Building a Europe of Asylum: UNHCR's Recommendations to France for its European Union Presidency (July – December 2008)

Introduction

France takes up the EU Presidency at a key juncture on the path to a Common European Asylum System (CEAS). The Reform Treaty, adopted in Lisbon in December 2007, is expected to be ratified by all Member States by the end of the year and to enter into force on 1 January 2009. The Treaty significantly widens EU competence for asylum and immigration matters and incorporates the Charter of Fundamental Rights, which guarantees the right to asylum.[1] Where the Amsterdam Treaty had called for minimum standards in the asylum area, the Treaty of Lisbon calls for uniform standards. It also mandates partnership and cooperation with third countries for the purpose of managing inflows of people seeking protection, as well as the introduction of a system of integrated management of the EU's external borders. The new Treaty furthermore expands the competence of the European Court of Justice over asylum and immigration.[2]

On the eve of the French Presidency, the European Commission will issue its proposed Policy Plan on Asylum. This Plan is expected to build on the Hague Programme and to take inspiration from the responses received by the Commission to its June 2007 Green Paper on the future CEAS.[3] During the French Presidency, the European Commission will also propose amendments to the Dublin II Regulation[4] and the Reception Conditions

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1 Article 18 of the *Charter of Fundamental Rights of the European Union*, 7 December 2000 [OJ C 364/01, 18.12.2000], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3b70.

2 European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007 [OJ C 306, 17.12.2007], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=476258d32.

3 European Commission, *Green Paper on the Future Common European Asylum System* (COM(2007) 301 final), 6 June 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=466e5a972.

4 Council of the European Union, *Council Regulation No. 343/2003 of 18 February 2003 establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* [OJ L 50/1, 25.2.2003], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e5cf1c24 (hereinafter 'Dublin II Regulation').

Directive[5], and take forward work on the proposed European Asylum Support Office. At the same time, the Union maintains a strong focus on combating irregular migration and managing the EU's external frontiers. Developments in these and related Justice and Home Affairs policy areas will affect the extent to which persons are able to seek and enjoy asylum in the European Union.

Against this backdrop, the Office of the United Nations High Commissioner for Refugees (UNHCR or the Office) welcomes France's announced intention to devote particular attention during its Presidency to "building a Europe of asylum,"[6] and to define key understandings in a proposed "European Pact on Immigration and Asylum."[7] UNHCR appreciates France's stated commitment to make sure that initiatives undertaken during its Presidency are coherent with the Commission's Policy Plan for the completion of the CEAS.[8] The Office further commends France's intention to address the current disparities in Member States' treatment of asylum-seekers and their claims.[9]

UNHCR has regularly provided advice and expertise to European institutions and Member States on asylum questions, based on the Office's supervisory responsibility with respect to the implementation of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol[10] and its consultative role as affirmed in Declaration 17 to the Amsterdam Treaty. The present recommendations are addressed to the incoming French Presidency in the same constructive spirit that has guided UNHCR's input since the inception of asylum harmonization efforts in the EU.

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5 Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States* (hereinafter 'Reception Conditions Directive') [OJ L 31/18, 06.02.2003], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ddcfda14.

6 Mr. Brice Hortefeux, *Codéveloppement et immigration choisie: repenser les relations Nord-Sud*, La Lettre Diplomatique, volume 80, fourth quarter 2007, at: http://www.lalettrediplomatique.fr/contribution.php?id=25&idrub=101&bouton=2.

7 Speech of Mr. Brice Hortefeux, Minister for Immigration, Integration, National Identity and Co-Development, to the delegation of the French National Assembly to the EU, at: http://www.premier-ministre.gouv.fr/iminidco/salle_presse_832/discours_tribunes_835/discours_brice_hortefeux_devant_59022.html.

8 In his speech (see above footnote 7), Mr. Hortefeux underlined the need to coordinate with the European Commission "*pour que le plan d'action qu'elle présentera en juillet 2008 serve de base aux initiatives que nous engagerons*".

9 Speech of Mr. Jouyet, French State Secretary for European Affairs, to the Assemblée des Français de l'étranger, 6 March 2008, at: http://www.ambafrance-dz.org/article-imprim.php3?id_article=1970.

10 *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3be01b964, and *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series, vol. 606, p. 267, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3ae4 (together referred to hereinafter as the '1951 Convention').

1. Safeguarding the rights of asylum-seekers and refugees in the broader migration management context

1.1. Preserving access to the European Union for persons seeking asylum

It is widely acknowledged that migratory flows towards the EU consist of persons in need of international protection as well as persons who are on the move for other reasons. UNHCR notes that France intends, during its Presidency, to strengthen efforts dedicated to the management of the EU external borders.[11] If the goal of a "Europe of asylum" is to have meaning, measures to control the EU's external borders must incorporate specific safeguards to ensure that persons seeking international protection are identified and given access to EU territory and to fair and effective asylum procedures. This is all the more important as the EU common visa policy, in combination with sanctions on transport companies carrying passengers without proper documentation, does not differentiate adequately between persons seeking international protection and other third-country nationals, and may therefore impede access to safety for persons seeking protection. It is noted that the lists of countries whose nationals are required to obtain visas, including airport transit visas, include most countries of origin of refugees. EU policies on irregular migration also include initiatives to fight trafficking in human beings.[12] Anti-trafficking measures should also acknowledge that persons seeking protection are often easy prey for traffickers, and that victims of trafficking may be in need of international protection.[13]

UNHCR has developed a "Ten Point Plan of Action" to assist States in finding practical solutions to the challenges of managing their external borders, while complying fully with their obligations under international refugee and human rights law.[14] In this context, UNHCR recommends and is prepared to help develop protection-sensitive border management mechanisms, including border monitoring and training activities, in

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[11] Department of the French Prime Minister, "Questions and Answers on the European Pact on Immigration and Asylum", at: http://www.premier-ministre.gouv.fr/information/questions_reponses_484/est_pacte_europeen_sur_59134.html.

[12] A key legal measure in this field is Council of the European Union, *Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities* [OJ L 261/19, 06.08.2004], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4156e71d4.

[13] UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07, 7 April 2006, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=443679fa4. The saving clauses contained in the two Protocols supplementing the UN Convention against Transnational Organized Crime ("Palermo Protocols") provide an additional source: Article 14 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4720706c0, and Article 19 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=479dee062. The saving clauses (Articles 14 and 40) of the Council of Europe Convention on Action against trafficking in Human Beings of 16 May 2005 (CETS 197), at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43fded544) also provide a relevant source of inspiration.

[14] UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, Rev.1, January 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45b0c09b2.

cooperation with Member States and other stakeholders.[15] UNHCR supports the further development of the concept of "Asylum Expert Teams" to help States to respond to large-scale arrivals at external borders[16] by providing increased capacity to identify people seeking protection. UNHCR would be willing to be part of such teams, for which the External Borders Fund could provide financial support. The inclusion of non-governmental personnel in these teams would also improve transparency and build confidence in Member States' responses to new arrivals.

Although the Regulation establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States and the European Union (Frontex) is subject to human rights obligations,[17] it is not always clear how respect for these obligations is assured. UNHCR recommends the explicit inclusion of refugee protection safeguards in arrangements governing Frontex-led operations, in particular to ensure that people seeking international protection are properly identified, and to clarify how examination of their claims will be assured. In this context, UNHCR has valued the opportunity to take part in EC-led discussions with Member States, Frontex and IOM on the development of guidelines for joint operations at sea. UNHCR considers it important to participate in discussions on processes which affect the rights of asylum-seekers and refugees, and believes its involvement can help to ensure consistency between Member States' international obligations and the practice of border control. For this reason, UNHCR is willing to participate not only in norm-setting activities, but also in training of officials, such as border and coast guards, as well as in the planning and, where appropriate, implementation of relevant aspects of Frontex-led operations.

1.2. Ensuring voluntary return in safety and dignity

UNHCR has consistently recognized that the credibility and viability of asylum systems depend in part on the return to their countries of origin of persons who are not in need of international protection. UNHCR advocates for sustainable return of such persons to their home countries, rather than removal to countries through which they transited. In 2005,

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[15] For instance, UNHCR has concluded a number of arrangements with border control authorities and NGOs for capacity building and monitoring activities, i.e. in Slovakia and Hungary. On the Italian island of Lampedusa, UNHCR participates in a programme with IOM and the Italian Red Cross for the initial reception and screening of new arrivals. See: *Statement by Ms. Erika Feller, UNHCR's Assistant High Commissioner for Protection, to the fifty-eighth session of the Executive Committee of the High Commissioner's Programme, Geneva*, 3 October 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4704e18d2.

[16] See section 1.6.2 of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41e6a854c.

[17] Council of the European Union, *Council Regulation (EC) 2007/2004 of 26 October 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 349/1, 25.11.2004], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4847e8022, refers in its considerations (paragraph 22) to the principles recognized by Article 6(2) of the Treaty on European Union: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

UNHCR published comments on the initial draft "Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third Country Nationals".[18] While UNHCR supports the elaboration of common standards for return which respect fundamental rights, it has several concerns about the draft Directive's potential application to persons whose protection needs have not been examined in substance in the EU. UNHCR calls for safeguards to ensure that removal is not effected unless the individual's protection needs have been examined in a full and fair procedure. If removal nonetheless takes place, this should only occur if access to a full and fair asylum procedure in the third country is assured, and if effective protection is available in that country if needed. UNHCR remains concerned about the inclusion of third country nationals in EU readmission agreements, without detailed safeguards requiring guaranteed access to asylum procedures for people whose claims may not have been examined in substance in the EU.

In UNHCR's view, detention pending removal from EU territory should be avoided whenever possible. Where detention does take place, it should be for the shortest possible time. Detainees should be treated humanely and with respect for the inherent dignity of the person. Detention of children and other vulnerable persons should be avoided. The possibility of detention for up to 18 months, foreseen in the Returns Directive as endorsed in recent discussions in the Council and with the European Parliament, gives rise to serious concern, as does the proposal for a mandatory, EU-wide (re-)entry ban, applicable to all persons removed from the EU. The application of such a re-entry ban would be difficult to reconcile with the right to seek and enjoy asylum, as any returned person might in future need to flee from persecution. A re-entry ban could also be a barrier to the reunification of refugee families, as provided for in the Family Reunification Directive.[19]

Recommendation 1: *UNHCR encourages the French authorities to ensure that the 'Europe of asylum' is based on a "full and inclusive application of the Geneva Convention".*[20] *UNHCR calls on the French Presidency to ensure that EU measures to combat irregular migration and human trafficking incorporate refugee protection safeguards, including access to EU territory and to asylum procedures for persons seeking international protection.*

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[18] UNHCR, *Observations on the European Commission's Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (COM(2005)391 final)*, 16 December 2005, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43a2a58f4.

[19] Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification* [OJ L 251/12, 03.10.2003], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f8bb4a10.

[20] See paragraph 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16 October 1999, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ef2d2264; paragraph 6 of *The Hague Programme* (see above footnote 16); and Article 63 of the *Treaty of Lisbon* (see above footnote 2).

2. Developing a fair and effective Common European Asylum System

The Hague Programme affirms the aim of the CEAS to ensure that persons in need of international protection are able to find it throughout the EU, in line with the 1951 Convention. France,[21] along with the European Commission,[22] has acknowledged that this is not yet the case. Indeed, as demonstrated *inter alia* by recent UNHCR research[23] into the implementation of the Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter "Qualification Directive"),[24] significant divergences persist in Member States' practices, and the quality of asylum decision-making across the EU remains a concern. More effective monitoring and enforcement, together with systematic arrangements for quality assurance, are needed.

UNHCR supports the objective of a common asylum procedure and a uniform status for refugees and subsidiary protection beneficiaries, and underlines the need to amend existing Directives and Regulations to achieve this. As stated in the Hague Programme, such amendments should be informed by a thorough evaluation of the application of the first-phase instruments. While some assessments are still pending, other published evaluations reveal serious gaps, warranting corrective measures.[25]

UNHCR believes that it should be a priority to fill the gaps between the existing norms and the practice of Member States, at the same time as striving to raise the standards where needed. UNHCR urges the French Presidency to take up this dual challenge for all the first phase instruments of the CEAS, including at the Ministerial Conference on asylum planned for September 2008.

Recommendation 2: *UNHCR encourages the French Presidency to support a strengthened monitoring role for the European Commission, in order to ensure adequate assessment of the transposition and implementation of the first phase instruments in the field of asylum. The development at EU and national levels of quality assurance mechanisms for asylum decision-making should be encouraged, as a way to narrow the gap between law and practice.*

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21 See above footnote 9.

22 *Green Paper on the Future Common European Asylum System* (see above footnote 3), Introduction.

23 UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473050632.

24 Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [OJ L 304/12, 30.09.2004], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4157e75e4.

25 See, for instance, European Council on Refugees and Exiles, *The Way Forward: Europe's Role in the Global Refugee Protection System. Towards Fair and Efficient Asylum Systems in Europe*, 1 September 2005, at: http://www.ecre.org/files/ECRE WF Systems Sept05.pdf.

2.1. The Dublin II Regulation[26]

The Dublin Regulation is based on the assumption that the quality and procedural safeguards of Member States' asylum systems are comparable. In reality, practice differs widely and an individual asylum-seeker's chances of finding protection vary considerably from one Member State to another, and some provisions of the Regulation are not fully respected.[27] Access to substantive claim determination processes is not always assured, and information on asylum-seekers' rights and the operation of the Dublin system is not always available. The asylum procedures in certain countries are plagued by long delays in determination of claims, and inconsistent or incorrect application of eligibility criteria. The frequent and often long detention of Dublin claimants awaiting transfer has extremely negative consequences for the affected individuals, especially for vulnerable persons.[28] These are among the findings of the EC's own analysis of the Dublin system issued in June 2007,[29] and other authoritative critiques.[30]

Accordingly, UNHCR has recommended, *inter alia*, revision of the Dublin Regulation's provisions regarding the definition of family members, suspensive effect of appeals, time limits and the conduct of transfers. UNHCR also recently advised Member States to refrain from returning asylum-seekers to Greece under the Dublin II Regulation[31] in view of identified shortcomings in the examination of claims and in the reception of asylum-seekers, among other problems.

For the Dublin system to operate properly, the problem of disparities in Member States' asylum systems must be addressed. In the meantime, a mechanism to allow for temporary suspension of the system in particular cases should be considered. However, even if there were no divergence in Member States' asylum systems, this would not resolve the burden-sharing issue. In general, the Dublin system places the responsibility for examining claims on the first EU Member State the asylum-seeker enters, which tends to be a State located at the EU's external border. For this reason, additional burden-sharing mechanisms – going beyond financial assistance – should be established, to assist States which, by virtue of geography, face particular pressures.

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[26] See above footnote 4.

[27] On 31 January 2008 the European Commission initiated an infringement procedure before the European Court of Justice against Greece for its failure to comply with Article 3, which obliges the responsible Member State to examine an application in the event of a Dublin transfer.

[28] UNHCR, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2006, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4445fe344.

[29] European Commission, *Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System (COM(2007) 299 final)*, 6 June 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=466e5a082.

[30] See, for instance, European Council on Refugees and Exiles, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, at: http://www.ecre.org/files/Sharing Responsibility_Dublin Reconsidered.pdf.

[31] UNHCR, *Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4805bde42.

2.2. Access to the Eurodac database for law enforcement purposes

UNHCR recalls that the Eurodac database was established as part of a framework for refugee protection.[32] While UNHCR accepts the need for law enforcement authorities to have the tools to investigate crime, such access should be subject to rigorous safeguards, limiting its use to cases where it is necessary for a legitimate purpose, proportionate, and subject to oversight. Asylum seekers and others registered in Eurodac should not be exposed to a greater likelihood of criminal suspicion, investigation or prosecution simply because they are registered in an EU database. In addition, under no circumstances should individual data about an asylum seeker be passed to his or her country of origin. This is a step which could seriously endanger the lives of refugees and their families.[33]

Recommendation 3: *UNHCR encourages the Presidency to lead substantive discussions on proposals for amendment of the Dublin and Eurodac Regulations, with a view to ensuring that the system does not deny asylum-seekers a fair determination of their claims, nor the exercise of other basic rights. Proposed changes should also seek to address particular pressures on certain Member States which may result from application of the system.*

2.3. The Reception Conditions Directive[34]

In its report on the application of the Reception Conditions Directive,[35] the Commission found that some Member States are not complying with EU standards. It concluded that many Member States fail to provide educational facilities to detained minors, and do not comply with the three-day deadline to issue asylum-seekers with personal documentation. It also identified wide disparities in Member States' practice, notably in the application of the Directive to persons in detention and/or falling under the Dublin Regulation; the level and form of reception support, including health care; access to employment; free movement rights; identification of vulnerable persons and provision of care to meet their needs.

During the French Presidency, the Commission will propose amendments to the Reception Conditions Directive. UNHCR particularly encourages the Presidency to

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[32] See Preamble to: Council of the European Union, *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention* [OJ L316/1, 15.12.2000], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f4e40434.

[33] UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS), *Terrorism as a Global Phenomenon*, 17-18 January 2008, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4794c7ff2.

[34] See above footnote 5.

[35] European Commission, *Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (COM(2007) 745 final)*, 26 November 2007, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0745:EN:NOT; see also Odysseus Academic Network, *Comparative overview of the Implementation of Council Directive 2003/9 of 27 January 2003 laying down Minimum Standards for the Reception of Asylum-Seekers in the EU Member States*, October 2006, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=484009fc2.

support amendments which would clarify that the Directive applies to asylum-seekers in detention and to persons pending transfer under the Dublin regime. UNHCR further recommends limitation of the possibility for states to use the withdrawal or reduction of reception support as a sanction, and to ensure that all Member States have mechanisms to identify vulnerable asylum-seekers and to meet their needs. UNHCR has repeatedly underlined that adequate, dignified conditions of reception are an essential prerequisite of a fair asylum procedure.[36]

Recommendation 4: *UNHCR urges the French Presidency to support amendments to the Reception Conditions Directive to more clearly define the entitlements of all asylum-seekers, including those in detention and/or awaiting transfer under the Dublin system. UNHCR further recommends limitation of the broad discretion of Member States in applying reception entitlements as well as to develop additional measures to ensure that the entitlements set out in the Directive are effectively available in all Member States.*[37]

2.4. The Qualification Directive[38]

Although the Qualification Directive sets out criteria for the identification of persons in need of international protection, Member States do not always apply these criteria correctly or consistently. In 2007, UNHCR undertook a study of the application of key provisions of this Directive by selected Member States.[39] While not exhaustive, this study clearly demonstrates that the possibility to find protection differs dramatically from one Member State to another. There are wide differences of interpretation on issues such as "internal protection alternative", actors of protection and qualification for subsidiary protection. The study further shows that the Directive is not achieving its objective of delivering international protection to all those in need. This appears at least in part to be due to restrictive interpretations of both the refugee and subsidiary protection criteria. Finally, UNHCR's study raises questions of compatibility with international refugee and human rights law, stemming either from the Directive itself, national implementing legislation or legal interpretation. These problems must be remedied for a Common European Asylum System to be consistent with the 1951 Convention and other relevant international instruments.

UNHCR supports the development of initiatives to improve the quality of Member State decision making,[40] as an important way to address at least part of these problems. In

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[36] UNHCR, *Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*, July 2003, at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f3770104.

[37] UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46e159f82.

[38] See above footnote 24.

[39] See above footnote 23.

[40] In 2005-2007, UNHCR and the UK Home Office undertook an innovative 'Quality Initiative' project which was seen by both sides as a significant positive step in assisting decision-makers to reach better quality first-instance decisions in a strengthened asylum system. For the reports on the project, see http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/. In Austria,

addition, UNHCR is willing to work with the Commission and Member States on Guidelines for the implementation of important provisions of the Directive.

However, targeted amendments to the Qualification Directive are the most effective and direct means to achieve the harmonizing objective of the Directive in line with international standards. In particular UNHCR encourages the French Presidency to support amendments to the Qualification Directive in the following areas, identified as particularly problematic in UNHCR's November 2007 study:[41]

i. On internal protection, the deletion of Article 8(3) and the amendment of Article 8(1) requiring that any proposed area of internal protection be practically, safely and legally accessible to the applicant;
ii. On subsidiary protection, the deletion of recital 26 and of the term "individual" from Article 15(c) as well as the amendment of Article 15(c) so that it is not limited to situations of international or internal armed conflict;
iii. On exclusion, the amendment of Articles 12, 14, 17 and 19 to ensure their application in line with Article 1F of the 1951 Convention and avoid, in practice, its expansive use as an anti-terrorism measure.

Recommendation 5: *UNHCR urges the French Presidency to address the serious discrepancies in the asylum determination practice of Member States, with a view to making sure that persons in need of international protection are able to find this protection, regardless of where in the EU or at its borders they present their applications. UNHCR further recommends amendment of the Qualification Directive to ensure full consistency with international norms.*

2.5. The Asylum Procedures Directive[42]

UNHCR has consistently expressed concern about certain provisions of the Asylum Procedures Directive, which may lead to breaches of international refugee law, including potentially the *refoulement* of persons in need of international protection.[43] Implementation of the Asylum Procedures Directive in a manner fully consistent with the letter and spirit of the 1951 Convention is vital to the effective functioning of a Common European Asylum System, as endorsed by the Member States in the Treaty of Lisbon. Yet in addition to a number of problematic procedural devices as set out below, the

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a pilot Quality Initiative project was also carried out on a more limited scale in 2006-2007. UNHCR has subsequently sought EC funding under the European Refugee Fund in 2007 for a Quality Initiative project involving eight Member States (Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia and Slovenia) over a period of nearly two years, which will also aim to stimulate cooperation and exchange of good practice between the involved States' asylum authorities.

41 See above footnote 23.

42 Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [OJ L 326/13, 13.12.2005], at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4394203c4 .

43 UNHCR, *Annotated Comments on the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (COM(2002) 326 final)*, 27 February 2003, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e5e34895.

Directive's "Basic Principles and Guarantees" are qualified by extensive exceptions and scope for discretionary provisions. As a result, Member States' asylum procedures remain widely divergent in their operation and outcomes. In some cases, the fairness and effectiveness of these procedures is not assured. The elimination of provisions in the Asylum Procedures Directive permitting States to derogate from agreed minimum standards would be an important step forward.

UNHCR continues to call for amendment of the most problematic procedural devices in the Asylum Procedures Directive, as follows:

i. Establishing a clear obligation to grant access to the asylum procedure and clarifying the responsibility of the competent authorities;
ii. Ensuring that essential procedural safeguards extend to asylum-seekers subject to border procedures;
iii. Strengthening the safeguards applicable to persons in detention, including access to the asylum procedure for persons in pre-removal detention;
iv. Ensuring that practical barriers to substantive asylum procedures are eliminated, such as unreasonably short filing deadlines and restrictions on access to competent translators/interpreters;
v. Limiting the 'safe third country' concept and eliminating the 'European safe third country' concept;
vi. Appropriate use of the 'safe country of origin' concept in accordance with UNHCR's recommendations;
vii. Limiting the use of accelerated procedures, which are characterized by reduced procedural safeguards, to clearly abusive or manifestly unfounded cases;
viii. Ensuring that procedural guarantees will not be reduced for reasons unrelated to the strength of a person's claim to international protection; and
ix. Revising the provisions on withdrawal of asylum applications, and the lodging of repeat or subsequent applications, to guarantee that each application is examined on its merits at least once.

Recommendation 6: *In advance of the European Commission's proposals for amendment to the Asylum Procedures Directive, UNHCR encourages the French Presidency to promote consideration of those aspects of the Directive which impede fair and efficient asylum processes in the EU.*

2.6. The establishment of an Asylum Support Office

UNHCR endorses the proposed creation of a European Asylum Support Office and would be ready to collaborate with such an Office, in line with UNHCR's mandate. The Asylum Support Office could assist the Commission with evaluation, monitoring and quality control, the identification of areas requiring new legislation, and the administration of additional tasks, including the expansion of practical cooperation among Member States.[44]

[44] See above footnote 37.

UNHCR welcomes the Justice and Home Affairs Ministers' recent encouragement to the Commission to develop further proposals in this regard to ensure effective support for practical cooperation,[45] and believes that a Support Office structure would be the most effective means to do so. In the context of its supervisory responsibility regarding application of the 1951 Convention, UNHCR would wish to contribute constructively to the work of the future Asylum Support Office.

Recommendation 7: *UNHCR urges the French Presidency actively to support the development of a European Asylum Support Office and a substantive and well-defined role for UNHCR within that Support Office.*

3. Securing durable solutions for refugees

3.1. Towards greater engagement in resettlement

In its work around the world, UNHCR promotes durable solutions for refugees, including voluntary repatriation to the country of origin when this can take place in safety and dignity, integration in the first country of asylum when this is possible, and resettlement. Resettlement involves the identification and transfer of refugees from a country in which they have sought asylum to another country which agrees to admit them as refugees for permanent settlement. Although resettlement can only benefit a modest number of the world's refugees, it is an important protection tool and way of demonstrating solidarity with countries hosting large refugee populations.

UNHCR welcomed the adoption of Council Conclusions first endorsing resettlement at EU level in 2004,[46] and has consistently encouraged greater engagement in resettlement on the part of EU Member States, including potentially through a common EU scheme.[47] In 2007, a modest 5% of the resettlement places available worldwide were in the European Union. Just seven Member States currently implement established resettlement programmes,[48] although several others – including France – are in the process of developing such programmes and the necessary legal and institutional framework. UNHCR will continue to contribute actively to efforts to expand EU participation in refugee resettlement, and welcomes the energetic contribution made to this endeavor by numerous European NGOs, as well as by the European Commission.

In the context of these efforts, UNHCR wishes to emphasize that resettlement is a complement to – and not a substitute for – the provision of protection to persons who apply for asylum in or at the borders of the EU. UNHCR advocates for a non-

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[45] Justice and Home Affairs Council, *Conclusions on Practical Cooperation in the Field of Asylum*, Luxembourg, 18 April 2008, at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/99991.pdf.

[46] Presidency Conclusions of the European Council of 4-5 November 2004, at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/82534.pdf.

[47] See above footnote 37.

[48] These are Denmark, Finland, Ireland, Netherlands, Portugal, Sweden and the U.K.

discriminatory, needs-based approach to the identification of refugees for resettlement. While supporting the capacity-building and resettlement components of the EU's pilot Regional Protection Programmes,[49] UNHCR believes that resettlement to the EU should not be limited to refugees from certain countries and regions.

Recommendation 8: *UNHCR urges the French Presidency to promote greater participation by EU Member States in worldwide refugee resettlement efforts, and to work with the Commission to expand the number of resettlement places in the EU.*

3.2. Towards facilitated integration of refugees and subsidiary protection beneficiaries – including through long-term residence rights

UNHCR welcomes the fact that France intends to organize a Ministerial Conference on Integration during its Presidency and hopes this will provide an opportunity to encourage Member States to take account of the specific situation of refugees and subsidiary protection beneficiaries, when designing integration measures.[50]

The 1951 Convention provides that States should foster the integration of refugees in their societies.[51] In this regard, UNHCR welcomed the proposal to amend Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents in an EU Member State,[52] to include refugees and subsidiary protection beneficiaries. The inclusion of both groups in the scope of the Directive on the Status of Long Term Residents would contribute to a more harmonized residence status for people with acknowledged international protection needs, and potentially to reducing secondary movements. UNHCR has consistently advocated for equal treatment of refugees and subsidiary protection beneficiaries, given that the protection needs of beneficiaries of subsidiary protection are often as compelling and as lengthy in duration as those of refugees.[53] The Office also proposed that the requisite five-year residency period be calculated from the date of lodging the application for protection.[54]

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[49] UNHCR, O*bservations on the Communication from the European Commission to the Council and the European Parliament on Regional Protection Programmes (COM(2005)388 final)*, 10 October 2005, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=436090204.

[50] UNHCR, *Note on the Integration of Refugees in the European Union*, May 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=463b24d52.

[51] Article 34 of the 1951 Convention, see above footnote 10.

[52] European Commission, *Proposal for a Council Directive Amending Directive 2003/109/EC to Extend its Scope to Beneficiaries of International Protection*, COM(2007)298 final, 6 June 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=466e5b582.

[53] In addition, Member States currently grant different forms of status to applicants from the same country of origin with similar reasons for seeking protection. For instance, in some Member States, Iraqi or Somali asylum-seekers are regularly recognized as refugees. In others, they are accorded only or mainly subsidiary protection.

[54] UNHCR, *Observations on the Commission Proposal for a Council Directive Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection*, 29 February 2008, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47cc017a2.

UNHCR also wishes to highlight that family separation is often an impediment to integration. Promoting and facilitating the reunification of refugee families not only enables refugees to enjoy their basic right to respect for family life,[55] but helps to promote their successful integration in their host country. UNHCR is concerned that strict criteria for family reunification and the absence of family reunification rights for subsidiary protection beneficiaries have a detrimental effect on integration and do not take into account the particular circumstances of people who have had to flee persecution and/or serious human rights violations.[56]

Recommendation 9: *UNHCR urges the French Presidency to promote measures to support the integration of refugees and subsidiary protection beneficiaries, and to work for amendment of the Directive on the Rights of Long Term Residents, to include both groups in its scope, as well as of the Directive on Family Reunification, to include subsidiary protection beneficiaries.*[57]

4. The global approach to migration and the "external dimension" of asylum policy

4.1. Building refugee protection capacity in third countries

In discussions on the "external dimension" of EU Justice and Home Affairs policy, UNHCR has consistently highlighted its support for cooperation with third countries, to strengthen their ability to provide international protection. UNHCR has welcomed EU activities directed at building the capacity of third countries to provide asylum, including through the development of legislation, institutions and processes for refugee protection.[58]

UNHCR works in more than 111 countries worldwide and is present in all key regions of origin, transit and asylum of asylum-seekers and refugees. In many of these countries, UNHCR's programmes enjoy support from the European Commission and the Member States. UNHCR has consistently underlined that the EU's engagement with third countries must be a complement to, and not a substitute for, the effective provision of protection in the EU for those in need of it.[59] This means that people requesting asylum

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55 K. Jastram and K. Newland, *Family Unity and Refugee Protection*, in: E. Feller, V. Türk and F. Nicholson (Eds.), *Refugee Protection in International Law*, Cambridge University Press, June 2003, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=470a33be0.

56 The proposed Long Term Residence Directive requires them to meet an economic means test on the same footing as other third-country nationals who are not in need of international protection (see above footnote 52). See also *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, see above footnote 19. The latter Directive, while proposing less restrictive requirements for refugees to seek reunification with their families compared to other third country nationals, contains no provision for family reunification of subsidiary protection beneficiaries.

57 UNHCR, *Comments on the Amended Proposal of the European Commission for a Council Directive on the Right to Family Reunification (COM(2002)225 final)*, 10 September 2002, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e4932de4.

58 See above footnote 49.

59 *Ibid*, paragraph 5.

in the EU or at its borders must be permitted to submit a claim, and to have it determined in a fair procedure in the EU.

The Hague Programme called on the Commission to undertake a study on "the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards … to be conducted in close consultation with UNHCR."[60] While awaiting this study with interest, UNHCR would not support an arrangement for transfer to a third country of asylum-seekers who have engaged the responsibility of EU Member States under international refugee law, whether by entering the territory of a Member State or being otherwise subject to its jurisdiction.[61]

Recommendation 10: *UNHCR encourages the Council, under the French Presidency's leadership, to continue to support programmes to build refugee protection capacity in third countries, while demonstrating leadership and solidarity by preserving and strengthening the EU's own asylum system.*

4.2. Migration, development and forced displacement

In October 2008, France will host a follow-up Conference to the July 2006 Rabat Euro-Africa Conference on Migration and Development. UNHCR is not a migration agency, but has an interest in ensuring that refugee protection finds its proper place in the range of States' responses to migration. For this reason, UNHCR participated at the Rabat Conference in July 2006 and shared some observations.[62] UNHCR welcomes the fact that the Rabat Declaration affirmed the will of States to "work together, following a comprehensive, balanced, pragmatic and operational approach" and to "provide adequate international protection in accordance with the international obligations of the partner countries."[63]

The October 2008 Conference will focus on three areas: legal migration, irregular migration and migration and development. UNHCR has an interest in each of these areas insofar as people in need of international protection are concerned.

Asylum-seekers and refugees are a relatively small part of the larger phenomenon of international migration, yet they frequently use the same routes as migrants. Systems developed to manage migration must be capable of identifying persons seeking international protection, and respond to their needs. Border and migration control

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60 See above footnote 16.

61 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4.

62 Statement by António Guterres, United Nations High Commissioner for Refugees, Euro-African Ministerial Conference on Migration and Development, Rabat, Morocco, 10-11 July 2006, at: http://www.unhcr.org/admin/ADMIN/44b254654.html

63 Euro-African Ministerial Conference on Migration and Development, *Rabat Declaration of the Euro-African Ministerial Conference on Migration and Development*, 11 July 2006, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4694d2ea2.

measures therefore should incorporate measures to ensure that persons seeking protection are not at risk of *refoulement*, and have access to the territory of States where their protection needs can be assessed.

Moreover, a well-managed legal migration policy may help to relieve pressure on asylum systems. To the extent that refugees may make use of legal migration options, these can also complement the classic durable solutions for refugees. UNHCR further believes that refugees can be agents of development if they are provided with an opportunity to make use of their skills and productive capacities while living in a country of asylum. UNHCR encourages the international community to extend development assistance to areas hosting refugees and to ensure that such areas are incorporated into national development plans. Similarly, when repatriation is possible, the development agencies should be involved in planning for the reintegration of former refugees, as their return to their areas of origin can make an important contribution to a country's development.

These considerations are also relevant for the discussions at the planned meeting of Directors-General of Immigration of countries participating in the ASEM process, on the Management of Migration Flows between Asia and Europe, which is expected to take place in France during the Presidency.

Recommendation 11: *UNHCR urges the French Presidency to ensure that the forthcoming EU-Africa Ministerial Conference, and other relevant regional forums, recognize that comprehensive approaches to migration and development need to address the situation of people who have been compelled to leave their countries owing to persecution, conflict or human rights violations.*

Conclusion

As France launches its Presidency with a particular focus on asylum, UNHCR remains convinced that the EU has a vital role to play in refugee protection worldwide. Continued efforts, rigorous analysis and political leadership will be needed to ensure that the future Common European Asylum System will reach its protection-oriented objectives in a 'Europe of asylum'.

The French Presidency can contribute to this objective by leading a principled and far-reaching debate on the changes that are required, not only to legislation but also to the practice of Member States, in order to remedy the problems posed by existing divergent practice. Inconsistent and sometimes unsatisfactory quality in asylum decision-making must be acknowledged and addressed. Regardless of how far Member States decide to proceed in integrating their asylum systems, it must be possible for all asylum-seekers in or at the frontiers of the EU to gain access to and receive a fair decision from an effective asylum procedure. This, in UNHCR's view, will require further investment in practical support mechanisms to assist Member States whose capacities need reinforcement, as well as in effective monitoring, quality assurance and, where necessary, enforcement.

Migration management is a legitimate policy priority for all Member States. However, under France's Presidency, UNHCR wishes to see further acknowledgement of the critical role of safeguards for asylum-seekers in all border, migration, return and related policy areas. UNHCR has consistently supported the EU's engagement with third countries in the asylum and migration fields. However, such engagement must continue to emphasize not only the EU's interests, but the specific needs of the concerned countries, and promote respect for and adherence to the international protection regime as a whole.

UNHCR
June 9, 2008