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from: Presidency

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Subject: Possible arguments in reply to criticisms by certain NGOs

I. Introduction

At its meeting on 20 September 1993, the ad hoc Group on Immigration was apprised of the criticisms levelled by various NGOs regarding Member States' asylum policies.

The ad hoc Group on Immigration agreed to instruct the Subgroup on Asylum to propose arguments which would provide the Twelve with a basis for replying to accusations from NGOs when taking part in various bodies.

This document, setting out a series of arguments on major issues in the field of asylum, is designed to do so. It is based to a considerable extent on previous work carried out by the Belgian Presidency at the time (SN 4493/93 WGI 1635).

Should delegations so wish, a joint position under Article K.3(2) of the Treaty on European Union (TEU) could be drawn up on the basis of this note.

II. Brief summary

Co-operation between Member States in the asylum field

1. Article 7a of the Treaty establishing the European Community (EC Treaty) lays down the objective of establishing an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

2. Achieving these Community objectives, particularly that of the area without internal frontiers requires the development of co-operation between Member States in a number of areas, notably measures in the asylum field.

3. With this in mind, the European Council agreed to the report drafted by the Co-ordinators' Group on Free Movement of Persons during the first half of 1989 (the Palma report). On that occasion it was considered essential to draft a convention governing Member States' responsibility for implementing asylum procedures. The Convention was concluded in Dublin on 15 June 1990. The ratification process is currently under way. The Convention is expected to enter into force in early 1995.

4. In December 1991 the European Council agreed to the report on asylum policy from the Ministers with responsibility for immigration. The programme set out in it formed the starting-point for further discussions by Member States.

5. The Maastricht Treaty, which entered into force on 1 November 1993, regards asylum policy as a matter of common interest for Member States (Title VI: Provisions on co-operation in the fields of justice and home affairs).

6. Efforts undertaken in close co-operation between Member States have made it possible in particular to:

   - continue to guarantee refugees due protection in accordance with the provisions of the Geneva Convention of 1951, as amended by the New York Protocol of 31 January 1967;

   - ensure that asylum procedures are adjusted as far as possible to the growing number of asylum-seekers, which could overload asylum procedures with manifestly unfounded applications, delay the recognition of refugees genuinely in need of protection and jeopardize the integrity of the right of asylum.

7. In the light of these considerations, Member States have adopted a number of measures such as the Dublin Convention, the Resolution on manifestly unfounded applications for asylum, the Resolution on a harmonized approach to questions concerning host third countries and the conclusions on countries in which there is generally no serious risk of persecution.

Criticism: Member States' policies call into question the international system for the protection of refugees

1. Member States have repeatedly reaffirmed their obligations under the Geneva Convention, as amended by the New York Protocol.

   In the Dublin Convention those obligations are referred to in the preamble and in Article 2. It is stipulated there that the obligations apply without any geographical restriction in the scope of those instruments.

   There is a similar reference in Article K.2 of the Treaty on European Union.

   Similar principles are laid down in the draft Convention on the crossing of external frontiers, in the Resolution on manifestly unfounded applications and in the Resolution on host third countries.

2. Moreover, in work on the Convention and Resolutions, consideration was given to the views of the United Nations High Commissioner for Refugees, whose duty it is to supervise the application of the Geneva Convention (under Article 35 thereof). What is more, Article 2 of the Dublin Convention spells out Member States' commitment to co-operate with the UNHCR in applying that instrument.

3. The object of the measures taken by the Member States is to ensure that any persons with a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion can have their applications examined in compliance with the rules laid down in the Geneva Convention. This will make it possible to safeguard the interests of anyone with a genuine fear of persecution.

Criticism: The Dublin Convention

1. The Dublin Convention lays down criteria for determining which Member State is responsible for examining an asylum application.

2. The Convention has a number of objectives:

   - to guarantee refugees effective protection, in compliance with the Geneva Convention of 1951, as amended by the New York Protocol of 1967;

   - to give all asylum-seekers a guarantee that their applications will be examined by one of the Member States;

   - to avoid asylum-seekers being sent from one Member State to another with no State acknowledging responsibility for examining the application;

   - to avoid situations arising where the asylum applicant is left in long-term uncertainty about the source and outcome of a decision on his application after submitting it in more than one Member State.

3. With this in mind, Member States give a commitment that any alien submitting an application for asylum in one of their number will have his application examined. To this end objective criteria have been laid down in Articles 3 to 8. Family unity is a factor also taken into consideration here.

4. Member States have decided to incorporate a provision in the Convention (Article 2) under which they express their commitment to co-operate with the United Nations High Commissioner for Refugees in applying the Convention.

5. At present, 7 Member States have ratified the Dublin Convention. It is expected to enter into force in early 1995.

Criticism: The Resolution on manifestly unfounded applications for asylum conflicts with the Conclusion of the UNHCR Executive Committee

1. The Resolution on manifestly unfounded applications for asylum was adopted by the Ministers with responsibility for immigration at their meeting on 30 November and 1 December 1992. The penultimate clause of the preamble contains a clear reference to Conclusion No 30 of the UNHCR Executive Committee.

2. Conclusion No 30 of the UNHCR Executive Committee was adopted in order to deal with applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria. The large number of manifestly unfounded applications for asylum constitutes a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol.

   The Resolution sets itself the same objectives as the Excom Conclusion with a view to coping with that situation.

3. With regard to procedural safeguards, the Resolution follows the same conditions as those contained in the Excom Conclusion in that it specifies that Member States may subject manifestly unfounded applications to an accelerated procedure on condition that:

   - the decision is taken by an official who is fully qualified in asylum or refugee matters;

   - the asylum applicant is given the opportunity for a personal interview with a qualified official.

   The Resolution also stipulates that appeal or review procedures are to be completed as soon as possible.

4. The Resolution goes beyond the content of Excom Conclusion No 30 in that it spells out in detail the criteria giving rise to an accelerated procedure.

They concern in particular:

- manifestly unfounded fear of persecution, and

- deliberate deception or abuse of the asylum procedure.

5. Under paragraph 12 of the Resolution, Member States will from time to time, in co-operation with the Commission and in consultation with the UNHCR, review the operation of these procedures and consider whether any additional measures are necessary.

Criticism. The concept of a safe country of origin entails the risk of infringing the prohibition of "refoulement"

1. The conclusions on countries in which there is generally no serious risk of persecution were adopted at the meeting of Ministers with responsibility for immigration on 30 November and 1 December 1992 in London.

2. The concept of a country in which there is generally no serious risk of persecution means that as a rule persons from that country are not recognized as refugees or that it is possible to establish that the circumstances which might in the past have justified invoking the Geneva Convention of 1951 have since ceased to exist.

3. The fact that a State comes into this category does not automatically mean that an asylum application will be refused. For the purposes of the asylum procedure, rather, it creates a presumption which can, however, be rebuffed upon examination of the individual application. The concept thus does not involve any automatic removal or expulsion.

4. Assessment is based on a comprehensive set of pertinent criteria, the reasons for which are plain to see:

   - previous numbers of refugees and recognition rates;
   - observance of human rights in practice;
   - existence of democratic institutions;
   - verification of stability in the country concerned.

   Assessment is based as far as possible on multiple sources of information.

5. Information from the UNHCR plays an important part in this connection.

6. Member States keep a constant watch on whether the factors in question continue to warrant the assessment.

Criticism: Application of the Resolution on a harmonized approach to questions concerning host third countries has detrimental effects on asylum applicants

1. The Resolution on a harmonized approach to questions concerning host third countries was adopted by the Ministers with responsibility for immigration at their meeting on 30 November and 1 December 1992.

2. The underlying objective of both the Resolution and Conclusion No 58 of the UNHCR Executive Committee is the need to make a concerted response to the problem of asylum-seekers unlawfully moving on from countries where they have already been afforded protection or have had a genuine opportunity to seek protection.

3. To that end the Resolution and UNHCR Conclusion No 58 establish objective criteria for applying the "host third countries" approach. The key factor is whether the asylum-seeker is currently still in need of protection. Moreover, the Resolution contains other explicit guarantees, such as the fact that the asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.

4. The Resolution puts into practice Article 3(5) of the Dublin Convention. It is clearly spelled out in Article 2 of that Convention that Member States reaffirm their obligations under the Geneva Convention, as amended by the New York Protocol.

5. The Resolution also specifies that Member States will from time to time, in co-operation with the Commission and in consultation with UNHCR, review the operation of these procedures and consider whether any additional measures are necessary.

Criticism: Harmonized application and interpretation of Article 1A of the Geneva Convention

1. All Member States have signed and ratified the Geneva Convention. Measures adopted at national level are aimed at implementing internationally binding obligations.

2. The obligation to determine refugee status is incumbent upon the States parties to the Geneva Convention. The Handbook on Procedures and Criteria for Determining Refugee Status, drafted by the UNHCR in 1979, is an important aid in so doing.

3. The application and interpretation of Article 1A of the Geneva Convention may in some cases give rise to differing results in the examination of asylum applications. Member States are therefore actively exploring the possibilities for harmonized interpretation and application of the criteria laid down in Article 1A of the Geneva Convention.

   The endeavour is to ensure that as far as possible Member States take a harmonized view of how to treat asylum applications, while meeting their international obligations.

Criticism: Member States have not responded adequately to the situation in former Yugoslavia

The twelve Member States have adopted a number of measures on people displaced from former Yugoslavia:

1. At their meeting in London on 30 November and 1 December 1992, the Ministers with responsibility for immigration agreed to conclusions on people displaced by the conflict in former Yugoslavia (WGI 1280), noting in particular that:

   - in most Member States, special arrangements had been put in place to meet the special circumstances of those displaced by the conflict in former Yugoslavia;

   - Member States were in principle willing to admit certain groups of people temporarily on the basis of proposals made by the UNHCR and the ICRC, in accordance with national possibilities and in the context of co-ordinated action by all Member States.

2. At their meeting in Copenhagen on 1 and 2 June 1993, the Ministers with responsibility for immigration adopted a Resolution on certain common guidelines as regards the admission of particularly vulnerable groups of distressed persons from former Yugoslavia (WGI 1499).

3. Lastly, an information exchange has been conducted on the policies adopted by each Member State in the various areas of action. The following data have been compiled for the purpose:

   - information on statistics and other aspects relating to policy on the admission of persons from former Yugoslavia;

   - a list of important documents;

   - a survey of visa requirements;

   - arrangements for co-operation among Member States.