respond. In UNHCR's experience, refugees often move on because they are not allowed, or not

² Goal 3, Objective 2 of the Agenda.

³ See UN doc. EG/GC/01/19 of 4 September 2001.

given, the means to become self-reliant pending a durable solution. Self-reliance is therefore often particularly relevant to avert secondary movements. Using development assistance for this purpose would enable genuine progress in this area. The High Commissioner's proposal, "Development Assistance for Refugees" (DAR), not only aims, from a development assistance perspective, to enhance effective protection and promote durable solutions for refugees, but also to provide concrete support to, and burden sharing with, host countries in the developing world. DAR should be built into responses, particularly in protracted refugee situations, to better equip refugees for any of the three durable solutions.

2. Comprehensive durable solutions arrangements

Comprehensive plans of action to arrive at solutions for targeted refugee groups, particularly those in protracted situations, could be developed, drawing also on gaps analyses to be undertaken for specific caseloads. Such plans of action might variously include arrangements of the following sort:

- Active promotion of **voluntary repatriation and sustainable reintegration**. The Agenda for Protection promotes strengthened co-operation to make repatriation possible and sustainable. In post-conflict situations, the High Commissioner has proposed an integrated approach, the "4 Rs" (Repatriation, Reintegration, Rehabilitation and Reconstruction) which aims to bring together humanitarian and development actors in order to facilitate sustainable reintegration and bridge the transition period between emergency relief and long-term development.
- Strategic use of targeted development assistance to achieve more equitable burden-sharing for countries hosting large numbers of refugees and to promote **self-reliance** of refugees. Self-reliance is an important precursor to any of the three durable solutions. An integrated approach which anchors refugee issues within national, regional and multilateral development agendas is called for.
- "Development through Local Integration" (DLI) as a strategy in circumstances where the **local integration of refugees** in countries of asylum is a viable option. DLI aims at soliciting additional development assistance to underpin this durable solution.⁴
- Multilateral commitments to expand **resettlement** as a protection tool, a durable solution as well as an instrument of burden-sharing. Expanded resettlement options might be made available in the form of a multi-lateral pool administered by UNHCR.

3. Facilitated return

Facilitated return would consist of a number of elements. How they are combined would vary according to specific regional circumstances, the States involved, the compatibility of their asylum systems and whether or not individual processing is necessary in the country of first asylum.

- **An admissibility procedure:** Its purpose would be the prompt differentiation and subsequent channelling of claims to be handled in one of two locations, that is, the country of destination or the country of first asylum (should processing be necessary in the latter case). Factors in this context include previous stay in a country offering effective protection and continued enjoyment of such protection upon return or processing facilities available in the country of first asylum as part of a durable

⁴ There are close linkages between DLI and DAR since both aim to tap the potential of development funds in securing durable solutions for refugees.

solutions strategy. Furthermore, strong links to the destination country, such as those based on family connections, would speak in favour of processing asylum claims in the destination country. Following a burden-sharing rationale, the latter would also apply in case the first country of asylum is faced with a large-scale influx of refugees.

- **Agreement on “effective protection” requirements:** There has to be a shared understanding on the types of situations guaranteeing effective protection, leading to timely and genuine solutions.
- **Readmission arrangements:** Readmission arrangements would need to be in place to ensure that individuals who are to be returned to countries offering effective protection, can be transferred promptly and under acceptable conditions. Such arrangements would benefit from assistance schemes and other supportive incentives. Targeted support would bolster the protection available in the first country of asylum and facilitate continued stay in host countries in the region until longer term solutions can be realised. The negotiation process should also be used specifically to address protection and assistance gaps, which could improve protection in the country of first asylum, leading to timely and genuine solutions.
- **Processing in the country of first asylum:** Individual processing may not always be necessary (for example where refugee status and attached rights flow from *prima facie* recognition). There will, however, be situations where processing is integral to accessing solutions and/or rights, for example: i) in the context of a comprehensive durable solutions framework set out in special agreements; or ii) where the solution, be it continued effective protection in the country of first asylum or resettlement elsewhere, requires formal recognition of status. In all these instances, it is important that the entire caseload present in the country of first asylum has equal access to processing arrangements.

4. Partnerships

Co-operative partnership arrangements would have to underpin the international framework, drawing upon the specific expertise of different actors, including UNHCR, IOM and non-governmental organisations. They should be formalised through memoranda of understanding at the country level, which would feed into broader regional arrangements. Ideally co-operation would be built around existing programmes managed by partner organisations, including for example IOM’s assisted voluntary return programmes, or existing programmes to respond to the needs of victims of trafficking.⁵

D. Challenge

Not all the elements set out in this paper are necessarily new. Many are drawn directly from understandings generated during UNHCR’s Global Consultations process and carried forward within the Agenda for Protection. States are encouraged to give active consideration to the timely platform offered by the Agenda for Protection and the Convention Plus initiative⁶, as enabling mechanisms for the development and

⁵ At Headquarters level a co-operative mechanism is emerging between UNHCR, IOM, UNHCHR and ILO, as a forum to discuss issues of common concern relating to the asylum/migration nexus.

⁶ The Global Consultations process focused on the *tools of protection* - those presently available and those in need of development – as the means to achieve better global management of refugee issues through more reliable and effective international responses incorporating greater equity in the sharing of responsibilities and burdens. The High Commissioner has identified the development of multi-lateral special agreements, termed Convention Plus, as an appropriate way to craft such tools of protection, complementing and buttressing the 1951 Convention regime.

implementation of an effective international framework to address the irregular movement of asylum-seekers and refugees. Convention Plus provides a basis for transforming ad hoc or unilateral responses to the causes and effects of irregular migration and forced displacement into multilateral special agreements to bring this international framework into working effect.

II. EXPLANATION OF THE EU PRONG

A. Introduction

Recurrent problems faced by States in Europe are abuse of the asylum channel by “economic migrants” and the non-return of persons found not to be in need of international protection. These issues have also been of concern to UNHCR, as they undermine the credibility of national asylum systems. The Agenda for Protection, deriving from the Global Consultations process is spurring new thinking and initiatives to tackle these problems, including through the development of special agreements in the context of Convention Plus. UNHCR is convinced that it is possible to combat abuse of asylum systems and to secure the return of persons found not to be in need of international protection, while at the same time preserving the core principles of the existing international refugee law framework and enhancing protection of refugees worldwide.

The EU-based mechanism, outlined below, represents one component of a multi-pronged approach UNHCR would like to propose. Such EU-based processing would be piloted through a joint process in respect of asylum applicants originating from designated countries of origin who are primarily economic migrants resorting to the asylum channel. These common processing centres would be located within but close to the external borders of the current EU, or alternatively of the EU as enlarged in 2004. This arrangement could be coupled with new or expanded **resettlement** quotas to increase avenues for and access to durable solutions globally for persons in regions of origin and/or stranded in transit countries without effective asylum systems.

B. Elements of the EU-based mechanism for “processing”

Immediate transfer: Upon arrival anywhere within the territory of EU Member States or at their borders, all asylum-seekers of the designated countries of origin would be transferred immediately to the centres, except for persons who are medically unfit to travel or stay in closed reception centres, as well as unaccompanied and separated children. The centres could be located initially in one or two EU Member States. Previous stay or transit through the country hosting the centre is irrelevant.

Closed reception centres should provide for decent accommodation and reception facilities in line with international standards and the EU’s own Directive Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States. Asylum-seekers transferred to such centres for determination of their claims would be required to reside in them during the full duration of the procedure, provided, however, that the special needs of vulnerable persons, including children, are met. Closed reception centres will be difficult to avoid, unless there is no fear of absconding and irregular movement in a particular case. Interpretation services and legal counselling should be provided to all asylum-seekers in the centres. Should complex cases arise which cannot be determined within the envisaged time frame, they should be taken out of this type of processing arrangement and be referred to the regular asylum procedure.

Procedures: “Processing” would be conducted in accordance with commonly agreed procedures respecting international standards. First instance decisions should be taken promptly, and appeals could be handled in the form of simplified reviews. Processing should be completed within one month, unless a particular case reveals special complexities. Determination of any needs for international protection should be made in a single procedure. A consortium of national asylum officers and second instance decision-makers would be responsible for the determination of the claims. UNHCR would monitor the determination process, provide advice, including through country of origin information, if necessary. The Office could also be part of the review process. The modalities of UNHCR’s involvement would need to be worked out in more detail.

EC Regulation or Directive: Depending on whether or not the arrangement is supranational or multilateral, a new EC instrument would regulate the transfer, the “processing” of the cases as well as the distribution criteria for those found to be in need of international protection. Given the close date of EU enlargement, transfer to and processing in candidate countries joining the EU in 2004 might also be considered. The future EC Qualification Directive would form the substantive basis for the determination of refugee status or subsidiary protection.

Funding and operation: The process would require joint EU funding and operation of the “processing centres”, possibly with funding from a special EU budget, and the sharing of resources and expertise. The operation of the centre would be a partnership effort involving States and relevant international organisations.

Returns and readmission: The burden of returning persons found not to be in need of international protection would be carried by the EU and its Member States, and would not fall solely on the State hosting the processing centre. Pre-negotiated agreements for return and readmission would be an important aspect of such a set-up. Negotiations would be greatly facilitated by the joint political weight of the EU and all of its Member States.

Single procedure: All persons found to be in need of international protection would be distributed fairly amongst Member States, according to a pre-determined key that would take into account effective links, including family, educational, or cultural ties.

C. Advantages of an EU-wide approach

A joint EU-based mechanism, if efficiently managed, should have the effect of (i) deterring abuse of the asylum system, as well as smuggling (ii) avoiding burden-shifting within Europe; and (iii) building on ongoing burden-sharing within the EU. It would also represent an important step towards creating a common asylum system.

- **Combating abuse of the asylum system by “economic migrants”:** Consistent with the objective of tackling the abuse of asylum systems, the main focus would be on populations who consist primarily of economic migrants, that is, persons from specific countries of origin whose asylum applications are likely to be manifestly unfounded. Rapid processing in closed centres close to the external EU border should have a strong deterrent effect.
- **Avoiding burden-shifting in Europe:** “Asylum problems” in Europe are still perceived primarily from a national perspective. Asylum policies adopted by any one country in Europe inevitably have an impact on other countries, often resulting in a shifting of the burden to neighbouring States. Common European approaches are necessary to avoid the deflection of movements to other countries.
- **Burden-sharing with border States of the EU:** Despite the recently adopted “Dublin II Regulation” and a limited framework for burden-sharing in the form of the European Refugee Fund, no real burden-sharing mechanism currently exists within the EU. Such a mechanism would be particularly relevant in situations where one State is overwhelmed by the number of asylum applications. It is precisely in relation to the processing of applications in the EU that considerable steps could be taken to reduce the burden more generally, and to ensure a more equitable sharing of the responsibility of processing asylum claims. Following the logic of both EURODAC and the Dublin II Regulation, EU border States are foreseen to bear the brunt of refugee status determination. However, since States, particularly candidate countries, lack the necessary resources, expertise and reception facilities, joint processing and solutions should be the approach.
- **Common asylum system:** Such a process would represent an important step forward in developing a common EU-wide asylum system, by providing for a common single

procedure for manifestly unfounded cases, joint efforts on return and readmission, and a common key for distributing fairly persons in need of international protection.

D. Advantages as compared with “transit processing” in a third country outside the EU

Such an EU-based set-up, as outlined above, would have all the advantages and effects of transit country “processing” (as has, for example, been proposed by the UK), without the legal, political and practical difficulties that a set-up in a third country outside the EU would entail:

- Such processing, particularly if based on an EU instrument, should avoid the question regarding the lawfulness of transfer (including possible devolution) of state responsibility. Since it would be an EU-based system involving countries with similar levels of protection, it would make challenges in courts less likely, or at least less likely to succeed.
- Such an approach would have a similar deterrent effect as processing in transit countries outside the EU, particularly since Member States currently at the border of the EU as well as candidate countries are in large part also transit countries.
- It would be more compatible with the international refugee protection regime.
- There would be no negative precedent, and EU Member States would show that they were indeed able to agree on burden-sharing rather than burden-shifting mechanisms.
- Secondary movements within the EU would also be reduced, as persons would normally be unable to leave a processing centre and at any rate would no longer be entitled to additional adjudication on the territory of another Member State.
- The process could function as a pilot to identify criteria for distribution more broadly of persons found to be in need of international protection.
- Such a system would probably be more economical, since it would lead to a sharing of resources, including asylum officers, interpreters, and legal counsellors.
- It would avoid far more difficult and costly negotiations with third countries, whose asylum systems would risk being jeopardised as a result of the establishment of processing centres.

E. Disadvantages

- UNHCR’s proposal for an EU-wide approach could negatively affect the debate in EU countries not currently facing a political problem with the migration/asylum nexus. This disadvantage would, however, also apply with respect to “processing” outside the EU.
- Neither EU-based nor ‘transit’ processing would resolve the situation of persons without identification or fraudulent identification documents, which would remain a problem.
- The proposal does not address the irregular entry and stay of economic migrants who do not resort to the asylum channel. The problem of illegal immigration per se requires different responses.

F. UNHCR involvement

- UNHCR would be willing to provide support to this type of EU-based processing.
- In line with its supervisory responsibility, UNHCR would monitor decision-making and be prepared to consider participating in a review board, especially with a view to promoting harmonisation in the decision making process.

- Further, UNHCR would also contribute to negotiations with countries of origin for purposes of readmission of persons found not to be in need of international protection, including in the context of the Convention Plus initiative. The EU and Member States could thereby rely not only on UNHCR's experience and resources, but also on its standing as a neutral multilateral agency, which should be of particular use in facilitating the necessary contacts and agreements.

III. EXPLANATION OF THE DOMESTIC PRONG

A. Introduction

Outside the context of mass influx, fair and efficient individualized asylum procedures are an essential element in the full and inclusive application of the 1951 Convention relating to the Status of Refugees. They enable a State to identify those who should benefit from international protection and those who should not. Initiatives by States to enhance the operation of the asylum system have tended in recent years to spawn an increasingly wide variety of procedures and processes. The challenge now is to refocus efforts to establish clearer and simpler procedures, which concentrate on well-resourced, and faster yet quality initial decision-making with appropriate safeguards. Asylum procedures managed expeditiously and efficiently in keeping with international refugee law standards can make an important contribution to improving the capacity of States to handle the arrival of non-nationals.

Equally important is the broader political and social context in which decision-making operates. It is therefore not only a question of the path which asylum-seekers take through the system, but also one of addressing a wide range of issues, including the need for:

- Concerted, responsible strategies to address the media portrayal of asylum issues.
- Sensitization as to the plight of refugees and promotion of the valuable contribution they can make to host societies and economies.
- Balanced and measured interventions on refugee and asylum issues by political, religious and community leaders.

B. Proposed measures

UNHCR has outlined appropriate standards and procedural safeguards for decision-making on numerous occasions.⁷ The measures outlined briefly below presume that fair and equitable decision-making procedures are in place. Depending on circumstances in the country of asylum concerned, measures to ensure the efficient operation of national decision-making systems on asylum could include:

- Rationalization of asylum systems by introducing consolidated legislation and establishing a single procedure. Such a procedure would provide an oral hearing for all applicants to assess whether they qualify for refugee status or complementary protection.
- Investment in good quality, first level decision-making by a single, central specialized agency. Such “front-loading” would include recruitment of appropriately qualified decision-making staff and interpreters, ongoing training, provision of accurate, impartial and up-to-date country of origin information, and of guidelines on interpretative issues to promote consistent decision-making. Where initial decisions are of a high quality, the appeal instance will give them considerable deference, but if they are not then pressures will arise at the appeal or judicial stage.
- Admissibility procedures, preferably at points of entry and where relevant as a result of significant numbers of asylum applications. In the absence of close links with the destination country, these could lead to refusal of access to the substantive asylum procedure if the applicant has already found effective protection in another country (a “first country of asylum”), or if responsibility for assessing the particular asylum application in substance is assumed by a third

⁷ See, for instance, UNHCR, “Asylum Processes (Fair and Efficient Asylum Procedures)”, UN doc. EC/GC/01/12, 31 May 2001.

country, where the asylum-seeker will be protected from *refoulement* and will be able to seek and enjoy asylum in accordance with accepted international standards (a “safe third country”).

- Specific short time lines for first instance decisions. This would involve providing sufficient resources to enable this period to be reduced to about three months, except in cases of a complex nature.
- Fast-track procedures, as for example mentioned under the EU prong, for manifestly unfounded cases, as well as fast track decisions for manifestly well-founded ones.
- Exclusion units, where appropriate, for cases raising exclusion questions. These should be within the regular procedure.
- Reducing levels and layers of appeal. Such measures would still ensure an appeal or review process by an impartial and independent tribunal or other body with the authority to review both points of fact and law. The appeal or review process would maintain procedural safeguards and due process, but could even be more simplified in the case of admissibility decisions or in relation to manifestly unfounded claims.
- Swift enforcement of return of asylum-seekers who have been rejected in a fair and efficient procedure (as outlined elsewhere in the proposal).

These proposed measures under the domestic prong are not necessarily new issues as such, but it is the bringing together of the whole as a comprehensive approach which is important.

**UNHCR Geneva
June 2003**