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

60 YEARS • ANS

Conference of the Polish Presidency of the Council of the EU

Challenges to the Development of the Common European Asylum System

On the 60th Anniversary of the Adoption of the Convention relating to the Status of Refugees

Plenary session 1: '60 years of the Convention: Achievements and weaknesses in asylum systems in Europe'

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Introductory remarks – the commemorations

I would like to thank the organisers for the invitation to speak at this important Conference. For UNHCR, the holding of this event constitutes a recognition of the value that the EU legal and policy framework places on the principles of refugee protection.

Looking back on 60 years of the 1951 Refugee Convention in Europe, we must acknowledge that during four of those six decades the main beneficiaries of refugee protection were Europeans themselves, many of them now EU citizens (and many thousands more resettled and now citizens of other safe, stable countries). These included people coming not only from former communist countries, but also from Greece, Spain, Portugal and other countries. During these decades the importance and authority of the Convention was undisputed.

Europe is the continent where the legal concept of human rights was first developed. It is part of the identity of European States. The EU itself was born out of a desire to prevent the misery of war, which shatters lives and drives people to seek protection from persecution. This is part of the reason why refugee protection and human rights and have been built into, and have their rightful place in, the very architecture of the EU.

Achievements to date

It is now nearly 12 years since the Amsterdam Treaty came into force, conferring legal competence on the EU for asylum. The same year, in Tampere, Finland, the European Council reaffirmed its commitment to build a Common European Asylum System (CEAS) based on the 'full and inclusive application' of the 1951 Convention and other relevant treaties.

There is no doubt that the achievements since then have been enormous. It's worth recalling that before Tampere, legal competence to regulate asylum matters lay exclusively in the jurisdiction of Member States: a national matter, firmly located among the matters States saw as essential to their national sovereignty. Yet today, we have EU-level standards on

many subjects related to asylum and refugees' rights. It is accepted that Member States can and must deal with these issues together, in the interests of all.

The EU's laws on asylum now cover several issues that go beyond the international level. For instance, there are not as yet common standards on reception of asylum seekers in international instruments on asylum.

Similarly, in the area of asylum procedures, there are at EU level minimum standards on procedures that are, in UNHCR's view, important to ensure a fair and effective asylum claim determination.

These important steps in adopting minimum standards on matters going beyond the minimum standards of international law, demonstrate the leadership and standard-setting potential of the Common European Asylum System_for other States and regions. It is clear that other parts of the world look to Europe as a significant influence and example. It is thus a very important responsibility that Europe holds as it further refines its standards and practices.

We have also seen important steps forward in practice. For example, the reception facilities that many States offer today represent models of good administration and living arrangements for families and others. States have invested extensively in building up the expertise, tools and processes in their asylum systems – investments complimented also by invaluable support from European Commission funds.

Weaknesses and ongoing areas of work

There are however still a number of weaknesses that need to be addressed. We see outstanding challenges in both of the two key aspects of the Common European Asylum System: (a) the legislative framework; and (b) the practical dimension.

a. EU asylum legislation

To a limited extent, some of the gaps in legislation are unsurprising in a system that is still under development. After all, the Stockholm Programme foresaw a second phase of legislation – a phase which is now ongoing. This second phase aims to build on a 'thorough and complete' evaluation of the first phase instruments.

The European Commission has issued several communications evaluating the first phase Directives and Regulations. UNHCR has sought to supplement these with several research reports issued between 2006 and 2010 which have analysed the practical application of three key instruments: the Dublin Regulation (2006), the Qualification Directive (2007) and the Asylum Procedures Directive (2010). In each of these reports, UNHCR examined in detail the practice of a number of Member States, based on an empirical examination of case files and decisions, and incorporating the views of authorities at all levels.

Our conclusions highlighted sharply the pressing need for reform of the legislation. Ambiguities and lack of clarity in the instruments have led to differing, and at times highly problematic interpretations of States' obligations and asylum seekers' entitlements. Moreover, the existing legislation contains many provisions which allow for derogations – for Member States to decide not to apply certain provisions. There are also exceptions which are so wide that they result in the main provision being applied only in a small minority of

cases. Such provisions mean that harmonization of asylum practices and outcomes would be difficult to achieve with the existing instruments. This is why the current legislative process is so crucial.

To illustrate this, based on our research and observations in relation to Dublin, UNHCR found that notwithstanding general obligations to provide information about the procedure – many, many asylum seekers in the system have no clear understanding of what the Dublin system means or requires. One of the problematic results of this is that asylum seekers were unaware of the kind of information they should be conveying to the authorities. This might include, for example, the fact that they have family members residing in another Member State – a fact that will be critical for determining responsibility for deciding a claim under Dublin. For this reason, the provisions in the Dublin recast requiring more specific information about the system can and will improve its operation.

Similarly, in relation to the Qualification Directive: our research revealed great confusion and at times illogical applications of the 'internal protection' or internal flight alternative. It was applied in cases where applicants could not reasonably have been expected to travel or reside in other parts of their countries of origin. After an important 2007 decision of the European Court of Human Rights, the Qualification Directive's provision became inconsistent with that court's jurisprudence. This is one of the anomalies that will be corrected with the formal adoption of the Qualification Directive recast in its final form.

Finally, the Asylum Procedures Directive is perhaps the instrument where the current wording is most evidently difficult and problematic in its implementation. I will mention just two areas, among the several that must be addressed in the amendments now under negotiation, in order to achieve coherence and just outcomes:

- The grounds for accelerated procedures must be expressed exhaustively and in clear terms in the EU legislation. Under the present provision, 16 optional grounds for acceleration are available. UNHCR in its 2009 research identified at least a further 12 which are applied in some Member States. The present legislation also allows acceleration of claims in cases where the applicant 'clearly does not qualify as a refugee'. In UNHCR's view, this is not something that can be assessed before one has actually carried out at least some reasonable analysis of the main elements of a claim. We consider that this provision does not add anything to the other grounds for acceleration that the EC has proposed to retain in the new recast.[1]

- UNHCR's research revealed that there were several aspects of asylum procedures that made it difficult for vulnerable and traumatized people to pursue their claims. These include short timeframes in accelerated procedures, pursuing applications in detention, interviews by non-specialised personnel and complex evidentiary requirements, which were strictly applied. The revised recast proposal refers to a category of people who may be in need of 'special procedural guarantees'. We understand some Member S apparently have concerns that this will add significantly to costs and delays. By requiring Member States to shall 'take appropriate measures to ensure' that such people 'are granted sufficient time and relevant support' to

[1] These include: that the applicant has raised only 'issues that are not relevant to the examination of whether s/he qualifies as a refugee' (art 31(6)(a)); is from a 'safe country of origin' (art 31(6)(b)); has 'misled the authorities by presenting false information or documents' (art 31(6)(c)); made 'clearly false or obviously improbable representations which contradict sufficiently verified Country of Origin Information' (art 31(6)(e)); and others.

present their applications, we believe essential safeguards are maintained in the recast. This is not a prescriptive formulation, and allows scope for Member States to ensure that such time and support is given as appropriate within their procedures. Where this is needed for an applicant to present a claim coherently, it will help decision-making processes in the interests of all concerned.

There are many other aspects of the Asylum Procedures proposal that will address the concerns of States: including their desire to retain border procedures; to use the safe country of origin concept; to apply exceptions to the general principle of suspensive effect of appeals. UNHCR accepts that States wish to maintain these concepts as a means to manage asylum applications efficiently and provide effective protection to meritorious claims. However, we believe that it is possible to do so in a way that ensures that the requisite safeguards are also applied. For these reasons, UNHCR supports work towards amendment of the current instruments, based on the present recast proposals.

b. Practice

In addition to strengthening legislation, it is clear that practice must also be addressed. Without more harmonized and coherent application of instruments, divergence cannot be overcome.

It is no secret that recognition rates in different Member States of the European Union continue to vary widely. The figures for 2010 confirm this, with protection rates for Somalis ranging from 33% to 93% among States with significant numbers of applications. For Iraqis, the variation was 14% to 79%; and for Afghans, 0% to 91%.

UNHCR has documented this in research it has recently carried out on protection specifically for people fleeing indiscriminate violence. This focuses on one provision of the Qualification Directive – article 15(c) - which was intended to extend protection in the EU beyond the refugee definition and Article 3 ECHR criteria alone. This research reveals that this provision is interpreted in varying ways across several Member States. It also highlights that some States also apply it in a very restrictive and technical way. This limits significantly the numbers of people and situations to whom it is applied in practice. For UNHCR, this raises the question whether specific approaches to practice in relation to this provision might in effect leave a ‘protection gap’ for people fleeing indiscriminate violence – a gap which the EU apparently intended to fill when it adopted this provision, and which UNHCR agrees is needed to help a significant group of people in need of protection.

The need to improve practical cooperation has been recognized explicitly by the EU, not only in The Hague and Stockholm Programmes – but also in the decision of the Council and Parliament to create the European Asylum Support Office (EASO), with its mandate to facilitate practical cooperation among States.

UNHCR intends to work hard to support the development of the EASO. We value our place on the Management Board, and have sought to contribute constructively to its discussions. We have also collaborated extensively with the first operational action of the EASO, namely the deployment of Asylum Support Teams to Greece.

Among the many challenges on the ambitious list that the EU has set for the EASO, there is one that UNHCR sees as a particular priority. This relates to maintaining and developing quality of asylum procedures in the EU.

UNHCR has worked with many Member States in recent years on national-level quality initiatives, starting with the UK back in 2004, and extending to others, including Austria, Germany, Ireland, Czech Republic, Sweden and more.

We have also engaged in two multi-country projects with EU funding: including the 'Asylum Systems Quality Assurance and Evaluation Mechanism' Central Europe (involving Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia, Slovenia - 2008-10); and 'Further Developing Quality' project (2010-11) in five Central (Bulgaria, Hungary, Poland, Romania, Slovakia) and four Southern (Cyprus, Greece, Italy and Portugal) European countries.

Through these projects, UNHCR has helped these countries identify areas where support, resources, training or other measures would be helpful. They have also worked to establish national-level, permanent quality assurance mechanisms that will operate under the leadership of the national authorities concerned, after UNHCR's projects have ceased. Further, the projects under UNHCR's facilitation have developed methods and tools – including training, checklists and monitoring arrangements – which can help States run systems at higher standards. These innovations can reduce costs and improve consistency of outcomes. As such, they are in the interests of all concerned.

UNHCR intends to propose inclusion of specific quality activities in the EASO's Work Plan for 2012. We will offer UNHCR's own expertise and support to the EASO to assist in developing and carrying these out in practice. We will look for the support of other Member States when this is discussed in the Management Board in the coming months.

What else can the EU do?

I have spoken today of the immediate challenges that the EU faces, and some of the ways that the EU can address them at the legislative and practical level. Together with the responsibility-sharing needs that Volker Turk will address, there is much that needs to be done to complete the CEAS, and bring it to its full and most effective operation.

There are two further concrete steps that UNHCR is encouraging the EU to take in the months and years ahead. Firstly, and building on the theme of this conference, the EU can affirm its ongoing commitment to the goals and principles of the international protection system in a formal way. In 2001, on the 50th anniversary of the 1951 Convention, the European Council adopted a declaration expressing its support for the Convention and for refugees. Now, ten years on, we have asylum instruments, a developed practical and policy framework, and reinforced obligations in the EU Treaties. It is an opportune moment for the Union to recall all it has done, and to pledge renewed efforts in the future. UNHCR calls on the European Council to reiterate in strengthened terms its commitments to refugee protection, through Conclusions to be adopted before the end of this year.

Finally, the Stockholm Programme called on the EU – subject to a study by the EC on its legal and practical consequences – to seek accession to the 1951 Convention. UNHCR welcomed this expression of will to deepen the links between the EU and the international protection system. We are ready further to discuss this with Member States and EU institutions, and we believe the idea has considerable potential to benefit the EU and its asylum system - as well as enriching the EU's contribution to development of refugee protection worldwide.

Thank you for your attention, and I look forward to our discussion.