

Consolidating the CEAS: innovative approaches after the Stockholm Programme?

UNHCR's recommendations to Italy for the EU Presidency July - December 2014

Augusta, Italy - A UNHCR staff stands on the dock of the port, observing the arrival of a ship carrying 1,123 people rescued off the coast of Lampedusa.



UNHCR/F.Malavolta/February 2014

Italy assumes the European Union (EU) Presidency at a moment when the 2009-2014 Stockholm programme is about to come to an end and when the EU Council will have adopted **strategic guidelines regarding future directions and priorities in the area of freedom, security and justice, including on asylum.**

A great deal has been accomplished over the past 15 years since Tampere, and more specifically in the frame of the Stockholm programme, with the **adoption of the second phase asylum instruments.** Nevertheless, many challenges lie ahead to reach a Common European Asylum System (CEAS) which “offers appropriate status to any third-country national requiring international protection”, in full respect of the 1951 Convention and in particular the non-refoulement principle, as well as the right to asylum enshrined in Articles 18 and 19 of the Charter of Fundamental Rights of the EU.

Among the many challenges the EU is currently facing is the steady arrival of people in need of international protection who take to the sea in dangerous conditions, together with other migrants. The increase in arrivals by sea, especially

Syrians, continued unabated in the first part of 2014, with an eight-fold increase in the number of arrivals in Italy compared to the same period in 2013, and with large numbers arriving to the Greek islands as well. Other countries have also faced large increases in Syrian asylum-seekers. This increase in arrivals has brought with it significant challenges, including frequent and costly search and rescue operations. It also stretches reception and screening capacity in those Member States bordering the Mediterranean and beyond, requiring the attention of both coastal and non-coastal states.

Solidarity and responsibility-sharing within the EU requires further urgent work to reach agreement on more effective ways forward. The ongoing discussions and processes under the aegis of the European Commission and the European Asylum Support Office (EASO) provide an opportunity for the Italian Presidency and Member States to agree on principled, practical and holistic approaches to further implementation of the CEAS and other areas of EU action affecting refugees and other people in need of international protection.

The Italian 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, including in the field of **solidarity and responsibility sharing, protection sensitive border management, early warning, preparedness and crisis management, and rescue at sea.**

1. Access to territory and asylum processes, and solidarity and responsibility sharing

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

The last two months of 2013 and the beginning of 2014 have starkly highlighted the scale of the challenge that some Member States face in managing borders and mixed migration in ways which respect fundamental rights. Hundreds of lives were lost in two widely-publicized tragic incidents, involving boats which sank close to Italian and Maltese shores. Thousands more people have suffered or perished after unseaworthy vessels have foundered in their bids to reach Europe, sometimes despite the best efforts of coast guards and other shipmasters to rescue them. Many more people – including persons who are in need of international protection– seek to enter Member States by land and air borders, frequently 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 grown of the legal obligations, derived from asylum principles and other fundamental rights that must be respected in the border and migration management context. The law at the European and international level is clear: people who may be in need of protection must be given access to territory and procedures in which their asylum claims can be examined.¹ Yet, reports continue of denial of entry at borders or in other

¹ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, <http://www.refworld.org/docid/4f4507942.html>.

situations where Member States exercise jurisdiction; failure to refer people in need of international protection to competent authorities are documented; foreign nationals are forcibly expelled from Member States, including under 'accelerated procedures' in readmission agreements providing for removal of people arrested in close proximity to a border, including in cases where they may have requested asylum.

UNHCR welcomes the initiative by the Italian government to launch Mare Nostrum in the wake of the tragedy off the coast of Lampedusa in October 2013. Since then more than 50,000 lives have been saved.

UNHCR works closely with Member States as well as Frontex, including in the implementation of its fundamental rights obligations and strategy², 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 adopted under the Greek Presidency offer an opportunity to reinforce observance of the non-*refoulement* principle as reiterated by the European Court of Human Rights³, notably the Regulation on Rules for Surveillance of the External Sea Borders in the context of Frontex-coordinated Operational Cooperation.⁴ The work of the Task Force on the Mediterranean, and the Commission's related Communication⁵, refer to the need not only to reinforce maritime surveillance, but also to focus on ensuring protection and saving lives.

UNHCR has issued recommendations in its Central Mediterranean Sea Initiative (CMSI) addressed to the Task Force and other stakeholders⁶ calling for the establishment of profiling and referral mechanisms which could help States swiftly identify those among people rescued at sea in who are potentially in need of international protection, and facilitate the finding of solutions for them, including through relocation or other agreed arrangements. A planned EU pilot on supported

² 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 <http://www.refworld.org/docid/533d212c4.html>

³ Hirsi Jamaa and Others, op. cit.

⁴ 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0197&from=EN>

⁵ European Commission, *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, <http://www.refworld.org/docid/52aebdff4.html>

⁶ 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>. <http://www.unhcr.org/531990199.pdf>
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 <http://www.refworld.org/docid/533d212c4.html>

processing, under the coordination of EASO, could focus on this situation in particular. UNHCR is prepared to work with Member States and EASO in this regard, focusing in particular on disembarkation, reception and identification of durable solutions.

Other means to ensure safe access to protection is to strengthen solidarity and responsibility-sharing in the EU, including more efficient utilisation of the family criteria, clauses on dependent persons and discretionary clauses under the recast Dublin Regulation, as well as through resettlement, intra-EU relocation, facilitated family reunification, private sponsorships humanitarian admission, humanitarian visas, and refugee-friendly labour migration schemes, would 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.

Recommendation: UNHCR encourages Italy, in its role as President of the Council, to lead relevant Council discussions on border measures, EU wide responsibility sharing and policies, so that they maintain a focus on access to territory and protection for those who seek asylum and strengthen solidarity among EU Member States, with transit countries and countries of first asylum. This includes:

- *Overseeing proper implementation of the Regulation on Frontex-coordinated sea border surveillance to ensure non-refoulement, rescue at sea and disembarkation in safety, including for asylum-seekers; and*
- *Leading the follow-up and implementation of an action plan on the Communication on the work of the Task Force on the Mediterranean (TFM) in relation to asylum and protection for those who require it;*
- *Considering the participation in the TFM of relevant international organisations and civil society actors;*
- *Ensuring protection-sensitive border management is in place and respects fundamental rights;*
- *Supporting third countries to build up their own asylum systems*

2. Ensuring protection in Europe for Syrian refugees

With the number of **Syrian refugees** displaced in Lebanon, Turkey, Jordan, Iraq and Egypt at over 2.8 million as of May 2014, and an estimated 6.5 million displaced within the country, the crisis is at its most acute 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 Syrians 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 concretely demonstrates a commitment to solidarity with those countries. There nevertheless remains 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. **UNHCR recalls its position** of October 2013 that the vast majority of Syrians fleeing the conflict are refugees⁷. UNHCR has also highlighted the 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 countries.⁸

UNHCR recalls that all those seeking asylum in the EU must be accorded rights and treatment in line with the requirements of the **Reception Conditions Directive**, while awaiting a decision on their claims. Reinforced contingency planning, at national and EU levels, including with EASO support, is needed in case of increased numbers of Syrians seeking protection in Member States.

UNHCR has welcomed the active engagement of European States and institutions in **humanitarian admission and resettlement** of Syrians during 2013.⁹ Further places are sought, to enable a total of 30,000 Syrians to be resettled or admitted by the end of 2014, with an additional 100,000 in 2015-16. Member States are also urged to explore other means to facilitate the admission of Syrians as well as Palestinians coming from Syria to safety in the Union, especially those who seek to join relatives in Europe, through family reunification, private sponsorships or other means such as student and work visas.

Recommendations: UNHCR urges the Italian Presidency to highlight the situation of Syrians and in particular to ensure:

- 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;
- A moratorium on returns of refugees or asylum-seekers to Syria and countries neighbouring Syria;
- Protection for Syrians with accompanying rights in line with international and 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

⁷ UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II*, 22 October 2013, <http://www.refworld.org/docid/5265184f4.html>

⁸ Ibid, sections 9 and 10, p 6

⁹ See UNHCR, *Finding solutions for Syrian refugees: resettlement, humanitarian admission and family reunification*, 18 October 2013, <http://www.unhcr.org/5249282c6.pdf>

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

More predictability in contingency and emergency preparedness is needed to ensure the CEAS can respond to pressures

Some Member States have faced considerable 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 by the Commission, the Council and Parliament, and support provided to address particular needs, including by the Commission, EASO and/or Member States.

However, **contingency and emergency response planning and preparation mechanisms** need to be enhanced. An **Early Warning, Preparedness and Crisis Management Mechanism** came into effect with the recast Dublin Regulation, which applies to asylum claims lodged from 1 January 2014,¹⁰ and envisages the drawing up of preventive as well as crisis management action plans to assist Member States in dealing with pressure on their asylum systems.

The Temporary Protection Directive,¹¹ in force since 2001, foresees a concerted EU response in case of a “mass influx”.

UNHCR considers that **more flexibility and swifter response capacity is required 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 *sur place* claims, and large refugee numbers in Europe – all of which require tailored and planned collaborative planning and implementation of responses. **Such responses should span the range of potential challenges from border 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.** It is timely to assess whether and how the tools available can be used more effectively, and if new tools, such as mobile protection teams, could be developed, to enable the EU and Member States to respond to such situations in a more rapid and comprehensive way. UNHCR stands ready to assist in this respect.

It is hoped that the recast measures overall will encourage Dublin participating states to continue to engage in maintaining and reinforcing standards across

¹⁰ 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.

¹¹ European Council, *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.

Europe. This can contribute to realising 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.

UNHCR also considers that mutual recognition of asylum decisions across Member States and a framework for the transfer of protection are areas for further development. These measures could contribute to alleviating the particular pressures felt by some Member States as a result of granting protection to significant numbers of applicants, by providing beneficiaries of international protection with opportunities to move between Member States, and take up residence in other Member States, subject to the fulfillment of relevant conditions

***Recommendations:** UNHCR encourages Italy 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.*

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 transposed the recast Qualification Directive¹²; and the amendment process ongoing to enact the revised Asylum Procedures¹³ and Reception¹⁴ Directives into national law. 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 is facilitating exchanges of information on transposition and implementation among States in Contact Committees, involving UNHCR and other stakeholders where appropriate. Effective and accurate transposition of the recast directives will require Member States to put in place inter alia mechanisms to identify and respond to the needs of vulnerable people, designation of guardians for unaccompanied minors, and appropriate psychosocial support.

During the Italian Presidency, **attention should be focused on the harmonised and correct application of the recast Dublin Regulation.** The responsibility criteria have been revised in important ways, including in relation to unaccompanied minors, children and families, including extended family members.

¹² 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

¹³ European Union, Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180/60, 29 June 2013

¹⁴ 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

The extent to which these revisions will 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 suspensive effect during appeal, among others, should bring about more clarity and enhance collection of information about claimants.

Reports indicate that **detention** continues to be used for asylum-seekers, including Syrians, in some Member States. UNHCR has witnessed the devastating human impact of detention upon refugees, including children and families, following their often-traumatic experiences of persecution and flight, and will launch a Global Strategy – Beyond Detention - at the 60th meeting of UNHCR's Standing Committee in July 2014 to support governments to end the routine detention of asylum-seekers and refugees. UNHCR recalls the recast Reception Conditions Directive provides for the use of detention only if less coercive measures cannot be applied effectively – truly as a measure of last resort. Where it is used, a periodic overview of the lawfulness of detention, adequate conditions and judicial oversight are essential. In line with international law, UNHCR also emphasizes the need for detention to be proportionate and necessary¹⁵ and advocates for the use of alternatives to detention. UNHCR remains ready to work with governments on this issue and looks forward to the European Migration Network's study on the use of detention and alternatives to detention in the context of immigration.

Recommendations: Working together with the Commission and EASO, UNHCR invites the Italian 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 in order to achieve a truly common approach to asylum applications, processing, status and reception standards, including addressing persistent gaps in reception conditions in some Member States. Similar cases with similar procedures = SAME outcome, including a uniform status based on the Qualification Directive;*
- *Assessing the impact and any relevant trends in application of the revised Dublin Regulation and the recast Qualification Directive, in their first months of operation at national levels;*
- *Keeping under review the use of detention to ensure it in accordance with international law and the EU Receptions Directive, as well as the consideration, expansion and implementation of alternatives to detention*
- *Establishing effective mechanisms to ensure the identification of, and response to, specific needs of asylum-seekers and refugees*

¹⁵ See UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, <http://www.refworld.org/docid/503489533b8.html>

5. Eradicating statelessness

In September 2014, UNHCR will launch a global campaign for the eradication of statelessness within a decade. It is certainly possible to reach this goal within the EU, where statelessness remains a concern in the Baltic States, but is also found among migrant populations throughout the Union. The EU pledged in September 2012 that Member States which had not done so would accede to the 1954 Convention relating to the Status of Stateless Persons (Cyprus, Estonia, Malta and Poland remain), and would consider acceding to the 1961 Convention on the Reduction of Statelessness. The EU acquis recognises, to a certain extent, the need for legal protection for stateless persons, as they fall within the scope of the Qualification Directive. But not all stateless persons are in need of international protection. States should take additional measures to ensure all stateless persons in the European Union enjoy their basic rights. States should strengthen the identification and the protection of stateless persons under the 1954 Convention, where they fall outside the scope of the Qualification Directive; promote law reform to prevent statelessness (notably among children born in Europe); and reduce statelessness by facilitating the acquisition of nationality by stateless persons in Member States. UNHCR calls on the Italian Presidency to make accession to the two statelessness Conventions a priority.

Recommendations: UNHCR encourages Italy to support and advocate for accession of remaining Member States to the 1954 Convention; to the 1961 Convention and for Member States to take additional measures for the protection of stateless people in the EU.

6. Combatting human trafficking

Victims of trafficking in human beings may have international protection needs as refugees, or people at risk of serious harm who are in need of subsidiary protection. This requires border and criminal law enforcement bodies to have the necessary knowledge to identify and refer trafficking victims to asylum authorities, where needed. It also requires the asylum authorities to be aware of the specific risks and protection needs which may face victims of trafficking, including in particular unaccompanied children, and address these in light of the provisions of the asylum acquis and the Directive on trafficking. UNHCR reiterates that a fundamental rights-based approach to victims of trafficking is necessary to address the fragmentation of victims' rights and entitlements across different policy areas.

The European Migration Network (EMN)¹⁶ study commissioned by the EC on the identification of victims of trafficking in international and forced return procedures has highlighted that the presence of victims of trafficking in the EU asylum systems is not insignificant. The study also identifies gaps in the implementation of the EU acquis. UNHCR therefore calls on the Italian EU Presidency, the EC and EASO to

¹⁶ See the European Migration Network study on the identification of victims of trafficking in international and forced return procedures: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_synthesis_identification_victims_trafficking_final_13march2014.pdf

build on the momentum created by the EMN report to improve the protection of victims of trafficking in the asylum system and the prevention of trafficking.

Last, UNHCR takes note of existing initiatives to tackle the complex problem of trafficking and smuggling in the East and Horn of Africa including through the current African Union led dialogue. UNHCR encourages States to continue their efforts in this regard as well as to provide effective protection for victims of trafficking.

Recommendations: UNHCR urges Italy to support a holistic and fundamental rights-based approach towards victims of trafficking and to build upon the EMN report prepared under European Commission auspices in order to improve the protection of victims of trafficking in the asylum system.

- UNHCR also urges the adoption of measures aiming at ensuring that **coordination and referral mechanisms** between the protection systems for victims of trafficking and the international protection system be established

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

Newly adopted Strategic Guidelines setting the agenda in the area of Home Affairs for the next 5 years

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. UNHCR contributed to the debate on the future of EU home affairs policies articulating priorities for the immediate and longer term.

UNHCR underlines the importance of recalling essential principles 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 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.

24 June 2014