



UNHCR Observations
on the European Commission Communication on ‘A More Efficient Common European Asylum System: the Single Procedure as the Next Step’
(COM(2004)503 final; Annex SEC(2004)937, 15 July 2004)

Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) supports the proposal for a single asylum procedure, conducted by a single competent authority. A consolidated procedure which assesses whether an asylum-seeker qualifies for refugee status or a complementary form of protection can provide the clearest and swiftest means of identifying those in need of international protection. It offers a more economical and less fragmented approach, which should ultimately lend itself more readily to the establishment of a more coherent interpretation of international protection needs.

Safeguarding the integrity of the 1951 Convention

2. UNHCR welcomes the Communication’s recognition that a single procedure must not be permitted to undermine 1951 Convention refugee status.¹ For this purpose, a predetermined sequence of claim examination is important, under which the criteria for granting subsidiary forms of protection are clearly distinguished from those under the 1951 Convention. To ensure that refugees enjoy all rights to which they are entitled, claims should be examined first to assess any Convention grounds for protection; and only if these are not present, should consideration be given to subsidiary protection grounds. UNHCR recommends that such a sequence be explicit wherever a single asylum procedure is introduced.
3. In addition, UNHCR welcomes that a properly reasoned decision is to be provided for all negative decisions on protection claims, including in cases where a claim is rejected on Convention grounds, but subsidiary protection is granted². In UNHCR’s view, these safeguards are essential to prevent the undermining of the 1951 Convention.

¹ Communication from the Commission to the Council and the European Parliament, ‘A more efficient common European asylum system: the single procedure as the next step’ (COM(2004)503 final); (hereafter ‘Communication’), paragraph 27.

² See Communication, paragraph 27.

4. Training of decision-makers is also an important further safeguard for the integrity of the 1951 Convention regime, as well as a means to improve the quality of decision-making generally. UNHCR welcomes the Communication's emphasis on this point.³

Ensuring a single procedure that is accessible and fair

5. With respect to subsidiary protection needs, UNHCR agrees that applicants cannot reasonably be expected to evaluate whether their claims fall under the 1951 Convention or under subsidiary protection grounds.⁴ For this reason, and to minimize the stress and uncertainty which may be associated with appearing before several adjudicating bodies, UNHCR would strongly support *ex officio* consideration of subsidiary protection needs by the same body, once Convention grounds have been exhaustively examined. This would also serve to increase the efficiency of the process.
6. UNHCR agrees with the concern that protection gaps may arise if minimum procedural standards do not apply to the determination of subsidiary protection needs and notes the suggestion to extend the Asylum Procedures Directive⁵ to claims for subsidiary protection. At the time of its negotiation, UNHCR repeatedly called on States to extend the scope of this Directive to all claims for international protection. UNHCR notes, nonetheless, a number of reservations which it has raised in relation to the finally agreed Asylum Procedures Directive. These relate *inter alia* to the provisions on the safe third country concept(s) as well as the possible extended reliance on accelerated procedures, encompassing categories which go far beyond manifestly unfounded or clearly abusive cases. In UNHCR's view, there is a genuine risk that the Asylum Procedures Directive, in practice, may lead to breaches of international law. These concerns would unfortunately also apply, if the Directive were extended mandatorily to the determination of subsidiary protection needs.
7. UNHCR notes in this regard the suggestion first to extend Chapter II of the Asylum Procedures Directive only, relating to basic principles and guarantees.⁶ Such an approach would avoid some of the most problematic provisions outlined above. Concerns remain, however, relating to the restrictions in the provision of legal aid and on personal interviews. UNHCR plans to issue comprehensive comments on both the Qualification Directive⁷ and the Asylum Procedures Directives in the near future.
8. Given these concerns, UNHCR welcomes in particular the suggested Preparatory Phase, providing for an assessment of the first phase of harmonization and an

³ Communication, paragraph 27-28.

⁴ Communication, paragraph 6.

⁵ Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (political agreement reached 29 April 2004).

⁶ See Communication, paragraph 22, point 1.

⁷ Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, adopted 29 April 2004.

analysis of applicable standards in determining subsidiary protection needs.⁸ It encourages the Commission to undertake a critical and thorough assessment of the results achieved, including possible further clarification of standards to ensure an interpretation and practice in line with international standards. It would, moreover, be useful to examine to what extent the Asylum Procedures Directive would require amendment to take into account specificities relating to subsidiary protection.

9. UNHCR notes that such an evaluation may take some time, given that the Directives have not yet been published and States will have two years to transpose these minimum standards. They may, moreover, be subject to further clarification by the courts. UNHCR further calls on the Commission and Member States to take into account that the standards in the Directives reflect minimum standards only, and encourage States to establish and/or maintain higher standards in their national legislation and in their implementation. UNHCR would welcome if higher standards could be agreed in any instrument on the single asylum procedure.
10. In line with international and European law, UNHCR also strongly supports the suggestion to ensure an effective remedy against decisions to refuse protection⁹, as provided by Chapter V of the Asylum Procedures Directive, and underlines the need for suspensive effect of appeals, which is not guaranteed under Chapter V. Given the potentially serious consequences of an erroneous determination in the first instance, the remedy against a negative first instance decision is ineffective if an applicant is not permitted to await the outcome of an appeal against that decision on the territory of the Member State. Even in manifestly unfounded cases as defined in Executive Committee Conclusion No. 30, there must be some form of review. UNHCR could accept the proposal to limit the automatic suspensive effect of an appeal to clearly defined manifestly unfounded cases, provided a court of law or another independent authority has reviewed and confirmed the denial of suspensive effect, taking into account the chances of an appeal.
11. If a claim for protection based on 1951 Convention and other complementary protection grounds has been refused, UNHCR would recommend the examination of any other factors, in particular any compelling humanitarian reasons, which may preclude removal.
12. UNHCR reiterates its support of an early extension of the Directive on Reception Conditions¹⁰ to applicants for subsidiary protection, not least since many of them will be already included in the scope of the Directive by their application for asylum.¹¹

⁸ Annexes to Communication SEC(2004) 937, 15 July 2004 (hereafter Annex), Annex D, paragraph 3.

⁹ See Communication, paragraph 22, point 2.

¹⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18 of 6 February 2003.

¹¹ See Communication, para 22, point 3.

13. For the same reason, UNHCR does not object, in principle, to an extension of the “Dublin II” Regulation¹² to applicants for subsidiary protection, but recommends that this be implemented at an appropriate time. UNHCR is concerned in this respect that an excessive burden could be placed on Member States located at the EU’s external borders. The new Member States in particular have fledgling asylum systems, which may not be capable of dealing with huge increases in the number of claims. Member States may, moreover, differ considerably in whether they provide subsidiary protection and what this entails. Providing for such a status will not be mandatory for some time, given the transposition period States have at their disposal. UNHCR would therefore recommend that the Dublin II Regulation not be extended to cases where only subsidiary protection is requested, until such time as this protection is indeed available in all Member States. It further suggests that compensatory measures be introduced in the interest of burden-sharing, potentially through ARGO or the European Refugee Fund II, as ventured in the Communication¹³, or other forms of cooperation.

Improving the quality of decision-making

14. In principle, UNHCR welcomes the Communication’s call for increased efficiency in asylum procedures, but stresses that this must not compromise natural justice or procedural fairness.¹⁴ UNHCR has long argued for “frontloading” of asylum procedures to lift decision-making quality at first instance. Ensuring quality first instance decision-making should reduce the number of appeals, and thereby save time and resources. To be effective, frontloading requires allocation of adequate funds and sufficient qualified, well-trained staff.

15. UNHCR welcomes the proposal to work for agreement on key principles of good practice in asylum procedures, and establish a centre of excellence for asylum practitioners.¹⁵ Inconsistency in decision-making on similar claims throughout the EU raises concerns about standards which must be addressed. The suggestion would be in line with UNHCR’s proposal for a process where asylum practitioners could meet to discuss not only best practice in procedures, but also recognition and refusal rates. It would provide a way to harmonize decision-making on claims relating to the same country of origin, which at present varies considerably within the EU, and is a likely factor in encouraging secondary movements.

16. Finally, UNHCR notes that the use of the term “one-stop-shop” may be misleading, as this phrase is used in some Member States for an arrangement whereby all facilities, including interpretation, legal aid, medical and psycho-social assistance, amongst others, are available in one place. UNHCR suggests that the “one-stop-shop” as used by these Member States could facilitate the preparation of claims and the procedure overall, and could be made available in

¹² See Communication, para 22, point 4. Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 50/1 of 25 February 2003.

¹³ Communication, paragraph 33.

¹⁴ Communication, paragraph 28.

¹⁵ Communication, paragraph 28.

reception centres where asylum-seekers are required to reside. In UNHCR's view, such an approach could potentially increase the efficiency of procedures without impacting upon fairness.

Conclusion

17. UNHCR welcomes the proposal for moves towards the introduction of a single asylum procedure as further positive progress towards a common European asylum system, which must be based on the full and inclusive application of the 1951 Convention. It reiterates its concerns about the standards contained the Asylum Procedures Directive, which could be interpreted and applied inconsistently with international law. UNHCR recommends that the Council and the Commission undertake the preparatory and subsequent phases of work towards a single procedure in a transparent and consultative manner, and to continue to work with UNHCR and other expert organisations which can contribute to the aim of improved quality and efficiency of asylum decision-making, in the interest of all concerned.

UNHCR
30 August 2004