

“The Common European Asylum System – a vision for the future”

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and Opportunities’**

Minister Billström, ladies and gentlemen, colleagues and friends,

It is with great pleasure that I am here with you today, to deliver my first speech in my new role as Director of International Protection at UNHCR. I would like to thank the organisers of the conference -- both the Swedish Red Cross, as well as the UNHCR Regional Office for the Nordic and Baltic Countries -- for inviting me, and giving me such a creative topic on which to speak. Sweden’s EU Presidency comes at a crucial time for the future of refugee protection in the European Union. The “Stockholm Programme”, which is due to be adopted by the European Council in December 2009, will determine the course of EU law and policy on international refugee protection from 2010 through 2014. It is therefore timely to take stock of what has been achieved, but most importantly to look ahead, address the gaps that remain in regard to ensuring effective international protection for persons at risk and determine priorities for future action. As I will outline today, I think there is room for some creative thinking.

The EU has been at the forefront of refugee law developments. In its quest to harmonize the asylum laws and procedures of its Member States, the Union has developed what is in effect a regional asylum system. This is further bolstered by the planned establishment of a European Asylum Support Office, which UNHCR strongly supports. There is also visible progress towards a joint EU Resettlement Scheme, which would enhance the EU’s role as a global partner, while recognising that resettlement is a key strategic tool in the search for comprehensive solutions for refugee problems.

The EU continues to draw those facing persecution. In the first half of 2009, 119,100 asylum claims were lodged in the EU. In the Nordic region, Sweden continues to be the most important destination for asylum-seekers, with 10,100 claims filed in the first half of 2009. It is vital, though, to look at these figures through a global lens, in order to gain perspective. At the end of 2008, UNHCR reported 11.4 million refugees and approximately 13.7 million internally displaced persons (IDPs) of concern to UNHCR, in addition to about 12 million stateless people. And if we compare the asylum figures in the EU today, to ten or fifteen years ago, we can see that the numbers have dramatically decreased -- from some 700,000 who applied for asylum in the then-15 EU countries in 1992, to 240,000 asylum applicants in 27 countries in 2008.

Despite this decrease, heated public and at times populist debate continues about asylum, misuse of asylum procedures and so-called "illegal" migrants. For example, the situation of irregular arrivals in the Mediterranean is often highlighted in the media. The everyday plight of those who try to reach the EU's southern borders, on an often treacherous journey, with thousands drowning in the attempt, has captured the public's attention in a way that the everyday plight of many others, who seek protection in the EU in less dramatic circumstances, has not. What we often miss is a sense of equanimity on the basis of which a reasonable debate is possible.

Against this background, what has been achieved, what are the gaps and what more needs to be done?

An important achievement has been the progressive development of international law in the area of asylum. Over the past two decades, international refugee law and policy have evolved not through hard law instruments but more through so-called soft law, such as Conclusions of UNHCR's Executive Committee or through the Agenda for Protection, which UNHCR developed together with States some years ago, as well as through operational arrangements, particularly in the context of voluntary repatriation.

The EU has gone one step further and set an example by in effect codifying a legal framework on asylum applicable to the Member States -- despite different legal traditions and systems. Were it not for the particular nature of EU regional law making, we would in fact talk here about a convention on asylum, a convention on asylum procedures, a convention on temporary protection and a convention on reception conditions. In crafting this regional framework of conventions, the EU has built its work on the bedrock of global refugee and human rights instruments. It is significant that the various texts and directives harmonising asylum policy and practice within the EU explicitly foresee a consultative role for UNHCR -- in recognition of UNHCR's supervisory function.

Such a regional codification process has great value in strengthening standards for the treatment of refugees, as long as it is in line with the broader international refugee protection regime. Indeed we have seen improvements, for instance, through the

recognition of non-state agents of persecution, gender-based persecution and codifying subsidiary protection – in the latter case also integrating international human rights and international humanitarian law obligations. The best interest of the child principle is equally enshrined in this normative framework. From a global perspective, I welcome how temporary protection has evolved in the EU as a provisional protection response to situations of large-scale influx, albeit more in theory than in practice. It is seen as an emergency device to respond to situations of mass influx, generated by compelling reasons including or akin to those in the refugee definition. The exceptional nature is recognized in that the overwhelming nature of the influx makes individual determination of refugee status impracticable. The EU has made it clear that temporary protection does not replace the 1951 Convention nor is it outside its remit. The Convention framework has thus retained its proper place.

Yet significant gaps and shortcomings remain. In our dialogue with the EU over many years, we have shared our observations and concerns related, in particular, to “downward harmonisation”, a tendency towards more exceptions and even derogations to established standards, as well as considerable room for discretion leading to varying interpretations.

Equally, the quality of implementation of the agreed standards varies widely. UNHCR has, for instance, noted with disquiet vastly varying recognition rates from less than 1% in one country to over 50% in another for the same nationality. Such divergences also manifest themselves in some EU States forcibly returning Iraqi asylum-seekers to Central Iraq despite ongoing human rights and security issues. Another area of concern is the tendency to resort increasingly to granting subsidiary protection rather than refugee status. In doing so, States recognise that an international protection need exists but they are unwilling, for a variety of reasons, to extend refugee status to certain claimants. This may be justified in some instances but not in others. In this connection, it is important to stress the pre-eminence of the 1951 Convention, its 1967 Protocol and the broader international protection regime.

From a global perspective it is necessary that these instruments are applied, and *seen* to be applied, as the legal basis for ensuring the protection of all refugees whether they escape from oppressive regimes or flee the turmoil of internal strife. We witness evidence of the continuing relevance of the grounds for refugee status contained in the 1951 Convention definition in analyzing today’s largely internal conflicts. Most States concur with UNHCR that the Convention and Protocol apply to refugees from civil wars who have good reason to fear persecution because of their religion, ethnic origin or imputed political opinion. EU Member States also agree now, and this has been a long battle, that persecution within the meaning of the 1951 Convention may emanate not only from the State but also from *de facto* authorities or from groups, even individuals, in situations where the authorities are either unwilling or unable in practice to provide the persons concerned with protection. In some countries, however, the refugee definition has been interpreted to require either a threat of persecution by State

authorities or the deliberate denial of protection by them to the individual concerned. Some States contend, moreover, that persons fleeing armed conflict cannot qualify as refugees under the 1951 Convention unless they are "singled out" for treatment different to that awaiting other members of their community. As a result, refugees fleeing ethnic or religious persecution by *de facto* authorities controlling a part of their country of origin, in the midst of a civil war in which it is effectively impossible for them to find safety elsewhere in their country, have been rejected as refugees under the Convention in certain States. However, once admitted, they are almost always authorized to remain on subsidiary protection grounds. In other Convention States, "war refugees" in identical circumstances are frequently accepted as 1951 Convention refugees.

The drafters of the 1951 Convention were visionary. For them the refugee notion based on a well-founded fear of persecution was adequate to cover all those in need of international protection owing to a rupture with their country of origin. The definition was meant to distinguish persons who could not safely return to or obtain the protection of their country because of the political situation there -- refugees -- from others who did not require international protection. There is no indication of any intention to single out a special class of refugees as more deserving of protection than others. The "broad definition" adopted was understood to cover "all refugees". For UNHCR, it has always been understood that the refugee definition was meant to have an inclusive meaning, rather than a restrictive one, in accordance with the fundamental objective of providing international protection to all who need it. This background is important when discussing persons in need of international protection, including beneficiaries of subsidiary protection. And it is against this background that we in UNHCR view our global responsibilities, including our supervisory role, which incidentally is not reduced to the 1951 Convention and 1967 Protocol, but instead covers all conventions for the protection of refugees, including, arguably, the EU asylum instruments.

I am aware that this is somewhat a digression, but it is nonetheless important to lay the foundation for the future by ensuring that we share a common understanding of the roots of international refugee protection.

What does the future hold? If we had a crystal ball, what would we see in ten, fifteen years from now? An invitation to set out a vision provokes thinking, including outside the box. Here are my three building blocks for the future.

First, the future lies in advancing supranational structures and instruments that guarantee the equitable sharing of burdens and responsibilities within the EU. In fact, for an EU-wide asylum system to be really effective, it would require giving up some aspects of their sovereign powers. This would mean the creation of an EU Asylum Authority that would act throughout the territory of the EU. It would mean the establishment of an EU Appeals Court that would be an independent second instance. It

would mean one EU asylum law that would cover substantive, procedural and standard of treatment issues, and that would be premised on one single category of people with clearly defined international protection needs -- refugees -- thus redefining in one term what is now split into two or more. It would mean an equitable burden-sharing system within the EU, as currently exists in some States for the reception of asylum seekers.

Such a system would resolve a lot of problems. It would, for example, resolve the pressure placed on certain asylum systems, notably on the external border of the EU. It would help address irregular onward movement within the EU and thus limit its scope. It would also resolve the vastly divergent practices that currently exist and that are accompanied by a host of problems in terms of inadequate regional cooperation, protection issues and Sangette/Calais like situations. This is of course sensitive to Governments, at least for now. But if we look at where we have come since the mid-1980s, from the legal elements contained in the third pillar of the Maastricht Treaty, Arts. 61-63 of the Amsterdam Treaty, and the Lisbon Treaty; as well as the political commitments in the Tampere Milestones, the Hague Programme and now Stockholm, there has been an impressive increase in cooperation, harmonisation and ultimately the realisation that the asylum/migration issues demand a truly cooperative regional response.

UNHCR made a couple of proposals in 2003. At the time we termed them the "EU prong paper" and some of the ideas put forward for discussion then may well require a fresh look. They could be useful in today's context, at least paving the way for the vision that I have just outlined. For the EU to be true to its founding ideas, there is no doubt that the future lies in re-examining Dublin II and seeking a mechanism which goes beyond allocation of responsibility based primarily on geography. The Malta situation is a good example of some of its complexities. It has taken much too long for an EU relocation project to start for the purpose of sharing responsibilities among EU Member States. It seems incongruous that the United States should have to resettle refugees -- as it is now doing to help Malta -- from a European Union with 27 Member States and a population of some 400 million people.

But why not go further? What about responsibility sharing schemes within the EU through the pooling of resources to provide for the reception, decision-making and solutions for asylum-seekers and refugees. This could mean the processing of certain categories of asylum claims in EU Reception Centres within the European Union. Those determined to be in need of international protection in this process would be settled in participating EU Member States in accordance with agreed burden-sharing and protection criteria, whilst those found not to be in need of international protection would be returned promptly to their respective countries of origin under joint EU operations. These arrangements could be established in an incremental manner and eventually end up in a genuinely supranational system.

Are EU Member States prepared to proceed in that direction?

The Lisbon Treaty and the Stockholm Programme offer opportunities in this regard. We welcome the Lisbon Treaty which will provide for the establishment of a 'uniform status of asylum', a 'uniform status of subsidiary protection,' as well as a 'common procedure' throughout the EU. We also welcome the planned expansion of the jurisdiction of the European Court of Justice, which would enable national courts at different levels to refer cases to the Court. The ECJ has already begun to examine asylum cases and we look forward to forthcoming judgments which will consider *acquis* provisions based on the 1951 Convention. Unlike in other highest courts, UNHCR is not able to intervene formally as a third party under ECJ rules, but we hope nonetheless to contribute to the development of the Court's jurisprudence. We welcome that the EU Charter of Fundamental Rights -- including its Arts. 18 (right to asylum) and 19 (principle of *non-refoulement*) will have legally binding effect. And we welcome the requirement for the EU to accede to the European Human Rights Convention.

The Draft Stockholm Programme points in the same positive direction. I'd like to highlight in particular the stated objective of pursuing EU accession to the 1951 Convention and 1967 Protocol. Before this vision is realized, at a practical level, I am aware that a lot more needs to be done in terms of improving the quality of asylum procedures and protection. Better quality first instance decision-making is not only fair, it also takes away burden from the appeal instance and complex court proceedings. We have high hopes for close collaboration with the European Asylum Support Office (EASO). As I understand it, the Draft Stockholm Programme foresees EASO to be mandated to promote exchange of good practice, gather information and monitor quality of asylum procedures. UNHCR is keen to work closely with this new Office.

Second, the future lies in ensuring protection-sensitive entry and border procedures. The issue of access has come vividly to the fore through Italy's practice of returning people intercepted in the Mediterranean to Libya. While maritime protection issues are complex, we are concerned that such a practice could place individuals of concern to UNHCR at risk and Italy at variance with accepted global and regional EU refugee protection standards. But it does not stop there. Greece's asylum practice is equally worrying as are border control practices along the EU external border in the East. And there is the perennial issue of problematic asylum reception and detention conditions at some EU airports-highlighted just last week by a new report from Human Rights Watch.

Of course States have a legitimate interest in controlling irregular migration. Yet how do we ensure that adequate safeguards are properly included in whatever measures States take or envisage in the broad area of freedom of movement? By making it virtually impossible for refugees and asylum-seekers to reach asylum countries or to effect family reunion through legal means, it has also stigmatised them as people trying to circumvent the law, and it has provided a market for smugglers and traffickers. There is no easy solution. Our contribution to this debate is captured in UNHCR's 10-Point Plan and this may provide further inspiration in the EU context. Another aspect is better

understanding of the broader migration context, particularly the reasons behind migratory movement. Asylum procedures are strengthened, for instance, by easing migratory pressures and diverting them to appropriate processes. By way of example, IOM and UNHCR are currently working on Standard Operating Procedures for trafficked persons, in an effort to make a useful contribution. I would also foresee more cooperation between UNHCR and FRONTEX not just in training but by increasing significantly collaboration on the operational front, including at sea.

Third, the future lies in improving protection and realizing solutions in regions of origin. The importance of sharing responsibility with States outside the EU -- who often have significantly less capacity and greater refugee numbers than those in the EU -- needs to be stressed again and again. For the first time in its history UNHCR presented, and its Executive Committee adopted a budget in October based on a comprehensive assessment of needs of refugees and others of concern around the world. In the past, our budget was resource-driven and not needs-based. This careful planning and budgeting work has led to the identification of inadequacies and real needs, including substantial financial and material investment to enable host countries to address these needs.

In UNHCR's experience, refugees often move on because their basic survival, their basic protection and assistance needs, including educational aspirations and primary health care, are not met. If they are not allowed, or not given, the means to become self reliant, they will move on. Many of the measures proposed and planned in response to identified needs would go some way to address the reasons behind onward movements of refugees. Funding such a budget would strengthen protection capacities in refugee-receiving countries in regions of origin. Obviously, it remains to be seen how much of this budget will in the end be funded. Another important aspect is addressing protracted refugee situations. This topic was given prominence at the High Commissioner's Dialogue on Protracted Situations in December last year and has led to concrete action in a number of situations (e.g. Tanzania, Nepal). At the same time it is important to underline that it is political will that is required to address the underlying causes of displacement. The EU has done a lot of cross-cutting work on the external dimension of responding to forced displacement over the years. The EU Resettlement Scheme, for instance, is an important contribution in this area and one with great potential. I'd predict a lot more activity on the external front in the future.

All this to say that the next phase of building a Common European Asylum System provides the exciting prospect of advancing the global refugee protection regime, while benefiting from its fundamental orientations and deep human values. I look forward to a lively debate with you.

Thank you.