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Brussels, Strategic Committee for Immigration, Frontiers and Asylum (SCIFA)
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Thank you for the opportunity to share with you, albeit in this informal setting, UNHCR's views on certain priority aspects of the developing Community legislation relating to refugee protection and asylum. My remarks concern essentially the proposed Qualification Directive, although I would also like to devote a little time to comment briefly on some other key issues that are on the harmonisation agenda.

UNHCR readily embraced, from the outset, the EU asylum harmonisation, as the most promising effort for strengthening refugee protection not only in Europe, but globally. Over the last years, we have worked assiduously with Member States and the European Commission to contribute to the successful development of harmonised European asylum policies which could result in a clear distinction between refugee protection imperatives and migration control priorities; ensure fair treatment of all in need of international protection; and establish workable mechanisms for equitable sharing of asylum responsibilities, both within the European Union and between the Union and other regions.

We have also been supportive of harmonised approaches to tackling irregular migration, human smuggling and trafficking. UNHCR's prime objective in engaging in broader migration issues has been, and remains, the need to ensure that legitimate immigration control measures provide for the required exception in respect of refugees to gain access to territory and to asylum procedures. In this respect, we remain particularly concerned that asylum issues have become an increasingly negative element in political and public debate around the highly contentious issue of migration. This, we believe, has made it all the more difficult to move the procedural and substantive harmonisation of asylum policies towards the highest standards of refugee protection.

Before going into the subject matter of the proposed Qualification Directive, let me say that UNHCR has appreciated the close co-operation with the Commission and the Presidency, as well as with delegations in the capitals, during the preparations and negotiations of this Directive. It is in this spirit that I would like to address some issues of particular relevance to UNHCR which have, according to our understanding, emerged during the negotiations. You will appreciate that I will address these issues in broad terms, given the evolving nature of the text under negotiation - a process of which

UNHCR is not formally part.

Draft Qualification Directive

The proposed Qualification Directive goes to the heart of UNHCR's international protection mandate. The Office regards it as its statutory responsibility to foster a common understanding of who should benefit from international protection in the European Union, based on the full and inclusive application of the 1951 Convention and established principles of international refugee, human rights and humanitarian law. We do hope that any amendment to the already agreed Directive on Reception Conditions will not negatively impact on the Qualification Directive.

Generally, UNHCR has welcomed the Qualification Directive's approach towards an inclusive interpretation of the refugee definition. A guiding consideration for UNHCR's observations on the Directive has been that the interpretation of the refugee definition set out in the 1951 Convention and its 1967 Protocol is a matter of international law and, therefore, should not be subject to variations stemming from cultural, political, or, indeed, even legal determinants in any one State or region. Similarly, the true meaning of the refugee concept must be determined independently from the financial or other costs attached to the granting of asylum, the management issues pertaining to asylum procedures, or other limitations on a State's capacity to meet international legal obligations as regards fair treatment of refugees.

One of the key elements of the Directive, which UNHCR fully supports, is the firm rule guaranteeing the provision of refugee status irrespective of the source and method of persecution, hence including persecution emanating from **non-State actors as well as gender- and age-related forms of persecution**. UNHCR has long maintained that acts committed by non-State agents against whom the State is unwilling or unable to offer effective protection qualify as persecution, giving rise to refugee status under the 1951 Convention, provided, of course, the other criteria of the refugee definition are met. However, refugee status in such cases should not be able to be denied on the assumption that the threatened individual could be protected by international organisations, unless the assumption is unchallengeable, or is unassailable, which it basically cannot be. It would be, in UNHCR's view, inappropriate to equate national protection provided by States, with the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis. Under international law, international organisations do not have the attributes of a State. In practice, this has also meant that their ability to enforce the rule of law is highly problematic. I would also like to point out that, determining the availability of protection requires an assessment of the effectiveness, accessibility and adequacy of available protection to prevent persecution in the individual case and not a general reference to either the possible guarantors of such protection or the existence of a legal system in a given country.

Also in this context, I wish to reiterate that in UNHCR's view, the assessment of an **internal flight alternative** is normally not relevant in cases where the feared persecution

emanates from State agents. In analysing the applicability of an internal relocation alternative, it has therefore to be determined first whether the issue has any relevance to an individual case. Where consideration of an internal flight alternative is warranted, the assessment has to involve whether or not the proposed area is physically, safely and legally accessible, whether it is reasonable for the applicant to stay there or whether this would cause undue hardship for the person in question. If the proposed area is not accessible in a practical sense, an internal flight or relocation alternative does not exist.

An aspect of key relevance to UNHCR is the attempt in the Qualification Directive to define acts of **persecution.** We understand that this provision has been subject to numerous discussions and has therefore undergone considerable change. I can only therefore stress some important basic considerations which, we hope, will be reflected in the Directive: The interpretation of persecution needs to be flexible, adaptable and sufficiently open to accommodate ever changing forms of persecution and human rights abuses. Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.

On a positive note, we fully endorse the focus on gender-related persecution and on **membership of a particular social group**. Member States' policy and practices differ considerably in this regard, yet we also witness a growing body of administrative and judicial decisions in a number of Member States. For this purpose, the inclusion of references to concrete examples of a particular social group, such as sexual orientation, age, gender, disability and health, would be very welcome and considered useful to harmonise the application of this Convention ground.

Governments and communities have legitimate interests to ensure that their hospitality and generosity are not exploited. Problems of any misuse of States' asylum systems can and should find their effective redress within the established asylum procedures, but certainly not by employing a narrow construction of the refugee concept or by downgrading generally accepted protection standards. One such standard to be retained, for example, is the **benefit of the doubt** principle which should be given to a generally credible asylum-seeker. The requirements of evidence should be applied in a balanced manner with the necessary flexibility to take account of the special character of asylum applicants who are often forced to flee instantaneously without the necessary documentation. As known from practice, cases where an applicant can provide full evidence of statements will be the exception rather than the rule.

I would also like to refer briefly to the question of **conscientious objection**. UNHCR supports the original Commission proposal which recognised that the risk of punishment for the refusal to perform compulsory military service in the form of draft evasion or desertion may, in itself, provide grounds for a refugee claim if the reasons for the refusal

to perform the required military service are based on specific individual circumstances relating to deeply held moral, religious or political convictions. This interpretation is consistent with the UNHCR Handbook and evolving human rights law. The Human Rights Committee in General Comment 22 (48) on Article 18 ICCPR (right to freedom of thought, conscience and religion) states that a right to conscientious objection can be derived from Article 18.

It is generally acknowledged that not all international protection needs are necessarily covered by the 1951 Convention. UNHCR therefore strongly supports a law-based approach to the granting of **subsidiary protection** to those at risk of serious harm for reasons and in circumstances not necessarily covered by the 1951 Convention.

An important consideration in this respect is the fact that there is a consistent State pattern of granting some form of complementary protection to persons risking indiscriminate but serious threats as a result of armed conflict or generalized violence. Practice varies, however, and the Directive offers a historical opportunity to establish a harmonized approach, based on an agreed definition and content. Since a harmonized understanding regarding the beneficiaries of temporary protection has been achieved (Directive 2001/55/EC of 20 July 2001), it would be consistent if individuals fleeing for similar reasons (but outside the context of a mass influx), were to be granted subsidiary protection, unless of course they fall under the 1951 Convention. Also, the evolution of the law of armed conflict and related thereto of international criminal law, most notably the Statute of the International Criminal Court and its adoption by the EU Member States, offer an important legal rationale for extending the scope of international protection. It would be incongruous if those persons who risk falling victim to violations of norms sanctioned by individual criminal liability and possible prosecution, would not be able to claim protection against being returned to situations where such violations risk to occur. From our perspective, it is therefore crucial to adopt an inclusive approach, to the Convention as it applies as well as in relation to beneficiaries of subsidiary protection. Other reasons for providing subsidiary protection stem from international human rights instruments, such as Article 3 ECHR**.**

It is essential that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This would imply that the refugee definition under the 1951 Convention be interpreted in such a manner that individuals who fulfil the definitional criteria are granted Convention refugee status, rather than being treated under subsidiary protection. To this end, the refugee definition should be interpreted with the necessary flexibility. Also, UNHCR has proposed **safeguards** to be incorporated in the Qualification Directive clearly stipulating that any application for international protection should first be considered under the criteria of the refugee definition of the 1951 Convention and only if that fails under the criteria for subsidiary protection. Such safeguards are all the more important given that the Directive's provisions on subsidiary protection comprise grounds

which would indicate a strong presumption for Convention refugee status in certain cases.[1]

Turning to the provisions on **cessation** of and exclusion from refugee status, we would ask that consideration be given to including in the draft Directive, the exception to general cessation of refugee status for persons refusing to avail themselves of the protection of their country of origin for "compelling reasons arising out of previous persecution" (as set out under both Articles 1C (5) and (6) of the 1951 Convention). This humanitarian exception is recognised to apply to refugees under Article 1 A (2) of the 1951 Convention and reflects a general humanitarian principle that is now well grounded in State practice. More generally, it is important that compelling reasons arising out of previous persecution be properly recognised even if a change of conditions in the country of origin has taken place at the time of decision-making.

Another main concern is that the Directive might introduce substantive modifications to the **exclusion clauses** of the 1951 Convention, which is not permitted by the 1951 Convention. This is particularly the case with the proposed expansion of the exclusion clauses by adding the provision of **Art 33 (2) of the 1951 Convention**. Under the 1951 Convention, the exclusion clauses and the *non-refoulement* exception serve different purposes. The Convention exclusion clauses are motivated by the severity of crimes committed in the past by an individual, rendering him or her undeserving of refugee status. By contrast, Article 33(2) deals with the treatment of those who have been determined to be refugees but nonetheless could be *refouled*. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses danger to the community. It would, from our perspective, be incompatible with the 1951 Convention to juxtapose the exception to the *non-refoulement* principle with the exclusion clauses. It would furthermore deprive refugees of the procedural guarantees contained in Article 32 of the 1951 Convention which would be applicable in cases involving Article 33(2).

As regards the **status** and rights of those determined to be in need of international protection, UNHCR welcomes that the proposed Directive reflects best Member State practice. It is UNHCR's long-standing position that the standard of treatment accorded to beneficiaries of subsidiary protection should provide for the protection of basic civil, political, social and economic rights on an equal footing with those granted Convention refugee status. This is so because, in UNHCR's view, the question of what rights these persons deserve in order to live in dignity should be based on their needs rather than on

[1] For example, an act of torture perpetrated by State actors would normally be linked to a Convention ground. However, cases where torture is inflicted out of purely criminal motivation could give rise to a claim of subsidiary protection under Article 3 of the ECHR, provided other relevant aspects of the Directive are met. Similarly, situations of armed conflict may well engender persecution, as acknowledged by the Commission in its Explanatory Memorandum under Article 11 (2) c) and as also confirmed by State practice and jurisprudence (for example, persecution in the form of non-military acts of persecution by State and non-State actors or in the form of targeted military activities). The nexus with a Convention ground is very relevant in situations of systematic or generalized violations of human rights. It is only in situations where such violations have no link to a Convention ground that subsidiary forms of protection are required.

the ground on which their protection claims were established.

UNHCR believes that members of the same **family** should be given the same status as the principal applicant whose status has been recognised. This is also, in our experience, the most practical way to proceed. There are only few situations where this general principle of derivative status need not to be followed, i.e. where family members wish to apply for asylum in their own right, or where the grant of derivative status would be incompatible with their personal status, e.g. because of different nationality or because of the applicability of the exclusion clauses. UNHCR also supports the originally proposed definition of family members which included - in accordance with the jurisprudence developed under Article 8 ECHR - members of the extended family. Such an understanding would, in essence, cover close relatives and unmarried adult children who live together as a family unit and who are wholly or mainly dependent on an asylum applicant.

Asylum procedures

The harmonised application of the refugee definition and subsidiary protection cannot be developed in isolation from strengthening the procedural framework of asylum. The negotiations on the Directive on minimum standards for asylum procedures constitute, therefore, the natural complement to the Qualification Directive. Indeed, some linkages must become more visible. Once, the Qualification Directive has been adopted, the next logical step is to legislate on a single procedure, within which all recognised international protection needs can be considered, in sequence but within a coherent and effective decision-making process. Likewise, the sharing and gradual harmonisation of case law across national jurisdictions will be facilitated if procedural and evidentiary standards, as well as substantive ones, are similar EU-wide.

The upcoming negotiations on the draft Directive on asylum procedures will inevitably confront difficult questions. In this connection it is important not to lose sight of the overarching objective of asylum procedures, namely: the prompt identification of those in need of international protection, which is in the interest of States and refugees alike. It is not an impossible task to combine successfully the requirements of fairness, efficiency and integrity of the refugee status determination process. This however can only be achieved if Member States are prepared to amend their domestic rules and regulations in the interest of the common good.

We are all concerned that the potential for misuse of asylum procedures should be reduced. We note a renewed interest in Conclusions of UNHCR's Executive Committee dealing with the problem of "manifestly unfounded" applications. There is reason to question the efficacy and fairness of several "fast-track" procedures, as they currently exist. The upcoming discussions on this Directive should provide an opportunity to develop further the thinking on how to prioritise cases for accelerated decision making; how to manage time limits within asylum procedures; and how to simplify appeal processes following a thorough assessment in first instance.

Accelerated procedures for manifestly unfounded or abusive claims must be clearly distinguished from admissibility procedures. The latter are governed by notions such as "first country of asylum" and "safe third country", which may raise complex questions of whether 'effective' protection was and will be available in a third country. In our view, such notions are directly relevant to responsibility-sharing among States. Procedural considerations are to be distinguished from issues for substantive analysis and should not substitute for proper application of fundamental principles. Rather it should be the reverse: procedures should be at the service of principles.

This brings me to my next point. You are at present re-writing and refining of the Dublin Convention. This discussion comes at a critical juncture, when the Union is preparing to expand, and its external border is about to make a dramatic move east and south. The special responsibility of Member States at the external border is, within the EU logic of free internal movement, inescapable. Burden-sharing mechanisms that go beyond the sheer transfer of border control technology and address the real problems of State capacity for identifying and protecting refugees upon their entry into the Union will need to be devised to ensure adequate protection and to ease the burden on those States that are at the entry gate of the EU.

Returns to Afghanistan

We are following with great interest the development of an EU Plan for co-ordinated returns to Afghanistan. As you know, the practical expertise of UNHCR in the repatriation of refugees has well been established through decades of practice in all parts of the world. Our Executive Committee, not least thanks to the support of its European members, has long recognised that UNHCR has a legitimate interest in the consequences of voluntary repatriation, a recognition which underpins the presence of UNHCR staff in countries of origin, such as Afghanistan today. In our experience, the most appropriate frameworks for establishing "ground rules" in respect of voluntary repatriation are tripartite agreements, of the kind we have recently concluded with Afghanistan on the one hand, and with Iran, France and the United Kingdom on the other. Important in the approach is that these agreements apply to Afghans irrespective of their status and, while giving clear priority to repatriation on a voluntary basis, also foresee the non-voluntary return of persons without (new) protection or compelling humanitarian needs.

We will soon submit to you some further thoughts on this issue. If the EU and UNHCR agree to co-operate in this return process, this may serve as a useful model for similar operations in future.

Link to the Agenda for Protection

The current developments in the EU asylum and migration agenda are of direct relevance to the implementation of the Agenda for Protection, which was recently endorsed by UNHCR's Executive Committee. As you know the Agenda for Protection derives from the two-year Global Consultations on International Protection, in which the EU Presidency, Member States and the Commission played an active and constructive role.

The Agenda is not directed at UNHCR alone. Its implementation will require close co-operation among States, UNHCR, the NGO community and other players with a stake in refugee protection. Among the Agenda's key goals are to strengthen implementation of the international legal framework for the protection of refugees as well as to reduce misuse of asylum channels.

Given the substantial contribution of the EU to the Global Consultations process, it is no surprise that the EU's asylum harmonisation process broadly coloured the goals and objectives of the Agenda for Protection. Your regional agenda has therefore contributed to the formulation of a global agenda on refugees. We trust that you realise that the harmonised standards you are developing, may impact on the future policies of States in other parts of the world. I should also like to add that for the EU's project of harmonisation to be truly effective, multilateral dialogue and co-operation extending beyond the EU's external borders will be needed.

Many of the activities contained both in the Agenda for Protection and the EU's programme in the field of asylum and migration will, indeed, require the building of cross-regional consensus and co-operation. For this reason, pursuant to the Agenda for Protection, the High Commissioner will launch a new Forum for the development of tools, *inter alia*, in the form of multilateral special agreements, which both build on the 1951 Convention and complement it. UNHCR not only sees itself as a partner in the search for solutions to the many refugee challenges in the world at large, but also in the development of an effective comprehensive EU asylum and migration strategy.

Conclusion

I appreciate the opportunity that has been given to UNHCR to share with you our thoughts on the EU harmonisation process, and in particular the Draft Qualification Directive. While difficult to comment on a text that is being negotiated, let me try to summarise the main thrust of our observations. The Draft Qualification Directive has come a long way to achieve a common and more harmonised understanding of the refugee definition and beneficiaries of subsidiary forms of protection. I'd like to highlight in particular the non-state agent of persecution issue, gender-related persecution, membership of a particular social group, as well as the granting of subsidiary protection to persons fleeing indiscriminate violence. By way of example, concerns remain, however, in relation to an overly restrictive understanding of persecution per se, high standards of proof requirements which would in effect do away with the benefit of the doubt principle, as well as unresolved discussions concerning the precise scope of the cessation and exclusion clauses.

We understand that your intent in drafting the Directive is to keep in a proper and manageable balance the numbers of persons making a valid claim to your protection. In UNHCR's view the proper apportionment of responsibility is a fair and understandable aim. Where we perhaps differ is on the approach most likely to achieve this objective while respecting the fundamental and time-honoured principles at stake. The Tampere Summit called for the future European asylum system to be based on a full and inclusive

interpretation of the 1951 Convention. Trying to restrict the scope of application of the refugee definition or to define away certain deserving cases is no solution to the problems of asylum abuse. Those problems have their origin in i.a the composite ("mixed") nature of contemporary migratory movements, lengthy and complicated asylum procedures, and various obstacles to implementing an effective return policy. Such problems need to be addressed by improving the management of both migration and asylum systems, each with their own tools and mechanisms, rather than by restricting the application of agreed refugee law principles.

Geneva, 6 November 2002