Mr. Marco BERTOTTO

Chairman
Amnesty International – Italy

CURBING THE NUMBER OF ASYLUM CLAIMANTS: IN HOW FAR IS A STRICTER APPROACH THE SOLUTION?

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Introduction: Why Curbing?

When Cicero Foundation kindly invited us to deliver a lecture in this stimulating seminar and assigned us this topic, first of all I wondered what was meant exactly by 'curbing' the number of asylum claimants. As a matter of fact, the question here is not to choose what is best between a stricter and a softer approach to solving a 'public order' issue. The question here is to implement human rights standards, to bring effectiveness to the international protection system, to grant asylum to every single person who is in need of international protection under the Geneva Convention on Refugees.

Therefore, asylum can not be considered as a matter of numbers: it is a matter of people, a matter of individuals seeking help and of countries obliged to give them help.
We understand this might sound quite unrealistic, since everything is also a matter of resources. But here comes the second point. Not only European countries are obliged to grant effective protection to people who need it, but they should also be of example to all the International Community.

In Italy, for instance, we still don't have a clear, comprehensive and effective regulation of the right to asylum, which is dealt with in a couple of articles at the end of the law on immigration: and this happens even if the right is enshrined in our Constitution (under article 10, paragraph 3: "Foreigners who are, in their own country, denied the actual exercise of those democratic freedoms guaranteed by the Italian constitution, are entitled to the right to asylum under those conditions provided by law").

Therefore, you will not be surprised to know that Italy is one of the countries with the lowest presence of recognized refugees in Europe: only around 10,000[1] compared to 102,000 in France, 142,193 in Sweden, 159,236 in United Kingdom and 903,000 in Germany[2]. This means there are 0,16 recognized refugees in Italy every 1000 citizens, compared to 11 every 1000 German citizens.
If we address the issue in a European perspective, where there are more than 2 million refugees, we need to say that Italy – together with a couple of other EU countries (Greece, Spain) – is only at the very beginning of the implementation of the right to asylum.
But Europe also, as a whole, is only less than half-way there, if we consider that the number of refugees and asylum seekers in the world is 11,404,100, of which only 2,503,000 are in Europe (both EU and non-EU countries)[2], and over 7 million are in Asia and Africa.

In fact, there is no flood of asylum seekers into Europe. The numbers entering the European Union are decreasing, and have halved over the past decade with the vast majority fleeing countries where there is conflict and persecution. To put the numbers into perspective, there are as many refugees being cared for in Tanzania, as in the whole of the European Union. Currently 80% of asylum seekers are concentrated in only five EU countries and there is a constant shifting of the numbers as one country after another seeks to tighten up its controls. This shows the urgent need to harmonize asylum policies to ensure equal treatment for all.

[1] 2003 UNHCR-Italy data
[2] 2002 UNHCR population statistics, www.unhcr.ch (Statistics).

As for the accusation that most asylum seekers are in fact "economic migrants" and that most see their claims rejected in the first instance, the statistics show that many more receive protection after a proper review or appeal process.

But let me reiterate the main point of my lecture today: international protection might be a question of resources, but people are not numbers. Europe has the moral and juridical obligation of granting protection to as many people as it can possibly do. And what Europe can do is certainly much more than what is being done: there is no need to curb the number of asylum claimants, as long as this implies Europe trying to avoid fulfilling its obligations. Having clarified this, we may now proceed on considering some key-issues of the concerns of Amnesty International about the asylum system in Europe.

1. A Common European Asylum System: Rules in Force

The development of a Common European Asylum System is one of the most complex and politically-charged areas of policy ever tackled by the European Union. Complex - because it is an attempt to harmonize 15 very different national systems in a highly sensitive policy area. Politically-charged - in that fears and myths surrounding asylum and immigration are directly influencing political agendas in many EU countries.

The blueprint for a Common Asylum System, drawn up at the 1999 EU Summit in Tampere, declared that the new system would be anchored in the "full and inclusive application of the Geneva Convention". But in many respects, what has transpired since then suggests that the emerging Common Asylum System may in a number of respects be in breach of international human rights and refugee law. Instead of ensuring that the "minimum standards" the EU is proposing will lead to "maximum protection", the trend is towards the "lowest common denominator" with numerous national exceptions, leading to a general lowering of protection.

The impetus to build a common asylum system in the EU came from a number of directions but primarily was a reaction to the practical problems arising from the relaxation of border controls in many EU countries. These problems were further highlighted by the influx of refugees from wars in the former Yugoslavia in the 90's. However, the political climate since then has made it increasingly difficult to argue successfully for strong levels of protection. Anti-immigrant and anti-asylum seeker sentiments were already building up in the late 90's. The tragic events of September 11, 2001 added a new element to the equation - the fear of terrorism. Since then, many media outlets and politicians across Europe have automatically linked controls on refugees and asylum seekers with the global "war against terror".

The CEAS comes under the "umbrella" of the overall Common EU Asylum and Immigration Policy. But so far, the policy emphasis across the board has been on control, not protection. Clamping down on "illegal immigration" and combatting "terrorism" are taking precedence over the formulation of an adequate asylum system based on the legal requirement to provide protection. In turn, these policies are increasing the vulnerability of asylum seekers and refugees.

Amnesty is concerned that international human rights and refugee law may be compromised at every stage of the process:

- Refugees are prevented from reaching EU territory through immigration control measures which may not take into account international obligations towards refugees;
- If they reach the EU, refugees may be unlawfully detained, and access to fair and satisfactory asylum procedures denied;
- If they gain access to procedures, these may be accelerated in ways that do not fulfil the minimum requirements of fair and satisfactory asylum procedures;
- Even if they are afforded access to a fair and satisfactory asylum procedure, effective and durable protection may not be ensured.

1.1 Which Country Should Process Asylum Applications?

First of all, let's concentrate on some of the already adopted measures within the CEAS. The first one which we will briefly analyze is the one addressing the problem of which country should process asylum applications.

"Dublin II" is the commonly used term for a European Community Regulation which determines which EU state is responsible for examining an asylum application. As you all well know, it gets its name from a previous agreement, the 1990 Dublin Convention. This was updated, and a new regulation adopted in February 2003. The Dublin Convention, in fact, was found to be inadequate. It was being applied to only 2% of asylum applications in the EU, since it was often difficult in practice to determine an asylum seeker's point of entry into the EU, and moving large numbers of asylum seekers between EU Member States under the agreement proved unworkable. The crisis at the Sangatte refugee centre in France highlighted these inadequacies. The convention was therefore modified to stipulate, in the Dublin II Regulation:

- that the primary responsibility for asylum applications should lie with the Member State that has borne the greatest responsibility for the asylum seeker entering EU territory;
- that responsibility for the application can be transferred to another state if it can be shown that a member of the applicant's close family resides in that state as a refugee or asylum seeker, or if that state has issued a visa, residence permit or other travel document;
- new humanitarian provisions, representing a higher degree of protection and respecting personal circumstances and the unity of the refugee family, particularly where minors are, or risk becoming, separated;
- that responsibility of the State where the applicant first entered "illegally" should cease 12 months after the date of the "illegal" border crossing: after this, responsibility for processing will fall to the state where the applicant has been for the last five months, or (if the applicant has been moving between several states) the one most recently inhabited.

Amnesty believes Dublin II was a disappointing result producing mainly cosmetic improvements. Member States can still send back asylum applicants to the country in which they first arrived: the 'Sangatte syndrome' continues. The UNHCR fears that the Regulation may cause States that receive large numbers of refugees to delay processing applications, and adopt policies to restrict access to their territory and even to their asylum procedure.
We insist that:

- the system whereby the state responsible for someone's presence in the EU must consider the asylum application, should be abandoned, since its implementation may lead to breaches of international refugee and human rights law;
- a refugee can only be returned to a safe third country if it is fair and reasonable to do so, and if it can be established that s/he has, in fact and in law, been guaranteed effective and durable protection against *refoulement*;
- where the applicant consents, the State responsible for examining the asylum application should be the one where a member of his/her family resides, or where a protection claim by a member of his/her family is being considered.

1.2 The Temporary Protection Directive

The second instrument I would like to say something about is the Temporary Protection Directive, which is in force. As you all know, it provides:

- mechanisms to determine common criteria for installing, reviewing or terminating a temporary protection regime in Member States, and what standards of treatment it should provide its beneficiaries;
- criteria for returning people after temporary protection ends, and for identifying those in need of continuing protection;
- a period of temporary protection of one year, which can be automatically renewed for up to three years;
- access to the regular asylum system at any time throughout the period of temporary protection;

- 'burden-sharing' mechanisms, including financial aid and the possibility of physical transfer of the temporary protection beneficiaries to other Member States, if both temporary protection beneficiaries and Member States agree.

In this respect, the UNHCR and Amnesty International praised the Directive for recognising refugee status as defined by the Geneva Convention, and for limiting the duration of temporary protection to ensure that it remains an emergency measure.

However, we have to say:

- The extension of temporary protection to cover *imminent* mass influx of displaced persons means that it may be enforced in anticipation of such influxes. Instead, it should be an *emergency response* to *actual* mass influxes;
- Certain key rights are curtailed in the Directive:
  (1) In granting access to the labour market, it allows discrimination against those under temporary protection;
  (2) Unmarried couples are not accorded full rights in all Member States;
  (2) People under temporary protection do not have the right to freedom of movement throughout the EU, and their right to move freely within the host Member State may be left to individual Member States' discretion.

Amnesty International further stresses that:

- A temporary protection regime should not be enforced preemptively, but only when refugees arrive in the EU in exceptionally large numbers in a short period of time;
- Many beneficiaries of temporary protection may also qualify as regular refugees under the Geneva Convention. The level and quality of protection under this instrument must not be undermined;
- A temporary protection regime must not deprive anyone of the right to have their asylum claim examined individually;
- Temporary protection should be ended only in accordance with the terms of the Geneva Convention, and Member States must continue thereafter to abide by their obligations under international refugee and human rights law.
- The directive does not make clear the procedures and rights for those forced to return when temporary protection ends. The system must ensure that people are returned only in sustainable and dignified conditions.

2. A Common European Asylum System: The Missing Pieces

In building the CEAS, the two most important instruments are still to be adopted. They are:

- A set of common criteria for what qualifies a person for refugee status, as well as standards for "subsidiary protection" - to make uniform the measures taken to protect refugees whose situation is not properly covered by the Geneva Convention – which were due to be established by June 2003, but haven't yet.
- Common asylum procedures: minimum standards for granting and withdrawing refugee status, and standards and time limits for the processing of asylum applications and for appeals, are to be agreed by December 2003.

2.1 Who is a Refugee under EU Law?

At the heart of a Common European Asylum System is the question of how to define a "refugee" or, more precisely, "a person in need of international protection". The European Commission submitted a proposal for such a definition in 2001 and it is currently under negotiation in the European Council.
The European Commission's proposed definition allows for protection of people under two categories:

- a "refugee": a person who fulfils the requirements of Article 1A of the Geneva Convention; i.e. anyone who is outside the country of his/her nationality or habitual residence and is unable or unwilling to return to it "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".
- a "beneficiary of subsidiary protection": "an applicant for international protection who is outside his or her country of origin", and cannot return "owing to a well-founded fear of suffering serious and unjustified harm", who does not qualify for the strict definition of refugee status under the Geneva Convention but who nevertheless is fleeing a situation of mass violations of human rights, for example the consequences of civil war and ethnic tensions.

We are concerned about the ongoing negotiations, and in particular:

- Amnesty International is critical of the Commission's latest proposal in that it breaches the Geneva Convention by excluding people from EU countries. This means that the EU may fail to protect the rights of, for example, the Roma populations from countries which are due to join the EU in 2004, who may have a legitimate claim to refugee status. This restriction violates the Geneva Convention which does not permit such distinctions.
- Amnesty fears that these definitions will create two classes of refugee: one 'privileged' group enjoying protection, rights and benefits under the Geneva Convention, and another group placed in a precarious situation under subsidiary protection, with fewer rights.
- The European Commission has claimed that "when part of the State from where the applicant comes from is deemed safe, he or she has no claim for international protection." Amnesty fears that an overly broad application of this concept of "internal flight alternative" means that victims of persecution may receive inadequate protection.
- Amnesty is concerned that the heightened emphasis on security in response to the terrorist attacks of September 11, 2001 has made refugee status and subsidiary protection more likely to be withdrawn or not renewed.

There are frequent claims by politicians and in the media that the majority of asylum seekers in Europe are actually "economic migrants". Amnesty believes the stereotyping of asylum seekers as illegal economic migrants is harmful to the plight of genuine refugees. This has led to systems that risk breaching international human rights and refugee law, including:

- immigration control measures that prevent refugees from reaching EU territory, disregarding international obligations towards refugees;
- the illegal detention of refugees (for example in the UK, where refugees have been handcuffed and kept in prisons).

2.2 The Council Directive on Minimum Standards for Granting and Withdrawing Refugee Status

But let us now focus in detail about the most important directive, the one on minimum standards and procedures for granting and withdrawing refugee status. Amnesty International has followed with great interest the on-going negotiations on the amended proposal for a Directive. Given the deadline set up by the European Council in Seville, the adoption of this proposal by the end of December 2003 is a high priority for the current Presidency.

2.2.1 Common Minimum List of Safe Countries of Origin

On the occasion of the October JHA Council, the fifteen Member States reached a political agreement on the principle of an EC binding list of safe countries of origin. Amnesty International strongly opposes the use of lists of safe countries of origin. Amnesty International appreciates that, under Articles 30 and 30A of the proposal, no country can be labelled as “safe” in general terms. However, the organisation is concerned that the proposal allows for the use of a common European list to restrict access to the regular asylum procedure. Amnesty International believes that the use of lists constitutes discrimination among refugees that is strictly forbidden by Article 3 of the Geneva Convention. While the individual may rebut the presumption of safety under Article 31, there is no mention of the benefit of the doubt and the burden of

proof lies exclusively with the asylum seeker. Amnesty International therefore remains concerned that people coming from countries considered "safe" may be forced to overcome an unreasonable presumption against the validity of their claim, and will have to do so in a procedure which may not offer sufficient safeguards.

Despite the above-mentioned political agreement, it shall be recalled that there are still scrutiny reservations on the criteria to be considered in order to designate such countries. Amnesty International considers that, in the absence of consensus concerning the criteria, the determination of safe countries oforigin is premature and may be guided by political interests rather than full consideration of human rights standards

Amnesty International insists that the situation in the country of origin of a particular applicant for asylum should be assessed on the basis of a wide variety of sources, including reports from non-governmental organisations. Furthermore, this monitoring mechanism should include an emergency procedure dealing with humanitarian crises or situations of massive human rights crisis.

2.2.2 Border Procedures

Amnesty International welcomes the provisions of Article 35 (1) according to which procedures dealing with asylum applications lodged at the border should comply with the principles and guarantees set out in Chapter II. However, Amnesty International fears that this principle may remain a dead letter given the subsequent exceptions embodied in the other provisions of Article 35.

Article 35 (2) foresees that Member States may maintain procedures derogating from basic principles and guarantees described in Chapter II in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who made an application at such locations. According to Article 35 (3), these specific procedures must nevertheless comply with Articles 6, 9 (1) (a), 10 to 12, 13 (1) and 15 (1) of the draft directive. These provisions are all the more worrying given that Article 35 (6) holds that such a procedure may be applied in the case where a Member State is facing a "sudden influx" of asylum seekers.

Although it acknowledges the sovereign right of States to control migration movements towards their territory, Amnesty International is concerned by the creeping confusion between asylum and immigration procedures. Amnesty International deplores that the draft directive increasingly departs from its initial objectives and that its provisions are distorted to achieve the objectives of efficiency of migration controls. The provisions of Article 35 (2) and (3) are increasing the confusion regarding the respective role of the migration authorities, such as border guards, and refugee status determination authorities as far as the decision making process is concerned.

Of particular concern to Amnesty International is that migration authorities will be de facto involved in a preliminary assessement of the well-foundedness of the claim through "pre-screening" procedures, while they do not have the necessary qualifications.

Given the potentially far-reaching implication of this procedure for the principle of non-refoulement, Amnesty International recommends that the asylum procedures should be kept clearly separated from other immigration procedures. In any case, immigration authorities should be restricted to registering asylum applications and forwarding them and relevant information to the competent authorities.

Furthermore, Amnesty International is concerned that the range of rights that would apply to this border procedure remains limited. Amnesty International believes that the full range of procedural safeguards codified by chapter II should be applied to all procedural stages, regardless of whether the asylum application is examined at the border or within the Member State's territory. In any case, the applicant should be heard by competent authorities and should have a right to appeal against a decision that states that his/her case is inadmissible.

Amnesty International is seriously concerned by the provisions of Article 35 A on the basis of which access to territory and to the refugee status determination procedure can be denied altogether, in particular in cases

where the applicant has transited through a safe third country. This provision is in flagrant contradiction with both Articles 27 and 28, which include safeguards regarding the examination of the situation of the particular individual.

On a more general level, Amnesty International believes that denying access to the territorry and to asylum procedure altogether is not in compliance with the Member States' international obligations. According to Articles 26 and 31 of the Vienna Convention on the Law of Treaties, it is well established that the provisions of a treaty to which a State is party are binding on it, and must be performed in good faith. It follows that a State that is seeking to give effect to its obligations under the Refugee Convention cannot do so selectively. The Refugee Convention is founded on the principle that all human beings should enjoy fundamental human rights and freedoms without discrimination.

Amnesty International acknowledges that the Refugee Convention does not explicitly oblige a State party to undertake refugee status determination. However, the observance of the obligations held by this convention implies that some form of determination procedure must be carried out. There is a reasonable presumption, not least on the basis of State practice, that such determination ought to be made in the territory where the asylum-seeker claims protection.

In addition to obligations flowing from the Geneva Convention, Amnesty International recalls that the principle of non-refoulement is embodied in a great number of international instruments and is now considered as a principle of customary international law. There is clear support in the jurisprudence of the European Court of Human Rights and of the UN Human Rights Committee, for taking the position that, where people risk torture or other forms of cruel, inhuman or degrading treatment or punishment, the prohibition of refoulement is absolute.

2.2.3 Appeal Procedures and Suspensive Effect of the Appeal

The provisions of Article 38 states that applicants for asylum shall have the right to an effective remedy before a court or a tribunal and that the court shall examine the claim both on facts and points of law. However, Amnesty International is concerned that some amendments put forward by some delegations will undermine the principle of "effective remedy" embodied in Article 13 ECHR by restricting the scope of the judicial control to a marginal appreciation of "relevant facts" or by adopting very general provisions which would not properly reflect international law.

Amnesty International is fully aware that these provisions are controversial since it will require considerable procedural changes in several Member States. However, these changes are unavoidable since the right to an effective remedy before a court or tribunal is already embodied in the EC treaties and the Article 47 of the Charter of Fundamental Rights. Furthermore, the jurisprudence of the European Court of Justice has consistently interpreted the right to an effective remedy as the obligation for Member States "to ensure effective judicial control as regards compliance with the applicable provisions of community law and national legislation intended to give effect to the right for which the directive provides"[3]. Amnesty International therefore believes that the principle of an effective remedy before a court or a tribunal should be clearly mentioned in the proposal of directive.

The right to an effective remedy is also embodied in Article 13 ECHR. Although it is true that the European Court of Human Rights has acknowledged that contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, the Court has nevertheless developed a detailed set of principles, which should be properly reflected into EC law. According to this jurisprudence, a remedy before a national authority is considered effective when that authority has competence both to decide on the existence of the conditions provided for by Article 3 of the Convention and to grant appropriate relief[4]. In the context of the EC proposal, Amnesty International considers that this

[3] ECJ, Johnston v Chief Constable of the Royal Ulster Constabulary, judgment 15 May 1986, req. 222/84; ECJ, Kingdom of the Netherlands and Gerard van der Wal v Commission of the European Communities, judgment of 11 January 2000, joined cases C-174/98 P and C-189/98 P

[4] ECHR, Klaas and others v Germany, judgement of 6 September 1978; ECHR, Silver and others v UK, judgement of 25 March 1983

ruling implies that the appeal body has full competence to examine both points of fact and law. In order to fully comply with the principle of impartiality and independence, this competence could not be limited to a "marginal appreciation" of the relevant facts.

This interpretation is reflected in the case Jabari vs. Turkey, in which the Court held that "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and vigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and to the possibility of suspending the implementation of the measure impugned"[5]. Amnesty International believes that this jurisprudence implies a fully-fledged examination by the appeal body. The integrity of such an examination would be undermined if the appeal body had to rely on prior assessment made by other governmental bodies.

Amnesty International notes with great concern that Article 39(2) and (3) allow for Member States to maintain or adopt new legislation in order to derogate from the rule on the suspensive effects of appeals. These exceptions are all the more worrying in that the latest version of the directive no longer includes safeguard mechanisms.

Amnesty International recalls that the exceptions allowing Member States to implement deportation orders without waiting for the court's ruling constitute a violation of international law and standards. The European Court of Human Rights reminded Member States in the case of TI vs. the UK, that any measure adopted by them individually or collectively had to ensure the fulfilment of their obligations under the European Convention of Human Rights. One such obligation is to provide for effective remedies against violations of the rights guaranteed by the Convention[6]. This ruling was further developed in the case of Conka vs. Belgium, where the Court held that "it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention."[7]. Given the absolute nature of the non-refoulement principle, the Court held that this scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State"[8].
Amnesty International urges Member States to ensure full respect of the suspensive effect of appeal.

3. Extraterritorial Processing

In general, Amnesty International is concerned that the overriding restrictive trend in the development of the CEAS - i.e. to deprive access to EU territory - has manifested itself recently in the newly emerged external JHA dimension. In order to underline what it sees as the lack of clear, strategic thinking in regard to the CEAS, Amnesty International released in June a major analysis of the UK proposal and the subsequent Commission Communication (3 June, 2003) which discusses the idea of extraterritorial processing of asylum applications[9].

Even though the subsequent EU Summit in Thessaloniki decided not to support the UK proposal, especially with regard to Transit Processing Centres, it is still worthwile briefly addressing this issue.

Under this proposal, officially launched in February 2003, the UK government promotes the idea of offshore processing of asylum applications by setting up, on the one hand, "Regional Protection Areas" (RPA) in refugee-producing countries and, on the other hand, off-territory "Transit Processing Centres" (TPCs) located at the external borders of the European Union. In a commentary to the JHA Council in March 2003, Amnesty International severely criticized the proposal[10]. In response to the UK proposal, an April 2003

[5] ECHR, judgement 11 July 2000
[6] ECHR, TI vs. UK, judgement of 7 March 2000
[7] ECHR, judgement of 5 February 2002
[8] ECHR, Chahal vs. UK, judgement of 19 November 1996
[9] Amnesty International, UK/EU/UNHCR: Unlawful and Unworkable: Amnesty International's view on proposals for extra-territorial processing of asylum claims, June 2003.
[10] AIEU Office, Strengthening Fortress Europe in Times of War. Amnesty International Commentary on UK Proposal for External Processing and Responsibility Sharing Arrangements with Third Countries, 28-29 March

"counter-proposal" from the UNHCR appeared to be an attempt to "rescue" refugee protection from the clutches of the UK proposal, yet in doing so undermined some fundamental protection principles[11].
On the basis of the mandate received at the 28-29 March 2003 JHA Council to further explore the ideas of the UK proposal, the European Commission adopted a communication on 3 June 2003[12]. While accepting the UK's diagnosis of the asylum problem in Europe, this Communication seems to reject its most radical elements, preferring to explore further the UNHCR proposal. The Commission thus suggests that the feasibility of this scheme be assessed further by means of a pilot project and that an adequate legal basis be developed.

Although Amnesty International is aware of the political pressure in such a highly charged environment, it deplores the European Commission's failure to seize this opportunity to depart from the drive for control and develop a coherent and integrated approach that maintains the Tampere commitments to a common asylum system that is based on "full and inclusive implementation of the Geneva Convention", and that gives substance to the stated intention to tackle the root causes of refugee flows.
This lack of political clarity reinforces the impression that the Commission lacks the resolve to counter-balance the radical push by certain governments to stop the "irregular" movements of asylum seekers to Europe, while not being able to articulate convincingly the external JHA dimension with its overall objectives in the fields of co-operation and development.

Within this context, Amnesty International recalls that the external JHA dimension has so far produced little more than an extension of the restrictive asylum and immigration policies, rather than giving direction to political, development or economic co-operation from a human rights perspective to prevent the causes of people fleeing their countries. It rejects the punitive approach endorsed by the conclusions of the June 2002 Seville European Council, which held retaliation measures could be taken under CSFP and EU policies in case of "persistent and unjustified denial" of co-operation regarding readmission[13].

Amnesty International considers that neither the Commission's communication nor the proposals of the UK and the UNHCR have given sufficient attention to the international legal standards that are at stake, including in particular refugee and human rights law standards, and what the implications are for the international refugee protection regime as a whole.

Of particular concern to Amnesty International is the suggestion to "adapt" EU asylum instruments. Amnesty International fears that the on-going discussions may undermine the Tampere commitments and have a detrimental effect on the on-going negotiations concerning minimum common standards for the definition and the status of refugees and persons in need of international protection, as well as current negotiations on common minimum guarantees for asylum procedure[14].

While the Communication supports the establishment of closed reception centres within the enlarged EU in order to cope with abuses of asylum procedures, Amnesty International is concerned that the real objective is to deter spontaneous arrivals by shifting asylum seekers to processing zones where responsibility and

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2003; Amnesty International's Observations to UNHCR Consultations on "Convention Plus", IOR 42/001/2003, 7 March 2003.

[11] UNHCR, New Approaches on Asylum-Migration Issues, Statement of High Commissioner R. Lubbers, at the informal JHA Council 28-29 March 2003,Veria, Greece.

[12] Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, Brussels, 3 June 2003 COM (2003) 315 final.

[13]Amnesty International's Appeal to the Seville Summit, EU war on "illegal immigration" puts human rights at risk, 12 June 2002.

[14] See Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection, COM (2001), 510 final, October 2002; Amnesty International's Comments on the Amended Proposal for A Council Directive on Minimum Standards on Procedures in Member States For Granting and Withdrawing Refugee Status COM (2002) 326 final, February 2003

accountability for refugee protection would be diminished, weak and unclear. As already mentioned in Amnesty International's March critique, this proposal, if it had been adopted, would have been likely to reinforce the "Sangatte syndrome" because zones located at the external frontiers of the EU are likely to attract trafficking and related criminal activity.

Another important element of the overall approach is to support the concept of protection in the region. While it is not opposed to the concept as such, Amnesty International considers that the communication fails to address squarely the realities of the movement of people. These proposals represent restrictive measures that fail to deal meaningfully and realistically not only with the realities of protecting refugees and asylum-seekers in developing regions, and the causes of onward movement, but also with the current realities of the movement of people, not least of which is that many countries of first asylum cannot offer effective protection or assistance, due to their own political and economic difficulties. Indeed, these proposals cultivate a short-term political vision without fully considering the long-term social, political and legal consequences for countries close to refugee producing regions.

While Amnesty International appreciates the desire of governments and the UNHCR to promote new and more effective ways of dealing with mixed movements of refugees and migrants, the organization believes that such efforts should be firmly grounded in principles of international human rights and refugee law. The establishment of any responsibility-sharing mechanism must take into account international responsibility for the protection of refugees so that a regional approach to refugee protection does not undermine efforts carried out at international level to protect refugees world-wide and to find safe and durable solutions for them.

4. A New Constitution for Europe

Let me conclude my lecture today with a brief glance at the new Constitution for Europe, as is being discussed in these days.

We note with satisfaction that the preamble of the draft constitution recognizes that the inhabitants of Europe "arriving in successive waves from earliest times…" have developed the common values which are given expression in the document. In this way, the centrality and positive contribution of immigration and asylum - past, present and future - to the development of Europe is acknowledged at the very start of the constitutional project.

We do, however, have some concerns about particular provisions in Chapter IV of the constitution. The Chapter moves from the position under the Amsterdam Treaty of seeking to establish minimum standards in the field of asylum to a common asylum policy. While in principle we are not opposed to this move we are concerned about the risk of a drop in standards in some Member States as regards the protection of asylum seekers and refugees which this could entail. Further, the failure to incorporate the principles contained in the Tampere Milestones exacerbates this concern. Thus we consider it essential that the constitution be considered to include a standstill provision whereby more favourable provisions in national law regarding asylum seekers and refugees cannot be abolished on the grounds of the common policy.

We also consider it essential to clarify the meaning of Article III-167(2)(g). This provision provides for "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection". While cooperation with third countries in this field is desirable, in particular regarding the development of resettlement schemes and appropriate burden sharing measures, we are concerned that this provision is open to misuse if Member States seek to "sub-contract" their protection duties to third countries. The discussion which has taken place in the first half of 2003 culminating in the Thessaloniki Summit of June 2003 regarding the processing of asylum applications outside the territory of the EU is of grave concern.
We are firmly opposed to any such attempt to move outside the territory of the Member States responsibility for asylum seekers who have applied for protection within the Union. In our opinion such measures are inconsistent with the meaning of the 1951 Geneva Convention relating to the status of refugees and its 1967

Protocol. In addition, it conflicts with the Union's commitment to coherence in external action including human rights protection as an objective for the relations of the EU with the rest of the world.

The EU Member States are both legally and morally committed to the international system of protection of persons fleeing persecution and torture. Member States are obliged to accept their responsibility within that international system to provide protection on their territory and not to seek to off-load the costs, both financial and political, onto weaker or poorer states either neighbouring on the EU or elsewhere in the world. Such efforts undermine the international system of human rights protection and the Union's commitments to itself, to the Member States and to the international community.

Article III-167(2)(g) contains the possibility that the EU could seek to coerce third countries into admitting those seeking protection in the EU. This would not be acceptable. It must be dependent on and subject to Article II-18, the right to asylum. The meaning and interpretation of the right to asylum in the 1951 UN Convention relating to the status of refugees and its 1967 protocol are the responsibility of the United Nations High Commissioner for Refugees whose interpretation of the protection duties of the Member States must be observed within all aspects of the law of the European Union. In no circumstances can Article III-167(2)(g) be construed as permitting the negotiation or settlement of agreements or understandings with third countries which would have the effect of moving or requiring the physical displacement of protection seekers to third countries before a full examination of their protection claims on their merits including an independent review of any refusal of the claim. Any person whose protection claim is accepted shall be permitted to reside within the Union.

5. Conclusions

Finally, I would like to answer the question posed.

First of all, as we said at the very beginning, there is no need to curb the number of asylum claimants in Europe, since there is not any flood of asylum seekers. We need to explode this myth and address the issue from a serious, cultural point of view, and not as an imaginary public order emergency. Sometimes I feel that asylum – together with immigration – is perceived as such – a public order emergency – due to a uninformed public opinion driven by (certain) media emphasis on news stories in which the perpetrator of the crime is a foreigner. And this is both ridiculous and unacceptable.

Secondly, if we want to manage a complete, effective and useful system of international protection, we need to concentrate on the respect of human rights and of solidarity between countries: we cannot lay our own responsibilities to anyone else.

And thirdly, if you really want to, there is one certain way of curbing the number of asylum claimants: working for the respect of all human rights all over the world, so that nobody needs to escape from their own country.