



United Nations High Commissioner for Refugees

**TOWARDS A COMMON ASYLUM
PROCEDURE AND UNIFORM STATUS,
VALID THROUGHOUT THE EUROPEAN
UNION, FOR PERSONS GRANTED
ASYLUM**

**Geneva
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UNHCR observations on the European Commission Communication “Towards a common asylum procedure and uniform status, valid throughout the European Union, for persons granted asylum” (COM (2000) 755 final)

Introduction

1. UNHCR welcomes the publication of the Commission Communication on a common asylum procedure and uniform status for persons granted asylum, issued by the European Commission on 22 November 2000. UNHCR believes the document, published jointly with a Communication on the prospects of a common European immigration policy, contributes to the development of a more strategic and outward-looking approach to the development of a principled, coherent asylum policy in Europe.
2. UNHCR agrees with the stated objectives and challenges of the common asylum procedure and uniform status, emphasising the imperative to maintain a rights-based approach to asylum and the need to develop a common asylum system in parallel to common measures reinforcing the Union’s capacity for migration management. UNHCR cautions that the basic principles of a common asylum procedure and uniform status should not be subjugated to the social, economic and demographic requirements of a common migration policy. Nor should any measures to fight against forms of serious organised and trans-national crime, including terrorism, interfere with fundamental rights and freedoms, including the right to seek and enjoy asylum.
3. UNHCR recalls that harmonisation of procedural and material asylum law not only serves the interests of Member States in limiting secondary movements, but also contributes to fair and non-discriminatory treatment of refugees and asylum-seekers. Where asylum-seekers have only once chance to have their application examined by one of the EU Member States, the standards, tools and mechanisms governing Member States’ procedures and systems need to be harmonised if equal treatment is to be assured.
4. UNHCR welcomes the general approach of the Communication by presenting the further harmonisation of Member States’ asylum systems as a necessary contribution to the process of strengthening the international protection framework, by reaffirming and where necessary complementing the 1951 Convention, streamlining asylum procedures, and achieving more uniformity in refugee status.

The single procedure

5. In its preliminary observations to the Communication¹, UNHCR welcomed the proposal to consider the establishment of a single procedure in each of the Member States in order to determine all protection needs in their totality rather than in a compartmentalised fashion. UNHCR reiterates its view that a fair operation of such a single procedure is to be premised on a common understanding of what constitutes a valid asylum claim. From UNHCR's perspective, a valid asylum claim can be lodged by persons coming within the scope of the 1951 Convention and 1967 Protocol as well as persons fleeing the indiscriminate effects of armed conflict or generalised violence (even where no specific element of persecution is recorded).
6. Furthermore, in implementing such a single procedure, each application for asylum must be assessed in a certain sequence, starting with an examination in respect of the provisions of the 1951 Convention, to be followed by an analysis of the possible application of provisions of other international human rights instruments, as well as, where appropriate, an assessment of humanitarian grounds militating against return. The examination of all needs for protection should be undertaken by a single qualified and competent body, and include a possibility to review the decision not to grant Convention status and, instead, offer a subsidiary status. UNHCR agrees that the examination of circumstances not related to protection needs yet which render return impossible is best left to the discretion of Member States and does not need to be part of the single procedure, or, generally, of the harmonisation of procedural asylum law.
7. UNHCR believes that the establishment of a single procedure will contribute to rendering asylum procedures swifter, more efficient and more cost-effective. This is also to the benefit of the asylum-seeker who otherwise may have to wait for a sometimes unacceptable long period before a decision on his application is to be taken and, should such decision be negative, will have difficulty to leave the country where asylum was sought.

Access to territory and admission to the procedure

8. Among the key elements of the common asylum procedure, the Communication raises the issues of access to territory and admission to the asylum procedure, in combination with visa policy and external border controls. UNHCR reiterates its concern that the Tampere European Council's commitment to the absolute respect of the right to seek asylum is in jeopardy if no adequate safeguards are put in place to mitigate the negative effects of migration control measures on people who need protection and are seeking access to safety in the European Union. The question of access to territory is indeed key to any asylum process; having the best asylum procedure and the most generous refugee status is of no use unless refugees can actually gain access to territory and admission to the procedures.

¹ Communication from the European Commission "Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum", UNHCR's preliminary observations, UNHCR Geneva, January 2001.

9. The Commission proposes that certain common approaches can be adopted to Member States' visas and border control measures as a contribution to better manage access to their asylum systems, including the imposition of visas in case of actual or imminent large scale influx. UNHCR, however, would caution against linking the issue of visas, and generally measures related to border control and management, and the need for providing access to safety by those fleeing persecution or conflict. In situations of large-scale influx, asylum-seekers should be admitted into safety at least on a temporary basis and be offered protection as long as required, and visa policy should not interfere with such measures for protection².
10. The Communication also refers to the possibilities for facilitating the visa procedure in specific situations. In the view of UNHCR, this could include the delivery of humanitarian visa to individuals who are at risk in their country of origin and in need of international protection. UNHCR would welcome the adoption of a common European approach to the delivery of such humanitarian visa as a means to help persons at risk to seek safety on EU territory, yet such approach should be developed as a protection measure rather than an instrument of migration management and border control.

Processing in the region

11. UNHCR believes there is merit in the Commission's proposal to explore the possibilities for future EU support for the establishment of processing schemes in countries neighbouring countries producing larger groups of refugees. In so far such processing in the region would, as the Communication suggests, be undertaken as a prelude to resettlement towards EU Member States, it should be recalled that screening in the region – like organised refugee reception through resettlement – is a complement to, not a replacement of, Member States obligations to examine asylum applications of those who seek protection on their territory. Processing protection needs with a view to subsequent resettlement should not be limited to an assessment of applications in regard to the 1951 Convention and 1967 Protocol but should include applications in relation to the extended definition of a refugee as applied by UNHCR under its mandate. This means that, in addition to those who qualify for protection under the 1951 Convention and 1967 Protocol, those who have fled indiscriminate violence arising in situations of war or conflict could also be accepted as refugees and as eligible for resettlement.
12. In so far EU support for processing in the region is intended as an element of asylum capacity-building in countries in the region enabling these countries to examine asylum applications and offer protection as long as required, it should be recalled that refugee status determination is and remains the responsibility of host Governments, and that such activity is to be based on agreed standards and be guided by tools and mechanisms as developed in *inter alia* the UNHCR

² EXCOM Conclusion 22 (XXXII) on Protection of Asylum-seekers in Situations of Large-Scale Influx.

Handbook on Procedures and Criteria for Determining Refugee Status and Conclusions of the UNHCR Executive Committee. Programmes of co-operation aimed at assisting host Governments to process asylum applications should include the involvement of UNHCR and implementing partners.

13. EU support for processing asylum applications as part of asylum system development in the region should be complemented with assistance to enhance the capacities of host countries to provide reception and protection, as long as required, to those who have received a positive decision, in order to ensure their physical safety, legal security and socio-economic well-being. Processing schemes should be developed as part of a comprehensive approach to asylum capacity-building which includes the adoption of a comprehensive legislative framework, institution-building activity and the enhancement of practitioner capacity.

Determining responsibility for examining an asylum application

14. The Communication calls for a reflection on the need for a revision of the Dublin mechanism in the context of establishing a common procedure for the admissibility of asylum claims, yet so far this has not resulted in a change in approach taken in the Commission's proposal for a Community legislative instrument which is to succeed the Dublin Convention. UNHCR has advocated a system where the responsibility for considering an asylum application lies with the Member State with which and in whose jurisdiction the claim is lodged, and where, in case of transfer to another Member State, such transfer is only justified in cases where the asylum applicant has meaningful links or connections with that Member State. Such a system is considered to be fairer and more cost-effective than the present one as is also borne out by the recent evaluation of the Dublin system conducted by the Commission.
15. Where EU Member States, in operating a system for allocating responsibility for the examination of asylum request, allow an asylum-seekers only one chance to have his or her application processed, the applicant should be ensured fair and non-discriminatory treatment throughout the European Union. UNHCR emphasises that the credibility of any mechanism for transfer of responsibility is contingent upon the existence of harmonised standards in several substantive and procedural areas of asylum, such as a common procedure and a uniform interpretation of the "refugee" definition³.

Common standards, tools and mechanisms for the asylum procedure

16. UNHCR agrees with the Commission that the adoption of the legislative package of common minimum standards in asylum policy and practice, as required by Article 63 of the Amsterdam Treaty, can be considered as a significant step forward in the EU harmonisation process, provided a broad interpretation and

³ Revisiting the Dublin Convention: Some reflections by UNHCR in response to the Commission staff working paper, UNHCR Geneva, January 2001.

detailed content is given to the notion of “minimum standard”. UNHCR believes that the proper implementation of the Amsterdam asylum proposals, once adopted, will require regular review and, where necessary, supplementary legislation and implementing regulations. UNHCR therefore welcomes the establishment of review and co-ordination bodies (such as Contact Committees) which can facilitate consultations between Member States on the proper application of the Community legislative instruments in asylum. UNHCR also believes the development of case-law by national courts and the European Court of Justice in relation to the interpretation and application of Community asylum instruments can contribute to further harmonisation.

17. The Communication does not include much detail as regards possible options and scenarios for further harmonisation or even standardisation of the tools and mechanisms used in Member States’ asylum procedures. Where this will be undertaken in future, e.g. through studies, the development of analytical tools, or strengthening of administrative co-operation, UNHCR hopes that future proposals will be based on high standards of protection and represent a sufficient level of detail. It should be recalled that the proposal for a Directive on minimum standards for asylum procedures allows Member States a large margin of discretion whether or not to use certain procedural concepts and devices, which may undermine the carefully construed body of international principles of procedural asylum law.⁴
18. UNHCR believes that the new areas of competence of the EC Court of Justice under Article 68 of the Amsterdam Treaty may help to further standardise asylum processes in EU Member States, provided the EC Court of Justice will reinforce and expand doctrine and jurisprudence in key elements of procedural and material asylum law as established by *inter alia* the European Court of Human Rights. Should national courts or the EC Court of Justice be seized for a ruling on the interpretation or application of any of the Community asylum instruments, UNHCR stands ready to submit its views in the exercise of its supervisory role as regards the interpretation and application of refugee instruments.
19. UNHCR supports the Commission’s proposal to improve, initially through the strengthening of networks at the level of both senior policy makers and practitioners, the collection and dissemination of comprehensive, accurate, objective and up-to-date information on asylum statistics, country of origin information and the application of legal and protection principles in Member States’ asylum processes and their consequences for the treatment of individual applications. UNHCR would expect to be closely associated with any future such networks and contribute actively to the joint evaluation of country situations and the application of specific protection or legal principles.
20. In the longer term, UNHCR would favour the establishment of a European documentation centre for the collection, dissemination and evaluation of country of origin information, as well as legal and protection issues and trends. Such

⁴ For a UNHCR Comment on the proposal for a Directive see UNHCR’s Observations on the Commission proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status, UNHCR Geneva, July 2001

a centre should, to the extent possible, work in all openness and transparency and be accessible to policy-makers, practitioners, international organisations, NGO representatives and academics. UNHCR may be given a role in the governing structures of such a centre and participate in expert meetings, and its information and guidance should be made available through this centre to the administrative and judicial asylum bodies in all Member States.

21. UNHCR supports the Commission in its efforts to promote closer co-operation between EU Member States, EU institutions and international organisations in the area of data collection and trends analysis. It stands ready to assist in the drafting of Action Plans and the proposed EU Annual Report in this area, as well as in the preparation of future Community legislation to improve the exchange, analysis and comparability of these statistics. Moreover, UNHCR is willing to co-operate with the EU Commission and Member States in training officials in candidate countries for the collection, analysis and dissemination of asylum statistics. UNHCR calls on the Commission and the Member States to explore the possibilities for the standardisation of the collection and analysis of Member States' asylum and migration data, possibly through the establishment of a central, specialised statistical office.

The uniform status

22. Where the European Union would consider introducing in the longer term a uniform refugee status for all who qualify as being in need of protection, such status should not dilute, let alone replace, refugee status based on the 1951 Convention. UNHCR would have difficulty with the introduction of a uniform status which would insufficiently respect the specificity and distinct nature of the Convention refugee status, which has an international dimension and produces extra-territorial effects. Refugee status must be formally declared if States are to fulfil their obligations under the Convention specificity and distinct nature of the Convention refugee status⁵.
23. UNHCR supports EU proposals, as part of efforts to harmonise the rights and benefits of persons in need of protection yet not covered by the provisions of the 1951 Convention, to assimilate as much as possible the standards of treatment of persons falling under the broader refugee definition to those applicable to Convention refugees⁶. The question of what rights and benefits refugees should be accorded in order to live in dignity until a durable solution is found for them should be based on their needs rather than on the grounds on which their refugeehood has been established. UNHCR recalls that any differences which may occur between the treatment of Convention refugees and others in need of protection can – in the case of Convention refugees – only stem from the direct applicability of international refugee instruments rather than national – or, in future, Community – law provisions.

⁵ See also UNHCR's Preliminary Observations to the Commission Communication.

⁶ This approach, with few exceptions, has been taken by the Commission in its proposal for a Council Directive on minimum standards for qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.

24. UNHCR supports the call of the Tampere Summit to offer long-term residents the opportunity to obtain the nationality of the Member State in which they have such status. To the extent that corresponding legislative instruments will address the situation of refugees among long-term residents, such a call is in line with Article 34 of the 1951 Convention, which urges asylum states to facilitate assimilation and naturalisation of refugees.
25. A future EC legislative instrument on the resident status and rights of long-term third-country nationals within the EU should, in UNHCR's view, include provisions on the treatment of those benefiting from subsidiary protection, similar to provisions safeguarding the rights of refugees. The needs of persons benefiting from subsidiary protection are, in many ways, similar to those of refugees. This is particularly relevant where persons exercise their right to freedom of movement within the EU. Both refugees and beneficiaries of subsidiary protection should be entitled to equal and non-discriminatory treatment as regards their resident status, rights and entitlements once they have moved to another Member State.

Resettlement

26. UNHCR welcomes the proposal to explore the possibilities for a common EU resettlement scheme as a significant initiative aimed at achieving a more orderly and balanced intake of refugees by EU Member States. Such a scheme should particularly heed the protection needs of vulnerable groups and, in addition to refugees within the meaning of the 1951 Convention and 1967 Protocol, cover for the needs of those who fall within the extended "refugee" definition as applied under the UNHCR mandate.
27. A common resettlement policy must be considered on its own merits, as one of the durable solutions for refugee challenges, and, hence, must not be confused with mechanisms aimed at regulating access to the territory of Member States. UNHCR would have preferred to see the issue of resettlement referred to in a separate chapter of the Communication rather than listed under the heading of "access to the territory". Resettlement and asylum are two distinct and separate responsibilities, and, as the Communication states, resettlement must be considered as complementary and without prejudice to proper treatment of asylum applications lodged spontaneously at the borders or on the territory of EU Member States.
28. In developing a common resettlement policy a number of questions need to be addressed, such as the method of selection, the identification of categories of persons eligible for resettlement, and registration of those to be resettled in countries of first asylum. Moreover, agreement needs to be reached on a number of measures to be implemented within Member States such as on immediate and essential services to be provided to resettled refugees, criteria governing placement of resettled refugees, the role of Government departments, NGOs and others in the delivery of resettlement programmes, the level and scope of

standards of treatment, financing arrangements, and integration programmes for groups with special needs.

External policy aspects

29. UNHCR agrees with the increased attention for the external dimension of the developing common asylum system, as also referred to in the Communication. UNHCR favours the inclusion of a meaningful asylum component in EU programmes for assistance to, and co-operation with, third countries. Such assistance and co-operation must be based on a proper identification of the needs and priorities of beneficiary countries. This is particularly the case for pre-accession assistance to candidate countries.
30. UNHCR believes the external policy aspects of the common asylum system must be addressed within a comprehensive strategy framework, which should include addressing the root causes of refugee flight, strengthening emergency preparedness and response, providing effective protection and achieving durable solutions. Partnership with countries of origin and in the neighbouring region is an essential element of such strategies, which must involve all relevant actors, including international organisations and civil society.
31. UNHCR believes that the issue of responsibility-sharing and solidarity deserves particular attention in developing the external dimension of the future EU common asylum system. The issue should not be limited to situations of large scale influx or to seeking a balance in the intake of asylum-seekers and refugees within the European Union only – it should also be addressed from a global perspective and in a comprehensive manner. This should include Community measures towards countries of origin and transit, such as preventative action, emergency preparedness, as well as asylum capacity-building in the region; Community support for EU Member States faced with considerable numbers of asylum-seekers seeking protection on their territory; and Community contributions to durable solutions, aimed at the integration of refugees and resettlement in EU Member States.
32. Developing a common approach to burden-sharing and solidarity both within the European Union and between the European Union and other regions should be aimed at strengthening the respect for principles of refugee protection and the maintenance of the integrity of States' asylum systems, and should not be used as an instrument of migration control. Any EU contribution to enhance the protection capacities of countries neighbouring countries of origin is to be part of a concerted effort of all relevant actors, including States, international organisations, regional bodies, financial institutions, non-governmental organisations and civil society. Access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place.

Return

33. Where the outcome of the asylum procedure is rejection of the application, UNHCR supports efforts to develop a common approach to return, which can contribute to preserve the integrity of States' screening procedures. UNHCR agrees that priority must always be given to voluntary return. Member States' fulfilment of their obligations towards refugees cannot be made dependent of the existence or effective implementation of return programmes.
34. UNHCR supports EU efforts to raise the importance of the return issue on the agenda of dialogue with countries of origin where these countries are responsible – but often unwilling – to take back their citizens, including unsuccessful asylum-seekers, and where they should do so with due respect for the fundamental rights and basic needs of the persons to be returned. Such dialogue may have to include the brokering of return agreements including monitoring arrangements and reintegration assistance. Proper implementation of such agreements should allow for sustainable reintegration in the country of origin and not cause frictions with members of the local community who have stayed behind.

Institutional aspects

35. UNHCR welcomes the references in the Communication to the need for strengthened partnership in developing the European asylum agenda further. UNHCR has appreciated the fruitful co-operation with the Commission so far in preparing for the various legislative instruments, and looks forward to continued co-operation in regard to the proposed Community asylum initiatives for the longer term. UNHCR partnership with the European Commission is based on Declaration No. 17 to the Amsterdam Treaty and has been given a more formal status through an exchange of letters concluded in July 2000.
36. UNHCR counts on close co-operation with the European Union where the latter will be implementing the various elements of the Commission Communication, given UNHCR's responsibilities vis-à-vis asylum-seekers and its long-standing co-operation with asylum bodies. It also expects to support the drawing up of expert studies, and participate, where appropriate, in future Community programmes in asylum, including those in support of common resettlement schemes, in preparations for additional legislative instruments as part of the common procedure and uniform status, or in monitoring the development of a body of Community case-law in asylum. Such participation, however, is conditional on the availability of sufficient financial support from the European Union.
37. UNHCR is also prepared to participate, on an ad-hoc basis, and in an expert capacity, in any Contact Committees or co-ordination groups to be established to monitor the application of future Community framework legislation in the asylum law and practice of Member States. These committees, tasked with facilitating the transposal and harmonised application of relevant legislative provisions, could benefit from policy guidance and expert advice from UNHCR, whether requested or offered spontaneously.

38. UNHCR agrees with the Commission that further harmonisation of EU asylum policy will raise questions regarding the relationship between the developing Community asylum legislation and international standards for refugee protection, including the 1951 Convention. It will also put forward the question of the representation of the Community in international and regional organisations active in the field of asylum, including UNHCR's Executive Committee. UNHCR believes that the developing Community legislation can contribute considerably to the advancement of international refugee protection principles. Conversely, UNHCR hopes that the developing EU asylum policy will be constructively informed by *inter alia* the present process of the Global Consultations launched in the 50th anniversary year of the 1951 Convention and aimed at revitalizing the international protection framework..
39. In the longer term the question of accession by the European Community to the 1951 Convention and 1967 Protocol may come to the fore as a consequence of the delegation of significant part of Member States' responsibilities in asylum to the Community. At the moment it remains unclear whether Community law actually permits the Community to accede to the 1951 Convention and 1967 Protocol. Moreover, for such accession to take place, an amendment of the 1951 Convention would be required as, under Article 39 of that instrument, only States can become parties to it.

UNHCR
Geneva, November 2001