

**Cicero Foundation: International Seminar on  
Refugee and Migration Policy in the European Union**

“The Emerging European Refugee Policy:  
Does it Live up to the Standards of the Geneva Convention?”

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I am pleased and honoured to be here at this very timely seminar at the Cicero Foundation, to speak on an issue of fundamental importance to UNHCR. It is indeed a particularly appropriate moment to take stock of what has been achieved to date in the European Union's efforts to harmonize asylum law and policy. In its recently concluded first round of asylum harmonization, the European Union has agreed upon legislation on the issues foreseen in the Treaty of Amsterdam. This is an important milestone in the process of creating a common European asylum system.

UNHCR has been strongly supportive of the harmonization process, since we believe that the establishment of a coherent asylum space in Europe, based on common high standards and practice, is in the interests both of refugee protection and of EU Member States. We have viewed harmonization as an opportunity to ensure high refugee protection standards across the EU as well as to bring coherence to what has hitherto been a wide variety of State practice, and to provide a better basis for effective management of asylum and irregular migration throughout the Union.

My remarks today will focus on what has been achieved at the European Union level to date, on some of the shortcomings, and on the challenges that lie ahead.

**The legacy of Tampere**

First, let us take a look at the goals that the EU established at the beginning of the process. In Tampere in 1999, the European Council called for a common asylum system to be developed, ensuring "absolute respect of the right to seek asylum" and the "full and inclusive application of the 1951 Convention." According to the Conclusions of the Tampere Summit, this was to be reached in phases, beginning with harmonization (through the setting of minimum standards in a number of areas as set out in the Treaty of Amsterdam) and leading to a common asylum procedure and a uniform status valid throughout the Union for those granted asylum or complementary protection.

After long and difficult negotiations, political agreement on an Asylum Procedures Directive was reached in April this year, just within the timeframe set by the Treaty of Amsterdam and on the eve of accession to the EU of ten new Member States. Agreement on the text concluded the first phase of the process foreseen at Tampere. The minimum standards contained *inter alia* in four Directives on asylum are to be transposed into national law within a two year period from the time of entry into force. Meanwhile, work on the establishment of common asylum system will continue. At the European Council Meeting in Brussels earlier this month, Heads of Government of EU Member States adopted the so-called "Hague Programme," which defines the parameters and duration of the second phase to be concluded by 2010.

So what is the current state of health of Europe's asylum project? Despite considerable progress, it is questionable whether the achievements to date or the level of ambition being set for the future measure up to the Tampere vision of "an open and secure European Union, fully committed to the obligation of the 1951 Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity." I will come back to some of the details of this deficit, but first let me say a word about the reasons for it.

Since the Tampere Summit, the issue of illegal immigration and concerns over the spread of international terrorism have moved the asylum issue up the collective and individual agendas of EU Member States. This phenomenon in turn has complicated both political and public debate and, by extension, negotiations at the European level. In short, asylum and illegal immigration have become issues on which Governments can fall, extremist parties and views can prosper, and elections can be won or lost.

Let me take the United Kingdom as an example. According to a report in the Financial Times of London on 20 August this year, a recent Mori opinion poll shows Britain as a nation in transition. Thirty percent of people polled cited immigration and race relations as one of the most important issues facing the country, compared with 14 percent in June 2001 and just 3 percent in June 1997. The article goes on to describe how the Conservative Party has worked hard to prove its electoral credentials on crime and immigration since Mr. Howard took over as leader in November 2003, launching a spate of initiatives on crime, and attacking the Government's asylum policies.

Crude numbers of asylum-seekers are not the reason for reactions such as this. The fact is that the number of people seeking asylum in Europe is actually in sharp decline. In 1992, asylum-seekers in the 25 States that now make up the EU numbered around 680,000. Last year, there were fewer than 350,000 of them. From January to September 2004, the numbers have fallen by a further 18 percent as compared to the same period last year. The total number of asylum claims is now on a par with those recorded before 1990. Objectively speaking, it cannot be argued that the European Union is unable to manage such numbers.

The explanation of why asylum continues to be such a contentious issue is more complex. It lies in the fact that refugees and asylum-seekers who arrive in Europe today are caught up in broader and increasingly globalized movements of migrants seeking a better life in countries with mature economies. Since there are very few legal channels for migration into Europe, both asylum-seekers and economic migrants resort to irregular means of access, often making use of smuggling networks. Once inside the European space, many would-be migrants apply for asylum as the only way of regularizing their stay. At the end of the asylum procedure, only a minority of those whose cases are rejected return to their countries of origin. All this feeds the perception of national populations that European Governments have lost control over their borders and their asylum systems to smugglers and to individuals misusing the asylum institution. As a result, asylum-seekers are increasingly criminalized in the public mind and stigmatized in a way that loses sight of the fact that many come from regions characterized by conflict and widespread violations of human rights and are thus in need of protection. Negative perceptions of this kind are further exacerbated by serious difficulties being experienced in many European States with the integration of third country nationals from different cultural, racial or religious backgrounds.

Moreover, in the current international environment, irregular movements of people are viewed by Governments and national populations through the lens of national security. This has further heightened hostile perceptions and xenophobic reactions, putting States in the awkward position of having to reconcile their legitimate concern to control their borders and combat illegal immigration with their voluntarily assumed obligations to recognize and provide protection to refugees.

In face of these challenges, there are important differences of opinion amongst European Governments in relation to the desirability and scope of a future EU asylum system, and the pace of its development. One broad trend, however, is the development of increasingly restrictive asylum legislation and policies. While the aim of these may be to combat illegal immigration, they also impact indiscriminately on *bona fide* asylum-seekers, making it more difficult for them to gain access to territory, more difficult to access asylum procedures and more difficult to have their claim heard and assessed in procedures that conform with international standards.

This is true at the national level. Among the “old” EU Member States, many have recently revised their asylum laws in a restrictive direction. It is also true at the European level where many of these restrictive provisions have either been incorporated or accommodated in the EU texts through provisions for exceptions, permitted derogations and scope left for national discretion.

The process of harmonization has not been easy for Governments. Many of them appear to be caught on the horns of a dilemma, because the effective management of irregular movements of people in the EU requires a common European approach, which in turn comes with the political price of being perceived as forfeiting control of issues that are felt to touch so directly on questions of national identity and sovereignty.

### **The results of EU harmonization**

Let me now turn to the actual results of EU harmonization to date. The achievements of the first phase are by no means insignificant. This is all the more the case, given the difficult political environment in which negotiations have taken place, with the issue of asylum and illegal migration in Member States often at the centre of over-heated political and public debate. Against this political backdrop, and faced with a requirement to reach decision by unanimity, the EU has adopted, or reached agreement on, four Directives and two Regulations in the area of asylum. It is no secret, however, that UNHCR has had misgivings, some serious, about certain aspects of these instruments. In a number of important respects, we believe they fall short of international standards and provide scope for a drift towards the lowest common denominator of existing national practice, and even for possible breaches of international law.

The four EU Directives set out minimum standards on temporary protection in situations of mass influx; on reception conditions for asylum-seekers; on the definition and status of refugees and persons in need of complementary or subsidiary protection (the so-called Qualification Directive); and last, but not least, on asylum procedures. The two regulations are the so-called Dublin II Regulation, which designates the Member State responsible for determining an asylum claim, and the EURODAC Regulation, which establishes a common database of fingerprints to reinforce the implementation of the Dublin II Regulation. Additionally, some of the instruments adopted under the Migration Agenda also have an impact on persons in need of international protection, such as the Directive on family reunification. At face value, this represents a fairly comprehensive

package of measures, covering the question of who qualifies as a refugee, what reception conditions are afforded to asylum-seekers, what procedural standards are applied in determining status, and which Member State bears responsibility for that determination.

A critical look at the detail of this legislation, however, reveals that the balance sheet is very mixed.

UNHCR has welcomed the Directive setting minimum standards on temporary protection, and the common EU regime that it establishes for situations where there is an actual or imminent mass influx of persons in need of international protection. Positive aspects of the Directive include that it is placed within the framework of the 1951 Convention and that it confirms that temporary protection does not prejudice recognition of refugee status under the 1951 Convention. It further provides for consultations with UNHCR on the establishment, implementation and termination of the regime. The Directive on temporary protection is, however, still to be tested in practice and skirts around the politically difficult question of burden sharing.

It is noteworthy that access is provided to the labour market for beneficiaries of temporary protection, while it may be delayed for asylum-seekers under the Reception Conditions Directive, and be subject to further conditions. Nevertheless, the Directive on reception conditions for asylum-seekers ensures that certain minimum standards are met, including with respect to health care, education, and documentation and guidance provided to asylum-seekers. This may seem elementary but should, once in force, oblige countries with very limited reception facilities, such as Greece, to put in place appropriate conditions and facilities. UNHCR has regretted, however, a number of possible exceptions outlined in the Reception Directive, which could be used to deny reception facilities to asylum-seekers. This may occur in various circumstances including, for example, because asylum-seekers had not submitted an asylum claim as soon as reasonably practicable after arrival in the Member State concerned.

In UNHCR's view, adequate reception conditions are a necessary component of fair asylum procedures. Denial of reception facilities may place *bona fide* asylum-seekers at a physical or psychological disadvantage in pursuing their asylum applications. Where there are problems of real abuse of States' asylum systems, these can and should find effective redress within the established asylum procedures. If a reduction in the level of reception needs to be made, this should take place only in situations of emergency or *force majeure* and for a short period of time. The provisions as they stand, however, permit for exceptions to be applied in a broad category of cases.

But it is the so-called Qualification Directive and the Asylum Procedures Directive that go to the core of UNHCR's mandate and of international protection. There are provisions in the Directives that are positive. UNHCR welcomes, for instance, the explicit recognition of persecution by non-state agents and of gender based persecution contained in the Qualification Directive. These are real advances. The Directive confirms that individuals or groups persecuted by non-state agents, such as armed militias, and whom the State was unwilling or unable to protect, may be refugees under the 1951 Convention. This includes cases of failed States. Similarly, gender and child-specific persecution are explicitly acknowledged to fall within the scope of the refugee definition in the 1951 Convention. It has been UNHCR's position that the text, object and purpose of the 1951 Convention require such an interpretation.

The Directive also codifies the notion of subsidiary (or what UNHCR calls complementary) protection for people whose claims are deemed not to qualify under the 1951 Refugee Convention but who nevertheless have a valid protection need. To date, in the absence of common criteria, State practice has varied widely and the Directive will hopefully introduce a greater degree of consistency in relation to the availability of complementary or subsidiary protection and the rights attached to such a status. In UNHCR's view, however, it is important to ensure that there not be a higher burden of proof in situations of generalized violence as to the threat faced by the individual. It also regrets that the text may be interpreted to exclude from subsidiary protection individuals fleeing from situations of generalized violence, where it does not meet the threshold of an international or internal armed conflict. The rights accorded to beneficiaries are, moreover, significantly less generous in a number of important respects than those accorded to 1951 Convention Refugees, despite needs that are generally equally compelling and of equal duration. Care will further need to be taken to ensure that persons who qualify are recognized under the 1951 Convention.

The Asylum Procedures Directive, however, gives rise to UNHCR's most serious concerns. On the one hand, the latitude this Directive leaves for national interpretations and derogations empties it of strong harmonization content. On the other hand, certain of its provisions give rise to a real danger of breaches, in practice, of international law and standards. This is notably the case in relation to the application of the so-called "safe third country" concept, the wide range of categories where the acceleration of procedures is possible, as well as with the possible latitude to deny suspensive effect of an appeal. Depending on how they are applied, these provisions may lead to cases of direct or indirect refoulement, thus contravening the cardinal principle of refugee protection and the letter of the 1951 Convention.

It should be noted that while political agreement has been reached on the Asylum Procedures Directive, it has not yet been formally adopted. A common lists of "safe countries of origin" and (according to the EU term) "super-safe third countries" also still need to be agreed. UNHCR is closely following negotiations on these lists and will also carefully monitor the way in which the notion of safe countries, both with respect to countries of origin and third countries, is applied.

The concerns raised by UNHCR in relation to this Directive are not simply questions of detail. A broad application of the notion of safe third country may, for example, lead to asylum-seekers being sent back to places where their individual circumstances render them unsafe, and where they have no real possibility to present their asylum claim and to gain access to protection. A given country may be safe for one individual or category of people but not for another. For these reasons, any safe third country arrangement must, at a minimum, make provisions for an asylum-seeker to rebut the presumption of safety in his or her individual case. Return should also be accompanied by appropriate measures to ensure that anyone being returned has the opportunity to present an asylum claim in the third country concerned. In the absence of safeguards of this sort, return to a supposedly safe third country may lead to indirect refoulement.

Similarly, failure to provide for the suspensive effect of appeal may also lead to refoulement. A relatively high percentage of negative decisions at first instance are overturned at the appeal stage in many European countries, representing in 2003 on average 18 percent.<sup>1</sup> This is a sobering comment on the quality of first instance

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<sup>1</sup> The total recognition rate during the appeal stage for the EU (25) was 18 percent in 2003, which includes positive decisions under the 1951 Convention and Humanitarian residence permits. If only looking at the

procedures. While it may be justifiable to deny suspensive effect in well defined circumstances, such decisions should, in the view of UNHCR, always be subject to independent review.

Because of these concerns, UNHCR will be particularly attentive to the transposition of the Directives into national law, as well as to their application in practice. As transposition takes place, UNHCR will be urging Member States to keep in mind that the Directives are intended to set minimum standards only and are not to be read as a prescription for convergence around the lowest common denominator of existing national practice.

While the primary task of ensuring that national legislation complies with the EU Directives will fall to Member States, the European Commission will have a responsibility to monitor and supervise transposition of the Directives. UNHCR will be involved also, on the basis of the supervisory role it has under its Statute more generally and of that reflected specifically in Article 35 of the 1951 Convention. We intend to offer assistance and constructive input to Governments in this process in order to advocate for standards in line with international norms and best practice.

As part of this process, UNHCR has already issued annotated versions of the Temporary Protection and the Reception Conditions Directives and we plan to produce similar editions of the Directives on Qualification and the Asylum Procedures. These can serve as guides to interpretation for legislatures or courts, by setting out UNHCR's analysis and comments upon the provisions, article by article.

Turning now to the two Regulations that the EU has adopted in the first phase, UNHCR also has concerns about the practical consequences of the Dublin II Regulation, the purpose of which is to designate which EU Member State is responsible for considering an asylum claim. Currently, the burden of asylum applications is very unevenly distributed amongst EU Member States. While the Dublin II Regulation will change existing patterns, it will not lead to the kind of responsibility and burden sharing that is needed to turn Europe into a coherent asylum space. Quite to the contrary. Although there are questions about how effective the Dublin II Regulation will be in practice, the logic of the Regulation, along with EURODAC, is to place the greatest burden for the determination of asylum-seekers' claims, and, for that matter, their integration or return, on States through which they have entered the Union. New EU Member States may be particularly affected by this, as they are for the most part located at the EU's external border. They do not have the resources or capacity to deal with a large increase in asylum claims or the integration of the majority of persons in need of international protection.

Although it would be premature to draw firm conclusions, UNHCR's statistics nevertheless indicate that from January to September 2004 there was a 16 percent rise in the numbers of asylum-seekers registered in new Member States (whereas most of the EU saw a decrease). The most significant increases were recorded in Cyprus (499%), Malta (49%) and Slovakia (46%), whereas reductions were registered in the Czech Republic (46%), United Kingdom (36%) and Germany (30%). The numbers of asylum applicants lodged in new EU Members States are still not high in absolute terms (and vary from country to country), but it must be kept in mind that the asylum capacities in these countries are very limited. Some Member States currently only have 10 or 15

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1951 Convention recognition rate, the percentage was 15 percent. These statistics refer only to substantive decisions (i.e., otherwise "closed cases" are not included).

asylum assessors. A decade ago they had no asylum systems at all. If large numbers of asylum-seekers are sent back from other EU countries, the still fragile systems of new Member States could easily be overwhelmed. And if procedures in these countries are pushed to the point of collapse, the result is likely to be a lowering of protection standards. Restrictive measures that make it more difficult for asylum-seekers to access asylum procedures and obtain protection in these countries would lead to more – instead of less – irregular movements between EU States. This is precisely the opposite of what the European Union needs and wants to achieve.

### **Towards a common EU asylum system**

In UNHCR's view, the solution to this is for the European Union to move beyond harmonization to a truly common asylum system in which standards, responsibilities and burdens are shared.

In discussions on the second phase of the development of a European asylum system, we have put forward specific proposals in this regard. These outline how a European asylum system could be achieved through the progressive development of common, and eventually collective, decision-making and through responsibility and burden-sharing arrangements. Such a system, we argue, would not only be to the benefit of refugee protection but would also be in the best interests of States, as it would provide them with an effective basis to manage, rather than merely react to, the challenges posed by mixed flows of asylum-seekers and migrants.

The initial focus should be on practical efforts to enhance existing harmonization. It is clearly not enough for the European Union to harmonize legislation and policies. It also needs to harmonize practice. What better illustration is there of this than current recognition rates for Chechen asylum-seekers? They vary from almost 80 percent in some countries of the Union to close to zero percent in others.<sup>2</sup> Overall, the recognition rate in the EU for all nationalities of asylum-seekers is a combined average of 15 percent. Yet, in a few EU Member States they are as low as 1 to 2 percent. It is not the new EU legislation that will solve these astonishing discrepancies but practical efforts to develop common tools and approaches, not least a shared interpretation of conditions in countries of origin and their implications for the determination of asylum claims.

At the same time, efforts need to be made to support fledgling asylum systems in border States, including through the sharing of expertise and the secondment of personnel. Gradually, the resources of Member States could be pooled and collectivized until finally a fully fledged EU asylum system with its own institutional underpinnings is established. This need not be implemented all at once, since the political will is clearly not there for that. But it may be possible to proceed in phases, starting with measures to enhance practical cooperation and burden-sharing, particularly with States likely to be overwhelmed by the numbers of asylum-seekers. An EU asylum office could be set up to monitor and possibly coordinate such actions.

The limited level of ambition currently shown by Member States to move to a radically different level of collective action is a significant obstacle to achieving such a system. The European Council meeting in the Brussels on 5 November this year has

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<sup>2</sup> This is the total recognition rate for asylum-seekers from the Russian Federation (of whom the majority are thought to be Chechen), including humanitarian status. Statistics are for first instance and substantive decisions only.

nevertheless agreed upon a framework for further action over the next five years and this contains a number of welcome elements.

The "Hague Programme" adopted in Brussels reaffirms that the aim of the second phase, as foreseen at Tampere and in the Constitutional Treaty, will be the establishment of a common asylum procedure and a uniform status throughout the Union for those who are recognized as refugees or granted subsidiary protection. UNHCR welcomes the renewed commitment of the Union to ensuring that this "will be based on the full and inclusive application of the [1951] Geneva Convention on Refugees and other relevant Treaties." The Hague Programme, moreover, sets 2007 as the target date for concluding an evaluation of the asylum Directives adopted in the first phase and 2010 as the time line for full establishment of the Common Asylum System. It foresees studies on joint processing of asylum claims (both within and outside the EU), as well as the establishment of 'appropriate structures' involving the national asylum services of the Member States with a view to facilitate practical and collaborative cooperation among Member States on asylum. Once a common asylum procedure has been established, these structures are to be transformed into a "European support office". The need to address particular pressures on asylum systems and reception capacities that result from the geographical location of States is also recognized.

There is much that is positive in these proposals. UNHCR would nevertheless urge Member States to ensure that the development of a common asylum procedure is premised firmly on respect of international standards. If the minimum standards that have been negotiated during the first phase are transformed into the absolute standards that structure a common asylum procedure, the lowest common denominator will have become a stark reality to the detriment of refugee protection.

With completion of the Amsterdam agenda, the process of decision-making on asylum issues will change. This may facilitate the work of Member States in the second phase and help guard against a drift towards lower standards. While all Member States to date have had, in essence, a veto right on all issues related to asylum, decisions in future will, at the latest as of 1 April 2005, be taken by qualified majority, in accordance with the Nice Treaty. The European Parliament will also have a greater role to play in the process, as will the European Court of Justice. These changes should facilitate adoption of new instruments in future. Given the supervisory role it has under its Statute and under the 1951 Refugee Convention, UNHCR hopes to continue to work closely with the EU Commission and Member States in elaborating and developing the next phase of the EU common asylum system.

## **The external dimension**

Needless to say, the problem of asylum in the EU cannot be solved in the European Union alone. For that reason, European asylum policy has acquired an increasingly robust external dimension. Much remains to be done in the regions bordering the Union, where asylum systems are, in most cases, rudimentary. While all neighbouring countries are now signatories to the 1951 Convention and have developed asylum legislation, most are very far from having functioning asylum systems. In this regard, it is encouraging to see the greatly increased interest that the European Union is now taking in supporting the development of asylum capacity in the broader Europe, not least in the Balkans and the countries of the Western CIS through its CARDS and TACIS programmes respectively.

There is also a new impetus to the EU's interest in building protection and promoting solutions further afield in refugees' regions from which refugees originate. Here there is a strong convergence of interest with UNHCR's own Convention Plus initiative and the Regional Protection Programmes proposed by the European Commission. The rationale is simple. The largest number of refugees and persons in need of international protection are located in regions of origin, in countries that often have the least resources and capacity to provide protection or durable solutions to persons in need. By reinforcing the protection available there, and ensuring that refugees have access to some durable solution or an acceptable degree of self-reliance, not only can their rights and well-being be better ensured, but the pressures which encourage onward secondary movement of refugees can also be reduced. To offer an example, there is undoubtedly a link between the availability of repatriation solutions in Afghanistan today and the dramatic drop in the numbers of Afghan asylum-seekers arriving in EU Member States.

However, UNHCR would wish to underline that the building of regional protection capacities outside the EU must be a complement to and not a substitute for EU Member States' obligations towards asylum-seekers arriving directly on their territory. In order to be successful, work undertaken to strengthen refugee protection internationally must be informed by a spirit of responsibility and burden sharing, and not one of burden shifting. A clear distinction needs to be made between working to strengthen asylum systems outside the EU and externalizing the EU's asylum problem and responsibilities. Some EU Member States have flirted with the latter, burden-shifting approach by putting forward proposals which involve the return of asylum-seekers from the EU to extra-territorial processing centres. Any failure of the European Union to provide access to its territory and its asylum procedures for those seeking its protection would raise serious issues in relation to state responsibility and respect of international law. It would also have the powerful export value of bad example and would risk unravelling the international refugee protection regime of which the 1951 Convention is the cornerstone.

I should like to conclude by highlighting a fact that I mentioned at the beginning of this presentation. The global numbers of refugees and other persons in need of international protection fell by 18 percent last year, as compared to 2002. A reduction of 20 percent was recorded in the numbers of asylum claims across the European Union. Let us hope that this reduced pressure will be seen by EU Member States as an opportunity to put refugee protection back at the centre of asylum policy as they move into the second phase of the development of a common European Union asylum system.

Thank you.