SOME REFLECTIONS ON DETENTION IN EUROPEAN ASYLUM POLICY

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UNHCR: "The detention of asylum seekers is inherently undesirable."

UNHCR: 10 Refugee Protection Concerns in the aftermath of September 11 2001

No 4. Treatment of asylum seekers: UNHCR is concerned that governments might be inclined to resort to mandatory detention of asylum seekers, or to establish procedures that do not comply with the standards of due process. UNHCR's long-standing position is that detention of asylum seekers should be the exception, not the rule. Detention is only acceptable when circumstances surrounding the individual case justify it, including when there are solid reasons for suspecting links with terrorism. But detention should always comply with due process. Similarly refugee status determination procedures put in place to deal with suspected terrorists must comply with minimum standards of due process, involve officials who are qualified and knowledgeable and contain the possibility of review.

I INTRODUCTION: THE POLITICAL AND SECURITY CONTEXT OF DETENTION

The detention of asylum seekers is an issue that raises passions. The right of an individual to liberty and security of the person is such a basic principle of international human rights law that the denial of liberty to persons who have committed no crime strikes at the fundamentals of human rights thinking. For asylum seekers the effects of detention can be particularly grave, given that many may have already endured persecution, imprisonment, even torture in their country of origin. For them, the additional psychological and emotional stress could well amount to inhuman and degrading treatment. Yet many governments

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in Europe detain asylum seekers, with the UK (statistically) in the lead, for reasons they deem important for their national interest or security or expedition of the asylum system.

The total number of those who are detained is a very small fraction of the total number of persons who enter Europe to seek asylum. Critics of the use of detention, which include the UNHCR and the majority of non-governmental and legal opinion in Europe, draw attention to its use in the context of the growing restrictive and deterrent attitudes of governments in general to the arrival of asylum seekers and others in need of protection in Europe. The Council of Europe Parliamentary Assembly put it like this (in January 2000):

> in recent years, many European governments have introduced restrictions in their policies and practices with a view to substantially reducing the number of refugees and asylum-seekers on their territory;
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> these restrictions can be divided into four types: (a) those designed to prevent undocumented travelers from arriving in Council of Europe member states at all, whether genuine asylum-seekers or not; (b) measures designed to expedite the consideration of applications by those asylum-seekers who do manage to reach their destination or to shift the determination procedure to other countries; (c) restrictive interpretations of international refugee law, and in particular the definition of the term "refugee"; (d) deterrent measures taken to make life uncomfortable for asylum-seekers awaiting a decision.

Detention "makes life uncomfortable", not only in practical terms for the asylum seekers themselves, but often also for those who detain them, and certainly for governments coming under criticism for resorting to this control measure. Critics argue that there are alternatives to detention which should be used, on the grounds of humanity and effectiveness, before detention is resorted to. They categorically reject the notion that detention can be used purely for the administrative convenience of the examining authorities.

Detention of asylum seekers is hardly new in European states and many governments have introduced safeguards on its use and permit independent review of its implementation. However, two recent factors give cause for concern that the use of detention may increase rather than diminish in Europe. The first is the fall-out from the "war on terrorism" with its security preoccupations which some legal observers believe constitute a serious threat to standards of international law.[1] The second is the arrival in the heart of some key European governments of explicitly xenophobic and anti-foreigner political forces.

On the first issue, namely security after September 11 2001, UNHCR's registers its anxiety thus:

> Our main concern is twofold:
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> Firstly, that bona-fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or administrative measures. And secondly, that carefully-built refugee protection standards may be eroded. Any discussion of security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorism, and are not themselves the perpetrators of such acts.

Since September 11 individual nation states in Europe have stepped up their national measures of anti-terrorism control. Collectively also the 15 member states of the European Union are responding with shared, regional measures. The cost of these measures in terms of established civil liberties a matter of intense discussion. Concerns about the handling of asylum seekers in general and, for the purposes of this paper, the use of detention must be counted one of many preoccupations of those who believe that Europe is reacting with a worrying disregard for the civil liberties of aliens. Some responsible observers go so far as to talk of the EU measures on terrorism as "criminalising" refugees and asylum seekers (See the work of the organization 'Statewatch').

What is the evidence for this? Certainly the institutions of the European Union, especially the Council of Ministers, have been very active since the attack

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1 See article by Cassesse in the European Law Journal: "The terrorist attack of September has had atrocious effects not only on the human, psychological and political level. It is also having shattering consequences for international law. It is subverting some important legal categories, thereby imposing the need to re-think them on the one hand and to lay emphasis on important general principles on the other…". Otherwise Cassesse fears the setting in of "anarchy" in the international community which is one of the aims of the terrorists.

on the US. Indeed it has become clear in recent months that the way in which the EU treats the issue of refugees and the movements of people is becoming a touchstone of its very credibility in the face of widespread public disillusion about its lack of apparent grip on the refugee situation and with the remoteness of the decision making processes from their daily lives. At summit meetings of the EU leaders in 2002, the question of asylum and immigration has risen to close to the top of the international political agenda. It is the link with the concerns about terrorism that has contributed to putting it there.

To illustrate the trend, the EU Common Position (Article 16) on Terrorism states:

> Appropriate measures shall be taken in accordance with the relevant provisions of national and international law, including international standards on human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.

In the case of European Union law, this 'Common Position' is binding on the member states. It could mean that all refugees and asylum seekers will be subject to vetting by the police and security services before their status can be granted. A file will be created on each person or family as to their political and trade union activity in their country of origin or any other country they have stayed in. Such a "Common Position" does not have to be submitted to national or the European Parliament for scrutiny. Article 15 of the Treaty on European Union gives a very general power simply to "adopt common positions", and "member states shall ensure that their national policies conform to the common positions". Effectively, by choosing to adopt these measures as Common Positions, the Council has not only by-passed the European parliament, but it also means that their validity cannot be challenged by the Court of Justice. Those who fear the worst of the terrorism applaud the introduction of measures to make them safe, and are indulgent if these measures may seem draconian. But others, and especially lawyers, have a role to ensure that whatever the provocations, some fundamental non-derogable human rights are asserted. And one of the most vital of these is the right of liberty of the person.

The second factor weighing heavily on European refugee policy is the extraordinary advance of political parties of the extreme right in some European states, most notably the Netherlands and Denmark, which have traditionally upheld progressive asylum policies. Their populist anti-foreigner platforms are full of the rhetoric of restrictive policies, deportation and detention, not so subtly infused with a generalised attack on progressive human rights thinking. The fear

is that they bring into the mainstream of government thinking intolerant and discriminatory ideas that once belonged on the fringes of politics. Through their traditional role as leaders in the European "harmonisation" debate, they also threaten the values underlying efforts of EU States to approximate their asylum and refugee policies. For ten years or more the issue for European States has always been to resist the temptation to harmonise at the level of the lowest common denominator. These recent political trends may well accelerate the rush to the bottom. If this hypothesis is correct, then the use of detention, as also summary rejection at borders, inadequate safeguards in accelerated procedures, and the doctrines of safe third country can be expected to increase. This is clearly a matter of concern for lawyers in their role as watchdogs of legal standards and legislative (or discretionary) innovations.

With regard to the state of asylum policy-making in general, it is not easy to find anyone in Europe who is content with the way states currently manage asylum flows to the region, nor the wider refugee phenomenon in the world. Refugees certainly find it harder to surmount the hurdles and obtain asylum; politicians in the receiving countries find their policies a source of stress and expense; lawyers, human rights organisations and the UN criticise the restrictive tendencies towards refugee protection, officials and civil servants struggle to make a coherent asylum system out of an inherently unpredictable phenomenon. Confidence in the practice of many European states is low. Where confidence in the system is missing and security concerns come to the fore, and when public opinion is disturbed or confused, then the temptation to resort to draconian measures grows inexorably.

When discussing approaches to refugee policy, it is important to distinguish the European Union (EU) from a totally distinct institution, namely the Council of Europe. The Union, headquartered in Brussels, is an economic pact of 15 European states with growing political aspirations and a large humanitarian role. The Council of Europe was established after the Second World War to promote democracy and human rights in Europe. Its growing membership is now in excess of forty States and its Secretariat is permanently based in Strasbourg. The Parliament of the Union is directly elected. The Parliamentary Assembly of the Council of Europe comprises members of the national parliaments of its member states who are sent to Strasbourg as delegates; they are not directly elected to this Assembly. Further confusion is easy since the European Parliament of the EU also has regular meetings in the same Strasbourg parliamentary buildings. The Council of Europe is best known through the European Human Rights Court system which is based in Strasbourg and oversees the implementation of the European

Convention on Human Rights. The Council of Europe traditionally takes a more progressive, human rights based view of refugee and asylum policy than either the individual nation states or the European Union. Since all the member states of the EU are also members of the Council of Europe, one can contrast the more aspirational positions of the Council of Europe with the increasingly fearful and defensive policies of the EU.

Real political power lies, however, with the European Union, and the domestic refugee policy of any European state is increasingly affected by the actions of the EU, with the Council of Europe far behind in terms of political muscle and influence. There is no doubting the ambition of the EU in the refugee and asylum field. It is trying to devise the architecture of a harmonised European policy for its current and future members. Its main ambition in the refugee field is described in the Treaty of Amsterdam which was signed in 1999 and whose objectives are supposed to be completed within 5 years, ie by 2004:

> The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution.

These simple words refer to a major exercise which will gradually move decision making away from national capitals and to Brussels. The Brussels model will be the one to which all new member states in central and eastern Europe will be required to adhere. The criticism of this process is well known: that harmonisation risks becoming a rush to the bottom, an agreement on the lowest common denominator. Its authors deny it; its critics assert it. The High Commissioner for Refugees, Ruud Lubbers, is a strong critic of trends in Europe:

> Many prosperous countries with strong economies complain about the large numbers of asylum seekers, but offer too little to prevent refugee crises, like investing in conflict prevention, or return, reintegration.

He goes on to say:

> it is a real problem that Europeans try to lessen their obligations to refugees…In any case, no wall will be high enough to prevent people from coming. The HC has said: "We cannot stand by while legal principles and international instruments that have protected refugees for over 40 years are eroded".

He is referring to what is widely referred to as the "deterrent approach" characterised by, inter alia:

- extension of visas to countries producing asylum seekers and the imposition of fines on transporters
- summary rejection of asylum seekers at ports of entry and the introduction of fast track procedures with inadequate legal safeguards
- the invention of safe third country doctrines so that asylum seekers can be returned to countries they transited and where they could have claimed asylum
- the restrictive interpretation of the refugee definition which is pushing up the standard of proof of persecution. In particular the refusal of many states to accept that not only governments persecute but non-state agents can also be responsible for persecution
- the reduction of rights to work or to welfare
- the development of international treaties, which seek to prevent asylum seekers submitting, claims elsewhere
- the use of detention.

The development of refugee policy in Europe in the last two decades has been to balance the sovereign rights of states to control immigration and ensure their national security on the one hand with, on the other hand, their obligation to protect the fundamental rights of all migrants, and specifically asylum seekers and refugees. In recent years the Council of Europe has repeatedly commented on the shortcomings of asylum policy in the wider Europe. It drew attention, for example, to the use of detention at airports. On 26 September 2000, the Parliamentary Assembly of the Council of Europe adopted a recommendation [1475(2000)] on the arrival of asylum seekers at European airports, noting that:

- since the mid-1980s the member states of the Council have been increasingly confronted with growing numbers of asylum-seekers, many of whom arrive at airports; besides the problem of ensuring that all asylum-seekers are treated in accordance with international refugee law, this increase in numbers has created a specific problem with regard to airport reception facilities; officials need to be clear that their role is to uphold asylum and not to be the agents of deterrence;

- the handling of requests for asylum at this stage is an important part of the refugee status determination procedure as a whole; access to a country's procedure for the granting of refugee status is essential to the concept of international protection; yet asylum-seekers arriving at airports may be denied access to this procedure, resulting in the risk of refoulement and violation of their human rights.

The Assembly recommended that the Committee of Ministers urge the member states, inter alia:

- to review their national legislation and practices with reference to the reception of asylum-seekers;
- to define the maximum duration of stay at an airport, as well as at any reception or detention centre pending the outcome of the determination procedure;
- to improve the conditions of detention of asylum seekers, and in particular to make sure that they are not detained together with common criminals, and review; and where necessary to improve the material and humanitarian conditions of reception at airports.

Among the EU member States detention is still largely a national procedural matter, but it is not untouched by the harmonisation drive. The November 2001 Communication from the Commission to the Council and the European Parliament on a "Common Policy on Illegal Immigration" reiterates "the obligation to protect those genuinely in need of international protection", and refers to the need to observe the principle of non-refoulement according to the 1951 Convention and Article 3 of the European Human Rights Convention. It looks to the future and suggests that for the EU states as a whole, and by extension the future member states, "common standards on expulsion, detention and deportation… could be developed".

The intention is clear, even if the rather tentative wording "could be developed" reveals the level of harmonisation possible at the present historical moment in Europe. Asylum and immigration are issues where states still jealously guard many sovereign prerogatives and are cautious in ceding authority to the European level. In addition there are within the European area very major regional differences as regards the political and economic capacity of the authorities to offer adequate levels of social care to asylum seekers or improve the conditions of those detained.

In April 2002 the EU published a Green Paper on a Community Return Policy on Illegal Residents, which states again that the minimum standards for the issuance of detention orders could be set at EU level as well as minimum rules on the conditions of detention "to ensure a humane treatment in all detention facilities in the member states". It says that any returnees who retained in ordinary prisons "might be separated from convicts in order to avoid any criminalisation" Of course regional and international standards require such a separation.

Critics of European Union legislation, for example Amnesty International, have noted that often it fails to incorporate minimum guarantees for detained asylum seekers who should have the right under Guideline 5 (UNHCR):

- to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and terms they understand
- to be informed of the right to legal counsel. Where possible they should receive free legal assistance
- to have the decision subjected to automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic review of the necessity for the continuance of detention, which the asylum seeker or his representative would have a right to attend
- to challenge the necessity of the deprivation of liberty at the review hearing either personally or through a representative, and the opportunity to rebut any findings made
- to contact and be contacted by the local UNHCR office, refugee assisting body or advocate. The right to communicate with these representatives in private should be assured.

UNHCR has been a consistent critic of European deterrence measures. It has also drawn attention to the risk that detention may be more widely used as a result of the new security concerns of states after September 11:

> The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as human rights law do not preclude restrictions on the movement of asylum-seekers, including detention as the exception, not the rule, if necessary in circumstances prescribed by law and subject to due process safeguards. Detention would justifiably be deemed necessary, where there are solid reasons for suspecting links with terrorism in the individual case. Proposals to introduce automatic

> detention of all asylum-seekers entering illegally or coming from particular countries, as are being considered in a number of States in response to the resurgence of fears about terrorism, are not supported by UNHCR. They would, in UNHCR's view, contradict long established guidelines on detention agreed by States, and could be seen as an arbitrary, even discriminatory response which could then come into conflict with international legal norms.

In support of this position, the Parliamentary Assembly of the Council of Europe offers its caution:

> The Assembly expresses its conviction that introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism, and calls upon all member States to refrain from introducing such restrictive measures. Resolution 1258 (2001), 26 September 2001.

II SOME SELECTED NATIONAL LAW AND PRACTICE

From this brief description of the troubled political context of European refugee policy, let us turn to the fundamental norms and standards that should govern the use of detention for asylum seekers.

It is beyond the scope of this paper to document all the varying detention practices in the 15 member states of the EU, nor indeed of the 40 plus member states of the Council of Europe. Some efforts to monitor detention practices have been made by the US Lawyers' Committee for Human Rights and the Danish Refugee Council, from which illustrations are cited below. This paper will recall the international standards that govern the use of detention, and refer to the alternatives that have been proposed. The legal challenge to bad practice is always important to ensure respect for established human rights principles, though the negative political trends are dominating the policy arguments, and those will need to be challenged from a wider sector of society than legal practitioners. The current security and control emphasis in Europe puts particular pressure on the agents of immigration control at borders. Interesting research in the UK is throwing light on the process of decision making of border guards regarding detention and this paper will highlight the findings of this research which deserves to be done on a wider international level.

The Danish Refugee Council is currently researching the practice of detention in a number of European countries. At time of writing (October 2002) the results are not yet published and more detailed work would be valuable to get a greater insight into how far detention is being used. Some illustrations:

Austria: Asylum seekers are not subject to mandatory detention, although they may be detained in the border control area until the Federal Asylum office has decided on admissibility for up to 5 days. Asylum seekers who enter illegally and have no residence rights may be detained. They may also be detained to ensure their deportation. If they are denied asylum this detention may last for 2 months, with the possibility of a single 4 month extension. There is no independent review of a detention decision.

Belgium: Belgian Aliens Law allows detention of asylum seekers in border procedures during the processing of their claims under the admissibility procedure. In-country applicants who entered the country illegally may also be detained during this period for up to 2 months. The decision to detain is influenced by an assessment whether a case on appeal is likely to be rejected or the asylum seeker comes from a country from where few asylum claims are granted. There is no substantive review of the detention decision. There is a maximum of 5 months permissible detention in deportation cases. Unaccompanied minors who apply for asylum at the borders are usually detained.

Bulgaria: The asylum seekers law does not provide for detention though it is believed that border officials routinely detain asylum seekers with other undocumented immigrants, for an unregulated length of time. Rejected asylum seekers who remain in the country are subject to detention. There is no review of the detention decision, and no limit on the length of detention.

Czech Republic: There is generally no detention, save in two situations:

- where identity cannot be proved;
- if the Aliens Authorities expect that rejected asylum seekers may try to avoid expulsion.

Detention is limited to 30 days.

Denmark: Detention is very common in Denmark. Ninety per cent of aliens in detention are asylum seekers, and it is estimated that 50% of all asylum seekers in Denmark will be detained at some time. The grounds for detention are stated as the following:

- the need to assess whether the applicant will be returned to a "safe third country" whether outside the EU or to an EU member state in application of the Dublin Convention;

- in manifestly unfounded applications to allow the authorities to reach a decision on the claim;
- where asylum seekers refuse to stay in the accommodation centre where they have been allocated, or have a violent and threatening attitude towards the staff of the accommodation center;
- when the claim has been rejected, and alternative measures to detention are considered insufficient to ensure deportation.

There are no maximum limits to the length of detention, although prolonged detention must be reviewed monthly by the court.

Finland: Detention in police custody is permitted for up to 4 days for the purposes of establishing the identity of, and the route taken by, the asylum seeker. Detention is also permitted if there is reasonable cause to believe the asylum seeker will commit a crime or abscond. There are no time limits to this detention, but there are independent reviews of the detention decision and every 14 days the detention itself must be reviewed.

France: "Retention" is allowed for two reasons:

- The arrival at an external border when s/he may be kept in a waiting area for as long as necessary up to a maximum of 20 days to determine whether the claim for asylum is manifestly unfounded;
- For in-country applications under accelerated procedures. These are used in four situations: When another state is responsible for examining the asylum claim under the Dublin Convention; when a person comes from a country where the French authorities apply the cessation clause of the Refugee Convention; when the presence of the person poses a serious threat to public order; and when the applicant has "wrongfully resorted" to asylum proceedings.

An independent review of detention exists and the maximum permitted detention is 20 days.

Germany: Detention is mostly used in Germany after a negative decision on an asylum claim, and when the individual has no other right to remain in Germany and is asked to leave but does not. The German Aliens Act allows two types of detention: "preparatory" and "preventive". Preparatory detention is used after the negative decision but before the deportation order if it is deemed impossible to effect an expulsion order without detention. Such detention can last up to 6 weeks.

Preventive detention happens after the expulsion order if there is a suspicion that the asylum seekers will abscond or evade the expulsion. Such detention may last up to a week. Competent authorities can extend this detention for up to six months, or more under exceptional circumstances. Rejected asylum seekers who are detained have a right to review of detention every three months.

Greece: Asylum seekers applying at borders are held pending the outcome of an accelerated procedure from 1-15 days. Authorities may also detain rejected asylum seekers awaiting deportation. Those who have been arrested for illegal entry before applying for asylum may be detained with no specified maximum length of detention. Detainees who cannot be removed to their home countries remain in detention indefinitely. Detention decisions are subject to independent review.

Hungary: All asylum seekers, on permitted entry, are directed to either an open immigration reception centre or a closed, military camp style detention centre run by the National Border Guard. "Safe Third Country" claimants may be detained in an airport transit zone. Rejected asylum seekers may be detained if they are not removed. Detention decisions are independently reviewed and aliens may not be detained more than 18 months.

Ireland: An asylum seeker may be detained if s/he;

- Is reasonably suspected to be a threat to public order or national security
- Has committed a serious non political crime abroad
- Has not made reasonable efforts to establish identity
- Wants to leave and enter another state illegally
- Has destroyed travel documents without reasonable cause
- Is attempting to avoid a transfer under the Dublin Convention.

There is no maximum limit on detention, but cases are reviewed every 10 days.

Italy: Asylum seekers apprehended at border entry points are held for hours or days at temporary holding centres. Those arriving by air are detained in the transit zone of the airport until Border Police decide on admissibility. There is a judicial review of the decision to detain within 48 hours of detention. The length of detention should not exceed 20 days for those whose identity cannot be

established, or 30 days for rejected asylum seekers awaiting deportation. UNHCR is entitled to intervene with the authorities on detention cases.

Luxembourg: Detention is uncommon but may take place:

- if identification papers are false or nonexistent
- if asylum seekers enter illegally at the airport
- if they apply for asylum after their attempt at illegal entry is refused by border control.

There is an independent review of the detention decision if initiated by the asylum seeker. There is a maximum of 3 months, and detention is reviewed on a monthly basis.

Netherlands: Individuals arriving by air who are determined to have inadmissible or "manifestly unfounded" claims are always detained by the Immigration authorities. Other applicants have their admissibility determined in 48 hours and must stay during that time at an "Application Centre". Rejected asylum seekers awaiting deportation are detained if there is a risk they will not leave the country. Detention is automatically reviewed independently within 10 days. Depending on the availability of travel documents and appeals lodged, an asylum seeker may be detained for as long as 11 months.

Norway: Asylum seekers may be detained at the border by police if, on arrival, they are not able to produce identity documents or if that documentation appears fraudulent. All asylum seekers must stay at open reception centres for the initial phase of the procedure. Asylum seekers are rarely detained to ensure they comply with deportation orders. There is a limit of 12 weeks in detention, and detention is independently reviewed by a court each three weeks.

Poland: Border applicants for asylum must remain at the border while police establish identification. Rejected Asylum seekers are also detained to ensure removal. Decisions to detain may be appealed to a provincial court within seven days. Detention at the border is limited to seven days; and pre-deportation detention is limited to ninety days.

Portugal: Asylum seekers may be detained at ports of entry by the Aliens Service. At Lisbon airport they may be detained in a transit zone from 48 hours to 5 days for an admissibility decision. If detention is due to a failure to leave the country, a judicial review is possible within 48 hours. If a decision on

admissibility is not made in 5 days, the asylum seeker is released. Detention of rejected asylum seekers awaiting deportation is limited to 60 days.

Romania: Aliens attempting illegal entry are detained as this is a criminal offence. Asylum seekers from safe third countries arriving without necessary documentation are detained (though there is no official list of safe third countries). Asylum seekers whose first instance appeal of a negative decision is rejected are "directed" to de facto detention facilities. There is a theoretical review of the detention decision. Asylum seekers may not be detained at the airport for more than 20 days, and there is no judicial review of detention.

Spain: Asylum seekers arriving by air must remain at an airport facility or hostel pending an admissibility decision for a maximum of seven days. Aliens detained for illegal stay in Spain who apply for asylum while in detention are detained during the processing of their application which must be done in 60 days. Rejected asylum seekers awaiting deportation may be detained. There is an independent review of detention for rejected asylum seekers awaiting deportation. They may be detained for a maximum of 43 days. There is no periodic review of detention.

Sweden: Asylum seekers may be detained if their identity and nationality are in doubt, or if the asylum seeker is likely to be refused entry or to be expelled, to abscond or to commit a criminal offence. There is an independent review of detention. Detention to determine an asylum seeker's right to stay in Sweden is limited to 48 hours and detention to ensure removal or establish identity is generally limited to 2 weeks. Pre-deportation is limited to 2 months with the possibility of an unlimited number of extensions. Such detention could exceed a year, particularly for those who cannot be removed due to the situation in country of origin. There is a periodic independent review of detention.

Switzerland: Asylum seekers arriving at the airport may be detained for up to 15 days while awaiting a decision on admissibility (plus five days for an appeal). Grounds for detention at the border include:

- Failure to establish identity or nationality
- Presenting a false identity
- Prosecution for being a threat to public order
- Coming from a "safe third country"
- Having a prior order of removal from Switzerland

- Returning to the country of origin while an asylum claim is pending
- Pre-deportation of rejected asylum seekers.

There is an automatic judicial review of detention after 96 hours. Detention to prevent absconding allows for a maximum of 3 months. Rejected asylum seekers deemed likely to evade removal may be detained for a maximum of nine months. There is a periodic and independent review of detention every two months for those awaiting expulsion.

United Kingdom: Statutory provisions for immigration detention are found in the Immigration Act of 1971 and the Immigration (Places of Detention Directive) Act 1986. The power to detain rather than grant temporary admission lies with Immigration Officers. There is no mandatory or automatic detention. Asylum seekers whose claim is deemed "manifestly unfounded" by a Home Office caseworker and confirmed by the Secretary of State can be detained by immigration officers. Factors in determining whether detention is appropriate include community ties and prior history of compliance with immigration laws and procedures. The reasons given are:

- where there is a reasonable belief that the individual will fail to keep to the terms of temporary admission or temporary release;
- initially to clarify a person's identity and the basis of their claim;
- where removal is imminent.

Most asylum seekers are detained pending removal. There is no presumption in favour of bail. There is no independent review of the detention decision. There is no limit on detention pending removal, though the courts may exercise discretion if removal is greatly prolonged. Decisions are reviewed monthly by immigration officers.

III SOURCES OF LAW REGARDING DETENTION

From this brief survey, it is evident that detention of one form or another is virtually universal in European states, with largely similar motivation and greater or lesser safeguards. What, then, are the sources of law and the norms behind the practice according to international human right standards?

Article 14 of the Universal declaration of Human Rights states that everyone has the right to seek and enjoy asylum from persecution. EXCOM conclusion 44, and the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers require that the detention of asylum seekers should

normally be avoided (Detention is described as "inherently undesirable"). Both sets of standards require the authorities to distinguish between asylum seekers and other detainees.

The sources on international law relating to the detention of asylum seekers and to the deprivation of liberty include Articles 25, 31,33, and 35 of the 1951 Refugee Convention; Article 9 of the International Covenant on Civil and Political rights, Article 5 of the European Convention on Human Rights, and article 37 of the Convention on the Rights of the Child. The instruments are binding on all States Parties, including therefore the member states of the European Union.

Article 3 of the Universal Declaration states that "no one shall be subject to arbitrary arrest, detention or exile". There are other non-treaty soft law standards adopted by consensus by UN member states which reflect customary international law. Such standards are the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment; the UN Standard Minimum Rules for the Treatment of Prisoners, and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Specifically European standards on the detention of asylum seekers derive from:

Article 5 of the European Convention on Human Rights which states that:

> Everybody has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;
>
> …The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition;... Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The law and the practice of the member states of the European Union must comply with the standards contained in the European Convention on Human Rights.

ICCPR Provisions: Article 9:

> Article 9.1. Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;
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> Article 9.4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful;
>
> Article 9.5 Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Human Rights Committee has taken the view in its General Comment on Article 9 that it also applies to immigration control. The committee's definition of arbitrariness not only includes merely being against the law, but it also includes elements of inappropriateness, injustice and lack of predictability. The UN Working Group on arbitrary detention has stated:

> Article 14 of the UDHR guarantees the right to seek and enjoy asylum in other countries from persecution. If detention in the asylum country results from exercising this right, such detention might be 'arbitrary'.

IV UNHCR'S APPROACH TO THE ISSUE OF DETENTION

The position that UNHCR has elaborated in its Guidelines for states draws on the UN Body of Principles, the UN Standard Minimum Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

The main UNHCR Guidelines are as follows**:**

- The detention of asylum seekers is inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs.
- Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many cases, contrary to the norms and principles of international law
- Article 1 of the 1951 Refugee Convention, which is often applied inappropriately by member states, exempts refugees coming directly

> from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those that are necessary, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country. The detention of asylum seekers who come "directly" in an irregular manner should, therefore, not be automatic, nor should it be unduly prolonged. This provision applies not only to recognised refugees but also to asylum seekers pending a decision on their status.

The concept of "coming directly" in should include a situation where an asylum seeker transits an intermediate country briefly without applying for or receiving asylum there. Given the particular needs of asylum seekers, it is not practical to apply a strict time limit to this notion. Detention of asylum seekers is only lawful, and not "arbitrary" if it is exercised in a non-discriminatory way, and it has to be subject to judicial/review or administrative review so as to ensure that it continues to be necessary in the circumstances. Release has to be effected if the authorities cannot continue to prove grounds to detain.

UNHCR also reminds states that for many asylum seekers the only option they have is to arrive at or enter a potential host state illegally, since it is not possible to obtain the lawful documentation from the persecuting state, and there is no recognised "refugee visa".

So, in summary, there should be a presumption against detention. Other options should be tried first unless they can be proven to be inadequate to the need, in other words only when the other alternatives have been considered.

V WHAT ARE THE ALTERNATIVES TO DETENTION?

UNHCR's position is widely shared by leading human rights and refugee protection organizations in Europe: asylum seekers should only be detained as a last resort where non-custodial alternatives can be proven on individual grounds not to achieve the stated lawful and legitimate purpose. The kinds of alternatives to detention which are advocated are:

- supervision systems
- a regime of reporting requirements

- bail or guarantee systems (with due regard to the very limited financial capacity of most asylum seekers. Such systems would only be reasonable if the amounts were regulated to not exceed a relatively low level and if there were organizations or community groups willing and able to help offer these securities on behalf of asylum seekers)
- the promotion of voluntary return through intensive and personalised counselling work prior to and during detention for all rejected asylum seekers.

VI CONDITIONS OF DETENTION

So far as the conditions in detention are concerned, articles 7 and 10 of the ICCPR addresses the prohibition of torture or cruel, inhuman and degrading treatment or punishment, a prohibition replicated in article 3 of the European Human Rights Convention.

UNHCR concedes that detention of asylum seekers is permitted under international standards on a limited basis, but stresses that the onus is on the detaining authorities to demonstrate why other measures are not sufficient for the purposes detention is supposed to fulfill. It is allowed if it is necessary, lawful and not arbitrary. The reasons are these:

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

In addition to these criteria, any asylum seeker who is detained legitimately should not be held in detention for longer than is necessary. Legal counselors for asylum seekers point out that "to verify identify" or "to determine the elements on which the claim to/refugee status or asylum is based" are only acceptable until the preliminary interview has taken place. In most cases this should not take more than a few days.

Consistent with its alarm at the developments in European states, UNHCR's further advice is noteworthy, namely that detention should never be used as a deterrence measure against future asylum seekers; nor should it be used in such a way as to persuade asylum seekers to withdraw a claim they have lodged. These actions would be contrary to the norms of refugee law.

Within the very limited area of permission to detain, UNHCR insists (guideline 20):

- All asylum seekers should undergo an initial screening at the outset of detention to identify trauma or torture victims for treatment
- Men should be segregated from women, and children from adults, except where they are part of a family group
- Separate detention facilities should be used to accommodate asylum seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups
- Asylum seekers should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to ensure such visits. Where possible such visits should take place in private unless there are compelling reasons to the contrary
- Asylum seekers should have the opportunity to receive appropriate medical treatment and psychological counseling where appropriate
- Asylum seekers should have the opportunity to continue further education or vocational training
- Asylum seekers should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities
- Asylum seekers should have the opportunity to exercise their religion in practice worship and observance and receive a diet in keeping with their religion
- Asylum seekers should have access to basic necessities such as beds, shower facilities, basic toiletries etc
- Asylum seekers should have access to a complaints mechanism (grievance procedure) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeals procedures, should be displayed and made available to detainees in different languages.

In addition to the right not to be unlawfully and arbitrarily detained, under international standards asylum seekers and refugees have the following rights if they are in detention:

- Right of access to legal counsel
- Right to notify their family of the fact and place of detention
- Right to be visited by and correspond with members of their family
- Right to communicate with the outside world
- Right to medical care
- Right to humane conditions of detention, which take into account their special status as asylum seekers: they should not be held in places where their physical safety is endangered and they should not be held with common criminals
- Refugee children should not be detained
- Families should not be separated.

VII TWO ILLUSTRATIONS, THE UK AND GREECE

A The Problem of Detention in the UK

December 2001 UN Human Rights Committee issued its observations on the report from the UK. The committee expressed concern that "asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant (ICCPR), including reasons of administrative convenience." The committee further noted that some rejected asylum seekers are held in detention*:* "for an extended period when deportation might be impossible for legal or other considerations". This prolonged detention raises the anxiety of arbitrariness. The Working Group recommended that the UK "should ensure that detention of asylum seekers is resorted to only for reasons recognized as legitimate under international standards and only when other measures will not suffice".

The explanations for this apparent carelessness may be found in the research done into the culture at the borders of the UK. In the present political climate in many European countries, it is important to look beyond the mere legal issues to attitudes held by detaining authorities toward asylum seekers. Very few empirical studies have been undertaken into the motivations of the examining immigration staff. One of the few was undertaken by the University of Essex Human Rights Department. In *Deciding to Detain: How Decisions to Detain Asylum Seekers are*

Made at Ports of Entry, researchers conducted many interviews with the cooperation of the UK Immigration service into how Immigration Officers at ports of entry make decisions to detain asylum seekers. The report gives an intriguing insight into the culture of border control. The studies were to examine the influence of the organisational context on decisions to detain. Its key proposition is that the specific physical and organisational context as well as the characteristics of individual decision makers play a crucial role in shaping how discretion is exercised.

The research deals with organisational influences on detention decisions including: occupational norms associated with the immigration officer role at ports, organisational incentives that reflect the activities that are penalised and those that rewarded; the effects of work load and administrative overload, and the implications of rapid organizational change. Through many interviews it reveals prevailing perceptions at ports about asylum seekers reasons for coming to the UK and immigration officers' assessments of the validity of claims for asylum. It considers the potential for stereotypes to develop due to the repetitive and nationality based nature of the work and how this reflects on the likely impact of policies which target identified groups. It also considers the relevance of personal characteristics and experience of individual immigration officers, including their reasons for being attracted to the Immigration Service, their preference for various aspects of the work and their assessment of the skills needed to be an immigration officer. It includes an explanatory framework for understanding variations between immigration officers in attitudes and decision-making styles, which draws on social psychology theory.

The policy implications of this report, based on many interviews with immigration officers in various entry points to the UK are fascinating, and the analysis merits replication in other European countries to understand the deeper personal reasons for the use of detention. Among the finding are:

- Policies aimed merely at deterring asylum applications which do not address root causes or consider reasons for inappropriate uses of asylum that can create escalating cycles of official reaction and individual resistance
- The restrictive approach is counterproductive from all perspectives, since any notional gain in terms of reduced numbers is offset by the increasingly desperate and devious actions of individual asylum seekers and organized "traffickers", which have made the job of immigration officers at ports more time consuming and difficult

- An "ideology of abuse" has developed and incorporates whatever is identified as an "immigration problem" Use of this broad terminology creates an ethos of extreme discretion among immigration officers. The labeling of asylum seekers or their actions as abusive is antithetical to the establishment of clear principles for the use of detention and also diverts attention away from a more critical analysis of the reasons for the perceived or actual misuse of asylum procedures
- The "honey pot" thesis has been hugely influential in asylum policy. It is sustained at ports by inference where other motives are not apparent to immigration officers
- In the face of an increased workload and overstretched resources, "passenger profiling" has been introduced to target controls towards categories of asylum seekers who are considered to be involved in "systematic abuse"
- An intelligence-based approach may be appropriate where there is concrete evidence about particular individuals which raises criminal or security concerns. But the wholesale application of intelligence at a group level in order to improve administrative efficiency is directly at odds with non-discrimination principles. The evidence suggests that to great an emphasis on intelligence patterns has resulted in prolonged detention and the misinterpretation of the facts of individual cases
- The nature of immigration work creates strong pressures to categorise passengers by nationality. This promotes direct discrimination whereby individuals may experience a greater risk of detention because of the negative characteristics associated with their national group. A particular effort is therefore needed to mitigate the formation of national stereotypes sand operationalisation of prejudice within the immigration service
- Detention has come to be used systematically for general deterrence and to expedite processing, and in an ad hoc fashion to encourage the withdrawal of applications. This may be in response to feelings of being administratively overwhelmed
- An absolute conception of "last resort" (based for example on principles of proportionality) requires that all alternatives to detention have been exhausted in any particular case. Immigration officers in the UK have available a limited range of non-custodial options compared with some

other countries, and several alternatives used regularly in enforcement contexts (bail, regular reporting) are either not available in law, or not considered at the time of arrival

- There is clear evidence of individual decisions and certain systematic practices which could be described as arbitrary. Detention might be arbitrary in its "everyday" sense (ie subject to personal whims, prejudices or caprice) where it is a punitive reaction to perceived "abuse"; in the 'legal' sense where it is motivated by broad policy objectives rather than by individual circumstances such as "special exercises" aimed at general deterrence or routine detention for administrative convenience, or where it is "experienced" as arbitrary by detainees who are often unaware of the reasons for their detention
- Pressures to detain and question asylum seekers of a particular ethnic appearance, from certain points of origin, or who lack adequate proof of identity are likely to increase in the context of the heightened security awareness following the September 11 attacks.

The authors of this research conclude that their research raises fundamental questions about the purposes for which immigration detention should be used, the specific circumstances which justify detention for these purposes and the proportionality of detaining on arrival to prevent absconding. They argue that resolution of these questions could be advanced by an exchange of views between legal practitioners, researchers, front line decision makers and policy makers.

B Greece

Greece is often cited as having a particularly harsh detention regime in terms of law, the training and behaviour of detaining officials, and the socio-economic rights afforded to those in asylum-related detention. A very critical detailed insight into the culture of detention in Greece is provided by a submission from the International Helsinki Federation to the Council of Europe Committee on Legal Affairs and Human Rights of 19 March 2002, quoted here verbatim.

Greece: Conditions of Detention in 2001

> (Prepared for Submission by the International Helsinki Federation to a Hearing on Conditions of Detention at the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights, 19 March 2002)

In 2001 the European Court of Human Rights convicted Greece for violation of the Convention's Article 3 for inhuman detention conditions in police stations

(*Dougoz v Greece*, 6 March 2001) and in prisons (*Peers v Greece*, 19 April 2001) while on 8 May 2001 the UN Committee against Torture (CAT) stated that detention facilities in Greece are characterized by excessive or unjustified police violence especially against minorities and foreigners, harsh detention conditions, as well as inhuman long-term detention of undocumented migrants and/or asylum-seekers awaiting deportation.

Overcrowding is the main problem in those facilities, something acknowledged even by the Planning Directorate of the Ministry of the Environment, Planning and Public Works, which stated in July 2001 that around 8,295 inmates were crowded into the 5,267 officially available places. Greece's largest prison, the Korydallos Prison Complex, is a case in point. In February 2001, there were 2,193 inmates for the 640 available positions, showing that the situation had worsened since the 1999 CPT visit. This problem is compounded by "traditional" problems like lack of physical exercise, ventilation, appropriate health care and vocational activities for the prisoners, in addition to the widespread availability of drugs.

Besides, the year saw a substantial increase in the number of asylum-seekers and undocumented migrants arriving into Greece. This resulted in the harsher attitude of the Greek authorities who oftentimes acted in violation of the Geneva Convention of 1951 and the new Recommendation of the Council of Europe, as even UNHCR-Greece publicly stated. This was so, despite the fact that more than 75 percent of the approximately 7,000 aliens who were detained by the Hellenic Coast Guard since the beginning of 2001 came from countries that are internationally known as human rights violators like Afghanistan, Iraq, Iran, Turkey, Sierra Leone, a fact that makes these people legitimate applicants for asylum. Even after the introduction of Law 2910/2001, the Greek state falls short of fulfilling its responsibilities due to constant misinterpretation and misapplication of the laws.

In general, asylum-seekers were detained for long periods of time in conditions, which constitute ill treatment, including lack of proper food, insufficient supply of water and unhygienic and unhealthy living conditions with no proper ventilation and physical exercise. In some cases they were assaulted physically, during their arrest or detention, and were almost never allowed to see doctors to treat and certify their wounds. On expressing their wish to contact the consulate of their country and/or a lawyer, detainees alleged not having been given the appropriate phone numbers. The few who had been given a chance to get a lawyer were not able to have confidential meetings with him/her, because

none of the police establishments visited by CPT offered facilities for that purpose.

In addition to that, almost uniformly, detainees were not informed of their rights in a language they understand, both during their arrest and - when applicable - during their subsequent trial and many were forced to sign documents in Greek, naturally unaware of their content: in some cases, such documents have later been used to incriminate the persons or prepare their deportation orders. In most cases, not even when taken to the detention facilities, were people shown the Hellenic Police Informational Bulletin, which contains – In two different versions and in 14 languages - a list of detainees' and deportees' rights.

The Hellenikon Holding Center's six small cells inside a locked detention block usually hold 30-34 persons. At times the tiny cells have held as many as 11 detainees despite the severe lack of space. The Chios Detention Center comprises two dormitories with a smaller cell in the middle. Here too, space is insufficient both for the detainees and for the police. The Kos Detention Facilities of the Port Authority comprise a 15 sq. m. room with a bathroom that is inadequate for the numerous migrants detained there who also lack proper food and medical facilities. The part of the Kos facilities, operated by the police authorities, is an abandoned entertainment club with 150-200 migrants lying on mattresses on the floor. In May the GADA (General Police Directorate of Attica) Holding Center had 207 people, even though it was meant for only 80 people. According to the Ombudsman, the unhygienic conditions, and the fact that aliens were detained for more than six months at the Center showed that the authorities violated the Constitution, Art 3 of the ECHR, Law 2778/1999 (Correctional Code), and 2910/2001 (on the entry and stay of aliens).

In June the detention center on Asklipiou Street in Piraeus had 18 detainees, 11 of whom had been in detention, awaiting deportation, between 3-11 months in contravention to Art 44.3 of the new Law 2910/01. The conditions under which visitors may communicate with detainees at the center were unacceptable: the detainee standing behind bars of a corridor and surrounded by other detainees, while the visitor is on the other side, with the police officers a few steps away. Following the persistent efforts of GHM and the Greek Ombudsman, in late July the General Secretariat of the Attica Region decided to examine the files of the Piraeus detainees and another 59 detainees elsewhere and order their release.

Apart from the material problems at the places of detention, police brutality against detainees remained very widespread especially when dealing with Roma and migrants. On 14 June police in Athens detained Andreas Kalamiotis for

making too much noise with his friends. While in detention, Mr Kalamiotes was allegedly beaten with truncheons and repeatedly insulted with racial slurs. On 4 August Nikos Theodoropoulos (19), Nikos Theodoropoulos (18), Nikos Tsitsikos (23), Vasileios Theodoropoulos (17), and Theodore Stefanou (16) were all detained in connection with the robbery of an Argostoli, Cephalonia kiosk. All young Roma men alleged that they were beaten and repeatedly kicked by the policemen. On 1 November in Zaharo, Ilia (in Peloponnese) Yiorgos Panayotopoulos (16) was arrested with his cousins for carrying unregistered arms. While in detention, a policeman reportedly beat Mr Panayotopoulos, placed a loaded gun against his head and threatened to sexually assault him.

In late May 164 asylum seekers (including 20 women and 25 children) and others were towed by the Greek Coast Guard in Crete who allegedly assaulted most of the male migrants and inflicted injuries on at least 16 of them. Around the same time Piraeus Coast Guardsmen ran after, shot at, and then seriously beat five or six Kurdish detainees who had managed to escape into a schoolyard. Even though all migrants have their share of police abuse, Albanians take the lion's share. In February the 16-year-old Refat Tafili was arrested in Athens. The severe beating he allegedly received resulted in a double rupture of the spleen and an emergency operation. In March Arian Hodi, 24, was allegedly beaten with a truncheon at the Mytilene police station.

All these cases, however, pale by comparison to the 24 October murder of the unarmed Rom Marinos Christopoulos, 21, during a road check in Zefyri and the 21 November murder of the 20-year-old Albanian Gentjan Celniku during an identity check in central Athens.

VIII CONCLUDING REMARKS

This paper seeks to throw light on issues relating to detention in Europe. Detention may affect a small fraction of those who seek asylum, but since it requires the denial of individual liberty it needs to be handled in conformity with established legal principles and human rights standards as spelled out in international law and advisory guidelines.

In so far as detention forms part of a European deterrent approach to asylum seekers its use is very problematic. Deterrent measures may seem to reduce the flows, but all too often they divert movements elsewhere, leading a situation of buck passing, not burden sharing. As the asylum door closes tighter, the asylum seekers are thrown on the mercies of smugglers and traffickers in human beings whose business is now worth some 12 billion dollars a year.

People can be expected to continue to migrate in large numbers and for many reasons, some related to protection need. States are spending billions of dollars on border controls, asylum procedures and detentions facilities, and yet the budgets for development of the promotion of human rights and the resolution of conflicts in countries of origin are not increasingly, or they are even reducing.

Policies developed in Western Europe have an "export value". There is a positive export value regionally and globally if the northern receiving states maintain a progressive asylum policy and respect human dignity and established human rights norms. Put another way, it is not surprising that poorer and less secure states in the south and east of Europe and in the developing world cite western European restrictive practices as a justification for their own hard line policies. The irony of course is that 95 percent of the world's refugees stay in or move between countries of the south and do not enter Europe at all.

A further consequence of the "war on terrorism" is becoming clearer by the day in terms of political realignments, and hence changing perceptions of the persecutors and the persecuted. For example the west is easing the pressure on human rights in China which now declares itself to have a terrorism problem as justification for the oppression of dissent. In Europe, Germany has announced a "differentiated evaluation" of the situation in Chechnya from the one it had held prior to September 2001. Australia routinely incarcerates Afghani asylum seekers. North African states with grave human rights records are now accepted as allies against terrorism; the President of Zimbabwe uses rhetoric to describe long time political opponents as terrorists. The impact of this on the culture of the border authorities in receiving states can only be guessed at. The result of this 'war on terrorism' is a political climate which resembles the atmosphere of the Cold War.

Greater analysis is needed of the detention practices of states, the potential for alternatives, and evidence of good staff training and practice. Such evidence could be used for consultations between lawyers, policy makers and border officials and could contribute to ensuring that the practice of detention when necessary is carried out with respect to human dignity, and when not necessary is discontinued or substituted by alternatives that meet the needs both of states and of the asylum seekers themselves.

APPENDIX 1

EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)[*]

SUMMARY OF KEY RECOMMENDATIONS ON THE DETENTION OF ASYLUM SEEKERS

1. The European Council on Refugees and Exiles (ECRE) supports the well established position of the UN High Commissioner for Refugees and other human rights organisations that, as a general rule, asylum seekers should not be detained. Detention may only be used in exceptional cases, and should carry full procedural safeguards.

2. The grounds for detention prescribed by national law should, inter alia, reflect the fact that illegal entry to the territory of a European State is in itself unacceptable as grounds for the detention of an asylum seeker.

3. Alternative, non-custodial measures such as reporting requirements should always be considered before resorting to detention.

4. The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker.

5. An absolute maximum duration for any such detention should be specified in national law.

6. Any review body should be independent from the detaining authorities.

7. Unaccompanied minors should never be detained.

8. Detainees should be given a clear understanding of the grounds for their detention and their rights while in detention.

9. Detainees should have unrestricted access to independent, qualified and free legal advice.

10. Specialised NGOs, UNHCR and legal representatives should have access to all places of detention, including transit zones at international ports and airports.

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[*] ECRE is a non-governmental organization comprising some 70 organisations working on the protection of refugees and asylum seekers in Europe. Its Secretariats are in London and Brussels.

11. Conditions in detention should reflect the non-criminal status of the detainees and be consistent with all international standards.

12. All staff should receive training related to the special situation and needs of asylum seekers in detention.

13. National authorities should provide detailed information on relevant policy, practice, and statistics in order to ensure transparency.

14. Any forthcoming efforts to harmonise the practice of European states in the area of detention of asylum seekers should reflect the standards which ECRE here advocates.

London 1996

APPENDIX 2

COUNCIL OF EUROPE

PARLIAMENTARY ASSEMBLY RECOMMENDATION 1475 (2000)[2]

ARRIVAL OF ASYLUM SEEKERS AT EUROPEAN AIRPORTS

(Extract from the Office database of the Council of Europe - September 2000)

1. Since the mid-1980s the member states of the Council of Europe have been increasingly confronted with growing numbers of asylum seekers, many of whom arrive at airports. Besides the problem of ensuring that all asylum seekers are treated in accordance with international refugee law, this increase in numbers has created a specific problem with regard to airport reception facilities. Officials need to be clear that their role is to uphold asylum and not to be the agents of deterrence. The challenge is particularly serious for the airports receiving the greatest numbers of applicants (such as Frankfurt, Paris or London), and those which have been confronted with this problem for a relatively short time (to be found mainly in central, eastern and southern European countries).

2. The handling of requests for asylum at this stage is an important part of the refugee status determination procedure as a whole. Access to a country's

2 Assembly debate on 26 September 2000 (27th Sitting) (see Doc. 8761, report of the Committee on Migration, Refugees and Demography, Rapporteur: Mr Gross). Text adopted by the Assembly on 26 September 2000 (27th Sitting).

procedure for the granting of refugee status is essential to the concept of international protection. Yet asylum seekers arriving at airports may be denied access to this procedure, resulting in the risk of *refoulement* and violation of their human rights.

3. Moreover, incoherent and unjustifiably lengthy procedures, in particular combined with difficult conditions at the airport (for example, unsatisfactory reception centres) may cause undue hardship to asylum seekers.

4. The harmonisation of national asylum policies at European level is more than ever necessary. In this context, the Assembly recalls and reaffirms its past recommendations designed to improve the protection and treatment afforded to asylum seekers, in particular its Recommendation 1163 (1991) on the arrival of asylum seekers at European airports; Recommendation 1236 (1994) on the right of asylum; Recommendation 1309 (1996) on the training of officials receiving asylum seekers at border points; Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe; Recommendation 1374 (1998) on the situation of refugee women in Europe; and Recommendation 1440 (2000) on the restrictions on asylum in the member states of the Council of Europe and the European Union. The Assembly stresses the need for sustained co-ordination of asylum and immigration policies between the European Union and the Council of Europe.

5. The Assembly notes with satisfaction that in general reception conditions at the visited airports have considerably improved since it adopted Recommendation 1163 on the subject. It also welcomes the adoption of Recommendation No. R (94) 5 of the Committee of Ministers to member states on guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum seekers at European airports.

6. Nevertheless, the Assembly notes with concern that basic problems subsist at several airports receiving asylum seekers, including shortage of accommodation and inadequate material conditions and equipment. Further improvement may in some cases require a review of the nature and characteristics of the authority in charge of managing the airport.

7. The Assembly notes with particular concern that the material and humanitarian conditions in which asylum seekers are received at certain airports are well below acceptable standards. Even if in some cases these can be partly explained by poor economic conditions in the country itself, or by the large

number of applicants, the relevant national authorities should be urged to improve the situation as quickly as possible.

8. The Assembly welcomes the initiative of the Netherlands in setting up an *ad hoc* parliamentary committee to investigate the conditions in which asylum seekers are received at Schiphol airport. This example should be followed by all Council of Europe member states in the framework of a wider investigation into the treatment received by asylum seekers in general, throughout the whole refugee status determination procedure.

9. The Parliamentary Assembly recommends that the Committee of Ministers: step up the monitoring of member states' compliance with international refugee law with reference to the reception of asylum seekers, and with the relevant recommendations of the Committee of Ministers;

- instruct the appropriate committee to ensure that the situation at those airports where particular shortcomings have been noted are improved by the member states concerned
- further intensify Europe-wide co-operation in the field of asylum with a view to undertaking a general overview of the situation of asylum seekers in the light of international refugee instruments.

10. The Assembly also recommends that the Committee of Ministers urge the member states to:

- review their national legislation and practices with reference to the reception of asylum seekers, and in particular:
- to include guarantees to protect asylum seekers in the readmission agreements to which they are parties
- to ensure that the "safe third country" and "safe country of origin" principles are not applied in an arbitrary manner, and that clear criteria are used for designating certain countries as "safe" on the basis of those recommended by the *ad hoc* Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)
- to provide that in every case a rejected asylum seeker should have a right to appeal, and that such an appeal should have a suspensive effect
- to define the maximum duration of stay at an airport, as well as at any reception or detention centre pending the outcome of the determination procedure

- to improve the conditions of detention of asylum seekers, and in particular to make sure that they are not detained together with common criminals
- to re-examine the procedures used during forced deportations with a view to the elimination of inhuman or degrading treatment
- review, and, where necessary improve the material and humanitarian conditions of reception at the airports, and in particular:
- to provide separate accommodation for women and men, except for families, which preferably should stay together, even for a short stay
- to give particular attention to unaccompanied minors, and to ensure that they are interviewed by an appropriately qualified adult, and given absolute priority
- to give special attention to refugee women in accordance with Parliamentary Assembly Recommendation 1374
- to provide rooms which are properly heated and ventilated, and which have natural lighting for applicants staying at airports
- in the case of long stays, to provide applicants with access to fresh air outdoors for at least one hour each day
- to provide regular and nourishing meals
- to guarantee access to medical care during the stay at the airport
- to ensure the presence of interpreters not only during the formal procedure, but, in case of a prolonged stay, also outside the procedure
- to provide applicants with the immediate opportunity to contact family members and with the possibility, in case of prolonged stays, of telephoning them and receiving visits from them
- ensure that the above requirements are also met in reception or detention centres located outside the airport, to which applicants are transferred for the duration of the determination procedure
- strengthen relations with non-governmental organisations concerned with human rights, and promote the networking of their activities.

APPENDIX 3

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION No R (98) 15 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE TRAINING OF OFFICIALS WHO FIRST COME INTO CONTACT WITH ASYLUM SEEKERS, IN PARTICULAR AT BORDER POINTS

(Adopted by the Committee of Ministers on 15 December 1998, at the 652nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees as well as other provisions relevant to refugees and asylum seekers, adopted by the Council of Europe and other competent international fora;

Having regard to Resolution 1309 (1996) of the Parliamentary Assembly on the training of officials receiving asylum seekers at border points;

Bearing in mind that, in order to fulfil their important tasks in an effective manner and to prevent refoulement and the turning away of the asylum seeker at the border as well as to ensure unimpeded access to the asylum procedure by those seeking asylum, officials who first come into contact with asylum seekers, in particular those fulfilling their duties at border points, need appropriate and adequate, initial and in-service training on how to recognise requests for protection and handle specific situations in connection with asylum seekers;

Stressing that the responsibility for providing appropriate and adequate training and the selection of training methods for officials who first come into contact with asylum seekers lies primarily with member States and that international co-operation, both between states and between states and competent international organisations, is of high importance, with particular relevance to those member states which consider themselves in need of a special international assistance for such training;

Without prejudice to the guarantees enshrined in international and applicable regional provisions concerning training and instruction for officials who first come into contact with asylum seekers;

Noting that in member states, different practices and competences exist for the reception and processing of asylum requests;

Considering that in the respective practices of member States, there are different categories of officials who first come into contact with asylum seekers;

Recognising**,** therefore, the importance of member states' agreeing to common principles relating to certain asylum issues which can guide their respective practices,

Recommends to member states that officials who first come into contact with asylum seekers should receive training on how to recognise requests for protection and handle specific situations in connection with asylum seekers.

1. For those of such officials who are required to refer these asylum seekers to the competent asylum authority, their training should lead to the acquisition of:

- basic knowledge of the provisions of national legislation related to the protection of asylum seekers and refugees, including the relevant administrative issues and knowledge of internal instructions, wherever applicable, on how to deal with asylum seekers
- basic knowledge of the provisions of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees and general principles of refugee protection as provided by international law, in particular the prohibition of refoulement and the situation of refugees staying unlawfully in the country of refuge
- basic knowledge of the provisions relating to the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in the European Convention on Human Rights
- basic knowledge concerning limitations under national and international law to the use of detention
- skills to detect and understand asylum requests even in cases where asylum seekers are not in a position clearly to communicate their intention to seek asylum, as well as basic communication skills concerning how to address asylum seekers, including those with special needs
- the skill to make the correct choice and use of an interpreter when necessary.

2. For those officials whose responsibility is to receive and also to process asylum applications, and also whose responsibility might be to take a decision, bearing in mind that a decision on an asylum request shall be taken only by a central authority**,** their training should lead to the acquisition of:

- detailed and thorough knowledge of all the provisions and skills listed under 1
- interviewing techniques, including skills of interpersonal and intercultural communication
- knowledge concerning the human rights situation in the countries of origin of asylum seekers and in other relevant third countries
- skills in establishing the identity of asylum seekers
- knowledge of the application of the "safe third country" concept by some member states.

Training on the issues noted under paragraphs 1 and 2 above should be included in initial and in-service training programmes for the officials concerned. Those responsible within the national administration for such training for officials should be familiarised with available materials prepared, and participate in special programmes when they are made available, by competent international governmental or non-governmental agencies and by national agencies in the framework of bilateral or multilateral co-operation.

Finally, the Assembly recommends that the Committee of Ministers invite the Commission of the European Communities to give greater priority within its Odysseus Programme to training border officials from countries in Central and Eastern Europe through visits and exchanges, with a particular view to learning about the most humane airport reception procedures and conditions in the European countries with most experience in this field (for example, Denmark and the Netherlands).

APPENDIX 4

UNHCR: TEN REFUGEE PROTECTION CONCERNS IN THE AFTERMATH OF SEPT 11

The horrifying Sept. 11 terror attacks in the United States have changed the world profoundly affecting millions of people around the globe. The repercussions will be felt for years.

As the agency mandated to protect and assist millions of the world's most vulnerable people, the UN High Commissioner for Refugees, is particularly concerned about the impact of Sept. 11 on those most in need of international protection and assistance.

UNHCR is concerned, for example, about the increasing public perception of refugees and asylum seekers as "criminals" and over attempts to create unwarranted links between refugees and terrorism. Even before the tragic events of Sept. 11, asylum seekers faced increasingly difficult obstacles in a number of countries, including gaining access to asylum procedures or overcoming presumptions about the validity of their claims because of their ethnicity or mode of arrival.

UNHCR is also aware that several governments are now looking at additional security safeguards to prevent terrorists from gaining admission to their territory through asylum channels. This is understandable and UNHCR endorses all efforts – multilateral or national – aimed at rooting out and effectively combating terrorism. In fact, UNHCR will be looking at what might be termed the "better practices" of the many governments that are undertaking these reviews.

The question being posed – what additional, security-based procedural safeguards can be taken by governments – is an inherently reasonable one. But we need to ensure that it is answered correctly, and that any new safeguards strike a proper balance with the refugee protection principles that may be at stake. UNHCR stands ready to work with governments on these issues.

As more and more governments undertake such reviews, UNHCR's main concern is twofold:

Firstly, that bona-fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or administrative measures.

And secondly, that carefully built refugee protection standards may be eroded.

Any discussion of security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorism, and are not themselves the perpetrators of such acts.

It is also crucial that states understand that the 1951 Refugee Convention does not provide a safe haven to terrorists, nor does it protect them from criminal prosecution. On the contrary, the Convention is carefully framed to exclude persons who committed particularly serious crimes.

So as governments around the world look at various additional procedural safeguards in their efforts to combat terrorism in the wake of Sept. 11, UNHCR has formulated 10 specific concerns over possible actions that may directly affect asylum-seekers and refugees.

1. **Racism and Xenophobia:** UNHCR is seriously concerned over the all-too-common tendency to link asylum seekers and refugees to crime and terrorism. Making such unwarranted links incites racism and xenophobia and is provoking serious protection worries. Equating asylum with the provision of a safe haven for terrorists is not only legally wrong and unsupported by facts, but it vilifies refugees in the public mind and exposes persons of particular races or religions to discrimination and hate-based harassment.

2. **Admission and Access to Refugee Status Determination:** All persons have the right to seek asylum and to undergo individual refugee status determination. Rejection at the border can result in refoulement – sending people back into danger. This is contrary to international refugee legal obligations. UNHCR's concern is that legislation may be enacted which effectively denies access to refugee status determination procedures – or even leads to rejection at the border – of certain groups or individuals because their religion, ethnicity, national origin or political affiliation are somehow assumed to link them to terrorism. The 1951 Refugee Convention already contains a so-called "exclusion clause" which excludes persons who have committed particularly serious crimes. In addition, it lifts the prohibition on refoulement for those who are a danger to national security. If properly applied, the 1951 Convention will exclude those responsible for terrorist acts, and may even assist in their identification and eventual prosecution. In short, the 1951 Convention does not extend protection to the non-deserving.

3. **Exclusion:** UNHCR is concerned that governments may automatically or improperly apply exclusion clauses or other criteria to individual asylum seekers based on the assumption that they may be terrorists because of their religion,

ethnicity, nationality or political affiliation. Genuine refugees are themselves the victims of terrorism and persecution, not its perpetrators. When appropriate, UNHCR encourages governments to rigorously use exclusion clauses contained in current international refugee instruments like the 1951 Convention. But the application of any exclusion clause must be individually assessed, based on available evidence and conform to basic standards of fairness and justice. The assessment has to be part of the overall status determination process.

4. **Treatment of Asylum Seekers:** UNHCR is concerned that governments might be inclined to resort to mandatory detention of asylum seekers, or to establish procedures that do not comply with the standards of due process. UNHCR's longstanding position is that detention of asylum seekers should be the exception, not the rule. Detention is only acceptable when circumstances surrounding the individual case justify it – including when there are solid reasons for suspecting links with terrorism. But detention should always comply with due process. Similarly, refugee status determination procedures put in place to deal with suspected terrorists must comply with minimum standards of due process, involve officials who are qualified and knowledgeable, and contain the possibility of review.

5. **Withdrawal of Refugee Status:** UNHCR is concerned that states may be inclined to withdraw the refugee status of individuals based on the assumption that they may be terrorists because of their religion, ethnicity, nationality or political affiliation. The rule is that the withdrawal of refugee status can only follow evidence of fraud or misrepresentation of facts that were central to the decision. A refugee's ethnicity or origin cannot in themselves be grounds for either denying or withdrawing status. The facts are what count.

6. **Deportation:** UNHCR is concerned that governments may be inclined to deport groups or individuals on the assumption that they may be terrorists because of their religion, ethnicity, nationality or political affiliation. While the 1951 Refugee Convention allows for the expulsion of individual refugees on grounds of national security or public order, it should only be done in pursuance of a decision reached under due process of law. This should include an opportunity for the refugee to counter the allegations.

7. **Extradition:** UNHCR is concerned that states may be inclined to expeditiously grant the extradition of groups or individuals on the assumption that they may be terrorists based on their religion, ethnicity, nationality or political affiliation. It is UNHCR's position that extradition should only be granted upon conclusion of the corresponding legal proceedings, and where it has been shown

that the extradition is not being requested as a means to return a person to a country for purposes which in fact amount to persecution, not prosecution.

8. **Resettlement:** Resettlement to third countries is one of three main durable solutions for refugees (the others are repatriation to the country of origin and integration in the country of first-asylum). UNHCR is concerned that states may now be inclined not to maintain their resettlement programs at promised levels, particularly for certain ethnic groups or nationalities. As far as UNHCR is concerned, resettlement remains imperative. This is especially true for some vulnerable refugees from places like Afghanistan, where women in particular may be at risk. Continued support for resettlement is vital. UNHCR is working to diversify the number of resettlement countries.

9. **UN Security Council Resolution 1373:** Security Council Resolution 1373 was adopted on September 28, 2001. Among other things, it calls on states to work together urgently to prevent and suppress terrorist acts and to complement that international cooperation by taking additional domestic measures. Resolution 1373, if properly interpreted and applied, is in line with principles of international refugee law. But care must be taken in its implementation to ensure that bona fide asylum seekers and refugees are not denied their basic rights under cover of the need to take anti-terrorism measures.

10. **Draft Comprehensive Convention Against Terrorism:** UNHCR would welcome the development and swift adoption of a comprehensive convention against terrorism. But it should not give legal force to unwarranted linkages between asylum seekers/refugees and terrorists. Nor should it be construed as implying that the 1951 Refugee Convention is inadequate for the exclusion of terrorists from refugee status, or that it somehow offers safe haven to terrorists.