



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

**The Hague Programme two years on:
UNHCR's Recommendations to the German Presidency of the European Union
January-June 2007**

The Federal Republic of Germany assumes the Presidency as the mid-point in the Hague Programme approaches, two years after the Council adopted its ambitious agenda for 'Strengthening Freedom, Security and Justice in the European Union'.¹ While progress has been made on asylum and refugee protection, much remains to be done to fulfil the objective of improving 'the common capability of the Union and its Member States to ... provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need'.² In this paper, UNHCR highlights several important areas affecting the rights of people with international protection needs, and offers constructive suggestions to take these issues forward.

Asylum remains a sensitive issue in many States, despite the marked decrease in asylum applications across Europe.³ Broader questions of migration management, which affect access to protection, are at the centre of debate throughout the European Union today, especially in Member States with external EU borders. Effective responses to asylum and migration challenges must thus be a priority, notwithstanding competing demands for political attention.

Several important initiatives relating to asylum require the Council's attention in early 2007. These include measures to further develop asylum policy and practice within the EU (the 'internal dimension'), and to uphold protection principles in the EU's interaction with third countries (the 'external dimension'). In the context of migration management, the challenge is to ensure that people arriving at the Union's external borders who seek international protection will have access to EU territory and to systems allowing fair and effective examination of their claims.

Protection in Europe: Policy Challenges

Completing the Common European Asylum System: Form and Content

The Hague Programme speaks of the second phase of development of the Common European Asylum System (CEAS), involving 'a common asylum procedure and uniform status', and calls for its completion by 2010. It does not, however, spell out the elements of the envisaged system, including its practical operation, structures or outputs, nor the degree of central regulation it should entail.

¹ Hague Programme, OJ C 53/1, 3.3.2005

² *ibid*, Introduction, paragraph 6

³ Asylum Levels and Trends in Industrialized Countries, Second Quarter 2006, <http://www.unhcr.org/statistics/STATISTICS/450fa85d2.pdf>

UNHCR proposes that the Presidency initiate a preliminary discussion, involving Member States as well as non-State experts and stakeholders, on what form the CEAS might take, and how best to complete its establishment. Whilst a fully informed and structured discussion can be expected after issuance of the Commission's planned Green Paper in mid-2007, there would be benefits in an earlier exchange of views. A seminar could be held to examine various options, including EU-led, or nationally- or regionally-driven arrangements. This could also help to prepare the ground and test the receptiveness for later proposals.

Recommendation: The Presidency is encouraged to facilitate a discussion, in a spirit of partnership, on what Member States envisage and expect from the establishment of the Common European Asylum System. This could help guide the development of proposals on how to achieve a common asylum procedure and uniform status.

Quality of Asylum Decision-Making and Practical Cooperation

In its observations on the Commission's Communication of 17 February 2006,⁴ UNHCR stated that the central aim of strengthened practical cooperation and further EU asylum harmonization should be to improve the quality of decision-making. It is in the interest both of States and asylum seekers to reduce current differences in the approaches to and decisions made on claims from similar applicant groups. Decision-making in practice should not be harmonized at the level of the 'lowest common denominator', but rather at a high standard of quality in analysis and interpretation of protection claims and criteria.

UNHCR has worked with Member States over many years to strengthen asylum processes, including claim assessment and decision-making. In discussions on practical cooperation, the Office encourages Member States, under the Presidency's leadership, to exchange views and experiences on how to maintain efficient and accurate first instance processes. UNHCR is prepared to contribute to discussions on how selective independent monitoring of decisions, and the provision of constructive feedback to authorities, has benefited asylum countries in the past.

In early 2007, the Commission will continue work towards greater collaboration in compiling, assessing and applying country of origin information ('COI'). UNHCR encourages the Presidency and the Commission to ensure expert input from various sources, including international and non-governmental organizations. A broad discussion can help to ensure that proposals for common guidelines on the use of COI, on a common 'COI portal', and potentially an EU COI database, build on existing tools (including UNHCR's RefWorld) and lessons learned, while respecting fundamental principles relating, among others, to confidentiality of claimant data.

⁴ UNHCR Observations on the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation (COM(2006) 67 final), 25 April 2006, <http://www.unhcr.org/home/RSDLEGAL/444f533d4.pdf>

Recommendation: The Presidency is invited to lead discussion on how States have sought to achieve and maintain high quality asylum decision-making, in order to promote good practice. Constructive input should be invited from UNHCR and other expert third parties on this and other aspects of practical cooperation, including development and use of COI.

EU Resettlement

UNHCR strongly supports the idea of a common EU resettlement programme, as contained in Council Conclusions in 2004. It urges the Presidency and the Member States to consider a wider concept of resettlement, extending beyond countries identified under 'Regional Protection Programmes'. UNHCR is ready to support this endeavour. In the absence of progress toward a common programme, UNHCR encourages existing resettlement countries to expand their programmes, and invites others to consider new schemes.

Recommendation: The Presidency is encouraged to promote the development of a common EU resettlement programme and to work with States to increase the total number of resettlement places available throughout the EU.

Integration

UNHCR welcomes the EU's intensified focus on integration as a priority area on which Member States can productively exchange experience, good practice and concerns. While refugees and people with subsidiary protection benefit from wider integration programmes, they may have special needs, such as help to overcome trauma, which should be considered when planning integration strategies. Many refugees and people with subsidiary protection have significant positive contributions to make to host societies.

In the context of resettlement, States have the opportunity to prepare tailored programmes to ensure the successful integration of resettled refugees, and a positive response from receiving communities. This in turn will facilitate integration of other refugees and beneficiaries of subsidiary protection. Similarly, a concerted integration effort will advance the preparedness to consider or increase resettlement and help pave the way for a common EU resettlement scheme.

Recommendation: In developing integration policies and programmes, EU States and institutions should take the special needs and potential of refugees and subsidiary protection beneficiaries into account. Targeted integration arrangements for resettled refugees can help to ensure the success of resettlement programmes for beneficiaries and host communities alike.

Progress on EU Asylum Legislation

Long-term Residence Rights of Refugees and Subsidiary Protection Beneficiaries

The Council Directive concerning the status of third-country nationals who are long-term residents⁵ ('Directive on long-term resident status') excludes refugees and people granted subsidiary protection from its scope.⁶ As a result, refugees and subsidiary protection beneficiaries who reside lawfully in and contribute to communities in Member States for many years do not, under EU law, enjoy the same rights as other legally resident third country nationals, such as freedom of movement within EU territory and other entitlements, including in respect of employment, education and vocational training and recognition of professional qualifications, among others.

A proposal for amendment to the Directive on long-term resident status is expected soon from the Commission. The German EU Presidency is encouraged to work with the Commission to ensure that this proposal is issued, and to start substantive negotiations on it in the coming months. The adoption of provisions which take into account the special position of refugees and subsidiary protection beneficiaries will close a long-standing gap in the legal framework established in the first phase of asylum harmonization.

Recommendation: The Presidency is invited to call on the Commission to issue its proposal for amendment of the Directive on long-term resident status, and facilitate early progress on substantial negotiations.

Common Standards for Returns

A Directive on common standards for returning illegally staying third-country nationals is also on the Council's legislative agenda. Given that people of concern to UNHCR – notably asylum seekers whose claims have not received substantive examination – are susceptible to removal from EU territory, UNHCR has called for Member States to ensure that the standards provide safeguards for people who need international protection, including against *refoulement*, and ensure that removals occur in a manner consistent with basic rights and human dignity.

UNHCR encourages the Presidency to facilitate agreement on a text which will meet these conditions. Balanced and principled compromise proposals are needed to address concerns regarding the current text. These concerns include the absence of safeguards for asylum seekers whose claims have not been addressed in substance, a wide-ranging re-entry ban which could deny access to protection for people requiring it in the event of changed circumstances in their home countries, the need to respect the best interest of children, and lengthy detention periods, among others.

⁵ Council Directive 2003/109/EC of 23 November 2003, OJ L 16/44, 23.1.2004

⁶ *ibid*, article 3(2)(c) and (d)

Recommendation: The Council, under the Presidency's leadership, is encouraged to ensure that the draft Returns Directive⁷ includes adequate safeguards for people potentially in need of protection, including the prohibition of *refoulement*, and that it ensures respect for human rights and dignity.

Dublin II Regulation

The Council Regulation 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 national⁹ (the 'Dublin II Regulation') will be addressed in a report from the Commission to the Council and Parliament in early 2007. In its April 2006 report on Dublin II,¹⁰ UNHCR made a number of recommendations and expressed concerns, particularly about the Regulation's human impact and consequences for asylum seekers' ability to pursue their claims effectively. UNHCR called for guarantees of effective remedy against Dublin II decisions in all Member States, an assurance of a full and fair examination of claims before removal from the EU, and clarification that minimum reception standards apply to people subject to the Dublin II Regulation.

UNHCR also highlighted the Regulation's acknowledgment of the special needs of separated children and families, the best interest of children, and the possibility for States to accept responsibility on humanitarian or other grounds at their discretion, as key principles which should be strengthened. UNHCR calls on the Presidency to ensure that these aspects are at the centre of discussions on Dublin II. While greater efficiency and consistency are important goals – along with reducing secondary movements and 'abuse' – they should not be at the expense of asylum claimants, including families and children, who may face long periods of uncertainty, restrictions of their basic rights, and problems gaining access to fair claim determinations. Substantive amendments to the Regulation and related instruments should be made to reinforce the system in protection terms, notwithstanding the sensitivity and technical nature of the negotiations this could entail.

The need for solidarity or responsibility-sharing mechanisms to assist States which face large or complex asylum caseloads has also been raised in recent Council debates. Any discussion on a systematic responsibility-sharing mechanism should consider whether and how to adapt Dublin II to support such arrangements. The Office encourages the Presidency to facilitate a transparent debate on the Dublin II system and its impact.

⁷ COM (2005) 391 final, 1.9.2005

⁹ OJ L 50/1, 25.2.2003

¹⁰ UNHCR, 'The Dublin II Regulation: a discussion paper', April 2006, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RSDLEGAL&id=4445fe344>

Recommendation: After issuance of the Commission's report on implementation of the Dublin II Regulation, Germany is encouraged to lead an in-depth discussion on the need for adjustment to the Dublin II system, to address shortcomings in protection and humanitarian principles or practice. Responsibility sharing measures may also necessitate changes to the Regulation or other aspects of Dublin II's operation.

Monitoring Transposition of Asylum Directives

A Commission report on progress in transposition of the Reception Conditions Directive¹¹ is expected soon. This report will draw on the findings of an independent study by the Odysseus academic network. It will be the first to examine substantive compliance by Member States with an asylum Directive. As such, it represents a new approach and a framework for discussion among States and other stakeholders on the problems and good practices which have emerged.

The Presidency is urged to ensure that a transparent and substantive discussion takes place on the findings. Such a discussion should encompass not only an analysis of State compliance, but also problem areas and gaps in the Directive itself – including its application to people in detention, and the absence in practice of special measures for vulnerable people.

The question of methodology for monitoring transposition is particularly important, as early 2007 will see the launch of other EC-funded studies of the transposition of asylum and migration Directives. These studies will have considerably fewer resources and more constraints than those applying to the Reception Conditions review, raising concerns about potential impact on the quality of the studies. UNHCR urges States and institutions to consider the observations of others with expertise and involvement in national asylum processes, including international and non-governmental organizations. This will be particularly necessary for the Qualification and Asylum Procedures Directives, given their complex nature and content.

Monitoring activities will have a significant impact on the further development of the EU asylum system. The Hague Programme calls for an evaluation in 2007 of 'first phase legal instruments', which should form the basis of proposals for second-phase measures leading up to 2010. The Presidency should support the Commission in preparing and carrying out its evaluation, and ensure that it receives the cooperation and resources required to do so effectively. UNHCR can also play a constructive role in assessing the adequacy of and gaps in the instruments adopted to date, complementing the work of the Commission.

Recommendation: As monitoring of first phase instruments progresses, the Presidency is encouraged to facilitate active discussion on the findings, as well as the potential need for amendment of the Directives. The Presidency and Commission are invited to include UNHCR as an expert body and contributor to the evaluation process.

¹¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 06.02.2003

Beyond the EU: Border Management and Cooperation with Third States on Asylum

Migration, Border Management and International Protection

The German Presidency has an opportunity to lead discussion of important new proposals on migration management and protection, following publication by the Commission, on 30 November 2006, of its Communications on 'Reinforcing the management of the European Union's Southern Maritime Borders'¹² and 'The Global Approach to Migration one year on: Towards a comprehensive European migration policy'.¹³ These documents, as well as other recent debates on Europe's migration challenges, have acknowledged that a key concern is to ensure that people can access mechanisms through which claims for international protection can be heard.

Even though many people arriving at the EU's external borders are not in need of protection, and in many cases do not ask for asylum, the EU must make sure that its responses to irregular migration fully respect the 1951 Convention on the Status of Refugees and the EU asylum *acquis*. Although attention has focussed recently on the EU's Mediterranean frontiers, significant movements also occur at the EU's Eastern borders. UNHCR welcomes the Presidency's intention to focus also on the Eastern border area. UNHCR's own monitoring activity and cooperation with authorities in this vital region have yielded important progress in ensuring access to international protection. With its well-developed collaboration with countries on both sides of this frontier, UNHCR is in a good position to contribute actively to discussion of how to address this issue, including such aspects as reception and referral arrangements, training of personnel, and responses to particularly vulnerable people.

UNHCR has made a substantive contribution to the migration management discussion as it impacts on asylum, in its 'Addressing Mixed Migratory Movements: A 10-Point Plan of Action' issued in June 2006.¹⁴ This document contains practical and policy elements to help States respond to migration challenges, in a way that addresses the needs of people seeking protection. Among these are activities and principles which underscore that reinforced border controls and barriers to entry cannot alone provide the answer to large-scale arrivals at the Union's frontiers.

UNHCR has also published an activity 'matrix' for implementation of the Ten-Point Plan of Action in Southern Europe which includes suggestions for protection-sensitive entry management,¹⁵ and is developing a similar catalogue of actions for other regions, including the EU's Eastern border. The Presidency is invited to study these and to facilitate discussion among interested States on how such actions could contribute to effective and comprehensive responses to changing patterns of movement.

¹² COM(2006) 733 final, 30.11.2006

¹³ COM(2006) 735 final, 30.11.2006

¹⁴ <http://www.unhcr.org/protect/PROTECTION/44b25a784.pdf>

¹⁵ 'Implementing the Ten-Point Plan of Action in Southern Europe: Activities Undertaken by UNHCR to Address Mixed Migration in the Context of the Mediterranean/Atlantic Arrivals', 2 October 2006
<http://www.unhcr.org/protect/PROTECTION/452ce4cd4.pdf>

The Office further welcomes the Commission's recent proposal for the Frontex Agency to work with UNHCR on protection aspects of border management, and looks forward to developing this cooperation.

Recommendation: The Presidency is encouraged to lead discussion on protection-sensitive border and entry management, including safeguards to guarantee access to asylum procedures for people arriving at EU frontiers who may be in need of international protection, as part of the EU's response to migration challenges.

Building Protection Capacity in Countries of Origin, Transit and Asylum

The EU has invested substantially, in political and financial terms, in regions of origin and transit of refugees, asylum seekers and people who move for other reasons. The Rabat and Tripoli Ministerial Conferences of July and November 2007 signalled a new engagement between the EU and Africa for closer dialogue and cooperation on migration and development issues. UNHCR welcomes States' recognition, as expressed in the final declarations of both meetings, of the critical place of international protection principles in migration management. It is hoped that these steps will be followed by strong encouragement from the EU of more progress from those States which in the past have not given high priority to protection concerns, laws and institutions.

UNHCR reiterates its support to EU efforts to build protection capacity in regions of origin and transit. Many third countries receive vital financial assistance from the EU, enabling them to establish and maintain competent asylum authorities, provide reception facilities, raise public awareness and carry out associated tasks.

At the same time, UNHCR emphasizes that engagement with third countries on asylum must be complementary to, and not in substitution for, the provision of effective protection in the European Union for people arriving at its borders. Capacity-building activities must also be targeted genuinely at the needs of the third countries in question; such an approach is more likely to yield a sense of ownership and practical engagement from States in regions of origin of transit.

Capacity-building is a key part of the EU's pilot 'Regional Protection Programmes', in connection with which UNHCR will begin implementing projects in Tanzania and the Western Newly Independent States (WNIS) in early 2007, following signature of funding contracts with the Commission expected in late 2006. UNHCR is also preparing to implement projects with EC 'Aeneas' funds in other regions, to improve access to and the quality of protection. The Office is ready to discuss these projects with the Presidency and Member States, and hopes to raise awareness of the needs and complexities associated with programmes of this kind, as well as their importance for people in need of protection.

Recommendation: The EU should be supported in its efforts to develop and implement capacity-building which aims at strengthening asylum laws, institutions and infrastructure in third countries. Such activities are additional to, and not in substitution for, the provision of asylum in the EU. The EU should also encourage third States to prioritize asylum and refugee protection.

Durable Solutions and Development

Every year, the EU invests large amounts of humanitarian aid in third countries and regions facing conflict and other crises which cause widespread displacement. In the medium to longer term, a major challenge in many of these States lies in achieving durable solutions to forced displacement. This can include helping refugees to be self-sufficient in countries of asylum, as well as permitting displaced people to return to their homes and resume productive lives.

Forced displacement and return can place significant demands on the scarce resources of host communities, and may even be a destabilizing factor. Given the opportunity, however, refugees and returnees can be agents of development, contributing actively to the economy in the areas where they live and to which they return. Experience shows that by including refugees, displaced people and returnees in development programmes, States can help to ensure the sustainability of solutions.

UNHCR encourages the Presidency to lead discussion on how to help countries of origin and asylum to address the needs of displaced people, in order to ensure the effectiveness and lasting nature of solutions, and to promote inclusion of this issue in national and regional poverty-reduction and development strategies. The Office is ready to contribute to such discussions, including among EU Ministers of Development Cooperation.

Recommendation: Discussions on humanitarian aid, migration and development among EU Ministers should address ways to achieve sustainable solutions to situations of forced displacement. UNHCR would be pleased to contribute its worldwide experience to such deliberations.

Conclusion

On the eve of the German Presidency, UNHCR welcomes the opportunity to set out its priorities, and encourages the Presidency to give attention to these areas. There is a need not only to complete the work started in the first phase of asylum harmonization, but also to fill gaps in the legislative and policy framework. This becomes increasingly important, as the EU works to develop comprehensive migration management strategies which are consistent with Member States' protection obligations.

UNHCR, December 2006