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UNHCR and the EU

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Chapter 1: UNHCR and the EU

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Chapter 1 UNHCR and the EU Asylum Agenda

Background

In early 1990, UNHCR established a liaison function in its Brussels office to monitor developments and provide inputs into the nascent EU harmonisation process in the areas of asylum and migration. Contacts were maintained and developed mainly with the Presidency as the driving force behind the preparation and subsequent adoption of the first soft law instruments (non-binding resolutions and recommendations adopted outside any formal Community structure). UNHCR developed simultaneous contacts with the European Commission (Task Force on Justice and Home Affairs in the Secretariat General) and the European Parliament. Both institutions had only an advisory role in the process, the Commission participating in Council discussions in an expert capacity, and the Parliament issuing non-binding opinions following adoption of instruments and decisions in Council.

With the entry into force of the Maastricht Treaty in 1993 and its Third Pillar structuring Member States' co-operation in justice and home affairs, the EU Commission was given a right to initiate and submit legislative instruments, as well as a more prominent place in the deliberations on draft instruments. The European Parliament's right to comment on soft law instruments (following adoption in Council) was also enshrined in the Treaty. UNHCR's relations with the Commission and the Parliament intensified: the office advised Commission staff on draft positions, including those submitted by the Commission itself (on Temporary Protection) and provided inputs into parliamentary opinions on Council instruments.

In response to the increased co-operation between Member States in asylum matters under the Third Pillar, UNHCR strengthened its relations with Member States other than those holding the Presidency. UNHCR's office in Brussels started a process of networking UNHCR branch offices in national capitals through the establishment of EU focal points in these offices. These were charged with monitoring and influencing their government's positions in negotiations on EU asylum instruments. The office also established an EU Task Force, consisting of people from selected EU focal points, including those from Troika countries (precedent, actual and incoming presidencies) and UNHCR HQ staff to reinforce inter-office cooperation, particularly as regards the preparation of lobbying papers, and the development of strategies and setting of priorities regarding UNHCR's involvement in the EU harmonisation process.

With the entry into force of the Amsterdam Treaty in 1999, Member States decided to relinquish their sovereign right to pursue national asylum policies and practices, and assigned competence to the European institutions to develop Community legislation in asylum - although limited to the adoption of common minimum standards. UNHCR's relations with the EU institutions subsequently intensified and the office in Brussels is now liaising with the EU Commission's Directorate General for Justice and Home Affairs, the Council secretariat, Member States' permanent missions and the European Parliament on a permanent basis. UNHCR provides expert input into the drafting of legislative instruments and comments on

proposals once under negotiation in Council.

In July 2000, the Commission DG JHA and UNHCR signed an exchange of letters in order to reinforce co-operation in asylum and refugee matters, as a concrete expression of implementing Declaration No. 17 of the Amsterdam Treaty. This stipulates that UNHCR must be consulted by the EU institutions in matters pertaining to asylum. In addition to day-to-day contacts, formal strategic consultations are now being held with the Commission DG JHA at senior level on a six monthly basis, following the standard agenda agreed during the signature of the exchange of letters.

Since the entry into force of the Amsterdam Treaty, UNHCR Brussels' co-ordination role has further developed vis-à-vis branch offices in the EU in regard to inputs in Member States' negotiations in Council on draft legislative instruments. The office co-ordinates lobbying activity by branch offices in order to influence effectively Member States' positions during negotiations in Council. UNHCR is also actively involved in the preparation of reports and resolutions by the European Parliament, particularly as regards parliamentary amendments to legislative drafts, and proposed EU asylum strategies and policies.

The quantity and quality of UNHCR's contacts with the EU institutions have increased considerably not only as a result of the institutional developments in asylum at EU level, but also following the EU's decision to make justice and home affairs (JHA) matters, including asylum, a priority in its strategy to prepare for enlargement and, hence, in its contacts with candidate countries. The office in Brussels maintains close and frequent contacts with Commission desks responsible for programming pre-accession assistance in JHA and asylum matters. It also monitors closely the Commission's and Council's regular "screening" of candidate countries' developing capacity to take on the obligations of the EU asylum acquis, and provides inputs into these processes.

Ever since the Commission and Council started to develop the external dimension of EU asylum and migration policy, aimed at improved co-operation in the joint management of migratory flows, UNHCR has monitored this process closely and has provided expertise and policy inputs as regards EU co-operation with third countries (Eastern Europe, Western Balkans, Mediterranean basin) in asylum and migration matters.

UNHCR has also welcomed the Union's efforts to develop a more comprehensive approach to refugee producing situations as pioneered by the High Level Working Group on Migration and Asylum (HLWG, see Part 1, chapter 2, B). The Group has developed close co-operation with UNHCR since its inception in 1999. UNHCR has tried to ensure that the protection dimension of HLWG Action Plans is given due emphasis by ensuring a balance in implementing deterrence and control measures on the one hand, and access and protection measures on the other. UNHCR has also asked for concrete and substantial support for the programmes and actions of UNHCR and its partners aimed at providing protection and assistance to refugees and displaced persons in the regions under review by the HLWG.

Summary of key UNHCR concerns in relation to harmonisation

The harmonisation of European asylum policy represents both an opportunity and a danger. It is an opportunity for the development of a principled and coherent asylum policy in Europe which provides a consistent standard of protection to refugees throughout the Union. There is, however, a pervasive danger that harmonisation proceeding from a migration control perspective may lose sight of refugees' need for protection. There is a risk of reinforcement of restrictive measures and of a movement towards the lowest common denominator of current national practice.

UNHCR continues, therefore, to urge Member States to commit themselves collectively to the highest standards of refugee protection and to preserve asylum as a right rooted in international law, rather than as an act of political discretion. UNHCR also urges governments to take a strategic approach to the development of asylum policy and law, starting from a common and inclusive interpretation of the refugee definition in the 1951 Convention.

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Chapter 2: Extracts from an article from Johannes van der Klaauw, Senior EU Officer at UNHCR

Chapter 2

Extracts from an article by Johannes van der Klaauw, Senior European Affairs Officer, UNHCR Brussels, 'European Asylum Policy and the Global Protection Regime: Challenges for UNHCR'¹

Ever since the member states of the European Community (EC), now European Union (EU), undertook to harmonize their policies and practices in asylum and migration, the effects of these efforts have had a significant impact on the policies and activities of the Office of the United Nations High Commissioner for Refugees (UNHCR). Initially, UNHCR adopted a rather reactive stance, commenting on some of the asylum-related resolutions and recommendations adopted in the early nineties. With the preparations for a Community policy on asylum and migration matters as required by the provisions of the Amsterdam Treaty, the Office took a more supportive position on the EU harmonization process, provided it would result in the adoption of a coherent and comprehensive European asylum policy, based on common standards of protection consonant with internally agreed standards.

UNHCR's support is predicated on the recognition that Western European countries have played a fundamental role in shaping the international framework of refugee protection. Moreover, UNHCR, in discharging its mandate and its duty of supervising the application of the provisions of the 1951 Convention, acknowledges that it relies heavily on support from Western European states to remain in the forefront of preserving and strengthening the global protection regime. UNHCR therefore has put its weight behind the construction of the European common asylum system, expressing the hope that the process would result in the adoption of accessible, fair and expeditious asylum processes in each of the member states, based on common standards of procedural and material asylum law. The system would also have to encompass a workable mechanism for determining responsibility for examining asylum requests, proper burden-sharing without shifting the burden to countries the least able to accept responsibility, a temporary protection mechanism to confront situations of mass influx, coordination in the effective return of persons not, or no longer, in need of protection, and common strategies to address human rights violations and other causes propelling forced population displacement (UNHCR 1996; UNHCR 1999).

UNHCR believes the EU harmonization process in asylum represents a unique opportunity to establish a consistent and coherent body of high protection standards, sufficiently detailed and "communitarizing" all key legislative elements of States' asylum systems. Yet it has also warned for the real danger that the outcome of the harmonization exercise will be a rather general and unambitious package of standards representing the lowest common denominator among Member States and creating some serious "protection gaps." UNHCR has called on Member States to show political leadership during negotiations to take a rights-based approach to asylum and not to subordinate the various standards to the political, security, and socio-economic dimension of migration policy, predominantly directed by efforts to combat illegal immigration and trafficking in human beings.

UNHCR has recognized the significance of the future European asylum standards, tools and

mechanisms for countries and regions outside the Union - as they are bound to influence the attitude of non-EU asylum countries towards certain groups of refugees and asylum-seekers that are less welcome in the EU. The emerging European asylum and migration regime has acquired an increasingly prominent place in the Union's external policies. Justice and Home Affairs (JHA) are now an essential, if often controversial, element in dialog and partnership between the Union and third countries. UNHCR has called on EU members and partner countries to adopt a protection-based approach to asylum in their negotiations, ensuring the fundamental rights of refugees and asylum-seekers, and full commitment to guarantee access to territory and protection to those in need of it.

The Office has also called on the Union to put the existing, somewhat fledgling consultative arrangements between successive Presidencies and UNHCR on a more formal footing. This would enable UNHCR to become fully associated with the preparations and subsequent implementation of the relevant provisions of the Amsterdam Treaty, as well as the related operational strategies and policy orientations to complement the common asylum system. This call resulted in the adoption of Declaration No. 17 to the Treaty stipulating that, in asylum matters, the Union is to consult UNHCR and other concerned international organizations² Following the entry into force of the Treaty, the European Commission and UNHCR entered into a formal exchange of letters to give substance to the text of the Declaration.

The Developing EU Asylum Agenda and UNHCR's Response

UNHCR considers the developing common asylum and migration policy of the EU as both an opportunity for and a danger to the preservation and strengthening of the international protection regime. Provided that EU members will demonstrate the political will to resolve existing differences, the process constitutes a unique opportunity to establish a principled and coherent asylum policy based on a consistent set of common standards of protection of refugees throughout the Union. Recent proposals and options put forward by the European Commission (2000) to establish a common asylum procedure and a uniform status throughout the EU are to be welcomed as an important step in the direction of a more strategic and outward-looking approach to the development of a common asylum policy. Were the Union to honor fully its solemn commitment to the "absolute respect for the right to seek asylum," as adopted at the Tampere Summit and enshrined in Article 18 of the European Union's Charter of Fundamental Rights, the establishment of a common European asylum system on the basis of the "full and inclusive application of the Geneva Convention" (Council of the European Union 1999) may contribute positively to the strengthening of the international regime for refugee protection.

In developing its common asylum policy based on common standards as part of the *acquis communautaire* the European Union should be guided by not only the core refugee law instruments—the 1951 Convention, the 1967 Protocol, and EXCOM Conclusions³—but also by the standards of international human rights law which are part of the foundation on which the global refugee protection regime is based. As has been pointed out by human rights review bodies and courts, member states' compliance with international human rights standards related to asylum and refugee matters is often found wanting. This concern for non-compliance is aggravated because the EU is not a party to any of the international or regional human rights instruments and hence escapes supervision by the bodies established on the basis of these instruments to scrutinize contracting parties' observance of the rights and obligations enshrined therein (for a summary of these concerns, see Amnesty International European Union Association 2000).

UNHCR has raised concern about the pervasive danger that the harmonization of asylum policy and practice in the EU may lose sight of refugees' need for protection. The Union's adoption of concepts and tools limiting access to asylum and restricting the application of international standards of material and procedural asylum law may result in other States also restricting access to asylum and curtailing asylum rights, and collective undermining of the international protection framework.

At the time of entry into force of the Amsterdam Treaty provisions, UNHCR asked the EU Commission and EU members to take a strategic approach to the development of the legislative package in asylum, starting from a common and inclusive interpretation of the refugee definition of the 1951 Convention. However, the preparations of the instrument on the refugee definition have been left for the last stage of the drafting process even though the Tampere Conclusions state that the common European asylum system must be based on the full and inclusive application of the 1951 Convention⁴. The focus of the Union's legislative work in asylum has been predominantly on the elaboration of procedural law standards⁵, since the preceding intergovernmental cooperation had yielded most results in that area. In implementing the Amsterdam asylum agenda the EU has taken inspiration from the existing soft law *acquis*, although it has tried to avoid a simple codification of the existing resolutions and recommendations in view of the gaps included in these instruments. By the time the Laeken Summit will review the progress made since the adoption of the Tampere milestones, all the Community legislative instruments in asylum have been put forward by the Commission. EU member states should seize this opportunity to rethink the order in which they want to adopt the various instruments, in order to ensure the coherence and completeness of the package, which should be centered on the core instrument related to the common interpretation of the refugee definition.

Beyond the adoption of common standards, UNHCR has advocated in favor of a common European asylum procedure, by suggesting the adoption of a single asylum procedure in each of the member states so that all international protection needs arising from all forms of risks would be considered in a holistic manner. This could bring the search for communality in member states' procedures a decisive step forward. UNHCR's suggestion has been echoed in the EU Commission Communication on the prospects of a common asylum procedure and uniform refugee status, prepared following a call by the Tampere Summit (paragraph 15), and has also been the subject of further study and consultations between the Commission and the EU member states (see Swedish Presidency 2001). With regard to the possible introduction of a uniform status, UNHCR has called on the European Commission and EU member states to respect the specificity and distinct nature of Convention obligations, which militates against the introduction of a common system granting the same undetermined status to all persons found to have a valid claim against expulsion, whether they are refugees under the 1951 Convention or persons who cannot be returned on other grounds (UNHCR 2001a).

UNHCR has commented critically on a number of soft law instruments adopted by EU member states prior to the entry into force of the Amsterdam Treaty, such as the London Resolutions on safe third country, safe country of origin and manifestly unfounded applications, the model agreement for a bilateral readmission agreement, the EU Resolution on minimum standards for asylum procedures, and the EU Joint Position on the harmonized application of the definition of "refugee." The Office has also commented, generally in positive terms, on the Commission proposals for legislative instruments on a Community temporary protection regime, minimum standards for asylum procedures, family reunion rules, minimum standards for reception of asylum seekers and minimum standards for the qualification as a refugee or as beneficiary of a subsidiary form of protection. Whereas the

resolutions and recommendations adopted in the pre-Amsterdam context of inter-governmental cooperation include a number of problematic elements, the Commission proposals for Community instruments reflect relevant international standards to a greater extent. The close and regular cooperation between UNHCR and the EU Commission during the preparations of these instruments has certainly contributed to this positive outcome of the drafting process, even if UNHCR remains concerned about a number of draft provisions in each of the instruments.⁶

However, the negotiations in Council have so far shown that many of the provisions proposed by the Commission are amended by EU member states. A case in point is the Directive on temporary protection, the first substantive Community asylum instrument adopted under the Amsterdam Treaty on 20 July 2001. These negotiations represent a major challenge for UNHCR to preserve the positive elements of the Commission proposals and to amend the weaker points through interventions by member states, but most importantly to prevent the introduction of amendments that may result in a departure from international standards and UNHCR recommendations. During the negotiations on the draft Directive on temporary protection, thanks to timely and coordinated interventions by UNHCR offices in capitals and by UNHCR's Brussels office with the EU institutions, substantial alterations of the contents of the Commission proposal could be avoided. The final product of the Council negotiations therefore could be welcomed by UNHCR as a positive contribution to the development of regional arrangements for temporary protection to be resorted to in mass influx situations where individual processing systems are unable to cope (UNHCR 2001b)⁷.

The adoption of other Community asylum rules and regulations (mostly secondary legislation in the form of Directives laying down minimum standards) is still some way ahead, as a result of protracted, often difficult negotiations in Council. It is thus too early to say whether the future common standards, individually and in their totality, will reflect a high standard of protection and a sufficiently ambitious and detailed level of legislation. Past experience, however, does not augur well for the end result of these negotiations. EU member states, in negotiating legal instruments, have more than once diverted from established international standards arguing that its own standards provide more detail than related international standards and cover areas where no international consensus has been reached so far.⁸ Member states have also justified their agreement on more restrictive measures with reference to the particular needs of highly sophisticated yet overburdened and costly asylum systems. Moreover, member states have argued that much of existing international instruments in procedural and material asylum law—EXCOM Conclusions, UNHCR guidelines, including the UNHCR Handbook—are not legally binding and need not be followed when codifying European asylum standards. This position is reflected in the Union's attitude towards UNHCR in developing its asylum standards, whereas the Office is considered its privileged partner whose guidance and expertise is badly needed, its criticism related to content of proposed or adopted European standards is best done without. (...)

UNHCR Liaison Function with the European Institutions

The emerging common asylum policy and practice at EU level does not only have major repercussions for the future of internationally agreed standards and mechanisms, it also has a significant impact on the operational responsibilities of UNHCR as the body tasked with supervising state practice in implementing the 1951 Convention. Where relatively few international treaty bodies exist to scrutinize state practice in JHA, it comes as no surprise that the EU is establishing its *acquis* in this area, including asylum and migration, without accounting for the contents and quality of its standards and practices in respect of existing

international standards, guidelines and recommendations. At the level of the European Union, UNHCR's role should be seen as one of advising and consultation during the negotiations and preparations of draft Community legislative instruments and operational strategies in asylum matters.

In future, however, UNHCR may find an important ally in the European Court of Justice (ECJ) in its task to supervise the correct application of international refugee law principles. According to Article 68 of the Amsterdam Treaty, the ECJ will be able to issue preliminary rulings on the interpretation and application of the common asylum standards as laid down in future Community legislative instruments, in order to ensure that implementing these standards does not violate internationally agreed norms and practices. The Court can be asked for such a preliminary ruling by the Council, Commission, or a member state, as well as a national court against whose decisions there is no judicial remedy under national law. The Court, albeit indirectly, will thus be given the competence when asked for a ruling on a question of the validity of an act of any of the EU institutions in relation to any of the Community asylum instruments, to decide on the interpretation and application of the provisions of the 1951 Convention, since the 1951 Convention lies at the basis of these instruments and is considered to be an integral element of the EU *acquis*. In view of this modest, yet important enlargement of the ECJ's competence to issue rulings in asylum matters, UNHCR may have to consider to be allowed to make submissions to the ECJ in the form of *amicus curiae* briefs, statements or letters, similar to its practice at national level, as a natural extension of its role to monitor the development of EU asylum standards and their implementation in the law and practice of EU member states. It remains to be seen, however, whether the ECJ rulings will follow the body of jurisprudence in asylum matters as developed by other regional courts, notably the European Court of Human Rights in Strasbourg.

Monitoring the preparations and negotiations in respect of draft EU legislative instruments in asylum, as well as the various policy discussions and the asylum-related aspects of the migration debate at European level, has required an increased UNHCR presence in Brussels and a more prominent role for EU asylum developments in the work of UNHCR staff in Geneva and in local offices in EU member states and applicant countries. Following the creation of a senior liaison post in Brussels in 1989, a network of correspondents in UNHCR offices in EU member states was created to follow the EU-related elements of the asylum discussion at national level and to undertake joint lobbying on UNHCR recommendations for improvement of draft EC law and policy proposals. Through its Brussels office, UNHCR coordinates its inputs into the developing body of asylum instruments and combines an international perspective with a familiarity with national practices, sensitivities and concerns. These qualities place the office in a unique position of not only providing expert advice but also playing an "honest broker" in often thorny negotiations among member states.

In addition to monitoring legislative and policy work within the European Commission and the Council bodies responsible for asylum and migration matters, UNHCR participates, since 1995, in an observer capacity in CIREA (Center for Information, Discussion and Exchange on Asylum), the Council forum for discussing and researching issues pertaining to asylum in EU member states. Through its participation in CIREA, UNHCR provides the EU member states with up-to-date country-of-origin information on a regular basis in order to influence positively the admissibility and eligibility practice of EU member states regarding asylum-seekers originating from countries under review by CIREA. On an *ad hoc* basis, the Office is also asked to provide its expertise and guidance on eligibility questions related to specific issues and themes. UNHCR's participation in CIREA affords the Office an invaluable opportunity to influence asylum processes regarding particular nationalities of asylum-seekers in all fifteen EU member states, and at regular intervals also in applicant countries, the USA and Canada,

when participating in CIREA in an observer capacity as well. In addition, as already referred to, UNHCR is involved in the work of the HLWG by contributing to the preparations of country assessments and the drafting of priority actions, as well as submitting operational proposals for enhancement of refugee protection and assistance capacities in countries under review by the HLWG.

Toward a Strengthened EU-UNHCR Partnership

UNHCR's relationship with the European institutions has intensified as a function of the increasing involvement of these institutions in asylum and refugee policies. With the entry into force of the Amsterdam Treaty and the subsequent relinquishing by member states of their sovereign right to pursue national asylum policies and practices—limited to adopting common minimum standards—UNHCR has considerably stepped up its cooperation with the Brussels-based institutions, primarily the European Commission as the driving force behind the preparation of a body of asylum regulations. UNHCR's cooperation with the European Commission in asylum matters has been marked by openness and transparency. The dialog on draft legislative instruments and the development of programs and operational strategies has been substantive and productive so far. UNHCR has been consulted on all the Commission's proposals for legislative instruments and most of its observations and comments have been taken into account prior to the publication of these proposals. As for the Council, UNHCR's comments on Commission proposals for legislative instruments are being distributed among delegations, and they are being referred to by delegations at regular intervals. The negotiations in the Council, however, continue to be marked by a lack of openness and transparency, as well as absence of accountability as regards the compatibility of proposed legislative standards with international law principles.

Upon the request of the European Commission, UNHCR concluded an exchange of letters with the Commission Directorate General for JHA in July 2000, building on Declaration No. 17 of the Amsterdam Treaty. The exchange of letters seeks to further develop the existing cooperation between the two institutions by establishing regular channels for exchange of information and documentation on ongoing and planned activities of mutual concern, providing mutual assistance in the study and implementation of programs on refugee and asylum questions and the holding of senior level semestrial consultations, alternately in Brussels and in Geneva, to coordinate cooperation, review progress in joint action and areas of mutual concern, and identify potential areas for further collaboration.

In May 2001, the European Commission adopted a Communication on strengthened partnership with the United Nations, including UNHCR, in the areas of development assistance and humanitarian aid (European Commission 2001). In releasing this Communication the Commission announced that it would address in a future document the question of the overall EC/UN relationship, including cooperation in conflict prevention and crisis management. Prior to submitting its Communication, the Commission had been approached by UNHCR to consider the conclusion of an EU-UNHCR Partnership Framework which should identify in some detail the different areas of common interest between the EU and UNHCR, as well as put in place appropriate consultation mechanisms to facilitate concrete action in these areas. The latter were identified by UNHCR as to include asylum and migration, EU enlargement and asylum capacity-building, refugee assistance and humanitarian aid, and the refugee dimension of EU external relations, including development aid. For UNHCR, in addition to the need to deepen cooperation in these areas in order to ensure full commitment by the EU to protection principles and support for operational strategies, the proposed partnership with the EU would pose two particular challenges: the

role of the EU Commission in UNHCR's governance structure (EXCOM), and the funding relationship. UNHCR committed itself to ensure that the European Union is adequately represented in its Executive Committee, particularly in view of the Commission's competence in developing common asylum policies and standards, and the importance of the European Commission as a collective donor. In presenting its proposal for a reinforced partnership with the European Commission UNHCR also aimed at ensuring predictable, flexible, timely and sufficient financial resources considered essential for the efficient functioning of the Office and the implementation of its core mandate. The immediate response from the European Commission and the Council, however, has been to put the UNHCR proposal on hold, not being convinced of the value of further formalizing existing arrangements at this juncture.

Conclusion

The EU harmonization process in asylum has had a significant impact on the international protection regime so far, and this will be even more noticeable once the common European asylum system is put into place. The future common standards, policies and practices are expected to curtail some of the international standards, yet they may reinforce and expand on others, mostly in the area of procedural asylum law. The Tampere Conclusions stipulate that the Common Asylum System must be firmly rooted in the full and inclusive application of the 1951 Convention. The Union, however, has not yet indicated what such "full and inclusive" application means, either at the conceptual level or as regards implementation (Feller 2001). In developing specific instruments, standards, tools and mechanisms, the Union has so far adopted a rather narrow and exclusive approach to some legal and protection issues and its common concepts of procedural and material asylum law have contributed to lowering rather than raising the level of protection afforded by international standards. While the existing soft law standards developed in the last decade represent a step backwards in the strengthening of the international protection regime, the developing Community standards may contribute in a more positive way to revitalize the international protection system, provided they will be based on a high level of protection, address all core elements of procedural and material asylum law, and are prepared from a rights-based approach rather than a migration-control perspective.

As regards the external dimension, the EU has been rather successful in exporting its standards and practices to third countries, particularly where these are aimed at controlling entry and residence, reducing the admission of asylum-seekers, and limiting the options for local integration of refugees which are considered as a burden on the often fragile social fabric. In so far EU assistance programs provide potential leverage for UNHCR with the authorities to develop full-fledged asylum systems, the EU's interest has been generally limited to transfer and implementation of EU standards and practices in applicant countries. Also, the EU's support programs have aimed at promoting the EU's internal stability and security by managing migration to and from the Union in a more orderly and predictable manner, through inter alia equipping third countries to control their borders and combat organized crime, including the fight against trafficking in human beings. Where the EU has responded positively to UNHCR's repeated calls to develop comprehensive strategies to refugee and migration challenges, it has not necessarily developed the protection dimension of such approaches, but rather focussed its energy on the need to improve its management of migration flows. UNHCR's involvement in non-EU countries, however, is much wider in that it aims at ensuring the availability of protection and transforming transit countries into countries of destination for refugees. UNHCR's also tries to ensure that migration and border control are effectively reconciled with refugee protection principles in its cooperation with, and assistance to, third countries.

The developing EU asylum and migration standards and operational strategies have also had an impact on UNHCR as the body tasked with supervising state performance in adhering to the international refugee law instruments. In both its policy development and organizational arrangements, UNHCR's protection agenda has been heavily influenced by European developments. Many of the recent policy documents prepared for EXCOM meetings address issues of direct interest and concern to European states. The global consultations, launched in the context of the fiftieth anniversary of the 1951 Convention, also focus on a number of issues which are figuring prominently on the EU harmonization agenda, such as the need to ensure protection in mass influx situations, improve the fairness and effectiveness of asylum processes, and clarify the nexus between migration and asylum by better reconciling the legitimate concerns of States to control irregular migration with their obligations to provide protection to refugees. The consultations, moreover, are examining specific interpretative aspects of the Convention, which have been a source of contention between European States and UNHCR in recent years. The consultations should place the EU harmonization process in a more global context and encourage the EU to base its legislative instruments on the required high level of protection standards. Through the consultations, the developing common policies and practices in Europe can be exposed to a wider audience and receive constructive criticism, particularly where these may impact on international cooperation for sharing responsibilities in addressing specific refugee problems. Conversely, the consultations can draw inspiration from the various EU legislative and operational initiatives.

The negotiations between member states in the period up to 2004, when the full legislative package in asylum must be concluded, represent a crucial period for UNHCR to ensure that the forthcoming EU legislation is aligned to international standards of refugee law and human rights law. Yet the process does not end there: the European Commission has already started to look beyond the legislative Amsterdam agenda and develop options for the adoption of common asylum policies and strategies. UNHCR has to remain closely involved in the post-Amsterdam developments in European asylum policy, and as the guardian of the 1951 Convention, has to continue to fight a hard battle to preserve the spirit of the Tampere Conclusions by ensuring the "full and inclusive application" of the 1951 Convention and preserving the integrity of the asylum institution, within and outside the European Union. The EU standards and policies have to be developed with due regard to internationally agreed protection standards and strategies, rather than allowing the EU law and policy-makers to make undesired inroads into the carefully crafted international framework of refugee protection. And the Office of the High Commissioner for Refugees must be given the political space and the human and financial resources to remain in the forefront of this process.

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Footnotes

- 1 Reprinted with the courtesy of the editors Emek Ucarer, Bucknell University USA and Sandra Lavenex, Zurich University and the publisher Lexington Books, New York, USA. Manuscript was completed in summer 2001.
- 2 It is to be recalled that in an earlier draft of the Amsterdam Treaty submitted by the (then) Irish Presidency to the 1996 Dublin European Council, a provision on "close and regular consultations with UNHCR" was included in the body of the Treaty text (Article D of the draft chapter on "free movement of persons, asylum and migration," CONF 2500/96, 5 December 1996)
- 3 Since 1957 the UNHCR Executive Committee advises the High Commissioner in the exercise of his functions and undertakes an annual review of the UNCHR assistance programmes. EXCOM approves UNHCR's programs and scrutinizes all financial and administrative aspects. EXCOM meets in formal session in October of each year and adopts Conclusions, including Conclusions on international protection, which represent an important body of opinion on detailed aspects. At the moment, more than fifty States parties to the 1951 Convention are formal members of ExCOM.
- 4 A directive on minimum standards for the harmonized application of the refugee definition and the provision of complementary forms of protection was introduced by the Commission in the Council and the European Parliament in September 2001. This was the last piece of the set of Commission proposals for Community legislative instruments in asylum as called for by the Amsterdam Treaty.
- 5 Examples are the 1992 London Resolutions on accelerated procedures for manifestly unfounded applications, a harmonized approach to the application of the "safe third country" notion, and common conclusions on the notion of "safe country of origin," as well as the 1995 Council Resolution on minimum standards for asylum procedures. The very first piece of the EU asylum acquis, the 1990 Dublin Convention, is essentially an instrument regulating the joint responsibility of EU Member States regarding the admissibility of asylum claims.
- 6 As an example, the draft Directive on minimum standards for asylum procedures includes provisions on the "safe third country" notion and the suspensive effect of appeal which have met with UNHCR criticism. Another example of UNHCR criticism is the proposed preservation of the basic criteria of the Dublin mechanism (Member State responsibility for controlling entry into the common territory as the over-riding criterion rather than the Member State where the asylum application is actually lodged).
- 7 Although the provisions of the Directive stipulate that temporary protection is not an alternative to refugee status under the 1951 Convention, but only a practical device aimed at meeting urgent protection needs during a mass influx situation, the provisions of the Directive allow for inception of a temporary protection regime prior to the emergence of a mass influx, when individual processing would still be possible. However, such possibility, as formulated, should be ruled out if UNHCR would oppose such a move (consultations with UNHCR on the establishment, implementation and termination of the system are mandatory).
- 8 This, for instance, has been the Union defense against criticisms that its legal instruments to combat migrant smuggling and trafficking in human beings do not follow the agreed language of the relevant protocols attached to the UN Convention Against Transnational Organized Crime ("Palermo protocols").
- 9 A similar biannual senior-level dialog between UNHCR and the European Commission Humanitarian Office (ECHO) was instituted in December 2000.

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Chapter 3: EU funding support to UNHCR

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EU's Funding Support to UNHCR

Over the last decade, Europe has consistently provided the largest part of the financial support given by the international community for humanitarian assistance, including well over fifty per cent for refugees and displaced persons. The European Commission provides a significant contribution but still much less than Member States collectively. Over the past ten years, the assistance given by the Commission has been increasingly channelled directly to the countries concerned and less and less through UN agencies.

The Commission's contribution to UNHCR amounted to some 70 millions US dollars in 2002. The EC contribution represented over 8 per cent of all contributions to UNHCR in 2002, compared to 22 per cent in 1994.

The main funding sources within the Commission budget are the following:

- the European Community Humanitarian Office (ECHO, created in 1992) - some 70 per cent of the overall EC contribution,
- the Directorate General for External Relations with its dedicated funding line for uprooted people in Asia and Latin America,
- the Directorate General for Development and the Directorate General for Justice and Home Affairs.

The EC has restructured the way it provides external aid, and established a EuropeAid Co-operation Office in January 2001 to handle the identification of specific projects and contractual arrangements for DG External Relations and DG Development. This authority will now be gradually transferred to the Commission delegations.

1. Key issues for UNHCR

The Commission does not act as a traditional donor but more as an actor of humanitarian and development assistance. As a consequence, the EC does not provide unearmarked funding and favours projects rather than programmes. UN agencies are often seen as possible implementation partners in the framework of EC funded projects. The submission of proposals, the monitoring of projects, and reporting are demanding, and require an exceptional mobilization of UNHCR and partner personnel.

There are a number of incompatibilities in the financial rules and regulations of the United Nations and the European Community (for example, on questions of verification and eligibility and on the procurement of goods and services). A new framework agreement between the UN and the EC, which was concluded in April 2003 will to some extent alleviate these difficulties.

Increasingly, the Commission channels funds directly to the countries concerned or through NGOs. In the Commission's view, certain activities can be implemented as well, better or more cheaply through NGOs. Direct funding of NGOs is also considered to provide better visibility for EC funding.

2. An improved dialogue and partnership with the EC

The European Commission has stated at regular intervals that it is committed to strengthening its partnership with the United Nations. This was forcefully translated into a Communication, issued in May 2001, entitled Building an Effective Partnership with the UN in the Fields of Development and Humanitarian Affairs. It was also expressed in the revision of the 1999 UN/EC framework agreement on administrative and financial issues. (refer above)

UNHCR has an annual strategic dialogue with the EC's ECHO where refugee situations are reviewed and analysed. This has helped to ensure that ECHO funding for UNHCR's activities is predictable, timely and consistent.

Efforts are made to obtain more predictable and timely financial support from other services of the Commission, notably from the EuropeAid Cooperation office. The EC pays particular attention to post-conflict situations and issued a Communication in 2001 on Linking Relief, Rehabilitation and Development. Funding from the European Development Fund (EDF) - the EC budget for developing countries mainly in Africa - has so far been provided for the repatriation and/or reintegration of refugees in Burundi, Eritrea and Angola. The budget for Aid to Uprooted People in Asia and Latin America has also been an important funding source for protracted refugee situations and return operations in the countries covered by this fund (such as Afghanistan, East Timor).

In parallel, discussions continue to grant the European Commission an enhanced position as special observer in the Executive Committee of UNHCR. As competence for many refugee matters is transferred to the Community, the EC will have to play a more important role in the future in the governance of global refugee problems.

In the future, with a general decentralization within the EC of the management of external aid, it will be essential for UNHCR offices in the field to maintain close cooperation with the EC delegations. Indeed, the EC delegations will manage directly the entire cycle of contractual arrangements with partners, from submissions of proposals to reporting.