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The Liaison Office for Romania of the United Nations High Commissioner for Refugees (UNHCR) presents its compliments to the Embassy of Denmark and has the honour to forward to it the attached copy of "Background information on the asylum system in Romania in the context of the 'Safe Third Country' notion".

This paper has been prepared by UNHCR to identify and examine some of the most important aspects of current asylum legislation and practice in Romania which should be taken into consideration by States contemplating to carry out returns of asylum-seekers to Romania in application of the "safe third country" notion. UNHCR stands at the disposal of the Embassy of Denmark to provide in writing or orally with any additional information as may be necessary in this respect.

The Liaison Office for Romania of the United Nations High Commissioner for Refugees avails itself of this opportunity to renew to the Embassy of Denmark the assurances of its highest consideration.



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**Background information on the asylum system in Romania
in the context of the "Safe Third Country" notion
(First Update - July 1997)**

Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the adoption between States of formal agreements for the return of refugees and asylum-seekers to a country where they have found or could have found protection and where their safety would not be jeopardized, either within that country or by an act of return therefrom to another country where their lives or freedoms would be threatened. Such agreements, which are aimed at identifying the country responsible for receiving and examining an asylum request, constitute the most satisfactory way to ensure respect for the fundamental principle of *non-refoulement* and to address the problem of "refugees in orbit," as well as promoting international cooperation and burden-sharing.
2. UNHCR further considers that, in the absence of any formal agreement between States to this effect, the return of a refugee or an asylum-seeker to a country where he/she found or could have sought protection should not take place unless certain essential conditions relating to the persons's safety and treatment in that country are met. UNHCR has identified some factors that should be carefully considered when determining whether the return of a refugee or an asylum-seeker to a particular country should take place. These factors, which include both formal aspects and the practice of the State to which return is contemplated, are: ratification of and, more importantly, compliance with international human rights and refugee instruments; observance of basic recognized human rights standards for the treatment of asylum-seekers and refugees, in particular of the principle of *non-refoulement*; readiness to readmit returned asylum-seekers and refugees, consider their claims in a fair manner and provide effective and adequate protection, including treatment in accordance with basic human standards.
3. UNHCR notes that bilateral readmission agreements have become the main legal instruments for co-operation among European States to secure the readmission to a Contracting State of its nationals or permanent residents who have entered the territory of another Contracting State in an unlawful manner. However, these agreements do not specifically concern themselves with the special situation and circumstances of asylum-seekers and, as such, do not impose on the Contracting Parties an obligation to ensure that a request for asylum is received and examined by one of them. This is the case with the bilateral readmission agreements concluded by Romania with the following European countries: Austria, Belgium, Czech Republic, France, Germany, Greece, Hungary, Luxembourg, the Netherlands, Poland, Slovak Republic, Slovenia, Spain, Sweden and Switzerland. These agreements generally cover the readmission of two categories of persons present illegally on the territory of one of the Contracting Parties: 1) nationals; 2) third country nationals and stateless persons lawfully staying on the territory of one Contracting Party. In addition, most of these readmission agreements also provide for the admission to the territory of a Contracting Party for transit purposes in the case of third country nationals in another Contracting Party who are subject to measures of removal to their country of origin.

Romania and the International Legal Framework

4. Romania ratified the 1951 Convention and the 1967 Protocol relating to the Status of Refugees on 7 August 1991. Romania is also a State Party to a number of international human rights instruments, including: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. At the regional level, Romania ratified on 20 June 1994 the European Convention for the Protection of Human Rights and Fundamental Freedoms and the eleven protocols thereto. Romania also ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 4 October 1994 and the Framework Convention for the Protection of National Minorities on 11 May 1995.

Domestic Refugee Legislation and Practice

5. Romania has taken a number of legislative and administrative implementing measures to accompany its ratification of the 1951 Convention and 1967 Protocol. The right of asylum is enshrined in the 1991 Constitution of Romania. Article 18 (2) of the Constitution reads: "The right of asylum is granted and withdrawn under the provisions of the law, in compliance with the international treaties and conventions Romania is a party to." According to Article 11 (2) of the Constitution, treaties ratified by Parliament are part of national law and, pursuant to Article 20 (2), international regulations take precedence over internal laws in the event of any inconsistencies between the internal laws and those pacts and treaties relating to fundamental human rights to which Romania is a State Party. In Article 19 (3), the Constitution guarantees that "expulsion and extradition shall be ruled by a court of law." Despite this constitutional development concerning expulsion, the 1969 Law relating to the Regime of Foreigners in the Socialist Republic of Romania, which *inter alia* confers authority on the Minister of Interior to issue an expulsion order against an alien, is still in force.

6. Draft refugee legislation was initiated by the Ministry of the Interior at the end of 1991 and, after some modifications, adopted by Parliament in March 1996. It was promulgated on 2 April 1996 as Law No. 15/1996 relating to the Status and Regime of Refugees in Romania and entered into force on 5 May 1996. The Romanian Refugee Law provides for three categories of refugees which may conveniently be termed as "Convention" refugees (Article 1), "humanitarian" refugees (Article 2) and "war" refugees (Article 5). Under the Romanian Refugee Law, day-to-day responsibility for refugee matters has been assigned to a newly-created Refugee Office within the Ministry of Interior's General Directorate of Border Police, Aliens, Migration Problems and Passports. The Refugee Law also establishes under Article 9 that the competence for interviewing refugee status claimants, examining the claims and rendering a decision at first instance lies with a Government-appointed Commission formed of representatives from the Ministries of Interior, Foreign Affairs and of Labor and Social Protection - the three main ministries involved in the Romanian Committee for Migration Problems (RCMP). According to Article 13 of the Law, appeal against a negative decision by the Commission may be filed with the court of first instance

(*Judecatorie*) within ten days. The decision of the *Judecatorie* may be appealed to the county Tribunal by the asylum-seeker or the prosecutor within five days.

7. UNHCR cooperated with the Government and Parliament of Romania throughout the process of drafting, revising and adopting the Refugee Law and many of the Office's comments regarding a number of problematic provisions of the Refugee Law were taken into account in the final version adopted by the Parliament. There remain however certain aspects of the Romanian Refugee Law which, in UNHCR's view, are not in conformity with international legal instruments for the protection of refugees. These include *inter alia* the provision in Article 22 which limits the duration of refugee status to three years, with the possibility of an extension for up to a maximum of another two years if the refugee proves once again that he/she still meets the definitional criteria in the Refugee Law. It is also cause for serious concern that under the Refugee Law the principle of *non-refoulement* applies to recognized refugees only. The Refugee Law makes no express reference anywhere to protection against *refoulement* in the case of asylum-seekers.

8. Article 4 of the Romanian Refugee Law which sets out grounds for exclusion from refugee status certain categories of persons far exceeds the exclusion clauses exhaustively enumerated in Articles 1 D, E and F of the 1951 Convention. For example, in the case of serious non-political crimes whereas the 1951 Convention excludes from refugee status only persons who have committed such crimes outside the country of refuge prior to their admission in that country, the Romanian Refugee Law also excludes from refugee status under Article 4 (b) persons who have committed any offence on the territory of Romania "for which the law provides a punishment of more than three years of imprisonment." Such an offence may include, for example, illegal crossing of the Romanian border which is punishable by varying terms of imprisonment ranging from three months to seven years under the Law concerning the Frontier of the Romanian State (Law no. 56/1992). Also excluded from refugee status under Article 4 (c) of the Romanian Refugee Law are persons who have "committed deeds which are contrary to... international treaties and conventions concerning refugees and to which Romania is a Party."

9. In addition to the exclusion clauses provided for under Article 4, the Romanian Refugee Law in Article 10 imposes on applicants for refugee status a number of obligations the non-compliance of which would lead to an automatic rejection of an application pursuant to Article 11 (e) of the Law. Thus, refugee status is automatically denied to, for example, an asylum-seeker who does not have "...a correct and civilized conduct..." or who does not "... obey the laws of the Romanian State or the measures established by the Romanian organs having competence in refugee matters." It is likewise in the case of an asylum-seeker who does not "...hand over the document used for crossing the border..." or who does not "...present himself for the medical examination established for him." All the same, leaving one's place of residence without authorization is considered under the Romanian Refugee Law reason sufficient enough to automatically reject an asylum application. UNHCR is of the view that any one of these "transgressions" cannot in itself vitiate a refugee's well-founded fear of being persecuted in his/her country of origin.

10. Under Article 6 of the Romanian Refugee Law an asylum-seeker must apply for refugee status within maximum ten days of his/her entry into Romania. UNHCR is aware of a number of

cases where the Commission responsible for refugee status determination has rejected claims on grounds of non-respect of the ten-day rule without affording the applicants concerned any opportunity to show good cause for the failure to submit their asylum request within the ten-day limit. UNHCR is also concerned about another provision of Article 6 which automatically bars from access to the territory of Romania undocumented asylum-seekers who do not "arrive directly" from a country where their life or liberty is threatened for any one of the refugee definition reasons contained in Article 1 of the Refugee Law. As such, the Law confers authority on the border guard/police, who do not necessarily have up-to-date knowledge about conditions in countries of origin of asylum-seekers, to determine the evidential and credibility issues pertaining to refugee claims of persons who seek admission to the territory of Romania without valid documents or entry visa.

11. Article 6 of the Romanian Refugee Law appears to incorporate into the legislation the notion of "safe third country" without expressly mentioning it or giving any indication as to the scope of its application. The Refugee Law implementation regulations issued by the Government on 13 November 1996 as Government Decision No. 1182 interpret "direct arrival" as including situations where the asylum-seeker "transits third countries which are not signatory to international conventions relating to the status of refugees" or where the asylum-seeker "was unable to claim refugee status on the territories of transited countries owing to reasons not imputable to him/her." As far as its application in practice is concerned, the "direct arrival" provision of Article 6 has not been limited to the question of admission of undocumented asylum-seekers as provided for in the Refugee Law, but has also been relied on by the Commission in the determination of refugee status at first instance. In a number of cases which have come to the attention of UNHCR, the Commission has used this provision as a "test of credibility" and held in effect that a well-founded fear of persecution could not be established where an applicant has transited any third State which is signatory to the 1951 Convention. An applicant so rejected is not returned to the presumed "safe third country" he/she had transited so that the authorities of that country could examine the applicant's asylum request, but is liable to expulsion to his/her country of origin once the appeal procedure is exhausted.

12. Apart from the incompatibility of a number of the provisions of the Romanian Refugee Law with international refugee instruments and other recognized international standards, UNHCR notes many lacunae in the implementation of those safeguards stipulated in the Law. For example, access to the Romanian territory or the refugee status determination procedure is not always ensured and there have been cases, albeit limited, of direct or indirect *refoulement*. Especially in the case of asylum applications at the border the determining factor in ensuring respect for the principle of *non-refoulement* appears to be the goodwill of the border police, who often make decisions more on a discretionary basis than by employing a consistent and rigorous interpretation of the Refugee Law. In a recent case of a group of asylum-seekers from Iraq who having entered Romania illegally presented themselves to a county police and requested to "contact the UN," they were brought before the court and sentenced to expulsion on charges of illegal border-crossing in spite of their declarations before the sentencing judge that they were political refugees and were as such unwilling to return to their country of origin. They were subsequently brought to Otopeni and Baneasa Airports to be deported, and it was only after persistent representations by UNHCR that they were finally granted access to the refugee status determination procedure.

13. The problem of admission (or readmission) of asylum-seekers arriving at Otopeni Airport, Romania's main international airport just outside Bucharest, is of particularly serious concern. Often asylum-seekers are detained in the transit zone of Otopeni Airport for between one and three months before any action is taken on their case, although the Constitution of Romania sets the maximum term for any detention at twenty-four hours. As far as UNHCR is aware, the only instrument governing the detention of asylum-seekers in the transit zone of Otopeni Airport is an unpublished circular of the Ministry of Interior. It is recalled in this respect that the European Court of Human Rights found, in the *Amuur vs. France* case, that holding asylum-seekers in a so-called "international zone", which does not have extraterritorial status, may amount to deprivation of liberty and to this end the rule governing such deprivation must have the character of law.

14. Asylum-seekers who are held in the transit zone and thus subjected to a deprivation of liberty do not benefit from the Constitutional guarantees that "any person detained...shall be promptly informed, in a language he understands, of the grounds for his detention...and that notification of the charges against him shall be made only in the presence of a lawyer..." Nor are they informed about the practical steps they have to take in order to request refugee status in Romania if they have a well-founded fear of persecution if returned to their country of origin. The only accommodation available in the transit zone is a two-room facility where men, women and children are sometimes kept together and according to information available to UNHCR persons held in the transit zone had to obtain their own food as of February 1997 since the authorities could not afford to provide it themselves. The inadequacy or lack of accommodation, social assistance and basic health services and non-existence of any kind of recreational facilities for children cause undue hardship to asylum-seekers held in the transit zone for unreasonably prolonged period. The holding facilities for asylum-seekers and other foreigners in the transit zone of Otopeni Airport was one of the detention areas visited by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment when it carried out its initial visit to Romania from 24 September 1994 to 6 October 1995.

15. Romania's refugee status determination procedure has seen some improvements since the Ministry of Interior was charged in November 1995 with the task of co-ordinating the Romanian Committee for Migration Problems. Among the improvements made the most significant one is that an asylum-seeker in the territory of Romania can now file his/her application for refugee status within a few days as opposed to the two to three months waiting period that was the general norm until the end of 1995. In addition, registration of asylum-seekers is no longer confined to Bucharest as applicants can address themselves to any provincial Passport or Border Police Directorate although they still have to come to Bucharest to be interviewed and proceed with all other formalities. The interviewing procedure has also seen some improvements, but there are a number of shortcomings. Most importantly, the legislated requirement under Article 9 of the Romanian Refugee Law for one single authority - the interministerial Commission - to have the exclusive jurisdiction for both interviewing applicants for refugee status and deciding on the applications at first instance has been ignored.

16. In contradiction to Article 9 of the Refugee Law, therefore, the task of interviewing applicants and examining their claims has been contracted out to the Refugee Office of the Ministry of Interior, with the Commission merely rendering decisions without any contact with the applicant and at times without even having before it any detailed interview report from the

Refugee Office. Interviewing by the Refugee Office was justified by the authorities as being necessary since the three-member Commission sits only once a week for three hours in a situation where some 80-100 applications for refugee status are registered every month. Still, an applicant who has filed his/her asylum claim has to wait for at least six months before he/she is interviewed by the Refugee Office and a minimum of another three to four months for the Commission to take decision at first instance. Those who are rejected at first instance are not provided with any substantive reasons for the rejection outlining the refugee definition grounds upon which the claim is based and the findings of fact drawn from the evidence and arguments presented in support of the case, as well as clearly identifying the issues and the relevant points of law upon which the claim was assessed and decided on. Since the Refugee Law came into effect in May 1996, the validity of some 250 negative decisions of the Commission have been disputed before the Bucharest *Judecatoria 1* court alone, but only five cases have been disposed of as of 30 June 1997 precisely because those first instance decisions of the Commission were not sufficiently motivated as to allow for an informed execution of the appeals.

17. UNHCR's essential conclusion in respect to Romania's refugee status determination procedure is that there is an urgent need to reconceive a wide range of policies and practices in order to ensure compliance with internationally recognized standards. Decisive measures have to be taken to remove the existing many barriers to the efficient functioning of the refugee status determination procedure, especially measures for the establishment of rules of procedure, code of conduct and a system of accountability for the inter-ministerial Commission statutorily mandated to interview applicants for refugee status and decide on their applications. It should be ensured that the refugee status determination process, which by its very nature should take the form of an inquisitorial adjudication, is led by informed, expert and impartial decision-makers familiar with juristic work environment in which all relevant issues are examined in terms of their relationship to the promotion of core legal values.

Living Conditions of Asylum-seekers and Refugees

18. UNHCR considers that the level of State benefits granted to refugees and asylum-seekers should at a minimum correspond to the general standard of living in Romania. However, refugees and asylum-seekers in Romania receive at present very little or no material support for their minimal upkeep from any other source than the UNHCR programme of assistance. Although in accordance with Article 23 of the 1951 Convention domestic legislation guarantees access of refugees to such public relief as social security and child allowance under the same conditions as Romanian citizens, this has not materialized in practice. Concerning special assistance programme for refugees, the commitment made in the Government Decision No. 807 of October 1995 to provide board and lodging to asylum-seekers for a period of up to six months and to refugees for nine months so far remains virtually unimplemented, as is the provision of the Refugee Law legislating the establishment of refugee reception and accommodation centres. At 30 June 1997, only seven asylum-seekers were being provided with temporary accommodation by the Government whereas nearly 900 destitute asylum-seekers and refugees had to rely on UNHCR's financial assistance to meet their most basic needs, such as housing, food, clothing, health care and transportation.

19. The Government of Romania does not have as of yet any policy or programme for the integration of persons it recognizes as refugees. Refugees are entitled by law to enjoy certain basic social and economic rights as may help them integrate into Romanian society, but they are confronted with a number of practical obstacles to exercising these rights. For example, refugees have the right to work, but they hardly have a chance to find employment without sufficient knowledge of the Romanian language. There are no language courses organized by the Government, nor are there vocational training or qualification/requalification programmes to help refugees acquire and develop specific job skills tailored to existing labor demands. Where employment opportunities are available, the income levels often do not allow refugees to meet their basic needs largely due to lack of possibilities to have access to State-subsidized or other affordable housing. Prospects for integration of refugee children in the long-term are also uncertain given that under the Romanian Refugee Law access of refugees to public school is limited to primary education only, for secondary and higher levels being required to pay tuition fees under the same conditions as foreign students.

20. Given the budgetary austerity Romania has been experiencing in its transition to the market economy, UNHCR has repeatedly stressed the need for material and technical assistance programme of European institutions in order to establish efficient systems and structures for the reception of asylum-seekers and processing of their applications and the local integration of those recognized refugees for whom voluntary repatriation is impossible. To this end, the Office has had on numerous occasions discussions with the Government of Romania on how it may make use of the facilities provided especially by the PHARE programme of the European Commission and the Social Development Fund of the Council of Europe, but no concrete steps have been taken thus far. Faced, therefore, with the lack of appropriate Government measures for the care and support of asylum-seekers and for assisting recognized refugees to find long-term durable solution by way of local integration, large numbers of refugees and asylum-seekers have felt impelled to move in an irregular manner from Romania to seek better opportunities elsewhere. Government statistics show that from 1991, when the Romanian Committee for Migration Problems started receiving asylum applications, until 30 June 1997 a total of 4,090 persons applied for refugee status in Romania of whom 585 were recognized as refugees. Although no official statistics are available on how many of this registered population of asylum-seekers and refugees have moved irregularly from Romania, UNHCR estimates are at around 50-60 per cent.

Conclusion

21. UNHCR recognizes the many other pressing priorities currently facing the Romanian Government. In the face of the enormous social and economic difficulties inherent in a restructuring process, effective management of the refugee problem is not an easy task. The situation in Romania, as elsewhere in Central Europe, is further complicated by the fact that many asylum-seekers do not necessarily wish to apply for refugee status in Romania and they do so only when confronted with the risk of deportation. UNHCR also shares the preoccupation of Romania over the increase in illegal migration, but at the same time the Office is concerned that measures intended to curb illegal migration are frequently applied indiscriminately with the consequence that refugees and asylum-seekers are denied the rights and protection which they should enjoy under international and domestic refugee instruments.

22. A fair, efficient and accessible refugee status determination procedure is the best mechanism which guarantees respect for the principle of *non-refoulement* thereby ensuring that international legal obligations are fulfilled. Romania has taken a number of legislative and administrative initiatives to this end, and UNHCR endeavors to increase its advisory services and support to further enhance the Government's institution and capacity-building efforts to ensure an adequately functioning asylum system with all its essential components ranging from registration procedures and reception facilities to refugee status determination process and integration structures. These efforts should, as a matter of course, be seen in the overall context of the ongoing process of democratic change and legal/administrative reforms.

23. With respect to the return of asylum-seekers or refugees to Romania on the basis of their transit or stay there, UNHCR would, in view of the above considerations, recommend that States carrying out returns whether under a bilateral readmission agreement or any other return arrangements should seek and obtain from the Romanian authorities assurances that they agree to readmit the persons in question, ensure their access to the refugee status determination procedure and provide adequate protection including treatment in accordance with basic human standards. UNHCR would also recommend that States carrying out such returns to Romania should seek and receive assurances that returned asylum-seekers or refugees will not be detained in transit zones or elsewhere unjustifiably or for an unduly prolonged period. In addition to informing the Romanian authorities that the concerned persons are asylum-seekers or refugees being returned in consideration of the "safe third country" notion, returning States should also inform the asylum-seeker of his/her right to apply for refugee status in Romania and of the practical steps he/she should take to exercise such right immediately upon return to Romania.

Geneva, July 1997

