

Moving forward on asylum and international protection in the EU's interests

UNHCR's recommendations to Greece for the EU Presidency
January - June 2014

A mother and her children at a detention centre in Greece.



UNHCR/Ketty Kehayoiylou

The EU's responses to displacement can and should be reinforced, based on solidarity within and beyond its borders

Greece assumes the EU Presidency at a moment when the Union faces opportunities as well as challenges in relation to asylum and international protection.

While Greece, along with other Member States, is rightly concerned about economic growth and stability as major priorities, other regions of the world are mired in the horrors of war and mass displacement. To address this, the EU has done much to help the people of Syria and those of other countries, including Central African Republic, the Democratic Republic of the Congo, Sudan, South Sudan, Eritrea, Mali, and Somalia, from which hundreds of thousands have fled persecution and violence in 2013. Yet the Union's responses to displacement crises can and should be strengthened further. This is needed not only to address desperate humanitarian and protection needs among refugees; but also to prevent the destabilization of other countries in regions of origin which risk sliding into chaos and violence themselves. More effective, coherent action to reinforce protection and assistance, both in Europe and abroad, is thus in the EU's interest, and would affirm its role as a leading global actor in this sphere.

There are opportunities that should be grasped as the Union moves into the next phase of developing the Common European Asylum System (CEAS). Transposition and implementation of the revised EU laws on asylum has begun and will continue, including with the support of EU institutions and agencies, to put agreed standards into practice more consistently across the Union. Renewed efforts have been brought to bear to address challenges at the Union's external borders, including after the tragic loss of hundreds of lives off the Italian and Maltese coasts in recent months; disasters that are sadly not isolated incidents, but which have brought to the fore the need for more concerted European action. In June 2014, the Council is also expected to discuss 'strategic guidelines'¹ regarding future directions and priorities in the area of freedom, security and justice, including on asylum. Solidarity and responsibility-sharing within the Union - much-debated concepts on which perspectives still differ widely - requires further work to reach agreement on more effective ways forward.

These discussions and processes provide an opportunity for Greece to lead the Member States in working to agree on principled, practical and holistic approaches to the further operation of the CEAS and other areas of EU action affecting refugees and other people in need of international protection.

1. Ensuring protection in Europe for Syrian refugees

Protection provided to Syrians in the EU is welcome, but further actions are needed

With the number of Syrian refugees displaced in Lebanon, Turkey, Jordan, Iraq and Egypt at over 2.2 million as of the end of 2013, and an estimated 6.5 million displaced within the country, the crisis is at its most acute point to date. UNHCR continues to acknowledge the efforts of EU Member States and institutions, notably in providing desperately-needed aid to countries in the region hosting the vast majority of refugees. The actions of many Member States in granting protection to Syrian asylum-seekers, and in offering humanitarian admission and resettlement places, are welcomed. Thousands of lives have been saved in this way, and the efforts noted by countries in Syria's region who continue to call for international support, as they admit and host refugees on a massive scale.

UNHCR has also welcomed the fact that most EU Member States refrain from forcibly returning people fleeing the conflict, including Palestinians from Syria, to countries in the region, which demonstrates concretely a commitment to solidarity with those countries.

There remain nevertheless areas where Europe can, and must, reinforce its protection response. Syrian asylum-seekers arriving at Member States' borders or within the territory trigger the responsibility of those Member States. Measures which prevent refugees from seeking asylum are inconsistent with European law. Reports continue to emerge of such non-entrée practices which, if accurate, are cause for serious concern. European Commissioner Georgieva, addressing the High-Level Segment on Syria during UNHCR's annual Executive Committee meeting in October, called on Europe to "keep our hearts and our wallets open,

¹ Art 68, TFEU: 'The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice'.

but also our borders” for those coming from Syria in need of protection. It is hoped this unequivocal position can be honoured in Member States’ practice.

UNHCR recalls its position, revised in October 2013, that the vast majority of Syrians fleeing the conflict should be recognized as refugees², or if not entitled to refugee status, as persons in need of subsidiary protection. UNHCR has also highlighted the vulnerable/precarious situation of Palestinians from Syria, as well as refugees of other nationalities previously living in Syria, who have fled in search of protection in other countries³. UNHCR recalls that all those seeking asylum in the EU must be accorded rights and treatment in line with or beyond the requirements of the Reception Conditions Directive, while awaiting a decision on their claims.

Reinforced contingency planning, at national and EU level, including with EASO support, is needed in case of increased numbers of Syrians seeking protection in the Member States. This need has been highlighted in the case of Bulgaria, where UNHCR in late 2013 began assisting asylum-seekers on an emergency basis, after significantly increased new arrivals, including of people coming from Syria, led to pressures in which conditions fell far below acceptable standards.

Reports indicate that detention continues to be used for a significant proportion of Syrian asylum- seekers in some Member States. UNHCR witnesses the devastating human impact of detention upon refugees, including children and families, following their often-traumatic experiences of persecution and flight. UNHCR recalls new provisions of the recast Reception Conditions Directive, adopted by the Council and Parliament in June 2013, providing for the use of detention only if less coercive measures cannot be applied – truly as a measure of last resort. Where it is used, an individual assessment of the lawfulness of detention, adequate conditions and judicial oversight are essential. UNHCR also emphasizes the need for detention to be proportionate and necessary⁴.

UNHCR has welcomed the active engagement of European States and institutions in humanitarian admission and resettlement of Syrians during 2013⁵. Further places are sought, to enable a total of 30,000 Syrians to be resettled or admitted by the end of 2014. Member States are also urged to explore other means to facilitate the admission of Syrians and Palestinians coming from Syria to safety in the Union, especially those who seek to join family members in Europe, through family reunification or other means.

² UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II*, 22 October 2013, available at: <http://www.refworld.org/docid/5265184f4.html>

³ *Ibid*, sections 9 and 10, p 6.

⁴ See UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

⁵ See UNHCR, *Finding solutions for Syrian refugees: resettlement, humanitarian admission and family reunification*, 18 October 2013, available at: <http://www.unhcr.org/5249282c6.pdf>

Recommendations: Access to territory for all those coming from Syria seeking protection in Member States, to fair and efficient asylum procedures, and appropriate reception conditions for asylum-seekers; detention should be a last resort with appropriate safeguards;

- A moratorium on returns to Syria and countries neighbouring Syria;
- Protection for Syrians with accompanying rights at least in line with minimum EU standards;
- Resettlement and humanitarian admission places for Syrian refugees, as well as facilitated family reunification and other forms of admission;
- Continued generous financial support to humanitarian and development activities in Syria and countries in its region.

2. Increasing flexibility and responsiveness in asylum systems in the EU

Contingency and emergency preparedness is needed to ensure the Common European Asylum System can respond flexibly to demand

Some Member States have faced demands on the capacity of their asylum systems, resources and public support in recent years. In some Member States, gaps are evident; while in some cases, increased arrivals of Syrian or other groups of asylum-seekers have placed additional pressure on national systems. These situations have been monitored at EU level, including in the Council and Parliament, and support provided to address particular needs, including by the Commission, EASO or Member States. However, there remains no established mechanism to prompt or support contingency and emergency response planning and preparation. The Temporary Protection Directive⁶, in force since 2001, foresees a concerted EU response in case of a ‘mass influx’, but it has never been activated. The new ‘Early Warning and Preparedness’ mechanism in the recast Dublin Regulation⁷ has also yet to be tested, but is not conceived as a collective undertaking to address the range of measures that a significant larger-scale arrival may warrant in different Member States of the Union.

UNHCR considers that more flexibility and swifter response capacity is required at a systemic level, to address protection challenges of a significant scale when they occur or appear imminent in the EU. Refugee movements, by their nature, emerge or expand dramatically in many cases in response to developments which may be sudden and unpredictable, occurring in rapidly-changing conflicts or situations of general violence and instability in volatile regions. These can, and have, led to increased arrivals at borders, as well as significant volumes of sur place claims, as well as large refugee numbers in Europe’s neighbours – all of which ideally require tailored and planned collaborative planning and implementation of responses. Such responses would ideally span the range of potential challenges from border

⁶ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7 August 2001

⁷ Article 33, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31, 29 June 2013

management, initial screening, facilitating access to asylum systems and reception, registration and claims processing, as well as solutions for those in need of protection, and clear outcomes for others.

UNHCR has called on Member States in recent years to consider or undertake planning and preparedness for foreseeable contingencies. The European Commission and EASO have also acknowledged this need, and technical discussions have been held to explore possibilities, including joint work on training and other actions. It is timely to assess whether and how the tools available can be used more effectively, and if new tools should be developed, to enable Europe to respond to actual or threatened displacement crises in a more rapid and comprehensive way.

Recommendation:

UNHCR encourages Greece to facilitate EU discussion on ways to assist Member States to undertake appropriate national contingency planning for significant numbers of asylum-seekers, and to ensure more effective coordination and preparedness on a collective basis at EU level. This could be linked to discussions on reinforcing solidarity and responsibility-sharing within the Union, where appropriate.

3. Access to territory and asylum processes, including in the Mediterranean

Protection challenges at external borders require comprehensive responses from the EU as a whole

The last months of 2013 have starkly highlighted the scale of the challenge that Member States face in managing borders and irregular migration in ways which respect fundamental rights. Hundreds of lives were lost in two widely-publicised events, involving boats which sank close to Italian and Maltese shores, while thousands more people have suffered or perished after unseaworthy vessels have foundered in their bids to reach Europe, often despite the best efforts of coast guards and other shipmasters to rescue them.

Many more people – including some who need protection and others who do not – seek to enter Member States by land and air borders, sometimes also by dangerous means. Systems for controlling entry, including many EU-led legal, policy and operational arrangements, have become highly sophisticated and resourced, and their effective reach extends well beyond Member States' physical borders, but without altering Member States' international responsibilities.

It is a welcome development that awareness has also grown of the legal obligations, derived from asylum and other fundamental rights, that must be respected in the border and migration management context. The law is clear, at European and international level: people who may be in need protection must be given access to territory and procedures in which their asylum claims can be examined.⁸ Yet is it not evident that the precise operational implications of this and related basic principles are understood across the Union or universally respected in practice. Reports continue of denials of entry at borders or in other situations

⁸ European Court of Human Rights (Grand Chamber), *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, 23 February 2012, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":\["001-109231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{)

where Member States exercise jurisdiction; failures to refer people in need of protection to competent authorities are documented; third country nationals are forcibly expelled from Member States under 'accelerated procedures' in readmission agreements providing for removal of people arrested in close proximity to a border, even in some cases where they have requested asylum.

UNHCR works closely with Member States as well as Frontex, including in the implementation of its extended fundamental rights obligations⁹, to assist with training, tools, information and other services which could help enhance access to protection in the context of border management. Additional EU measures are also foreseen which offer an opportunity to reinforce observance of the non-refoulement principle as reiterated by the European Court of Human Rights¹⁰, notably the proposed Regulation on Rules for Surveillance of the External Sea Borders in the context of Frontex-coordinated Operational Cooperation¹¹, to be negotiated in triologue under the Greek Presidency.

The work of the Task Force on the Mediterranean, and the Commission's related Communication¹², refers to the need not only to reinforce maritime surveillance, but also to focus on ensuring protection and saving lives. UNHCR has issued recommendations addressed to the Task Force and other stakeholders¹³ calling for the establishment of profiling and referral mechanisms which could help States swiftly identify those among people rescued at sea in international waters who are potentially in need of international protection, and facilitate the finding of solutions, including potentially through relocation or other agreed arrangements. A planned EU pilot on joint processing, under the coordination of EASO, could focus on this group in particular. Other means to ensure safe access to protection in the EU, including through resettlement and other means, will also be welcome.

UNHCR has also highlighted the need for further collaboration with States in North Africa and beyond, including on protection and institutional capacity-building. This could form the basis for a more comprehensive regional approach to migration management and refugee protection in the Mediterranean, in the interests of the EU and its neighbours.

⁹ European Union, *Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, OJ L 304/1, 22 November 2011

¹⁰ *Hirsi Jamaa and Others*, op cit

¹¹ For the initial proposal, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, COM(2013) 197 final, 12 April 2013

¹² *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, COM(2013)869, 4 December 2013

¹³ UNHCR, *Proposal for a Central Mediterranean Sea Initiative: EU solidarity for rescue-at-sea, protection and comprehensive responses*, October 2013, available at: <http://www.refworld.org/docid/52c172f84.html>

Recommendation:

UNHCR encourages Greece, in its role as President of the Council, to lead relevant Council discussions in a constructive way on border measures and policies, so that they maintain a focus on access to territory and protection for those who seek asylum. This includes:

- Further negotiations on the Regulation on Frontex-coordinated sea border surveillance so as to reinforce non-refoulement, sea rescue and disembarkation in safety, including for asylum-seekers; and
- Supporting follow-up on the Communication on the work of the Task Force on the Mediterranean in relation to asylum and protection for those who require it.

4. Implementation of EU asylum legislation: operating fair and effective asylum systems

Implementation of the recast instruments is an opportunity to ensure more consistent respect for common standards

Progress towards implementation of the revised EU legislation on asylum is underway, with many Member States having adopted legislation reflecting the recast Qualification Directive¹⁴; and the amendment process ongoing to enact the revised Asylum Procedures¹⁵ and Reception¹⁶ Directives. The Dublin and Eurodac Regulations will apply to asylum claims lodged from 1 January 2014 onwards¹⁷. Extensive further work will be needed, including at EU level, to ensure the recast provisions are put fully into practice in consistent ways across the Union. The Commission will facilitate exchange of information on transposition and implementation among States in Contact Committees, involving UNHCR and other stakeholders where appropriate. The EASO will play a central role in facilitating practical cooperation to support implementation of the new rules, including through updating and rolling out training materials, producing analyses of changes and emerging challenges, and developing other tools as required to assist Member States and promote harmonized approaches.

During the Greek Presidency, particular attention should in principle be focused on the correct application of Dublin 'III'. The responsibility criteria have been revised in important ways, including in relation to unaccompanied minors, children and families, and extended family members. The extent to which these revisions will

¹⁴ European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, OJ L 337/9, 20 December 2011

¹⁵ European Union, *Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast)*, OJ L 180/60, 29 June 2013

¹⁶ European Union, *Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast)*, OJ L 180/96, 29 June 2013

¹⁷ The recast Regulation also applies to claims lodged before that date for which 'take back' or 'take charge' requests are made after 1 January 2014.

change practice will be a crucial test of the recast Regulation's effectiveness, given that family criteria were comparatively under-utilised in the past, despite their place at the top of Dublin's hierarchy. The discretionary criteria have been reframed, providing Member States with the means to use these more flexibly where needed to address humanitarian or other exceptional situations of need.

The changes to procedural arrangements under Dublin – including requirements to provide information and to conduct an interview addressing Dublin issues; and rules regarding suspension of transfer decisions on appeal, among others – should bring about more clarity and enhance collection of information about claimants.

An 'Early Warning and Preparedness Mechanism' comes into effect with the recast Regulation, providing a formal system for gathering information and taking measures to address problems and ensure Dublin's ongoing operation. The Council, Commission and EASO are encouraged to ensure that they seek and obtain relevant information from a wide range of sources, taking account of the insights and expertise of many civil society organisations active at national level. Objective and constructively critical approaches will be needed to ensure that discussions on perceived potential or actual problems will be practical and frank, and addressed through the necessary action.

It is hoped that the recast measures overall will encourage Dublin states to continue to engage in maintaining and reinforcing standards across Europe. This can contribute to realizing the Dublin system's underlying presumption – that fair and effective asylum systems will operate in all the participating States and respect the rights of asylum-seekers – which is in the interests of all stakeholders, including States and asylum applicants alike.

Recommendation:

Working together with the Commission and EASO, UNHCR invites the Presidency to maintain oversight at Council level of the ongoing transposition and implementation process. Priority should be accorded to:

- *Technical and other discussions as required on tools and processes to assist Member States in the transposition process;*
- *Assessing the impact and any relevant trends in application of the revised Qualification Directive, in its first months of operation at national level; and*
- *Dialogue on the forthcoming implementation of 'Dublin III' and Eurodac as needed, including on reinforcing the capacity of national Dublin Units as necessary.*

5. Asylum within the area of Freedom, Security and Justice from 2014

Strategic guidelines for the future JHA agenda should reflect the EU's longstanding

2014 is a key moment for defining the future course for developing the CEAS within the wider area of freedom, security and justice. Since the Stockholm Programme was adopted in 2009, the Treaty on the Functioning of the EU has entered into force; an intensive legislative process on asylum has been completed;

and the EASO has come into full operation. Among other major developments, the Court of Justice of the EU and the European Court of Human Rights have handed down landmark decisions on asylum; the Arab Spring triggered significant movements of people within North Africa and beyond; conflicts raged in Mali, Central African Republic and elsewhere; intense fighting and human rights violations continued in DRC; the decision made to reduce the international presence in Afghanistan, and conflict erupted in Syria, triggering displacement and a resulting humanitarian crisis on a scale unprecedented in recent years. The Greek Presidency will thus oversee a much-needed discussion about how to move forward on protection in the EU, taking into account both progress made and new challenges unfolding.

These guidelines will reportedly aim at defining principles and goals rather than detailed operational measures, by contrast with The Hague and Stockholm Programmes. UNHCR underlines the importance of recalling essential principles, expressed in and since the Amsterdam Treaty (TEC), including the Union's commitment to a common policy on asylum which reflects the full and inclusive application of the 1951 Convention and other relevant treaties, including the European Convention on Human Rights and Fundamental Freedoms and the EU Charter of Fundamental Rights.

UNHCR is producing a set of recommendations to the Council and Parliament on the forthcoming strategic guidelines, articulating priorities for the immediate and longer term. These seek to provide input to the reflection and discussion process among EU Member States and institutions which is principled, realistic and practical, taking into account today's challenging economic and social circumstances in many Member States. UNHCR is ready to continue to support and contribute to further discussion on these ideas, and on how to realize the interest of the EU and its citizens in a strong legal framework reflecting international law, which contributes to and facilitates the efforts of other States to protect refugees within the global international protection system.

Recommendation:

UNHCR invites the Greek Presidency to lead a far-sighted and principled debate on the future strategic guidelines for the area of freedom, security and justice after 2014, including on asylum and international protection. Greece and other Member States and institutions are encouraged to draw on UNHCR's input, and to consider the views of a wide and representative range of stakeholders, to ensure that the vision agreed for the future is comprehensive, practical and reflective of Europe's longstanding values and commitment to protect those who flee persecution and serious harm.

December 2013