



Six steps toward convergence, quality and shared responsibility

UNHCR's recommendations to Belgium for its EU Presidency

July – December 2010

UNHCR welcomes Belgium's intention to make asylum a priority for its activities in the Justice and Home Affairs field during its 2010 EU Presidency. Significant progress should be possible as key elements are now in place: the Lisbon Treaty establishes a new legal basis for common standards and completion of the Common European Asylum System (CEAS); new decision-making arrangements are in place in the Council; the Stockholm Programme sets out a clear agenda for the next five years; and the Commission has presented a series of proposals for new legal and policy measures.

At the same time, Member States have made clear their reservations about further regulation of asylum, for a variety of reasons. The economic problems in some Member States provide a difficult backdrop against which to convince citizens of the need to invest in new measures. A way forward needs to be found which can reconcile current political considerations with the commitment to build a Common European Asylum System in full respect of international and regional refugee and human rights law.

Member States have pledged to protect persons who fear persecution and human rights violations in their own countries, and refugee protection is a fundamental part of Europe's tradition and values. Member States remain convinced of the value of harmonisation of and convergence in their asylum systems.¹ UNHCR believes that further measures to build a CEAS are not only necessary to eliminate the current unjustifiable inequalities in the treatment of asylum applications, but also to reduce irregular secondary movements within the EU. It is in the interest of all Member States to ensure that their asylum systems are more accurate, efficient and consistent.

The EU's commitment to support third countries in the area of asylum capacity building is also important. UNHCR looks forward to working with the EU to strengthen refugee protection and access to durable solutions around the world, including through Regional Protection Programmes. However, capacity building alone, even with strong political support, will not resolve refugee problems, and the EU's engagement with third countries therefore cannot be seen as a substitute for – or justification for limiting access to – protection for asylum seekers in the European Union.

Against this backdrop, UNHCR proposes six areas on which it encourages the Belgian EU Presidency to focus, with a view to achieving substantive progress in the area of refugee protection.

Achieving quality and consistency through practical means

Strengthen the focus on quality and consistency of asylum decisions across the EU through practical initiatives in key priority areas.

The EU's new European Asylum Support Office (EASO) is expected to begin operating during Belgium's Presidency. The Stockholm Programme affirms that quality of asylum decisions should be a major focus for the EASO. UNHCR agrees, and as a member of the Management Board, intends to contribute energetically and substantively to discussions on ways to achieve greater consistency and quality of asylum decision making across the Union.

UNHCR brings to this challenge not only its experience worldwide but also its many years of collaboration with Member States' asylum services. More specifically, UNHCR brings the knowledge and insights gained from its daily work throughout Europe as well as from several recent studies on the implementation of EU asylum instruments and asylum practice in Member States. Based on its March 2010 study of the application of the Asylum Procedures Directiveⁱⁱ, UNHCR has proposed several 'practical cooperation' initiatives which could improve asylum practice and increase consistency. These include the development of common training tools, including for interviewers and interpreters; Codes of Conduct for interviewers and interpreters; collaboration on the assessment of information related to the designation of 'safe' countries of origin; and the development of a common, EU-wide checklist to guide the production of asylum decisions that are rationally structured and adequately motivated. These could be future areas for EASO action.

With support from the European Refugee Fund (ERF), UNHCR has also completed an ambitious project to build asylum quality in Central Europe. Eight central European countries worked with UNHCR over a period of 18 months on ways to build mechanisms to ensure the quality of asylum systems.ⁱⁱⁱ A second project, entitled 'Further Developing Quality',^{iv} is now underway in Central and Southern EU Member States, again with support from the ERF. UNHCR will in the coming months be putting forward for States' consideration the insights and strategies which are expected to emerge from this new project. Participating States will be able to share their experience from both projects and suggest elements which could be developed into EASO-led actions.

Whereas some Member States produce eligibility guidance for their adjudicators, many others do not. The handover to the EASO of the co-ordination of the Eurasil forum offers scope to move beyond current information-sharing activities, and more actively to promote consistent approaches to claims, in order to reduce the wide divergence in how similar applications are treated in different EU countries. Harmonizing eligibility policy and practice would be a major step forward towards a CEAS. UNHCR encourages the Belgian EU Presidency to explore concrete ways in which the exchange of good practice can contribute to building a high-quality and truly common European asylum system.

Continue to work for improvement of legal standards in priority areas, in particular where current standards diverge from international law.

Much can be achieved through more effective practical cooperation, but such cooperation alone will not resolve the challenges of coherence and quality. Some of the legislative provisions adopted in the first phase of harmonisation also contribute to existing divergences, as they contain or permit broad exceptions, derogations and ambiguities.

In its 2010 Report on implementation of the Asylum Procedures Directive (APD) in 12 Member States,^v UNHCR established that there are a number of practices permitted by the APD which lead to highly problematic outcomes. In particular, the research found that accelerated asylum procedures are conducted in some Member States in a way that does not ensure respect for basic safeguards. The result is that the asylum-seeker is denied an effective opportunity to present his/her claim.

UNHCR appreciates the difficulties States face in a time of economic crisis to agree to legislative changes which would require the allocation of increased resources for international protection. Nonetheless, there are a number of legal gaps, uncertainties, and exceptions which lead to outcomes that are unsatisfactory to all. UNHCR believes that this situation should be resolved through amendment of the existing instruments.

Specifically, UNHCR urges attention to the following proposed changes:

(i) In relation to the *Qualification Directive*: UNHCR encourages the Council, Member States and Parliament to agree on changes to the Qualification Directive which would strengthen the entitlements of subsidiary protection beneficiaries and align these more closely to those of Convention refugees. Due in particular to the resilience of contemporary conflicts, many subsidiary protection beneficiaries are in practice unable to return in safety and dignity to their country of origin, while at their same time their integration is delayed and, in some Member States, seriously hampered by their lesser status. However, EU and national law entitle them to reside in the EU. They should receive the right to work, to receive social assistance and to benefit from integration facilities (such as language classes), in order to allow them to contribute effectively to European society. Such measures, which promote integration and a cohesive society, are also in the interest of host communities.

(ii) In relation to the *Asylum Procedures Directive*, some elements of the European Commission's 'recast' proposal are particularly urgent. Existing restrictions on the right of applicants to a personal interview – which could in practice deprive decision makers of key information relevant to a claim – should be removed. Provisions which would clarify the role of and ensure appropriate training for determining authorities are also vital. Changes to accelerated procedures, to ensure their limited application in line with essential safeguards, are also needed. Measures should be taken to avoid inconsistent application of the safe country of origin concept. Finally, the provisions on effective remedies should be amended to reflect the caselaw and standards of the European Court of Human Rights.

(iii) The proposed 'recast' of the *Reception Conditions Directive* contains proposals for better regulation of detention of asylum-seekers which are particularly pressing. UNHCR notes that the administrative detention of asylum-seekers is frequently much less well-regulated than detention of accused and convicted criminals. At a minimum, detention grounds should be specified in law, detention should be subject to a clear necessity test, and limited in time. Although several Member States already provide for different forms of judicial oversight of detention decisions, as well as acceptable conditions of detention, others do not. Many Member States still detain children for extended periods. Respect for basic human rights norms when asylum-seekers are detained should, in UNHCR's view, be addressed in the *Reception Conditions Directive*. Moreover, as the detention of asylum-seekers is inherently undesirable, states should intensify efforts to develop alternatives to detention.

Responsibility sharing in the EU

Make a renewed commitment to responsibility sharing within the EU. Adopt a mechanism for conditional and temporary suspension of the Dublin II Regulation.

In the Stockholm Programme, Member States reaffirm their commitment to responsibility sharing within the EU. However, it remains a challenge to translate this commitment into action.

The ongoing pilot programme for reallocation to other Member States of persons granted international protection by Malta should help to address the pressure that Malta has experienced owing to arrivals by sea, although these have recently declined sharply. Resettlement of refugees from Malta to the United States also contributes to alleviating these pressures.

However, intra-EU relocation is but one possible way to assist states facing particular pressures. UNHCR urges the Belgian EU Presidency to promote discussion of other measures including:

(i) *A temporary suspension mechanism under the Dublin II Regulation*: UNHCR supports the proposal for temporary suspension for States facing significant pressures on their asylum systems, but suggests that such a mechanism should include binding benchmarks and obligations for the requesting State to take steps to address its asylum capacity difficulties within an agreed time frame.

Although many Member States are reluctant to support the temporary suspension proposal, UNHCR considers that it is an essential step to begin to address the legal, practical and human dilemmas that emerge from the Dublin system. The system is predicated on the assumption that all participating States can and will provide generally equivalent protection to those in need. Yet the evidence demonstrates clearly that this is not the case. Unless this critical weakness in the operation of the Common European Asylum System is addressed, current volumes of secondary movements are likely to continue, States will continue to face high costs and administrative burdens, individuals will continue to suffer the hardship that the Dublin system entails, and people in need of protection may not be able receive it.

(ii) *Asylum capacity-building*: Member States could benefit, at their request, from sharing of personnel, case management strategies and skills development which could be provided by other Member States, and in co-operation with UNHCR. In this context, more targeted and more effective use of existing EU funding mechanisms could also improve performance.

(iii) *Joint processing*: UNHCR encourages creative thinking around this idea, drawing on some of the possibilities that the Lisbon Treaty may afford, and the coordination capacity offered by the new European Asylum Support Office. UNHCR believes joint processing could hold promise as a form of responsibility sharing and a way to address divergence in practice. Preliminary work on this issue could help provide input for the study foreseen in the Stockholm Programme on the possibility of joint processing of some asylum claims.

Resettlement

Reach agreement on the proposed joint EU resettlement scheme, and develop it further, including by setting an ambitious target for resettlement to the EU.

The EU must continue to look beyond its borders to provide support for countries hosting much larger refugee populations. Resettlement not only provides refugees with protection and a durable solution. It also has strategic value, making it possible to expand protection space in third countries and to help to resolve long-standing refugee situations. More generally, resettlement is becoming a key instrument of international cooperation.

There is welcome new interest in refugee resettlement in Europe. However, the number of refugees resettled to EU Member States remains very low. UNHCR believes the European Union could make a significant contribution to refugee resettlement, and urges discussion among Member States about setting an ambitious numerical target.

UNHCR strongly encourages the Belgian EU Presidency to work closely with the Council to reach agreement regarding the proposed joint EU resettlement programme. Institutional challenges and sensitivities should not be allowed to stand in the way of this important initiative, which has the broad support of states and international organizations. UNHCR urges adoption of the text and its implementation as soon as possible.

Protection of unaccompanied children

Ensure that the best interest of the child is a primary consideration in all actions concerning unaccompanied children.

UNHCR encourages the Belgian EU Presidency to take forward work on unaccompanied third-country children in the EU, including those who seek asylum as well as those who do not. More consistent practice as regards reception, guardianship, age assessment, child-friendly asylum procedures and durable solutions will not only help to ensure the protection of children's rights, but will reduce the incentive for children to move irregularly from one Member State to another.

During the Spanish EU Presidency, an EU Action Plan on Unaccompanied Children has been put forward. This Plan, and the subsequently adopted Council Conclusions, place considerable emphasis on the return of unaccompanied children to their countries of origin. Several Member States are engaged in efforts to prepare the ground for the compulsory return of children to countries such as Afghanistan and Iraq.

Where return of children not in need of international protection is envisaged, child protection safeguards should be in place.

UNHCR emphasizes that the return of children, including those who have been found not to be in need of international protection, should be accompanied by the necessary safeguards and practical measures to ensure that children's rights and well-being are respected. This includes a careful assessment of the children's best interest, which must be a primary consideration in all actions concerning children. UNHCR urges that return-related efforts be embedded in broader work on developing child protection systems in countries of origin.

Managing borders

Ensure that border management does not obstruct the fundamental right to seek and enjoy asylum in the EU.

It is expected that there will be significant progress under Belgium's EU Presidency on the revision of the Frontex Regulation. UNHCR encourages all involved to make sure that the revision incorporates those elements of the European Commission's proposal which relate to the obligation for Frontex and States engaged in joint operations to ensure compliance with fundamental rights, including the right to asylum.

The Council Decision adopted in February 2010 on interception at sea continues to be the source of controversy. In UNHCR's view, however, it represents a step forward. The Decision clearly reaffirms Member States' *non-refoulement* obligations, and requires specific standards to be met for disembarkation of persons intercepted or rescued at sea. The real challenge will be in the implementation of these Guidelines. UNHCR encourages the Presidency and other stakeholders to maintain close scrutiny of border management policies and practices, to ensure that actions at the EU's external borders are in line with the protection principles expressed in the EU's Charter of Fundamental Rights, in the Lisbon Treaty and in the asylum *acquis*.

UNHCR, June 2010

ⁱ See Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08, Part IV (adopted by the European Council on 15-16 October 2008), available at: <http://www.unhcr.org/refworld/docid/48fc40b62.html>; Council of the European Union, *The Stockholm Programme - An open and secure Europe serving and protecting citizens*; OJ C 115/1, 4.5.2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>.

ⁱⁱ UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

ⁱⁱⁱ *Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe Sub-Region (ASQAEM)*, a UNHCR project undertaken with ERF funding in cooperation with Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia and Slovenia, September 2008 - February 2010.

^{iv} *Further Developing Quality*, a UNHCR project being undertaken with ERF funding in cooperation with Austria, Bulgaria, Cyprus, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Slovenia and UK, from April 2010 - September 2011.

^v See note II above.