



UNHCR

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

**UNHCR's Recommendations for
Portugal's European Union Presidency
July-December 2007**

1. Protection in the European Union: the 'internal' dimension of asylum

UNHCR encourages Portugal to lead substantive discussions to advance towards a Common European Asylum System based on the "full and inclusive application of the Geneva Convention", as pledged by the EU Council at Tampere in 1999 and at The Hague in 2004.¹ Persons requesting protection within the European Union (EU) or at its borders must be able to have their protection needs assessed. The laws and practice of Member States on asylum continue to differ markedly, and do not always ensure effective access for asylum-seekers to full and fair status determination procedures.

Next steps for the Common European Asylum System: The Green Paper and the evaluation of first-phase legal instruments

During Portugal's Presidency, the European Commission will solicit input on steps which should be taken in the development of the Common European Asylum System (CEAS), based on questions asked in its Green Paper issued on 6 June 2007.² UNHCR welcomes the Commission's intention to consult with a wide group of stakeholders, including governmental and non-governmental actors, and expects that all submissions will be made public, to enable a transparent exchange of views.³ The Office appreciates the Green Paper's broad scope, and its acknowledgement that many gaps exist in the current system. UNHCR encourages the Presidency and Council to demonstrate the political will to make substantive changes where required.

Recommendation: UNHCR encourages Portugal to lead discussions among the Member States on the results of the Commission's consultation and on the future of the Common European Asylum System, keeping in focus the primary goal of ensuring high standards of protection in the EU and consistency with the 1951 Refugee Convention.

¹ Art. 13 of the Tampere European Council Presidency Conclusions, 15-16 October and paragraph 6 of the introduction to The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (OJ C53/1, 03.03.2005).

² Green Paper on the future Common European Asylum System (COM(2007) 301 final).

³ UNHCR will be issuing its own response to the Green Paper and will participate in the public hearing.

Key instruments adopted in the first phase of asylum harmonization will be evaluated during the Portuguese Presidency, and the evaluation results discussed. All such evaluations must be thorough and independent, with a view to determining whether the instruments and the practice of Member States effectively ensure full respect for the basic rights and human dignity of asylum-seekers and people in need of international protection.

The first published evaluation relates to the Dublin II system⁴ and reveals significant divergence in Member States' interpretation and application of this instrument. UNHCR and other observers have also highlighted various problems, including the fact that applicants wait for long periods for the State responsible for their applications to be identified, and their claims addressed; a lack of systems to determine and ensure respect for the best interest of the child; failure to respect family unity; inadequate access to remedies for people wishing to challenge Dublin II decisions, and others.⁵ They have further drawn attention to the need for responsibility-sharing measures to redress the consequences of Dublin II for some Member States, notably those along the external frontiers of the Union.⁶

The Commission is also expected soon to issue its evaluation report on the Reception Conditions Directive. UNHCR observes that transposition and implementation of this instrument is far from complete. It is particularly concerned that while the Directive requires States to address the needs of vulnerable asylum-seekers, systems are often not available in practice to identify such persons, provide concrete support and ensure delivery of the treatment they need.

Recommendation: UNHCR encourages the Presidency to facilitate a transparent debate about the adequacy of the instruments adopted in the first phase of work toward a Common European Asylum System, and to propose concrete measures - including new legislation where needed - to address the gaps in the current legal framework, as well as those between EC asylum law and State practice.

Long-term residence rights

UNHCR welcomes the Commission's proposal to amend the Council Directive concerning the status of third-country nationals who are long-term residents, in order to

⁴ Council Regulation (EC) 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 L50/1 of 25.02.2003) and 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, 11.12.2000).

⁵ The Dublin II Regulation. A UNHCR Discussion Paper (April 2006).

(<http://www.unhcr.org/home/RSDLEGAL/4445fe344.pdf>).

and ECRE, The Dublin Regulation: Ten Recommendations for Reform (March 2007).

(http://www.ecre.org/resources/responses_recommendations/799).

⁶ The Dublin II Regulation. A UNHCR Discussion Paper (April 2006), p.2.

extend its scope to persons who enjoy international protection in the EU.⁷ Refugees and subsidiary protection beneficiaries who reside lawfully in and contribute to communities in Member States should be entitled to the same rights under EC law as other legally resident third country nationals, including free movement and residence rights in EU Member States, as well as entitlements to work, receive education and training, and to recognition of their professional qualifications, among others. This could also help to relieve disproportionate pressures on certain Member States, by enhancing the mobility prospects of refugees and beneficiaries of subsidiary protection. However, UNHCR considers that the period of five years which refugees and subsidiary protection beneficiaries will have to wait to qualify for long-term residence status is excessive, in view of their particular situation.

Recommendation: UNHCR encourages the Presidency to move swiftly toward adoption of the proposed amendment to the Directive on long-term residence status, in order to close a long-standing gap in the legal framework on asylum.

Harmonising approaches to protection: the case of asylum seekers from Iraq

UNHCR is concerned that the responses of EU Member States to requests for asylum from Iraqis vary enormously, and in some cases are seriously deficient. UNHCR's ongoing analysis of State practice under the Qualification Directive reveals widely disparate approaches to Iraqis as well as to other groups of asylum seekers, and raises concerns about the extent to which all persons in need of protection are indeed able to find protection in EU Member States.

Some Member States recognize the protection needs of virtually all Iraqi asylum seekers, while in others, Iraqis remain without meaningful protection. One State has suspended decision-making at second instance, and another is revoking the refugee status of many people who fled before 2003. Treatment also varies of Iraqis whose applications for protection are rejected but who cannot return, owing to the situation in Iraq.

UNHCR reiterates its position that persons from Central and Southern Iraq should be favorably considered for refugee status, and that those found not to qualify for refugee status should benefit from subsidiary protection, barring any exclusion considerations.⁸

Recommendation: UNHCR calls on the Portuguese Presidency to lead discussions on how to address Member States' diverging approaches to the assessment of protection needs of Iraqis, which in many cases depart from UNHCR's guidance.

⁷ Commission Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection (COM(2007)298 final).

⁸ UNHCR Return Advisory and Position on International Protection Needs of Iraqis outside Iraq (18 December 2006) (<http://www.unhcr.org/publ/RSDLEGAL/458baf6f4.pdf>).

2. International migration and refugee protection

Migratory flows toward the EU include people in need of international protection as well as those on the move for other reasons. UNHCR has consistently highlighted the need for migration and border management strategies to be 'protection-sensitive', that is, to incorporate safeguards ensuring that people seeking asylum have access to territories and to full and fair procedures, where their protection needs can be assessed.

Migration and border management

UNHCR acknowledges the right of States to control their borders. However, border management must be done in a protection-sensitive way, so that persons seeking refuge from persecution and human rights violations can reach safety. UNHCR has developed a "Ten Point Plan" of action⁹ proposing practical strategies for addressing the challenges of mixed migration in a way which respects the rights of persons seeking international protection.

UNHCR notes that the tools available for management of the EU's external borders are expanding, including with the entry into force of the Schengen Borders Code and the anticipated adoption of a new Regulation on Rapid Border Intervention Teams ('RABITs').¹⁰ These new tools must also be applied in a protection-sensitive manner.

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 protection obligations under the 1951 Convention.¹¹ However, it is not clear how this is assured in practice in the context of border control operations. Greater clarity is required about the conduct of such operations, including the identification of people who may be seeking international protection, and how examination of their claims is assured.

⁹ Refugee Protection and Mixed Migration: A 10-Point Plan of Action.

(<http://www.unhcr.org/home/RSDLEGAL/44ca0eda4.pdf>) and 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 (<http://www.unhcr.org/protect/PROTECTION/452ce4cd4.pdf>).

¹⁰ Proposal for a regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism (COM(2006)401).

¹¹ Council Regulation (EC) No 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, 25.11.2004, p. 1–11) 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 and Frontex have begun discussions on cooperation, as foreseen in the Frontex Regulation¹² and proposed by the Commission in its Communication on Reinforcing Management of the EU's Southern Maritime Borders.¹³ UNHCR is willing to collaborate with Frontex to ensure that personnel deployed on joint operations are trained in the essential principles of international law and refugee protection. Guidance would appear also to be necessary on how border operations can be carried out in a way that ensures consistent respect for international refugee law. UNHCR calls on the Presidency and other Member States to support development of this cooperation in relevant priority areas, including training, exchange of information relevant to risk analysis, and others.

UNHCR welcomes the intention of the Portuguese Presidency to address border management policy and related challenges. The Office encourages the Presidency to ensure that safeguards for people potentially in need of international protection are included in these discussions, in particular the need for asylum seekers to receive access to claim determination procedures following interception, rescue at sea and border control operations.

Recommendation: UNHCR urges the Portuguese Presidency to take up the complex issues around border management, to ensure that measures taken by the EU or its Member States to deter irregular migration do not result in violations of basic rights, including the right of access to effective asylum procedures. Discussions among Member States on border policies and tools, including RABITs and joint operations coordinated by Frontex, should address protection concerns directly.

Rescue at sea and disembarkation

UNHCR is gravely concerned by recent incidents in the Mediterranean,¹⁴ and recalls not only the obligation of ship masters to render assistance to persons in distress at sea, but the corresponding obligation of States to co-operate in rescue situations - including by allowing persons rescued at sea to be delivered promptly to a place of safety.

UNHCR reiterates the importance of ensuring that the rights of persons seeking international protection are respected, whether in the context of movements across land borders or maritime frontiers. Recent incidents involving vessels in the Mediterranean and Atlantic seas have highlighted the lack of clarity regarding responsibilities in the context of interception and rescue at sea.

¹² *ibid.*, Art. 13.

¹³ Communication from the Commission to the Council: Reinforcing the management of the European Union's Southern Maritime Borders (COM(2006)733 final). (<http://europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=COM:2006:0733:FIN:EN:PDF>).

¹⁴ UNHCR Briefing Notes of 1 June 2007 (<http://www.unhcr.org/news/NEWS/4660020820.html>).

Recommendation: UNHCR urges the Portuguese Presidency to focus attention on the unqualified obligation of ship masters to render assistance to persons in distress at sea. It is also important to work to resolve the lack of clarity concerning which State should take responsibility for disembarkation, reception, identification of passengers and, in the case of asylum seekers, examination of claims and provision of protection. Guidelines on the implementation of international legal obligations at sea are an important priority. UNHCR is prepared to participate in these efforts.

Irregular migration: protection of victims of trafficking, data protection principles and standards for return

EU measures on irregular migration include initiatives to fight trafficking in human beings.¹⁵ This work should also draw on international protection principles, and acknowledge that refugees are often easy prey for traffickers, and that victims of trafficking may be in need of international protection.

UNHCR notes that the Visa Information System ('VIS') should be launched by end 2007 and that work towards the adoption of the second generation of the Schengen Information System (SIS II) is ongoing. UNHCR welcomes the fact that these instruments explicitly state that their provisions are subject to Member States' obligations under the 1951 Refugee Convention. Continuous efforts will be needed to ensure that the 1951 Convention's international protection principles are also observed in practice.

With respect to the scope for interaction between the VIS, SIS II and Eurodac databases, and access for law enforcement authorities to all three tools, UNHCR remains concerned about the absence of sufficient data protection safeguards for persons whose fingerprints are registered in Eurodac. As a database designed to facilitate determination of which Member State is responsible for examining an asylum claim, Eurodac was never intended as a law enforcement tool. Asylum seekers should not be exposed to a greater likelihood of criminal suspicion, investigation or prosecution simply because they are registered in EU databases.

On return of persons not in need of protection, UNHCR notes that Member States are expected to examine alternatives to the initial draft Directive on common standards on return, as proposed by the Commission at the end of 2005.¹⁶ UNHCR strongly encourages the Portuguese Presidency to support efforts to establish standards for return which respect fundamental rights and refugee protection principles. Concerns with the

¹⁵ Key legal measures in this field include 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 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0081:EN:HTML>).

¹⁶ Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (COM(2005)391 final). (<http://europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=COM:2005:0391:FIN:EN:PDF>).

present proposal 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. As operational cooperation develops, and substantial Community assistance under the Return Fund becomes available, it becomes increasingly important to have EC norms which provide legal safeguards and redress for persons facing removal, including vulnerable people and those in detention, and notably asylum seekers who have not had a substantive determination of their claims in the EU.

UNHCR remains concerned that persons seeking protection may be sent out of the EU in the context of readmission agreements without having had their asylum applications examined in substance.¹⁷ It is vital that parties to such agreements adhere to protection principles, including the prohibition on *refoulement*. Transparency in the implementation of these agreements would help to allay concerns.

Recommendation: EU policies on migration, including legal as well as irregular migration, should acknowledge their potential impact on people in need of international protection. The Presidency and Council are encouraged to ensure that measures to fight trafficking, to promote information exchange on third country nationals, and to facilitate removal and readmission, are balanced with safeguards to ensure respect for basic rights, including the right to asylum.

3. Cooperation with third countries on refugee protection: the 'external' dimension of EU asylum and migration policy

The joint programme of the German, Portuguese and Slovenian Presidencies pledged to 'give priority to asylum and migration policy in the Community's external relations policy', and to 'place emphasis on the dialogue with countries of origin and transit'.¹⁸ Following the Commission's Communication on 'Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European

¹⁷ The Council has so far authorised the Commission to negotiate Community readmission agreements with 16 third countries: Morocco, Sri Lanka, Russia, Pakistan (September 2000), Hong Kong, Macao (May 2001), Ukraine (June 2002), Albania, Algeria, China, Turkey (November 2002), Montenegro, FYROM, Serbia, Bosnia and Herzegovina (November 2006) and Moldova (December 2006). Negotiations have been successfully completed with Hong Kong (November 2001), Macao (October 2002), Sri Lanka (May 2002), Albania (November 2003), the Russian Federation (September 2005), Ukraine (October 2006), Bosnia and Herzegovina, FYROM, Montenegro, Moldova (April 2007) and Serbia (May 2007). The readmission agreements with Hong Kong, Macao, Sri Lanka, Albania and the Russian Federation have entered into force.

¹⁸ Outline of the joint working programme of the German Presidency and future Portuguese and Slovenian Presidencies from Jan 2007-June 2008 in the fields of Asylum, Immigration, Borders and Visa Policy, Council Document 5041/07, JAI 2, ASIM 1, Brussels, 8 January 2007.

Union'¹⁹, the Portuguese Presidency is expected to lead further discussions on the EU's activities concerning these regions, which include important areas of origin and transit of asylum seekers and refugees.

UNHCR welcomes the EU's constructive engagement with third countries on migration and asylum, including the investment of Community resources in refugee protection capacity-building activities. It also supports dialogue and collaboration on asylum and migration through regional processes and partnerships, including the European Neighbourhood Policy, the EuroMed process, and EU-Africa relations. However, such assistance and cooperation should always be complementary to – not in place of - access to protection in the EU.

Portugal is expected also to oversee discussions on the future of 'Regional Protection Programmes', which refer to protection capacity-building and resettlement activities in selected regions.²⁰ UNHCR welcomes the EU's interest in promoting the development of asylum processes, institutions and laws in third countries,²¹ but urges the Commission and Member States to maintain realistic expectations about what these activities can achieve, in view of the limited sums available and the complex challenges in the regions concerned.

Cooperation with States in the Mediterranean region is a priority for the EU and for UNHCR. The Presidency will host a Euro-Mediterranean Ministerial Meeting on migration on 17-18 November 2007 in Lisbon, which *inter alia* aims at 'strengthening management of migratory flows, to the benefit of peoples in the whole Mediterranean region'.²² UNHCR urges the Presidency and Member States to ensure that asylum and refugee protection concerns are reflected in the commitments and priorities to emerge from this meeting. It is important that border control measures do not preclude access by asylum seekers to territories and procedures in which protection needs can be examined. In discussions on migration and development, UNHCR encourages States and relevant institutions to acknowledge the importance of ensuring that refugees, internally displaced persons and returnees are addressed in development programming, with a view to the sustainability of solutions.

The EU-Africa Summit, planned for December in Lisbon, will offer another important forum where refugee protection and the need for sustainable solutions to forced displacement can be addressed. Given the scale of forced displacement in Africa, these

¹⁹ COM(2007)247 final, 16.5.07 (<http://europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=COM:2007:0247:FIN:EN:PDF>).

²⁰ UNHCR is undertaking EC-funded projects in priority regions for the first two pilot 'RPPs,' namely in Tanzania and Belarus, which was selected along with Moldova and Ukraine.

²¹ UNHCR Observations on the Communication from the European Commission to the Council and the European Parliament on Regional Protection Programmes (COM (2005) 388 final, 1 September 2005) of October 2005 (<http://www.unhcr.org/protect/PROTECTION/4360a5ab2.pdf>).

²² 8th Euro- Mediterranean Conference of Foreign Ministers, Tampere, Nov 2006.

issues should be accorded high priority in the planned Joint Strategy with the African partners, due for adoption under the Portuguese Presidency.

Another key region of concern for UNHCR and Member States over the coming six months will be Iraq and the neighboring countries. Syria and Jordan alone host around two million Iraqis and another two million are displaced within Iraq. UNHCR welcomes the solidarity with states in the region expressed by the EU at the International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons inside Iraq and in Neighboring Countries convened by UNHCR in Geneva in April 2007, and urges Member States to demonstrate this solidarity, including by offering financial support to meet humanitarian needs.

Recommendation: Cooperation with third countries on refugee protection should be developed in a spirit of partnership, addressing the genuine needs of the countries concerned. This cooperation should be complementary to – and not in place of – access to protection in the EU.

4. Durable solutions and the EU

Integration of third country nationals has been identified by the EU as a key policy challenge. In May 2007, UNHCR issued a Note on the integration of refugees and beneficiaries of subsidiary protection.²³ The Note called for inclusion of refugees and subsidiary protection beneficiaries in general integration programmes, but also highlighted that special attention and resources are required to address their particular needs. UNHCR hopes that this document will assist further discussion on integration during the Portuguese Presidency.

In the context of EU discussions on integration, UNHCR urges the Presidency and other Member States to extend the limited rights of subsidiary protection beneficiaries, including to employment, beyond the minimum standards presently enshrined in the Qualification Directive.²⁴ Such an approach would be consistent with the aim of facilitating integration of third country nationals in the EU.²⁵

The resettlement of refugees in the EU remains a priority for UNHCR. Since the adoption of Council Conclusions addressing resettlement in November 2004²⁶, UNHCR has

²³ Note on Integration of Refugees in the European Union.

(<http://www.unhcr.org/protect/PROTECTION/4636462c4.pdf>).

²⁴ Chapter IV of the 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 L204/12, 30.09.2004) (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>).

²⁵ See further section 4 below.

²⁶ General Affairs and External Relations Council Conclusions (2 November 2004), p. 17.

(http://www.consilium.europa.eu/cms3_applications/Applications/newsRoom/LoadDocument.asp?director y=en/gena/&filename=82620.pdf).

promoted the concept of a joint EU resettlement scheme, and urges the Presidency and Member States to take this idea forward. Further discussion on resettlement in the EU should aim to increase the number of available resettlement places, both by expanding existing national programmes and engaging more countries in the resettlement effort. UNHCR is ready to help EU Member States to engage in resettlement for the first time. The Office also encourages discussions on a joint EU scheme, including for instance the development of common criteria, joint resettlement missions, and potentially a 'clearing house' mechanism to manage submissions from UNHCR.

Discussions are underway on a proposed 'UNHCR Transit Facility' in Romania. This facility would be used as a location to which limited numbers of UNHCR mandate refugees in urgent need of resettlement could be transferred, pending completion of resettlement processing. Building on past successful experiences with transit arrangements in Romania, UNHCR believes this initiative would be a significant contribution to refugee protection, and encourages the Presidency and Member States to support this proposal.

Recommendation: UNHCR urges Portugal to take forward the subject of refugee resettlement during its Presidency. UNHCR hopes this will encourage more Member States to engage in resettlement.

Conclusion

UNHCR looks forward to collaborating with the Portuguese Presidency to address the many refugee protection challenges facing the EU. These include deliberations on how to complete the common European asylum system; migration and border management; and developing relations with key third countries and regions of origin and transit. The next six months provide important opportunities for the EU to demonstrate its support for more effective protection of and solutions for refugees, both within and beyond the European Union.

UNHCR
15 June 2007